

The Accoucheur Comes: Interpreting *Measure for Measure* as Administrative Midwifery

John A. Peterson III*

*The purpose of this article is to perform an act of midwifery. I will begin by considering and summarizing the view, argued by Adrian Vermeule and Eric Posner, that our system of government has loosed the bonds of Madisonian design and now exists and operates as a postliberal largely post-republican executive administrative state. I will briefly highlight the philosophic features and legal doctrines which define this new regime. I will then turn to a challenge issued by these same legal scholars: if this view—regardless of being good or bad—is the true and unalterable reality of our government, then how does a legal thinker or political theorist properly act as a midwife to this burgeoning constitutional administrative order? What would a scholarship unconcerned with the classical constitutional mandates entail? I will posit first that our culture lacks the aesthetic vocabulary needed for this kind of work. I will then posit that the law and literature movement—in considering the roles of rhetoric and aesthetic preferences in justifying and ultimately explaining legal regimes—provides the best path forward for aspiring administrative midwives. I will conclude with a demonstration of midwifery by offering an interpretation of Shakespeare’s play, *Measure for Measure*, which approaches the play from the vantage point of a literary critic saturated in the dictates of a post-Madisonian regime.*

INTRODUCTION.....	120
I. THE ADMINISTRATIVE STATE	122
II. THE PROBLEM: AN ABSENCE OF VOCABULARY FOR THIS REGIME AS OPPOSED TO OTHER FORMS	126

* John A. Peterson III is an attorney in private practice. He would like to thank Judge Ralph K. Winter Jr., formerly of the Second Circuit Court of Appeals: Judge Winter was an invaluable teacher, mentor, and friend. He would also like to say a special thank you to Isaac N.F. Jones and Alexander W. Burdulia for their generous feedback. Finally, he thanks the journal editors whose work and comments vastly improved this piece.

<i>A. The Law Literature Enterprise</i>	126
<i>B. Past Examples of Literature Justifying the Legal</i>	129
1. Tocqueville and Whitman.....	130
<i>C. Concluding Thoughts on Law and Literature</i>	132
III. <i>MEASURE FOR MEASURE AND THE MODERN ADMINISTRATIVE STATE</i>	132
<i>A. Act I</i>	134
1. Scene 1: The Delegation	134
2. Act 1: The Problem Presented	137
3. Act 1 Concluded	140
<i>B. The Flaws Inherent in Older Governing Structures</i>	141
1. Law’s Empire.....	141
2. Executive Truly Unbound.....	144
3. The Duke of Dark Corners.....	147
<i>a. Claudio</i>	147
<i>b. Isabella</i>	149
<i>c. Barnardine</i>	151
4. The Democratic Check on the Duke.....	152
CONCLUDING THOUGHTS.....	156

INTRODUCTION

It is beyond the scope of this paper to consider whether our system of government has truly left behind its origin as a constitutional republic to become something fundamentally different in kind. So too is it beyond the scope of this paper to ponder whether this new state, the administrative state, is a normative good and improvement, or a degradation of previous epochs which should be resisted. Many prominent scholars hold contrasting views on these questions. I endorse Phillip Hamburger’s description of the debate over the lawfulness of administrative law that it “consists largely of constitutional critiques on one side and justification for extralegal power on the other.”¹ I will not settle this debate and so seek to largely ignore it for the purposes of my purely descriptive section. Rather, for the purposes of this paper, I will channel W.H. Auden and “agree [g]ladly or miserably

1. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 15 (2015).

[t]hat *the Law is*”² post-Madisonian as described in two works which argue this description of our current regime: *Law’s Abnegation* and *Executive Unbound*.³ I will begin with a brief description of the animating principles and ideals behind the administrative state as understood by these works. My aim is two-fold in that I hope both to describe the administrative state from the lens of this understanding, and to articulate the reasoning and philosophic ideals which animate its operation.

I will then describe what I see as a social problem with the administrative regime: regardless of legality or intrinsic “goodness,” it exists in stark contrast to traditional American ideals of governance, politics, and statecraft. I will provide several examples of what I mean when I say traditional sources of civic culture. From my summary several assumptions which guide the arguments of this paper should arise: (1) it is self-evident that the government described is fundamentally unlike the traditional Madisonian model which American culture has historically extolled; (2) the rationales and philosophic justifications for its existence and operation do not align with conventional ideas and sources of American legal and civic culture; (3) there are scant sources available within the American literary, popular historical, or political milieu which can aid citizens and legal commentators in holding accurate or positive opinions toward the administrative state (or even to adequately discuss it) as most such sources regard its elements warily; and (4) a new literature, artistic culture, or civic education must arise to describe this new regime.

These assumptions will lead to the task this paper strives to meet. If it is true that in the post-Madisonian administrative state, “[t]he aim of legal theorists, in this new world, should be to help make it more so—to act as midwives to the postliberal order of executive government,”⁴ what exactly does it mean for a legal scholar to act “[a]s midwife” to this new order?⁵

I posit that what ultimately gives a regime “validity” or “authority” in the eyes of the governed is the people’s own understanding and engagement with just such a government. One could imagine in the classical mode that reciprocal bonds of amity and love—between rulers and subjects—are the differences between tyranny and monarchy; between corruption and wisdom; between decay and evolution. As love is too speculative a term to

2. W.H. AUDEN, *Law Like Love*, in COLLECTED POEMS 262 (Edward Mendelson ed., 1991).

3. The impetus for this article stems from the following declaration taken from *Executive Unbound*: “researchers should no longer view American political life through the Madisonian prism, while normative theorists should cease bemoaning the decline of Madisonianism and instead make their peace with the new political order. The center of gravity has shifted to the executive, which both makes policy and administers it, subject to weak constraints imposed by Congress, the judiciary, and the states. It is pointless to bewail these developments, and futile to argue that Madisonian structures should be reinvigorated.” ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 209 (2010).

4. *Id.* at 16.

5. See ADRIAN VERMEULE, *LAW’S ABNEGATION* 16 (2016).

satisfy, I am happy to substitute for it this definition: love is an understanding of and appreciation for the inherent virtues of something. “To study law as a system . . . [is] to see it as a body of reasoned principles of rules consciously founded in principle and of principles embodying a common purpose.”⁶ What is therefore needed to “shorten and lessen the birth pangs as the administrative state is born from the womb of law”⁷ is largely a cultural, spiritual, and ultimately aesthetic question.⁸

As this paper strives only to demonstrate an act of midwifery, I will spend the bulk of it performing an aesthetic reconstruction of our legal regime, by arguing that William Shakespeare’s *Measure for Measure* is best understood as a portrayal of just such a state as our modern administrative state. The play therefore offers readers the chance to perceive the essence of, and self-justifications for, the administrative state. The play’s explication of the flaws and virtues of the novel legal regime of Vienna is a useful tool for developing an understandable common vocabulary for further debate regarding the legal order of our present day. Through this new lens of interpretation, I will demonstrate how the play contains both the wisdom inherent to our present system of law, and a fuller understanding of its shortcomings. The highest act of midwifery is in teaching both how and what to understand.

