

Looking for the Common Good with Adrian Vermeule and William Shakespeare

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In a March 2020 essay for The Atlantic, Harvard Law professor Adrian Vermeule called on fellow conservative legal thinkers to renounce the bedrock principle on which Originalism rests—the separation of law and morality. Instead of placing legal reasoning inside an airtight box into which no moral or political exigencies may enter, Vermeule counseled the conservative legal movement to permit moral and legal claims to mingle freely, to drop the drab positivist hermeneutics and embrace a vibrant form of natural law oriented to the “common good.” The essay provoked intense reactions, and in the process Vermeule—an administrative lawyer theretofore known primarily for his robust if increasingly lonely conservative defense of Chevron deference—became something of a legal celebrity on the integralist right. His recent attempt to expand his 2020 essay into a book entitled Common Good Constitutionalism is the subject of this Article. I read Vermeule’s book against Shakespeare’s The Merchant of Venice in an attempt to draw out some of the unsettling ahistorical patness at the center of Vermeule’s theory. Where Vermeule assumes that legal questions can have a single correct solution coterminous with the common good, The Merchant of Venice provides that legal subjects, in their ineradicable and splendid human inconsistency, will have no trouble suggesting others.

INTRODUCTION

If you earnestly ask what the law actually is, don’t be surprised when your interlocutor’s eyes glaze over. It’s a question with no clear answer, a journey that begins, encouragingly enough, among a coterie of self-certain legal formalists,¹ but ends—after bidding them farewell and heading down

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a road studded with dead-ends, washed-out bridges, and mislabeled signage—in total postmodern confusion: Law, it turns out, is either morality² or ideology,³ social relations⁴ or social institutions,⁵ or something stranger.⁶ A trip best left to eccentric legal theorists and their blear-eyed pupils. Moreover, the age of originalist hegemony seems to have decisively settled the old question, for all practical purposes anyway, replacing the cacophonous din of debate with a rigid legal positivism that purports to exclude most extratextual considerations from its interpretive arsenal.⁷ If Justice Elena Kagan is right in saying that “we are all originalists” now, perhaps it’s best to permanently retire the whole question of what the law really is.⁸ Maybe American legal theorists can lay down their pens, get some sun, and start teaching something real like civil procedure or evidence.

Adrian Vermeule’s new book, *Common Good Constitutionalism*, seeks to reanimate the debate over what the law really is. The prominent public law scholar and recent convert to a resurgent strain of illiberal Catholicism⁹ sets forth a theoretical repudiation of originalism, arguing that its empty ideological center makes it methodologically incapable of consistently delivering “desirable” results and, indeed, renders it susceptible to producing results indistinguishable from those desired by its progressive opponents.¹⁰ In prose that edges into something like the opening round of an internecine brawl, Vermeule calls for fellow right-wing legal thinkers to

Humanities for their substantive suggestions and editorial work.

1. Legal formalists posited a conception of the law as a gapless, internally consistent, and independent object, a system untouched by society and amenable to rational scientific study. See Duncan Kennedy, *Legal Formalism in* *ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES* 8634-38 (Neil J. Smelser & Paul B. Bales, eds. 2001).

2. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

3. See ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK* (2015).

4. See H.L.A. HART, *THE CONCEPT OF THE LAW* (1961). See also ALEXANDER SOMEK, *THE LEGAL RELATION: LEGAL THEORY AFTER LEGAL POSITIVISM* (2017).

5. KARL SCHMITT, *ON THE THREE TYPES OF JURISTIC THOUGHT* (1934).

6. W.H. AUDEN, *Law Like Love in* *THE SELECTED POEMS* 98-99 (Edward Mendelssohn, ed. 2007) (mischievously pronouncing that law is “like love”).

7. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

8. *Id.* at 2352, quoting Clip: Kagan Confirmation Hearing, Day 2, Part 1 (C-SPAN television broadcast June 29, 2010), <http://www.c-span.org/video/?c2924010/clip-kagan-confirmation-hearing-day-2-part-1/>.

9. See Adrian Vermeule, *Liturgy of Liberalism*, *FIRST THINGS* (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism/> (“Liberalism needs an enemy to maintain its sacramental dynamism . . . This is why the triumph of same-sex marriage actually happened *too suddenly and too completely*. Something else was needed to animate liberalism, and transgenderism has quickly filled the gap, defining new forces of reaction and thus enabling new iterations and celebrations of the Festival.”). See also Leon Wieseltier, *Christianism*, *LIBERTIES* (Spring 2022), <https://libertiesjournal.com/articles/christianism/> (placing Vermeule among a constellation of thinkers, including Patrick J. Deneen and Sohrab Ahmari, calling for the erection of something like a confessional state in America).

10. ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 16-17 (2022) (“On social matters, originalist judges have written expressly originalist opinions, such as the decision in *Bostock v. Clayton County*, reaching results that almost no one alive at the time of the law’s enactment would conceivably have thought desirable or even defensible.”).

abandon the positivist separation between law and morality and to embrace an agenda where moral reasoning spills over the positivists' tightly patrolled boundary, infusing judicial decisions with a "substantive vision of the good." Vermeule's theory draws heavily on the work of liberal legal theorist Ronald Dworkin, who holds that the one correct answer to a thorny legal issue can be divined upon the application of a bit of moral reasoning—that is, with reference to the background principles encoded in institutions, legal and otherwise.¹¹ It parochializes positive law by placing it inside the "larger objective order of legal principles" that make up the *ius commune*.¹² And it stands in opposition to the pluralistic assumption that everyone is entitled to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," as *Casey* so famously set forth.¹³ Where originalism offers mere methodology, Vermeule offers a way to align legal reasoning with a normative account of human flourishing. Where liberal jurisprudence offers an infinite regress of negative rights, common good constitutionalism stands as a guarantor of immovable principles—the family, the city, the nation.

This paper argues that Vermeule's theory rests on a simplistic foundation, a false theory of how human communities negotiate moral issues through legal institutions. *Common Good Constitutionalism* makes the same error Dworkin makes in *Taking Rights Seriously*: It presupposes the existence of a free-floating, autonomous set of controlling principles, merely repackaging them as the "common good."¹⁴ But this common good, even when located within a rich and deeply rooted set of normative institutional practices and traditional lifeways, is illusory. The common good does not announce itself in a legible voice. As Stanley Fish notes, the practice of discerning such principles for purposes of legal interpretation is itself a matter of interpretation and therefore a ripe site for a certain kind of herd thinking, where judges submerge their subjectivities and comport themselves in accordance with institutionally dominant mores: "[I]t is neither the case that interpretation is constrained by what is obviously and unproblematically 'there,' nor the case that interpreters, in the absence of such constraints, are free to read into a text whatever they like," writes Fish.¹⁵

[Judges] are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to

11. See generally DWORKIN, *supra* note 2.

12. VERMEULE, *supra* note 10, at 1 ("[T]he classical European synthesis of Roman Law, canon law, and local civil law.").

13. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

14. SOMEK, *supra* note 4, at 5 (calling Dworkin's insistence that humans can identify morality with anything like certainty "strangely fanatical and perhaps even morally wrong").

15. STANLEY FISH, *Moving the Chain Gang in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 87, 97 (1989).

say . . . and it is within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed.¹⁶

Put differently, interpreting legal texts with the aid of something as ill-defined as Vermeule's common good necessarily requires a judge-derived definition of the common good, a definition that, if Fish is correct, necessarily comports with the dominant mores held by most reasonable people.

Anti-foundationalist theory is great fun. But I wager that William Shakespeare's play, *The Merchant of Venice*, its thundering cast of archetypes groping fruitlessly toward a useful definition of the common good, serves as a more apt guide to the darker implications of Vermeule's theory. I argue that *The Merchant of Venice* hints at the dubious value of trying to hit on a single right answer to difficult legal issues while demonstrating the impossibility of discerning anything like the common good in a pluralistic society, where vindication of the majority's conception of the term often results in coercion of the minority. While Vermeule confidently outlines a universally palatable form of public goodness, *The Merchant of Venice* amiably circles around the question of what such a thing might look like, its characters weighing a pair of opposing definitions—material goodness and moral goodness—before setting out to resolve the play's central tension, a legal dispute, by appealing to either definition whenever it best suits them. In their profound inability to move beyond grubby particulars, the bright patch of humanity that populates the play helps demonstrate the ramshackle nature of the abstractions on which Vermeule's book rests.

The Merchant of Venice concerns a contract between a Jewish lender, Shylock, and a Christian merchant. The pair are not on good terms. The merchant, a member of the same Christian majority that confines Venetian Jews to a ghetto, partakes in the public abuse of Shylock. According to Shylock, the merchant "hates [his] sacred nation, and he rails even there where merchants most do congregate, on me, my bargains, and my well-won thrift."¹⁷ The terms to the loan follow: Shylock lends the merchant three thousand ducats free of interest. But if the merchant should fail to repay the loan, Shylock may take from the merchant's body a pound of flesh. Shylock relies on a dispassionate Venetian court system to enforce this grisly contractual obligation. When the merchant fails to pay and Shylock calls on the courts to enforce the loan's terms, to wrest a pound of flesh from the naked chest of the foolish merchant, Christian allies insinuate themselves into the Venetian court on the merchant's behalf, posing as

16. *Id.* at 98.

17. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 1, sc. 3, l. 48-50.

learned members of the bar and weighing the legal saliency of the loan's terms. The players exchange impassioned soliloquys, the counterfeit legal authorities deem the loan's terms unenforceable, and the Christian majority forces Shylock to choose between conversion and total financial ruin. He converts. The merchant's disguised allies make a mockery of justice, shrouding their dubious legal holdings and their knee-jerk antisemitism under the "fair ornament" of a tidy legal proceeding. While pretending to dispassionately enforce the terms of a loan, the Venetian legal system participates in the maintenance of entrenched religious hierarchy, all in the service of a common good substantially similar to the one propounded by Vermeule.

More specifically, *The Merchant of Venice* undermines Vermeule's theory in three ways: As its dialogue touches on topics of legal and ethical concern, it articulates a consistently disillusioned posture, one that could sit comfortably on a critical legal studies class syllabus. If a rubric of universally laudable principles informs the law in *The Merchant of Venice*, it's a rubric rendered illegible by the unending procession of ellipses, qualifications, and cynical soliloquizing emanating from the major actors. This background hum culminates in the climactic and farcical courtroom scene, where irreconcilable opposing principles (or, in Vermeule's terms, opposing conceptions of the common good) inform dueling legal interpretations. As Fish would predict, the majority's conception of the common good ends up informing the case's coercive dispensation. The play's characteristic indeterminacy, its consistent acknowledgement of the ineradicable multiplicity of competing truth claims, is mirrored in the widely divergent interpretations literary critics have imposed on its text. Is it antisemitic or is it transgressively pluralistic? There's no single answer. And as everyone knows, dead poets' intentions are "modified in the guts of the living."¹⁸ If interpretive instability reigns inside the finite boundaries of an Elizabethan stage drama, similar difficulties should arise when judges are tasked with interpreting the contours of a pluralistic society's "common good."

I. THE ROLE OF THE "COMMON GOOD" IN VERMEULE'S THEORY

Vermeule insists that "law is the art of justice for all."¹⁹ By his count, two powerful jurisprudential factions oppose the realization of this unimpeachable ideal. To the right stand the originalists—Federalist Society-bred positivists who "[deny] that law is the art of justice at all."²⁰ And to the left stand the progressives—unmoored hedonists who deny that

18. W.H. AUDEN, *In Memory of W.B. Yeats* in *THE SELECTED POEMS* 88, 89 (Edward Mendelssohn, ed. 2007).

19. VERMEULE, *supra* note 10, at 184.

20. *Id.*

“justice transcends the satisfaction of the individual will.”²¹ Both positions, according to Vermeule, are untenable.