I. THE ADMINISTRATIVE STATE

For the purposes of this article it is necessary to describe the background regime from which my interpretation of *Measure for Measure* will spring. I will focus less on doctrinal points in this section and more on the overall character and design of the administrative apparatus as elucidated by Posner and Vermeule. I have chosen these commentators deliberately, as their general approval of the growth of the administrative state has allowed them to describe its mechanisms clearly through their scholarship. As I am not arguing for approval or disapproval of any administrative doctrines, their model serves my intention best, as almost all commentators—even their most savage opponents who view the administrative state as a flagrant and illegal violation of the Constitution—still largely agree with Posner and Vermeule’s *description* of our current regime.⁹ “There is now virtually no

6. See DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE; THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* at 18 (2014).

7. VERMEULE, *supra* note 5, at 16.

8. I will sidestep the point raised by Vermeule that the administrative state naturally arose from liberal legalism as a solution to the problems and commitments of legal liberalism. This may be accurate but does not serve alone to convince commentators to abandon reclamation. Nor does it aid in refining or curbing the operation of the administrative apparatus. *Id.* at 218 (“Those very institutions, operating in a system of mutual interactions are what produced the administrative state itself.”).

9. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231-33 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution. . . . Faced with a choice

significant aspect of life that is not in some way regulated by the federal government. This situation is not about to change.”¹⁰

To explain the administrative state contra the Madisonian constitution, I will affirmatively define it via the following excerpt:

[T]he administrative state has at least five features that cannot be squared with the original Constitution: (1) the vastly increased scope of federal governmental powers under Article I, particularly the Commerce Clause; (2) massive delegation from Congress to the President and bureaucracy, amounting to a *de facto* transfer of legislative power to nonlegislative officials; (3) the creation of independent agencies, which is said to be inconsistent with the “unitary executive” created by Article II; (4) the vesting of adjudicative power in executive agencies, subject only to deferential review by Article III judges; (5) and the combination of legislative (rulemaking), executive, and adjudicative functions in administrative agencies. Jointly and severally, the consequence of these violations is that the original scheme of separated legislative, executive, and judicial powers has fallen by the wayside.¹¹

This is a workable definition to describe the migration of political power, size, and function toward the executive branch of the federal government. This massive increase in the primacy of the executive is additionally coupled with a nearly equal reduction in the concepts and institutions which nominally exist to check its power. One could go so far as to say that Madisonian era law—defined by its procedures, rigidly in separation of functions, and structural hurdles to unchecked executive action—hardly operates in a meaningful way at all to check administration. Within “the modern administrative state the executive governs, subject to legal constraints that are shaky in normal times and weak or nonexistent in times of crisis.”¹²

To further color this purely descriptive exercise I will highlight a few

between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck. . . . In Short, the modern administrative state openly flouts almost every important structural precept of the American constitutional order. . . .” See also Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 854 (2020) (“Respect for the limits of judicial capacity interweaves with concerns about agency slack or fecklessness, leading to a doctrinal fabric that is either nuanced or incoherent, depending on one’s priors. . . . [There are] important disagreements, to be sure, but they operate[] within a shared framework of admittedly unstated, and perhaps conflicting, assumptions about the administrative state and the rule of law.”).

10. Lawson, *supra* note 9, at 1236.

11. VERMEULE, *supra* note 5, at 38 (summarizing the views of Gary Lawson). See also HAMBURGER, *supra* note 1, at 29 (“[T]he central evasion is the end run around acts of Congress and the judgments of the courts by substituting executive edicts. This suggests that there can be an alternative system of law, which is not quite law, but that nonetheless can be enforced against the public.”).

12. POSNER & VERMEULE, *supra* note 3, at 4. See also VERMEULE, *supra* note 5, at 216 (“Deference on questions of law is now the norm; agencies get deference on the scope of their own jurisdictions and the interpretation of their own regulations, something that drives separation of powers traditionalist mad; and the doctrines of jurisdictional fact and constitutional fact are for the most part dead letters.”).

more features which explicitly run against the primacy of the rule of law; the separation of functions between law making, execution, and judgment; and the background guiding principles of curtailing and checking the potential for executive abuse of power in any Madisonian sense.¹³ Consider the following pair of excerpts:

In the administrative state, the abuse of power is not something to be minimized, but rather optimized. Law has come to recognize that a well-functioning administrative regime will tolerate a predictable level of abuse of power, as part of an optimal package solution—as the inevitable by-product of attaining other ends that are desirable overall. So one way of describing the basic movement of modern administrative law is the abnegation of the separation of powers.¹⁴

The basic flexibility of the Administrative Procedure Act (APA) allows courts to allow government to do what government needs to do when it needs to do it. The result is a series of legal “black holes” and “grey holes”—the latter being standards of reasonableness that have the appearance of legality, but not the substance, at least not when pressing interests suggest otherwise. This regime is a triumph for the nominal supremacy of the APA, but not for any genuine version of the rule of law. Liberal legalism’s basic aspiration, that statutes (if not the Constitution) will subject the administrative state to the rule of law, is far less successful than it appears.¹⁵

Posner and Vermeule assert that constraints on the executive “do not arise from law or from the separation-of-powers framework . . . but from politics and public opinion.”¹⁶ It is no longer any formal rigidity that constrains the power of the executive but rather the amorphous quality of public perception. It is not the courts or any vestigial legislative bodies which stand in the way of executive action, but rather the popular will at any given time.¹⁷ Consider:

With credibility the formal rules of the separation-of-powers system can be bargained around or even defied as Lincoln and FDR

13. See HAMBURGER, *supra* note 1, at 3 (“Traditionally under the U.S. Constitution, the government could bind its subjects only through its legislative and judicial powers. And because the Constitution granted these powers, respectively, to Congress and the courts, only the acts of these institutions could impose legally obligatory constraints on persons who were subject to the laws. In contrast, the executive’s acts could not create this binding effect.”).

14. VERMEULE, *supra* note 5, at 59. See also HAMBURGER *supra* note 1, at 114 (describing the degradation of notice and comment procedures: “agencies increasingly make law simply by declaring their views about what the public should do.”). But see VERMEULE, *supra* note 5, at 60 (“The architects of modern administrative law believed that a government that always forms undistorted judgments and always acts from welfare-maximizing motives, and that therefore never abuses its power, will do too little, do it too amateurishly, and do it too slowly.”).

15. POSNER & VERMEULE, *supra* note 3, at 85.

16. *Id.* at 4.