Originalists purport to interpret constitutional law without recourse to principles and moral meaning. But any theory that attempts to pin an “eternal fixed ‘meaning’” onto an ever-shifting set of novel applications is courting “a counsel of despair.”²² Indeed, Vermeule spends more than a dozen pages of his lean book demonstrating the impossibility of deciding difficult cases on that basis alone, tediously enumerating the ways justices unconsciously swap the originalist’s austere tools (historical dictionaries and close reading) for a more robust Dworkinian arsenal (principle and fit).²³ Justice Neil Gorsuch emerges as the exemplary embodiment of Dworkin’s Judge Hercules, seamlessly appealing to a pair of encoded principles, equality before the law and continuity with past decisions, to arrive at his majority opinion in *Bostock*.²⁴ Or as Vermeule puts it, “originalism is illusory.”²⁵

Progressivism fares no better under Vermeule’s analysis. Honest about its methodological commitments, it is nonetheless in thrall to an unsustainable “mythology of endless liberation through the continual overcoming of a reactionary past.”²⁶ This myth holds that it is right and just to expand the circle of negative rights at an ever-increasing pace along an ever-increasing number of fronts, disrupting old lifeways at unsettling speed and naming new enemies of enlightenment upon the commencement of every new battle. Vermeule cites the post-*Obergefell* legal landscape as the most illustrative example of what he calls “liberationist mythology.” The right to same-sex marriage set off an emancipatory jubilee touching on everything from contraceptive coverage to the dignity of trans people, “liberating legal subjects from putatively irrational constraints founded in arbitrary power.”²⁷

It is worth noting that Vermeule is parroting a well-worn and specifically Catholic historical narrative here,²⁸ one that typically opens with Martin Luther (hammer in hand at his Wittgenstein church door) and ends in a hyper-pluralistic hellscape—with its consumer culture and its characteristic cognitive dissonances, its undifferentiated sprawl populated by an anxious mass of people who associate “progress” with a startling array of potential

21. *Id.*

22. *Id.* at 116.

23. *Id.* at 99-116.

24. *Id.* at 108; RONALD DWORKIN, *LAW’S EMPIRE* (1986).

25. VERMEULE, *supra* note 10, at 108.

26. *Id.* at 117. Vermeule expounds on this reactionary thesis at greater length in Vermeule, *supra* note 9.

27. VERMEULE, *supra* note 10, at 119.

28. See MARK LILLA, *From Luther to Walmart*, in *THE SHIPWRECKED MIND: ON POLITICAL REACTION* 67 (2016) (critiquing this kind of mythological historicizing).

pleasures.²⁹ It is nevertheless a narrative gaining in popularity as what Martin Amis calls the “age of acceleration” continues apace.³⁰ The task of arresting the rise of “liberationist mythology” occupies a growing and ideologically diverse range of contemporary thinkers, many of whom, like Sohrab Amari and Patrick Deneen, explicitly align themselves with Vermeule’s legal project.³¹

Vermeule proposes a new jurisprudential methodology for jurists hoping to oppose this kind of progressivism. In the place of an ossified and illusory originalism, jurists ought to adopt a substantively Dworkinian interpretive scheme that incorporates traditionally encoded principles that advance the common good. But what is the common good? Vermeule’s definition relies heavily on antonyms: what *isn’t* the common good. Well, it isn’t a question of utilitarian analysis or aggregate pleasure.³² The common good cannot be adduced by summing private goods. Instead, it is unitary: something like the aim achieved by a victorious football team.³³ The common good is also not coterminous with the rule for private benefit. While liberal democracies yield to the unilateral demands of a dominant political party or a wealthy set of private interests, the common good cannot be dominated; it stands at a monastic remove from power, patiently waiting to inform a just ruler.³⁴ After dispensing with these vague preliminaries, Vermeule gets more specific about what this common good would mean when incorporated into constitutional interpretation:

[Common good constitutionalism] reads constitutional provisions to afford public authorities latitude to promote the flourishing of political communities, by promoting the classical triptych of peace, justice, and abundance, and their modern equivalents and corollaries. These include health, safety, and the right relationship to the natural environment. . . . The main aim of common good constitutionalism,

29. See, e.g., BRAD GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* (2012). If, thanks to Luther’s *sola scriptura*, everyone can be their own priest and follow their own intuition, what need was there for Rome’s hierarchy? Each individual, armed only with a bible and rational faculties, could find his or her own truth. Multiple truth claims can be made simultaneously. *Individuals*, not clerics, could argue about the image of God, morality, and the like. The common good could shatter into an infinite number of schismatic sects. See also ALISDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

30. Scott Timberg, *An Interview with Martin Amis*, L.A. REV. BOOKS (June 21, 2018), <https://lareviewofbooks.org/article/the-age-of-acceleration-an-interview-with-martin-amis/>.

31. See, e.g., Jennifer Schuessler, *Two Religious Conservatives and a Marxist Walk into a Journal*, N.Y. TIMES (Mar. 22, 2022), <https://www.nytimes.com/2022/03/22/arts/compact-magazine-conservatives-marxists.html/>. See also SOHRAB AHMARI, *THE UNBROKEN THREAD* (2021); Mark Lilla, *Two Roads for the New French Right*, N.Y. REV. BOOKS (Dec. 20, 2018), <https://www.nybooks.com/articles/2018/12/20/two-roads-for-the-new-french-right/>; Thierry Baudet, *Houellebecq’s Unfinished Critique of Liberal Modernity*, AM. AFFAIRS, Summer 2019, at 213 (identifying at the margins of novelist Michel Houellebecq’s critique of liberal modern anomie a hope that “some form of identitarian movement, of nationalist and populist origin will rise up.”).

32. VERMEULE, *supra* note 10, at 26-28.

33. *Id.* at 28.

34. *Id.* at 28-30.

then, is not the liberal goal of maximizing individual autonomy or minimizing the abuse of power—an incoherent goal in any event, as multiple risks of abuse of power by multiple actors, private and public, chronically trade off against one another. Instead it is to ensure that the ruler has both the authority and the duty to rule well. . . . There has never existed, in the history of the world, a polity that took no stand on which preferences and beliefs are normatively proper—emphatically including the subset of polities that aim to enforce liberal beliefs and preferences in the name of “tolerance.”³⁵

Vermeule ticks off a few areas of U.S. Supreme Court jurisprudence that would likely “prove vulnerable” to this interpretive regime, including free speech, sexual liberties, and “related matters,” before sketching its implications for a limited number of specific issues.³⁶ For example, a jurist informed by Vermeule’s common good would overturn the famous obscenity case, *Ashcroft v. Free Speech Coalition*, where the Court invalidated a law that banned digitally rendered child pornography.³⁷ Surely the government has authority to regulate such speech on behalf of the common good of the community, to prevent a practice that patently “tears at the very fabric of natural human order in ways that cannot be accounted for in a narrow calculus of immediate harms in production or use.”³⁸

Vermeule proceeds in much the same manner through a series of fraught civil liberties issues—a method that hangs entirely on faith in the existence of a discernible common good, a fuzzy kind of moralizing encoded somewhere in the normative social values of traditional institutions.³⁹ In this way, Vermeule’s theory resembles those articulated by Nazi legal theorist Carl Schmitt as much as it resembles Dworkin’s liberal method. Schmitt argued that the practice of law is based on “three eternal types of juristic thought”: decisionism, normativism, and institutionalism.⁴⁰ But normativism and decisionism, which resemble positive law, cannot capture the messy practices of concrete institutions like the family, the church, and the nation. There’s always some contingent thing wriggling out of rationalization’s grasp. Schmitt gives an example. Roman tort law requires a level of care commensurate with that practiced by the normal father. But fathers exist inside an institution: the Roman family.⁴¹ The norm doesn’t make sense without presupposing a common definition of the Roman family. Sure, happy families are all alike. But can the same be said for all Roman families?

35. *Id.* at 36–38.

36. *Id.* at 41, 134–78.

37. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

38. VERMEULE, *supra* note 10, at 171.

39. *Id.* at 134–78.

40. KARL SCHMITT, ON THE THREE TYPES OF JURISTIC THOUGHT 43 (1934).

41. *Id.* at 67.

II. THE ELUSIVE NATURE OF GOODNESS IN *THE MERCHANT OF VENICE*

If the players that populate *The Merchant of Venice* could answer that question in unison, they'd doubtlessly respond in the negative. Indeed, suspicion of generalities runs through the play's dialogue like those leitmotifs that curl through Giselle, intermittently reminding the reader of the radical instability of definitions—for institutions, for people and concepts. This section identifies some of these statements and argues that they collectively serve a powerful blow to Vermeule's faith in a discernible common good.

The English critic Frank Kermode attributes the power of Shakespeare's language to its patient "power to absorb our questions."⁴² It is therefore no surprise that an ever-proliferating range of critical perspectives line up to feast on the Bard's inexhaustible linguistic largesse.⁴³ The faithful find supplication to God buried in his stanzas, and gay critics spy homoeroticism in his Sonnets. Meanwhile, everyone from lawyers and military generals to feminist theorists and cynical politicians find their preoccupations reflected in the wildly indeterminate language that constitutes the Shakespeare corpus. It's in this parasitic spirit, then, that this section seeks to harness the volatile dialogue contained in *The Merchant of Venice*.

One instance of this kind of fruitfully indeterminate language arrives early. Bassanio, a profligate Venetian nobleman who has squandered his estate "showing a more swelling port / Than my faint means would grant continuance," is smitten with a woman named Portia.⁴⁴ But Portia and her "sunny locks" live in faraway Belmont.⁴⁵ The successful courtship of "fair Portia" will require a substantial financial outlay, something Bassanio cannot muster.⁴⁶ So he asks his great friend Antonio, the merchant, for the money. Antonio's capital is all tied up. But he permits Bassanio to cast about on his behalf for a loan among the Venetian class of money lenders. Bassanio eventually approaches Shylock for a loan of three thousand ducats. Shylock immediately agrees to lend the money, asserting that "Antonio is a good man."⁴⁷ "Have you heard any imputations to the contrary?" asks a befuddled Bassanio. "Ho no, no, no, no!" replies Shylock. "My meaning in saying he is a good man is to have you understand me that he is sufficient." Mixed signals briefly reign before the dialogue passes onto the solid ground of Antonio's various unresolved sea-going ventures bound

42. Frank Kermode, *The Patience of Shakespeare*, in SHAKESPEARE, SPENSER, DONNE: RENAISSANCE ESSAYS 149, 160.

43. John Bayley, *The Greatest!*, N.Y. REV. BOOKS (Aug. 10, 2000), <https://www.nybooks.com/articles/2000/08/10/the-greatest/>.

44. SHAKESPEARE, *supra* note 17, act 1, sc. 1, 131-32.

45. *Id.* at l. 176.

46. *Id.* at sc. 2, l. 189.

47. *Id.* at l. 12.

with goods for places like Mexico, Rialto, and Tripolis.⁴⁸ But the ambiguity introduced by this seemingly simple statement (“Antonio is a good man.”) does not fade, its twin meanings establishing a crude set of opposing value systems that snake through the remainder of the play. In what way is Antonio a “good man”? Is he good because he is virtuous, as Bassanio initially has it? Or is he good because he is good for the loan, as Shylock has it? What constitutes a good man? His Christlike qualities or his solvent balance sheet?