17. This view is easily adjacent to and does not necessarily contradict Hamburger’s warning that “[a]dministrative power thus brings back to life three basic elements of absolute power. It is extralegal, suprallegal, and consolidated.” HAMBURGER, *supra* note 1, at 7.

demonstrated. Without credibility, the president is a helpless giant. Even if legal and institutional constraints are loose and give the president broad powers, those powers cannot effectively be exercised if a sufficiently large supermajority of the public believes that the president lies or has nefarious motives.¹⁸

In essence the rule of law, defined as the formal separation of powers and functions which constrains the executive, has been replaced by the temperature-taking of public opinion.

The major justification of the growth of the administrative state has been an argument for necessity due to the rapid pace of policy change, the complexity of modern life, and the ever increasing needs of our citizenry—needs the government is charged with meeting.¹⁹ The growth of the administrative apparatus, so the argument goes, was a necessary evolution out of the inadequate and too limited liberal structures: “the constitutional framework of liberal legalism has collapsed under the . . . brute fact that the rate of change in the policy environment is too great for traditional modes of lawmaking and policymaking to keep pace.”²⁰ Additionally, the classical institutions, starting with Congress, were structurally incapable of taking effective action.²¹ Put another way:

The complexity of policymaking and the rapid pace of change in the policy environment make it prohibitively costly for relatively underspecialized legislators, burdened with cumbersome processes of collective action in large-number bodies, to attempt to specify all policy choices themselves, even if they would want to.²²

It is clear that both the sidelining of the other branches and the blurry legal structures which constrain executive action are features and not bugs of this system.²³ It was gradually, consciously, and unconsciously designed to transcend and replace the Madisonian design. I pause to note that this regime is not necessarily undemocratic although it is unequivocally un-republican in any American sense. As Vermeule and Posner discuss, the popular will of the masses exerts an informal check on the government as

18. POSNER & VERMEULE, *supra* note 3, at 153.

19. VERMEULE, *supra* note 5, at 59. *But see* Richard A. Epstein, *Why the Modern Administrative State is Inconsistent with The Rule of Law*, 3 N.Y.U. J. L. & LIBERTY 491, 492 (2008) (“That vision rests on the key assumption that government officials armed with technical expertise and acting in good faith to advance the public interest can systematically outperform any system of limited government who major function was to support and protect market institutions.”).

20. POSNER & VERMEULE, *supra* note 3, at 61.

21. *Id.* at 24 (“[B]ecause Congress is a they, not an it, and is a they with many members, legislators face severe problems of collective action in organizing to oppose the executive, even where it would be socially optimal to do so.”).

22. *Id.* at 31.

23. This is not to say they are completely lawless. Merely that they are not recognizable to the Madisonian understanding. For a discussion of the morality of the administrative state *See generally* Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018).

distilled by media coverage, and polling; and formally checks the government through presidential elections.²⁴ Much could be and has been written on the validity of this process, what distorting influences exist in media coverage, and which class's popular will is really represented in such a system.²⁵ As my description is only meant to provide a backdrop to my interpretation of *Measure for Measure* I leave these questions where they are.

II. THE PROBLEM: AN ABSENCE OF VOCABULARY FOR THIS REGIME AS OPPOSED TO OTHER FORMS

To talk of concepts such as “rule of law,” “freedom,” or “separation of powers,” is useless without a firm understanding of what these terms mean within the context of the legal and political order they strive to describe. It is therefore crucial to administrative midwifery that the customary terminology used in describing political goods is redefined and understood within an administrative state's context. This is just as important an exercise for opponents of the administrative state as for its defenders—for meaningful criticism of our current regime to rise beyond the level of impotent wailing into the void of academic journals it must address the government *as it currently is*, not as or in relation to a form it may once have taken.²⁶ Fortunately, this problem—the problem of contextual definitions—has already been understood and discussed by the law and literature movement. I will briefly describe this movement's insights as they pertain to my paper and give a few examples of how law and literature has been, and may continue to be, used in a similar fashion.

A. *The Law Literature Enterprise*

In this act of midwifery, I will endorse the wisdom of the law and literature enterprise and argue that, for legal commentators, a midwife to the administrative state is best understood as, “[a] man who gives himself in full submission and sacrifice to his historical moment in order to comprehend and control the elements which that moment brings.”²⁷ If this

24. POSNER & VERMEULE, *supra* note 3, at 83 (“The populace at large exercises an indirect influence over constitutional development, but as a filter that rules out certain elite positions and as an ultimate court of appeal, rather than as a frontline participant. The process of constitutional change is roughly plebiscitary: the people do not propose, but they do dispose.”).

25. See HAMBURGER, *supra* note 1, at 9 (“[I]t is a means of class power—a mechanism by which a class wrests power from the people and their representatives.”); Epstein *supra* note 19, at 492-93 (“Expertise is an overrated virtue, while the risk of political capture by interest groups and the discord that faction produces is an underappreciated vice.”).

26. See James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688 (1985) (“[T]he lawyer, like any rhetorician, must always start by speaking the language of his or her audience, whatever it may be.”).

27. Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 7 (1989) (summarizing the view of James B. White) (citing THE PORTABLE MATTHEW ARNOLD 7 (Lionel Trilling

historical moment is indeed one of executive centrality and administrative action largely loosed from the bonds of law, it is vital for a commentator seeking to influence its nature to understand not just how it operates but why it exists. This new administrative order comes with hardly any accompanying domestic culture from which citizens could ever develop an understanding of its virtues or vices. And without such an understanding meaningful criticism of both its excesses and its deficiencies in operation is made impossible—the lack of a common ethical and aesthetic vocabulary renders most discussion flat and unhelpful as it focuses on justifying or attacking the existence of a regime which, reality tells us, is here to stay.

I am not so much arguing for any specific positive or negative orientation toward the administrative state; I am not a midwife seeking to dictate how the infant should grow—rather I am searching for a more fruitful and honest dialogue regarding the successful or faulty operation of the present regime. Work which lauds the wisdom of its design or calls it illegal makes hardly any contribution to good governance or civic engagement. That a new direction is needed is confirmed by the fact that I am not alone in this attempt—commentators from all over the political spectrum have had the same idea with, in my view, insufficient results.

Jeffrey A. Pojanowski groups commentators into three classes: the administrative supremacists, the administrative skeptics, and the administrative pragmatists, each of which is defined by their relationship to both the original constitutional order and the present administrative regime.²⁸ His elegant attempt at a pragmatist's synthesis through *Neoclassical Administrative Law*, in his own words, “reconciles traditional notions of the judicial role and separation of powers within the administrative state that Congress has chosen to construct and provides a clearer, more appealing allocation of responsibilities between courts and agencies.”²⁹ Additionally, during the writing of this article, professors Cass Sunstein and Adrian Vermeule published a book in the supremacist vein (which opened with a quote from *Measure for Measure*) which similarly attempts to impose a framework for debate over administrative law by “offering a structure that [they claim] can transcend the current debates and provide a unifying framework for accommodating a variety of first-order views, with an eye to promoting the common good and helping to identify a path forward amid intense disagreements on fundamental issues.”³⁰ They make clear that theirs is an attempt to offer commentators of all persuasions a place in the debate by moving away from doctrinal disagreements and

ed., 1949)).