Shakespeare seems to suggest that it depends on the context, an interpretive game where the outcome changes drastically when moved from the bank lobby to the confessional booth. And the impossibility of assigning a single definition to something as elemental as “good” is only compounded by the irreconcilability of the twin meanings established in the exchange. Conducting oneself as a virtuous merchant might prove inconsistent with the kinds of behaviors that make a merchant solvent. A merchant who refuses to push his advantage and refuses to blind his eyes to the financial duress of other parties might not remain “good” for a loan for long. And a scrupulously economizing merchant might necessarily do evil in pursuit of sound financial footing. In other words, the definition of a “good man” is contested ground, a zone of competing and incompatible interpretations. As such, it is fertile ground for miscommunications of the kind experienced by Bassanio and Shylock, where the “clarity of misunderstanding” yields more information than the fanatical “blur of certainty.”⁴⁹ Like most general phrases, goodness cannot announce its contents in a single voice.

This theme—the elusive nature of goodness—crops up with increasing frequency as the play shifts away from Venice to the subplot involving Portia of Belmont. Portia sits ensconced in her Belmont villa playing hostess to a ceaseless stream of would-be suitors. She is bound by a legal document executed by her dead father providing that she marry the first suitor who correctly guesses which of the three chests arrayed before them (one of gold, one of silver, one of lead) contains her likeness. The suitors always choose the wrong chest. It comes as no surprise that Portia is “awearied of this great world.”⁵⁰ In this dejected state Portia holds forth on the difficulty of doing good: “If to do were as easy as to know what were good to do, chapels had been churches, and poor men’s cottages princes’ palaces.”⁵¹ Continuing in this vein, Portia meditates on the irrationality of a mind that “may devise laws for the blood” but yields to the rude dictates of

48. *Id.* at l. 13-27.

49. Dan Chiasson, *Fanny Howe Makes Sense of Beginnings and Endings*, NEW YORKER (Sept. 30, 2019), <https://www.newyorker.com/magazine/2019/10/07/fanny-howe-makes-sense-of-beginnings-and-endings/>.

50. *Id.* at l. 1-2.

51. SHAKESPEARE, *supra* note 17, at act 1, sc. 2, l. 12-14.

“a hot temper.”⁵² How can a person pin goodness down to a single reasonable definition when her waking mind and her subconscious strike out in different directions?

When the characters are not riffing on the slipperiness of goodness, they often bemoan the way it is used to conceal evil. “Mark you this, Bassanio,” says Antonio the merchant while mulling the terms of Shylock’s loan. “The devil can cite Scripture for his purpose. / An evil soul producing holy witness / Is like a villain with a smiling cheek, / A goodly apple rotten at the heart. / O what a goodly outside falsehood hath!”⁵³ A similar thought issues from Bassanio’s lips several acts later while he tries deciding which of the chest ritually arrayed before Portia’s suitors contains her likeness and her hand in marriage.

So may the outward shows be least themselves;
The world is still deceived with ornament.
In law, what plea so tainted and corrupt
But being seasoned with a gracious voice,
Obscures the show of evil? In religion,
What damned error but some sober brow
Will bless it and approve it with a text,
Hiding the grossness with fair ornament.⁵⁴

Bassanio chooses the unadorned lead chest over the chest of “gaudy gold,” and he chooses correctly.⁵⁵ Goodness, as Bassanio intuitively feels, does not always reside in the most prepossessing place.

Vermeule’s legal theory, like those propounded by Dworkin and Schmitt before him, rests on an optimistic faith in jurists’ ability to extract a tidy set of first-order principles from the pullulating mess that constitutes a pluralistic society. But this assumption—the glib assurance that something as fundamental as “goodness” can yield a single definition—is quite naïve, as the morally ambiguous haze that wends its way through *The Merchant of Venice* helps demonstrate. With great consistency, Shakespeare notes how goodness is fractured into competing meanings, concealed behind a mean exterior, or enlisted to conceal less-than-benevolent intentions. This general background hum finds more obvious expression as the play rolls into Act 4, its climactic courtroom scene serving as the vehicle for two competing visions of the common good.

III. TWO IRRECONCILABLE VISIONS OF THE COMMON GOOD IN THE VENETIAN COURTROOM

A great deal has passed by the time Antonio and Shylock square off in

52. *Id.* at l. 18.

53. *Id.* at sc. 3, l. 106-11.

54. *Id.* at act 3, sc. 2, l. 75-82.

55. *Id.* at l. 103-04.

court. Shylock has lost an employee and a daughter: one running off to find preferable employment and the other running off to marry a Christian (Shylock's gold in tow). Antonio fared no better. With his merchant ships scuttled impotent off various faraway coasts, he is unable to repay Shylock's loan as it comes due. So it is an angry and aggrieved Shylock who calls upon the Venetian courts to enforce the loan's terms: a pound of flesh from Antonio's chest in the event he fails to pay the principal. "Jailer, look to him," says Shylock as he accompanies Antonio to the jailhouse. "Tell me not of mercy. / This is the fool that lent out money gratis."⁵⁶ Antonio begs Shylock to reconsider, but the moneylender stands resolute and bent on revenge. "I'll have my bond. Speak not against my bond. / I have sworn an oath that I will have my bond. / Thou call'st me dog before thou hadst a cause, / But since I am a dog, beware my fangs. / The Duke shall grant me justice."⁵⁷ Antonio responds with resignation instead of anger: "I'll follow him no more with bootless prayers."⁵⁸

As Antonio shuffles to his cell, the play's haphazard musings on the elusive nature of goodness and justice congeal into a legible binary, what at least one scholar has identified as the play's "fundamental opposition."⁵⁹ On the one hand, in the figure of Antonio and his Christian allies, stands generosity, forgiveness, and mercy. On the other stands Shylock, in possession of the "hard-headed attitude of those who have a high estimation of their own value and rights, and who demand just payment for themselves".⁶⁰ The court will resolve the legal issue (whether to enforce the loan's terms) by applying one of these competing systems of value: Christian charity or something like Old Testament retribution.⁶¹ That the Christian majority's conception of the common good informs the eventual dispensation of justice should come as no surprise. Neither should that dispensation's coercive nature.