28. Pojanowski, *supra* note 9, at 882-83.

29. *Id.* at 867.

30. See CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 5-6 (2020).

separation of powers concerns to instead focus on whether administrative law adheres or not to a discernable and internally consistent morality.³¹ Finally skeptics too admit, without offering much in terms of reclamation, that “the architects of the New Deal chose the administrative state and that [] choice has been accepted by all institutions of government and by the electorate.”³²

I have no interest in rehashing historical debates, pitting legal interpretations of centuries of law against the unarguable realities of the day, or ranking deeply held political and civic beliefs. If the most well credential legal minds disagree so vociferously as to the legality and nature of our administrative regime, we have exhausted the utility of purely doctrinal arguments. Rather, in attempting to redeem, alter, or undue the administrative state commentators should first ask themselves how or why citizens come to value the legal order in which they live, and then seek to inculcate within the populace the values by which doctrinal formulations later spring. This is a job for rhetorical persuasion and literature.³³ “Law is most usefully seen not, as it usually is by academics and philosophers, as a system of rules, but as a branch of rhetoric . . . as the central art by which community and culture are established, maintained, and transformed.”³⁴

This insight also explains why Sunstein and Vermeule’s most recent attempt at this exact kind of communal forming around the administrative state will yield insufficient results. The theme of their recent argument is that the administrative state is not some monstrosity unbound from law, but actually adheres to a consistent legal morality as best described by Lon Fuller’s principles of valid legal regimes.³⁵ To this I answer “who beyond a handful of academics cares at all whether Lon Fuller would hypothetically approve of a regime that does not honor the Madisonian commitments?” If one seriously wants to justify and redeem the administrative state one must first acknowledge the vast and awe-inspiring array of cultural and literary sources which fiercely resist such a paradigm shift.

I take the position that modern society’s use for the Constitution is largely rhetorical in nature.³⁶ “[T]he role of the Constitution in later daily life [is] as a rhetorical instrument for framing and justifying later conversations about political values. When speakers try to take up political power by rhetorical force, this document will validate or invalidate speakers’

31. *Id.*; see generally LON FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

32. Lawson, *supra* note 9, at 1254.

33. White, *supra* note 26, at 689.

34. *Id.*

35. SUNSTEIN & VERMEULE, *supra* note 30, at 39-41.

36. White, *supra* note 26, at 697 (“[T]he United States Constitution can be regarded as a rhetorical text: one that establishes a set of speakers, roles, topics, and occasions for speech. So understood, many of its ambiguities and uncertainties become more comprehensible, for we can see the text as attempting to establish a conversation of a certain kind and its ambiguities as ways of at once defining and leaving open the topics of the conversation.”).

claims.”³⁷ Law and literature views both law and rhetoric as linguistic expressions of social and moral value, or efforts through communication to discern or establish social and moral value.³⁸ This communication has become frayed in the post Madisonian state because the rational technical apparatus of the administrative state exists largely beyond the cultural milieu or understanding of the lay citizen.³⁹ Midwives interested in the prolonged survival of the new legal regime as a democratic one should rightfully view this as the gravest threat to its existence. Describing the administrative state to lawyers is only part of the task: the efficient operation of the administrative state really depends on the citizens’ political will and allowance of its operation. If we were to imagine a single document much like the Constitution but instead comprised of the myriad doctrines of modern administrative law as sculpted through the historical evolution of the modern administrative state—let us call it the administrative constitution—law and literature’s explanatory utility becomes readily apparent:

Great legal documents, like great works of literature, create community and culture and . . . the constitution is the paradigm of this creation. The constitution seeks to establish a national community not merely at a transcendent moment of crisis, but in its ordinary existence and over time.⁴⁰

But what community would exist alongside and within the administrative state? It is one that has yet to be defined but must be defined if we are to remain a democracy under this new state. “The law should take as its most central question what kind of community we should be, with what values, motives, and aims. . . . This means that one question constantly before us as lawyers is what kind of culture we shall have, as well as what kind of community we shall be.”⁴¹

B. Past Examples of Literature Justifying the Legal

As Weisberg discusses in *The Law Literature Enterprise*, the defining of community by way of legal texts has always been at the core of the law literature movement. I quote this passage at length to demonstrate how this

37. Weisberg, *supra* note 27, at 62.

38. White, *supra* note 26, at 695 (“The rhetorician, like the lawyer, is engaged in a process of meaning-making and community-building of which he or she is in part the subject. To do this requires him or her to face and to accept the condition of radical uncertainty in which we live: uncertainty as to the meaning of words, uncertainty as to their effect on others, uncertainty as to our own character and motivations.”).

39. See MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 321 (Max Rheinstein ed., trans., Edward A. Shils, Harv. Univ. Press 1954) (“Inevitably the notion must expand that the law is a rational technical apparatus, which is continuously transformable in the light of expedient considerations and devoid of all sacredness of content.”).

40. Weisberg, *supra* note 27, at 61.

41. White, *supra* note 26, at 698.

goal operated in the classic Madisonian regime:

Law and literature were linked because the professional man's broad cultural responsibilities and his literary impulses were the same . . . the love of rational liberty . . . to show that on the basis of the republican principle all good morals, as well as good government and hopes of permanent peace, must be founded. Literature was to facilitate the great experiment of republican influences upon the security, the domestic happiness of man, his elevation of character, his love of country.⁴²

The classic republican or Madisonian community has an extensive and persuasive body of literary and cultural support. I here give two of the more famous examples to illustrate my point.

1. Tocqueville and Whitman

The best example of a literary work defining a legal culture would be Alexis de Tocqueville's description of the township system in America. This is a vision of government as a small entity whose sphere of power extends only over those who voluntarily submit to regulation in a community for communal gain. Furthermore:

The individual is the best as well as the only judge of his particular interest, and . . . society has the right to direct his actions only when it feels itself injured by his deed or when it needs to demand his cooperation.⁴³

When comparing America to Europe, Tocqueville observes that in Europe "the government lends its agents to the township; in America, the township lends it officials to the government."⁴⁴ This describes a polity in which the most important political judgments are made at the local level. The township is both active and the primary force in governmental actions. The very existence of a county, or state, or federal government is accepted only based on the agreement and necessity of the smaller localities. The larger spheres of power are built from the ground up and exist at the pleasure of the smaller entities. State legitimacy is derived from consent of the governed in matters that affect their day to day lives.

Tocqueville also discusses the unique manner of government administration in America. The defining feature of American administrative law is its decentralization. As to why this is, Tocqueville remarks:

Administrative centralization, it is true, succeeds in uniting at a given period and in a certain place all the disposable strength of the nation,

42. Weisberg, *supra* note 27, at 10.

43. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 62 (Harvey C. Mansfield & Delba Winthrop eds. and trans., 2000).

44. *Id.* at 63.

but it is harmful to the reproduction of strength. It makes [the nation] triumph on the day of combat and diminishes its power in the long term. It can therefore contribute admirably to the passing greatness of one man, not to the lasting prosperity of a people.⁴⁵

In a more poetic vein, Walt Whitman's entire cannon could be read as answering the challenge he himself issued in the essay *Democratic Vistas*. In the *Vistas* he elaborates upon the American regime's need for a thriving literary and philosophic culture which extols the virtues of democracy. He views this yet-to-exist literature as vital to the survival and preservation of democratic norms, as rhetorical and aesthetic force is what truly bends the populace toward participating in and preserving democracy. I quote him here at length in these two excerpts:

I say that Democracy can never prove itself beyond cavil, until it founds and luxuriantly grows its own forms of arts, poems, schools, theology, displacing all that exists, or that has been produced anywhere in the past, under opposite influences . . . [a]bove all previous lands, a great original literature is surely to become the justification and reliance (in some respects the sole reliance,) of American Democracy.⁴⁶

For, I say, the true nationality of The States, the genuine union, when we come to a mortal crisis, is, and is to be, after all, neither the written law, nor, (as is generally supposed,) either self-interest, or common pecuniary or material objects—but the fervid and tremendous Idea, melting everything else with resistless heat, and solving all lesser and definite distinctions in vast, indefinite, spiritual, emotional power.⁴⁷

Finally, Whitman is an American in the full Tocquevillian mode when he announces the ultimate goal and project of the American republic and legal regime:

I say the mission of government, henceforth, in civilized lands, is not repression alone, and not authority alone, not even of law, nor by that favorite standard of the eminent writer, the rule of the best men, the born heroes and captains of the race, (as if such ever, or one time out of a hundred, get into the big places, elective or dynastic!)—but, higher than the highest arbitrary rule, to train communities through all their grades, beginning with individuals and ending there again, to rule themselves.⁴⁸

From these brief descriptions one can easily imagine what “rule of law,” “liberty,” “justice,” “separation of power,” and “self-rule” in

45. *Id.* at 83.

46. WALT WHITMAN, *DEMOCRATIC VISTAS* 5 (2010).

47. *Id.* at 10.

48. *Id.* 22.

government will come to mean in analysis.⁴⁹ Such concepts are defined within the context of participation in governance, individual rights, and equality of treatment and outcome. Additionally, there is a strong culture of wariness towards distant decision makers and the minutia of administrative bureaucracy.⁵⁰ This is particularly relevant to our present administrative state because the Tocquevillian concept is actively hostile towards its existence and is replete with justifications for its nonexistence.⁵¹

C. Concluding Thoughts on Law and Literature

It is clear to me from the examples I have given that midwifery to an arising legal regime is largely a rhetorical exercise. As studying Tocqueville leaves the reader in a state of awe mixed with understanding of township political participation, and as reading Whitman's poetry imbues the reader with a sense of pride coupled with a fervent desire to see the effective operation of engaged democracy, so too can literature and persuasive rhetoric—in this case a literature which holds a mirror to the virtues and justifications of the administrative state, or at least attempts to explain its necessity and deficiencies to those who live under its rule—aid in the growth and survival of our present regime.⁵² Whitman argues as much:

Not only is it not enough that the new blood, new frame of Democracy shall be vivified and held together merely by political means . . . but it is clear to me that, unless it goes deeper, gets at least as firm and as warm a hold in men's hearts, emotions, and belief . . . and inaugurates its own perennial sources, welling from the centre forever, *its strength will be defective, its growth doubtful, and its main charm wanting.*⁵³

This is the challenge to any new order, and it requires a robust literature which both speaks the right vocabulary and possesses the aesthetic force needed to animate the wisdom behind a legal regime. This is what midwifery must entail.

III. MEASURE FOR MEASURE AND THE MODERN ADMINISTRATIVE STATE

I share the view of noted commentator Harold Bloom that it is a near

49. For a sublime example of the law literature enterprise using literature to interpret, explain, and ultimately mold a legal regime, see RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994), in which Professor Parker uses the short Thomas Mann story *Mario and the Magician* as a touchstone to understanding our populist constitution.

50. *But see* POSNER & VERMEULE, *supra* note 3, at 176-205 (arguing the American's fear is tyranny is overblown and that Tyrannophobia is a cognitive distortion in commentary on the modern state).

51. *But see* ERNST, *supra* note 6, at 7-8.

52. *See* Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1378 (1986) ("How can a writer persuade, without an effort at logical or empirical proof? The answer is that in areas of uncertainty, areas not yet conquered by exact science, we are open to persuasion by all sorts of methods, including some that are remote from logic and science.").

53. WHITMAN, *supra* note 46, at 9 (emphasis added).

futile effort to attempt to transcribe Shakespeare's genius into a specific didactic mode. "Most commentary upon Shakespeare at best answers the needs of a particular generation," and I am self-consciously using his to explain the needs of my own time.⁵⁴ Furthermore, I will intentionally neglect the myriad themes and avenues of interpretation available in this play that do not pertain to law and the legal regime; my task is a solely legal assessment. I therefore wish to make clear that I am not saying Shakespeare is endorsing any specific practice or understanding of government. "Shakespearean representation is indeterminate and always shifting; cultural practices are represented but never fully adopted, nor is a political stance ever fixed."⁵⁵ Rather it is my contention that his play has imagined a regime which can help us to better understand our own.

With those qualifications made I would like to posit that, while it is of course absurd to suggest Shakespeare would understand and predict modern American administrative law, the play in fact is a shocking depiction of the nature of such a regime as described by Posner and Vermeule. Furthermore, the play succeeds in leaving us with a somewhat ambivalent estimation of the virtues and flaws of such a regime. My interpretation is not meant to define the play nor is it meant as an argument for or against the modern administrative state. Rather, it is an attempt to analyze and assess the values and structure of the play's moral and political universe so that, in so doing, we can develop the context and vocabulary necessary to better discuss the operation of law in the regime argued by Posner and Vermeule. Such an exercise through this "most problematic of all of Shakespeare's plays" is useful because it aids in the moral reevaluation of common legal, political, and ethical terms necessary for any mature discussion of administrative law.⁵⁶

I offer the Duke of Dark Corners as the best literary analogue to the modern executive. After cynically attacking the notion of justice under the rule of law, and then rejecting in equal disgust the concept of an absolute ruler operating completely above law, Shakespeare concludes his play with a fantastical imagining of a regime which hybridizes the virtues of both failed regimes and so attempts to mitigate their deficiencies. "Shakespeare's quarrel with the rule of law did not stem from a conviction that monarchy was superior to parliamentary rule, but from a belief that law was merely a tool of power, at least as arbitrary and corrupt as any other."⁵⁷ *Measure for*

54. HAROLD BLOOM, *SHAKESPEARE THE INVENTION OF THE HUMAN* 718-19 (1998) ("Explaining Shakespeare is an infinite exercise; you will become exhausted long before the plays are emptied out. . . His universality will defeat you; his plays know more than you do, and your knowingness consequently will be in danger of dwindling into ignorance.")