Antonio shows up at court and the Duke, presiding over the proceedings, neatly sums up the opposing value systems. "I am sorry for thee," he says to Antonio. "Thou art come to answer / A stony adversary, an inhuman wretch, / Uncapable of pity, void and empty / From any dram of mercy."⁶² Antonio meekly submits to Shylock's un pitying posture, stating that he will oppose his "fury" with simple "patience" while "suffer[ing] with a quietness of spirit the very tyranny and rage of his."⁶³

56. *Id.* at sc. 3, l. 1-2.

57. *Id.* at l. 5-9.

58. *Id.* at l. 22.

59. John R. Cooper, *Shylock's Humanity*, 21 SHAKESPEARE Q. 117, 123 (1970).

60. *Id.*

61. *But see, e.g.,* D.M. Cohen, *The Jew and Shylock*, 31 SHAKESPEARE Q. 53 (1980) (examining the antisemitic assumptions undergirding this dichotomy). This will be revisited *infra* Part IV of this paper.

62. SHAKESPEARE, *supra* note 17, act 4, sc. 1, l. 3-6.

63. *Id.* at l. 12-14.

With that, the proceedings begin. It seems foreordained that the court will enforce the loan's bloody terms, consistent with the city's carefully maintained presumption favoring freedom of contract.⁶⁴ Instead of engaging in legal arguments, the merchant's Christian allies make half-hearted rhetorical appeals to Shylock's "gentleness and love" while holding out a small amount of hope that Bellario, the learned lawyer scheduled to weigh the contract's legal enforceability, will wrap their merciful conception of justice in an officious legal envelope.⁶⁵ But when Bellario shows up in court it is not Bellario at all, but Portia dressed in drag to impersonate the learned member of the Venetian bar. And instead of parsing the contract with the aid of principles like charity, forgiveness, and mercy, Portia adjudicates the enforceability of the loan's terms on Shylock's terms—with the aid of a starkly legalistic and retributive conception of the common good. She observes that "[t]here is no power in Venice / Can alter a decree established." Failure to enforce the loan, she notes, "'Twill be recorded for a precedent, / And many an error by the same example / Will rush into the state: it cannot be."⁶⁶ As such, she instructs Antonio to "bare your bosom" to Shylock's blade.⁶⁷ But not before pushing the legalistic logic of Shylock's position one step farther, noting that the loan's terms fail to provide that Shylock may take a "jot of blood" in excess of the pound of flesh. If a taking of "Christian blood" exceeds this contractually defined right, she says, the state will confiscate Shylock's land and goods.⁶⁸

Dumbfounded, Shylock declines to collect his pound of flesh and agrees to leave the matter rest. But Portia the counterfeit legal authority pushes on, improvising a draconian and religiously coded legal framework in a virtuosic bid to punish Shylock for his transgressions. A Venetian law, she says, provides that "[i]f it be proved against an alien / That by direct or indirect attempts / He seek the life of any citizen, / The party 'gainst the which he doth contrive / Shall seize one half his goods; the other half / Comes to the privy coffer of the state; / And the offender's life lies in the mercy / Of the duke only, 'gainst all other voice."⁶⁹

As Portia's pronouncement hangs in the air (interrupted only by a Christian spectator's callous quip that Shylock, like Judas, would "have leave to hang thyself" if only he had enough money to afford "a cord"⁷⁰) the underlying principles informing the courtroom's legal reasoning shift

64. *Id.* at l. 36-40 ("I have possessed you grace of what I purpose, / And by our holy Sabbath have I sworn / To have the due and forfeit of my bond. / If you deny it, let the danger light / Upon your charter and your city's freedom!").

65. *Id.* at l. 26.

66. *Id.* at l. 228-230.

67. *Id.* at l. 262.

68. *Id.* at l. 319.

69. *Id.* at l. 364-371. Jewish residents of Venice, confined to a ghetto, were "aliens" deprived of citizenship.

70. *Id.* at l. 379-81.

abruptly.⁷¹ If the moral reasoning that informed Portia's adjudication of the loan was coterminous with a cold retributive sense of justice, the moral reasoning that informs its aftermath is consistent with Christian charity. Where Venice's common good was once held to be advanced by a predictable businesslike legalism, its common good is now held to be advanced through humble charity. So the Duke quickly declines to put Shylock to death. "That thou shalt see the difference of our spirit," he intones. "I pardon thee thy life before you ask it."⁷² Antonio follows, offering Shylock the right to half of his estate so long as he converts to Christianity and deeds it to his newly converted Christian daughter and her husband upon his death.⁷³ The common good—which with no embarrassment is now associated with Christian mercy instead of the businesslike legalism of only a few pages earlier—undergirds a startling act of coercion, ripping Shylock from his community with a laugh.

This abrupt shift in the common good helps demonstrate what makes moral principles such an unsuitably ephemeral rubric by which to engage in legal hermeneutics. The common good does not announce itself in a single voice. It requires an interpreter, a fallible individual vulnerable to herd thinking and implicit biases of the kind that afflict the legal decisionmakers in the Venetian courtroom. Instead of identifying some objective set of common values to which their legal interpretations ought to be ordered, Portia, the Duke, and Antonio embrace irreconcilable moral readings at different times depending on when it best suits them—delivering stern encomiums to retributive justice before extending merciful legal pronouncements dipped in the acrid poison of religious coercion. Shakespeare's fictional representation lends ballast to the previously mentioned anti-foundationalist theorizing of Stanley Fish. Because language and the world are too multifarious to foreclose splintering meanings, always wriggling out of the tidy boxes in which we place them, objective moral meaning is difficult to identify.⁷⁴ As Shylock could attest, there's only force and rhetoric and self-interested interpretation.