55. Louise Halper, *Measure for Measure: Law Prerogative and Subversion*, 13 *CARDOZO STUD. L. & LITERATURE* 221, 243 (2001).

56. Harold Bloom, *Introduction* to *WILLIAM SHAKESPEARE'S MEASURE FOR MEASURE* at 6 (Harold Bloom ed., 1987).

57. Halper, *supra* note 55, at 248.

Measure succeeds in questioning the rule of law or the neutrality of such a concept, and envisions a ruler who, in striving to be responsive to the populace, is graced with the ability to fluidly tailor remedies to policy problems while sometimes transcending or abridging the rule of law:

In some sense, then, the scorn for law and preference for mercy that we see in *Measure for Measure* foretells the problematic of the rule of law: that the representation of neutrality is inconsistent at best, false at worst . . . The lives of the citizens under law are no more ordered, predictable, or safe than under some alternative. . . . Shakespeare supports neither the monarchical principle nor absolutism. . . .⁵⁸

A. Act I

I wish to treat Act I as its own entity to ground us in the world Shakespeare creates as he introduces the Dukedom of *Measure for Measure*. Throughout my interpretation I will mark what legal or symbolic roles I see the various characters playing within the political structure of the city, as they are frequently changing and slippery to pin down. Additionally, although the laws passed and enforced in Vienna regard sexual mores, I am using them merely as examples of the acts of a sovereign passed to solve a problem; I will therefore speak in moral terms as this is a moral play, but the content of these specific laws and the accompanying moral valuations should not distract from my purpose in using this play to understand the character of administrative law.

1. Scene 1: The Delegation

The play begins with a delegation of power from the Monarch to two figures: a judge and an administrator clothed in the full power of the ruler. For reasons that have yet to be made known, Duke Vincentio opens the scene by splitting “the atom of sovereignty” between Escalus and Angelo.⁵⁹ It is important to understand the motivations given in scene 1 and what they imply about this dual delegation. To start with, the Duke has decided that there is an emergency situation in Vienna: the sexual mores have deteriorated to such a point that the city is on the verge of destruction, and this emergency must be dealt with using the full power of the government.⁶⁰

58. *Id.* at 252. See also Harold Goddard, *Power in Measure for Measure*, in WILLIAM SHAKESPEARE’S *MEASURE FOR MEASURE*, *supra* note 56, at 24 (“If only laws would construe, administer, and enforce themselves!”).

59. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995).

60. For a summary on why emergencies reveal the illiberal character of administrative law, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1099 (2009) (“[L]iberal democracies committed to the rule of law have no theory of exceptional states and that ‘[s]overeign is he who decides on the exception’. . . . The legal systems of liberal democracies cannot hope to specify either the substantive conditions that will count as an emergency, because emergencies are by their nature unanticipated, or even the procedures that will be used to trigger and allocate emergency powers, because those procedures will themselves be vulnerable to being discarded when an

Vincenzio has chosen Escalus as the ideal kind of Hercules Judge,⁶¹ eminently learned and unsurpassed in wisdom regarding “the nature of our people, our city’s institutions, and the terms for common justice.”⁶² In fact, it is freely acknowledged by Vincenzio that he himself could not so adroitly or scientifically describe the properties of the government as Escalus could and that he, despite being the sovereign lord, is a mere novice in legal matters. The judge is given a commission to unfold the properties of the government guided by his aforementioned wisdom and is urged by the Duke not to “warp” his duty any further.⁶³ Many commentators seek to read Escalus as a consequential figure in this play meant to embody the prudence and wisdom of an ideal judge.⁶⁴ As my interpretation will strive to show, I find this reading to be absurd and grounded in the desire of most commentators to redeem, from an American perspective of divided government, the frankly bizarre regime depicted in Vienna. Escalus is at best a decent yet minor figure, and at worst a buffoon operating in a largely inconsequential sphere.⁶⁵

The second, and more important delegation concerns the man given by the Duke in “his deputation all the organs of [the Duke’s] own power,” Angelo.⁶⁶ It is crucial to understand that Angelo was not haphazardly selected for this role. The wise judge Escalus applauds the choice of Angelo in saying that “If any in Vienna be of worth to undergo such ample grace and honour, it is Lord Angelo.”⁶⁷ Angelo has been chosen for his

emergency so requires.”) (citing CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 1985)).

61. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975). *But see* VERMEULE, *supra* note 5, at 4.

62. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 1.

63. *Id.*

64. See DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS? SHAKESPEARE’S LEGAL APPEAL* 62 (1994) (“A judge should understand ‘the nature of our people,’ that is, what they are inherently capable of doing or not doing. A judge should also understand our ‘institutions,’ political and otherwise, with the appropriate respect for tradition and for potential. Finally, a judge must know ‘the terms for common justice,’ that is, have a good practical sense of what is right and wrong”); Kenji Yoshino, *On Empathy in Judgment (Measure for Measure)*, 57 CLEV. ST. L. REV. 683, 684 (2009) (“Th[e play’s] kind of justice leads to less conclusive results . . . requiring more human agency and discretion. It is represented by Escalus, the wise older advisor whose name means ‘scales.’”). *But see* Richard Strier, *Shakespeare and Legal Systems The Better The Worse but Not Vice Versa*, in BRADIN CORMACK, MARTHA C. NUSSBAUM & RICHARD STRIER, *SHAKESPEARE AND THE LAW: A CONVERSATION AMONG DISCIPLINES AND PROFESSIONS* 184 (2016) (“The problem with this view is not merely that Escalus—despite the opening lines of the play extolling his qualifications—turns out to be a rather minor character, and not . . . the withdrawing Duke’s choice for the job of governor and chief judicial officer . . . but also that the issue on which the play is focused is not that of the behavior of a good judge.”).

65. I highlight Escalus as the height of judicial ability to drive home the point argued by Vermeule that “the administrative state . . . relegate[s] courts and judges to a lower status, as marginal officials who are stationed in the outlying provinces . . . but who are no longer central actors.” VERMEULE, *supra* note 5, at 4. *See also* Yoshino, *supra* note 63, at 697 (“The three judges of the play can be seen as three aspects of the sitting sovereign”). This is true but in a different manner than Yoshino means. The three sovereigns are not equal and the judicial figure of Escalus hardly matters compared to the might of the Duke and his delegate.

66. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 1.

67. *Id.*

demonstrated excellence and expertise in the matters of self-control. His virtue can therefore be understood as a kind of mastery of the subject matter or—to strain the comparison—knowledge of the industry, regulated by the law.⁶⁸ The Duke anoints Angelo as “at full ourself.”⁶⁹ Angelo will wield all the powers of the sovereign lord in the Duke’s absence. And the Duke makes clear the hierarchy between his two deputies: “old Escalus, though first in question, is . . . secondary” to Angelo.⁷⁰ The administrator charged with carrying out the call to rule over “mortality and mercy in Vienna”⁷¹ is above the legal scholar and judge who, though he may and must review questions of legal prolixity, is second to the decisive character of Angelo.

To quote the exact delegation of the Duke to Angelo: “your scope is as mine own/ So to enforce or qualify the laws/ As to your soul seems good.”⁷² This is a monumental phrase—Angelo is not beholden in real time to the Duke. The principal delegation of sovereignty includes the right of enforcement and of interpretation of the laws Angelo is charged with upholding.⁷³ This implies that there is no single correct way for Angelo to carry out his charge;⁷⁴ rather the sovereign action of the Duke has already occurred in his delegation of power to Angelo. But from there Angelo has immense power, governed by his own reasons and interpretations, to mold the enforcement of the laws.⁷⁵

To conclude the scene the legal minded Escalus announces to Angelo that

68. See *Vermont Yankee v. NRDC*, 435 U.S. 519, 525 (1978) (“[A]dministrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved”) (citing *FCC v. Schreiber*, 381 U.S. 279, 381 (1965)).

69. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 1.

70. *Id.*

71. *Id.*

72. *Id.*

73. We can imagine that the Duke has in essence said Angelo has general authority to make rules and regulations carrying the force of law in his implementation of his mandate. See *U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001) (*Chevron* deference is appropriately applied in circumstances where Congress has explicitly left a gap to fill, the agency has been delegated express authority to elucidate the law by regulation). See also *Chevron v. NRDC*, 467 U.S. 837, 843 (1984) (“The power of an administrative agency . . . necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress . . . there is an express delegation . . . to elucidate a specific provision of the statute by regulation.”) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); *City of Arlington v. FCC*, 569 U.S. 290, 293 (2013) (“[A]n agency’s interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron*.”).

74. See VERMEULE, *supra* note 5, at 201 (summarizing the view of Donald Elliott as “the *Chevron* framework conceives interpretation as typically involving agency choice within a ‘policy space,’ defined by the range of the statute’s reasonable interpretations”).

75. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (courts must defer to agencies interpretations of their own rules); *Bowles v. Seminole Rock*, 325 U.S. 410, 414 (1945) (“[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”); *Perez v. Mortgage Bankers*, 575 U.S. ___ (2015) (notice and comment procedures are not required when an agency “wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted”); KORNSTEIN, *supra* note 64, at 60 (“[T]he duke was reposing discretion in Angelo. . . .”).

“it concerns me to look into the bottom of my place: A power I have, but of what strength and nature I am not yet instructed.”⁷⁶ Angelo responds “‘Tis so with me.”⁷⁷ Both answers imply that the deputies take seriously the power of the Duke and wish not to overstep the mandate he has given them in their commission. But it is clear from the speeches above what these delegations entail. It is Escalus who was limited in commission and urged by the Duke not to stray from his charge. And it is Escalus who concludes the scene by saying to Angelo, “I’ll wait upon your honour.”⁷⁸ The delegated rule of the Duke in Vienna may involve both the administration of Angelo, and the juridical wisdom of Escalus, but it is clear in scene 1 where the majority of the Duke’s exercise of power truly lies.⁷⁹

2. Act 1: The Problem Presented

It is now worth pointing out what is not presented in scene 1: the people to be ruled or any institution meant to represent their voices in the government.⁸⁰ Furthermore, the only mention of the general populace of Vienna is anything but flattering. The Duke loves the people but does “not relish well their loud applause and Aves vehement”⁸¹ nor does he respect or value the wisdom of any man who does. The opening scene is a conversation between elites and the ruling class, but we have yet to understand their relationship to the masses of Vienna. Is there any discourse between the rulers and ruled?

We are indeed far from any notion of republican virtue as our first encounter with the population is essentially 50 lines of venereal disease humor, war-mongering, and whore-mongering. Perhaps Lucio speaks for Shakespeare about the world of Vienna when he says to his companion that “Grace is grace, despite of all controversy: as, for example, thou thyself art a wicked villain, despite of all grace.”⁸² We are very much in a rotting city with no vestige of republican virtue or civic duty. The modern state is unromantic and lacks all vocabulary which revolves around inculcating citizen virtue: “[t]o look for happiness is childish: what should be looked for is the good, proper, socially fitting relation: *the basis is impersonal*

76. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 1.

77. *Id.*

78. *Id.*

79. VERMEULE, *supra* note 5, at 219 (“[B]oth cannot simultaneously be paramount. Only one can be master; and law has decided to give way.”). This also explains why the Duke in delegating power to Escalus “need only give Escalus the requisite authority and leave him to exercise it in accordance with his considerable abilities,” it is because Escalus has hardly any power of consequence. KORNSTEIN, *supra* note 64, at 61.

80. For the Schmittian view of congressional anemia, see POSNER & VERMEULE, *supra* note 3, at 42 (“The basic dilemma, for legislators, is that before a crisis, they lack the motivation and information to provide for it in advance, while after the crisis has begun they lack the capacity to manage it themselves.”).

81. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 1.

82. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 2.

morality.”⁸³

The vision of a populace as some enlightened body with a meaningful share of governance or any deeper understanding of political virtue is nowhere to be found. Rather, the state of man unrestrained and “free” is equated to licentious self-destruction, and is eloquently summarized later by Claudio: “Our natures do pursue like rats that ravin down their proper bane, a thirsty evil; and when we drink we die.”⁸⁴ We have passed “into Hobbes’s picture of the world: where the nature of man is solitary fearful nasty brutish and short; a world where force and fraud are the only laws.”⁸⁵ We can believe and even be correct that the people are fundamentally better or different from that picture, but for the purposes of law and behavior we can expect that no “spirit of religion” or restraint will guide the people’s conduct;⁸⁶ decisions on policy should be made assuming that if law does not prevent something, it is implicitly licensed and will occur.⁸⁷

After introducing us to Mistress Overdone and Pompey, essentially two pimps, we learn of Angelo’s speedy administration. Angelo has, as charged by the Duke, revitalized the old laws against fornication and prostitution. Immediately we see the difficulties and seemingly arbitrary nature—along with the corrupting influences of the powerful—in drawing distinctions between permitted and banned acts. “All houses [of prostitution] in the suburbs of Vienna”⁸⁸ are to be closed but those in the city, which, at the behest of a well-connected nobleman, are to remain.⁸⁹ As *Measure for Measure* is a play concerned with the earthy challenge of doling out remedies in just proportion, this scheme seems to reek of unequal treatment and corruption in the state.⁹⁰ But it is not the principal difficulty introduced in Act 1.