IV. SCATTERSHOT CRITICAL APPRAISALS OF *THE MERCHANT OF VENICE* AND THE PROBLEM OF INTERPRETATION

The interpretive instability that reigns throughout *The Merchant of Venice*, that recurs in its dialogue with increasing frequency until it flowers in the courtroom scene (its dueling conceptions of the common good arbitrarily deployed in the maintenance of hierarchy) is mirrored in the critical appraisals brought down on the text. There remains no critical

71. *Id.*

72. *Id.* at l. 384-85.

73. *Id.*

74. FISH, *supra* note 15, at 87.

consensus on whether the comedy is or isn't a crude vehicle for antisemitic caricature. Is Shylock a contemptible wretch or a flawed human built with Kant's "crooked timber" like the rest of us? The play seems to vindicate Martin Amis' assertion that "[t]he great writers can take us anywhere; but half the time they're taking us where we don't want to go."⁷⁵ Where exactly is Shakespeare taking us? The apparent unresolvability of this question hints at how rarely something like interpretive certainty arises. If the text of a comedy like *The Merchant of Venice* remains radically unstable hundreds of years after its publication, how can a Vermeulian judge discern and pin down something as mercurial as the common good? If the American intelligentsia can't identify a cliché as shopsoiled as antisemitism, how can the same intelligentsia identify the normative lifeways and moral ends desired by a diffuse and unruly mass of people?

Vladimir Nabokov provides a brief appraisal of this proud intelligentsia in his novel *Pnin*. Emigree Professor Timofey Pnin—with his perfectly bald egg-shaped head and wooly accented English—is hosting a faculty party at his house, something he's prepared for all day, busying himself with the "culinary operations," and dressing himself in a "sybaritic smoking jacket of blue silk, with tasseled belt and satin lapels."⁷⁶ He walks up to a mirror, baring his new synthetic incisors, inspecting "his cheeks and chin to see if his morning shave still held. It did."⁷⁷ Timofey has few friends and is regularly mocked by his peers, so he is excited to host fellow faculty members and wants to make a good impression.⁷⁸ But by ten o'clock, as "Pnin's Punch" starts "causing some of the guests to talk louder than they thought they did," Timofey overhears a conversation emanating from the far end of his rented home and walks over to check it out.⁷⁹ There he finds one professor "morosely" playing with a Christmas snow globe while another professor, "carefully avoiding the traditional intonations he would have used in more congenial surroundings" tells the other professors the "latest story about Mrs. Idelson."⁸⁰ Here's the intelligentsia according to Nabokov: one professor unspooling his antisemitic anecdote while another giddily grins and another "morosely" listens in. Only Pnin, the nonacademic outsider, speaks up, showing complete and dignified indifference to impressing the same faculty he previously primped and primed himself in an earnest effort to impress. "I have heard quite the same anecdote thirty-five years ago in Odessa, and even then I could not understand what is

75. MARTIN AMIS, *Don DeLillo: Laureate of Terror in THE RUB OF TIME*: BELLOW, NABOKOV, HITCHENS, TRAVOLTA, TRUMP 185, 186 (2017).

76. VLADIMIR NABOKOV, PNIN 151 (1957).

77. *Id.*

78. *Id.*

79. *Id.* at 159-60.

80. *Id.*

comical in it,” Pnin remarks.⁸¹

This same milieu produced a startling array of critical examinations aiming to shield Shakespeare and *The Merchants of Venice* from accusations of antisemitism. For some of these critics, the text demonstrates that Shakespeare tried to create an evil and ridiculous caricature calibrated to reflect his Elizabethan audience’s knee-jerk antisemitism but failed, inadvertently deploying his genius to imbue the stock villain with humanity and depth.⁸² For some, Shakespeare created a fully-formed human and merely leavened the character with antisemitic clichés in an attempt to meet the rigorous dictates of the comedy genre.⁸³ Others draw a line between Shylock’s particular traits and their unfortunate associations with Jewishness: Shylock’s abhorrent qualities have nothing to do with his Jewishness at all, and everything to do with his inherent greed, vengefulness, and usurious dealings.⁸⁴

These interpretations certainly contain truth. As Shylock rages eloquent against the unfair dealings of his Christian counterparts or bemoans the loss of his much-loved daughter, it is difficult to deny his humanity. His eloquence rises Ahab-like above the sometimes slack comedic banter deployed by other characters, as this soliloquy on Christian hypocrisy gamely illustrates:

What judgment shall I dread, doing no wrong?
 You have among you many a purchased slave,
 Which like your asses and your dogs and mules
 You use in abject and in slavish parts,
 Because you bought them. Shall I say to you,
 “Let them be free! Marry them to your heirs!
 Why sweat they under burdens? Let their beds
 Be made as soft as yours, and let their palates
 Be seasoned with such viands”? You will answer,
 “The slaves are ours.” So do I answer you.
 The pound of flesh which I demand of him
 Is dearly bought, ‘tis mine, and I will have it.
 If you deny me, fie upon your law!
 There is no force in the decrees of Venice.
 I stand for judgment. Answer: shall I have it?⁸⁵

In other words, how could Shakespeare deny Shylock his humanity when he gives him the best lines? The oft-cited “hath not a Jew eyes” speech

81. *Id.* at 160. The Jewish population of Odessa, located in modern-day Ukraine, experienced a series of pogroms between the city’s founding in the late eighteenth century and the Second World War.

82. H.B. CHARLTON, *SHAKESPEAREAN COMEDY* 123-60 (1938).

83. H. GRANVILLE BARKER, *PREFACES TO SHAKESPEARE* 98 (1939).

84. Warren D. Smith, *Shakespeare’s Shylock*, 15 *SHAKESPEARE Q.* 193, 198-99 (1964).

85. SHAKESPEARE, *supra* note 17, act 4, sc. 1, l. 90-104.

provides further ballast to the critical school that would deny the inherently antisemitic quality of the play.

[Antonio] hath disgraced me and hindered me half a million, laughed at my losses, mocked at my gains, scorned my nation, thwarted my bargains, cooled my friends, heated mine enemies—and what’s his reason? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions?—fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge?⁸⁶

The speech seems to address the audience with its questions, the word “you” implicating the Christian audience deeper with each repetition until Shylock underscores the most fundamental equality of all—an equal capacity among Christians and Jews to exact revenge and do evil unto others. “The villainy you teach me I will execute, and it shall go hard but I will better the instruction.”⁸⁷

But where some critics spy humanistic bromides, others see a crudely antisemitic plot structured to prey on base biases. One critic summed it up quite plainly when he wrote, “Current criticism notwithstanding, *The Merchant of Venice* seems to me a profoundly and crudely antisemitic play.”⁸⁸ It’s a play that elevates Shylock, in all his vengeful rapaciousness, as the identifiable literary embodiment of the Jew while offering its beneficent Christian characters the chance to point at his villainy.⁸⁹ “I pray you think you question with the Jew,” says Antonio to Bassanio. “You may as well go stand upon the beach / And bid the main flood bate his usual height; / You may as well use question with the wolf / Why he hath made the ewe bleat for the lamb.”⁹⁰ And the logic of its plot, which spirals downward from the voluntary conversion of Shylock’s daughter to Shylock’s court-sanctioned deracination, is uncomfortably consistent with the logic of ethnic cleansing campaigns, as one of the two Philip Roths who appear in *Operation Shylock* suggests.

[E]xpulsion of the unregenerate Jew Shylock from the harmonious universe of the angelic Christian Portia, the Hitlerian dream of a *Judenrein* Europe. Today a Shylockless Venice, tomorrow a Shylockless world. As the stage direction so succinctly puts it after Shylock has been robbed of his daughter, stripped of his wealth, and

86. *Id.* at act 3, sc. 1, l. 53-66.

87. *Id.* at l. 70-72.

88. Cohen, *supra* note 61, at 53.

89. See Marty Roth, *His Pound of Fresh*, JEWISH CURRENTS (May 16, 2016), <https://jewishcurrents.org/his-pound-of-fresh/>.

90. SHAKESPEARE, *supra* note 17, act 4, sc. 1, l. 71-75.

compelled to convert by his Christian betters: *Exit Jew*.⁹¹

The preceding section does not aim to offer an exhaustive recitation of the various ways *The Merchant of Venice*'s treatment of religious difference has been interpreted. It merely means to demonstrate the irreconcilability of the opposing critical camps, a 400-year stalemate that hasn't yet given way to anything approaching interpretive stability. If determining the moral character of a relatively short piece of drama written by a single man in Elizabethan England proves vexing, perhaps the moral character of a nation will be similarly difficult to parse.

CONCLUSION

This paper enlists *The Merchant of Venice* to unsettle the foundations on which Adrian Vermeule's newly-published book of legal theory rests. "Common Good Constitutionalism" calls for jurists to abandon the old positivist separation of law and morality, and embrace a natural law framework, where moral reasoning infuses judicial decisions with a "substantive vision of the good." This theory, which is touted as a bold break from contemporary orthodoxy, shares much in common with the work of liberal jurisprude Ronald Dworkin and Nazi jurisprude Carl Schmitt, both of whom hold that law ought to be ordered to a substantive understanding of normative moral principles (identified as principles by Dworkin and Institutions by Schmitt). *The Merchant of Venice* demonstrates the unworkability of this theory in three ways: (1) It conjures a cloud of unknowing, where moral clarity is unavailable to the characters or the reader; (2) it revolves around a courtroom scene where opposing parties arbitrarily avail themselves to irreconcilable and opposing substantive visions of the good; and (3) its unstable moral character as a work of literature—the issue of whether it depicts Shylock as a human or as a caricature—demonstrates the impossibility of identifying one correct answer to any kind of issue, let alone a thing as vexing as the "common good."

There's an old joke about the kind of question the medieval scholastic theologians occupied their time with: "How many angels can stand on the point of a needle?" It's representative, so the jab goes, of how medieval scholastic thought floated high in a heady ether of its own making, one "without roots in reality."⁹² When legal debate devolves into a series of metaphysical postures—shopworn and stale, each couched in an ornate carapace that only exists because the parties believe it to exist—what's really going on? Felix S. Cohen influentially argued that certain legal theorists share a lot in common with the scholastics, those relics of pre-

91. PHILIP ROTH, OPERATION SHYLOCK 276 (1993).

92. Felix S. Cohen, *Transcendental Nonsense*, 35 COLUM. L. REV. 809, 811 (1935).

Reformation theology.⁹³ Such jurists, who parse abstract constructs like due process, the corporate form, and the common good without tethering their musings to more quotidian social concerns, partake in what Cohen calls the language of “transcendental nonsense,” predicated on the earnest belief in simple fictions.

Vermeule’s *Common Good Constitutionalism*, with its unquestioned faith in the existence of a discernable common good, speaks in the language of “transcendental nonsense.” Like the theological pronouncements of Cohen’s medieval scholastics, the book is, in the end, life-denying—refusing to sing about what Saul Bellow calls “the human situation.”⁹⁴ It resembles John Updike’s characterization of Nabokov’s late period novels: “air tight boxes, like five-foot plastic cubes in a minimal art show, all inner reflection and shimmer, perfectly self-contained.”⁹⁵ *The Merchant of Venice* stands in direct opposition to Vermeule’s self-contained formalism. Where Vermeule assumes that legal questions can have one correct solution, the *Merchant of Venice* posits that legal subjects, in their ineradicable and splendid human inconsistency, will have no trouble suggesting others.

93. *Id.*

94. SAUL BELLOW, *To Melvin Tumin in SAUL BELLOW: LETTERS* 27, 28 (Benjamin Taylor, ed. 2010).

95. JOHN UPDIKE, *PICKED UP PIECES* 196 (1966).