We discover that Claudio has been condemned to death for impregnating Julieta. Yet Claudio and Julietta are betrothed and lack only “the denunciation . . . of outward order”⁹¹ in a formal marriage due to issues with her dowry. Historical critics have noted that in Elizabethan times the pair

83. M.C. Bradbrook, *Authority, Truth, and Justice in Measure for Measure*, in WILLIAM SHAKESPEARE’S MEASURE FOR MEASURE, *supra* note 56, at 7, 20 (emphasis added).

84. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 1, sc. 2.

85. A.P. Rossiter, *Measure for Measure*, in WILLIAM SHAKESPEARE’S MEASURE FOR MEASURE *supra* note 56, at 45, 57.

86. TOCQUEVILLE, *supra* note 43, at 43.

87. See generally Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 333-334 (1991).

88. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 1, sc. 2.

89. See Halper, *supra* note 55, at 245 (“[T]he voice of the town is heard complaining of the enforcement of laws against popular pleasure, while wealthy men every day break laws against usury without punishment, indeed with reward, and magistrates are told by their superiors how to rule on the causes of the poor.”).

90. See VERMEULE, *supra* note 5, at 59 (explaining the need to trade a predictable “level of abuse of power as . . . the inevitable by-product of attaining other ends that are desirable overall”).

91. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 1, sc. 2.

would likely be considered legally married and so it seems impossible that Claudio's sentence is a wise administration of justice.⁹² Even assuming he is not married to Julietta, he is condemned for a common sin—a sin which time would mediate as he has every intention of honoring his “true contract” to marry her.⁹³

Claudio's speculations as to his sentencing begin to reveal the difference in Vienna between the concept of law and the edicts of the ruler. There is no legalized discussion of whether Angelo, who has now chosen draconian enforcement of a law that has not been in effect for years, had the right to apply and interpret his general mandate from the Duke to the specifics of Claudio's case.⁹⁴ As Lucio notes, the changed enforcement merely “follows close the rigour of the statute.”⁹⁵ We also do not know whether the crime of impregnating Julietta happened before or after the law's revival.⁹⁶ Claudio even asserts that Angelo has likely used his power so forcefully merely to make a name for himself and terrorize with his new authority.⁹⁷ But there is no questioning of Angelo's *right to do this*. Claudio speaks with wisdom regarding the relative positions of law and the ruler in Vienna when he laments: “Thus can the demigod Authority/Make us pay down for our offence by weight/the words of heaven; on whom it will, it will;/On whom it will not, so; yet still ‘tis just.”⁹⁸

To define “just” in Vienna is a difficult task for the contemporary understanding since it clearly involves seemingly arbitrary decisions, unequal and selective enforcement, and at first glance no input from the general populace. The action of Authority is tautologically “just” because it is the action of Authority. Put more delicately, the law can and will change to reflect the ruler's evolving conception of how society should be ordered regardless of the somewhat unequal cleavages across time and space made by such decisions; and of course Angelo is the decider as to how much

92. See Katharine Eisaman Maus, *Introduction to Measure for Measure*, in *THE NORTON SHAKESPEARE* 2021, 2023 (Steven Greenblatt et al. eds., W.W. Norton & Co., 1997) (1623).

93. “Hard cases make bad law. Claudio is an example of the hard case. He has a common-law marriage with Juliet for prudential reasons, to get a dowry.” W.H. AUDEN, *LECTURES ON SHAKESPEARE* 190 (Arthur Kirsch ed., 2019).

94. See generally *Auer v. Robbins*, 519 U.S. 452, 457-58 (1997). See also VERMEULE, *supra* note 5, at 80 (“What is really at stake in the *Auer* setting is not agency self-delegation of power, not the expansion of power, but rather timing—the timing of the exercise of whatever statutory power the agency otherwise has.”).

95. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 2.

96. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947) (“There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”).

97. The resurrected law would seem to violate almost all of the principles outlined by Fuller that a fictitious legal regime must adhere to, specifically: “a failure of transparency, in the sense that affected parties are not made aware of the rule with which they must comply . . . an abuse of retroactivity, in the sense that people cannot rely on current rules and are under threat of change; ‘a failure to make rules understandable’” Sunstein & Vermeule, *supra* note 23, at 40.

98. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 2.

process protections an offender like Claudio is to receive.⁹⁹ Clearly this seems to lack the procedural safeguards and democratic check on the modern administrative state sketched by Vermeule and Posner, but as I will demonstrate going forward there are in fact democratic mechanisms which exert influence on the law. However, the emergency situation—an emergency declared by the Duke—has obviously led to policy changes and enforcement which seems out of step with our notions of proper warning and process.¹⁰⁰

3. Act 1 Concluded

Shakespeare then explains to us in scene 3 why the Duke has absconded his seat and empowered Angelo. By his own admission, the Duke has, for 19 years, failed to enforce the “strict statutes and most biting laws”¹⁰¹ against vice in Vienna. This has led to chaos and unwellness in the state. But, because the Duke himself had allowed such a lapse in enforcement, he believes it would be tyrannical for him to start punishing people now. I am saving my assessment of the democratic mechanisms at work in Vienna for the conclusion of this piece, but it is worth noting here that the ruler is very concerned with public perception. He has delegated to Angelo as a way of sparing his own name from the furious slander of the people. He has avoided accountability for his decisions by enacting them through the administrator Angelo,¹⁰² in essence sidestepping any political or popular will based feedback against him.¹⁰³

So why is this all relevant? If we envision the character of the Duke as changeable and subject in action to the whims of popular opinion, the government of Vienna introduced in Act 1 begins to resemble the one described by Vermeule and Posner. As I will strive to show, the absence of a congressional body, and the subservience of law to the decisions of the ruler has not eliminated a democratic component from the polity. Shakespeare uses the rest of the play to highlight both the flaws inherent to monarchical rule and alternatively those inherent to governments fully subservient to law. This is done in preparation of Act 5’s fantastical imagining of a superior kind of Dukedom, which closely mirrors our own administrative design or at least the aspirations of our administrative design.

99. See *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976); *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment) (“[C]ourts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the constitutional interests of citizens. . . .”) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

100. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (applying the *Mathews v. Eldridge* factors to process considerations.).

101. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 3.

102. Compare to the supposed check that other non-legal institutions exert on the unbound executive. See generally POSNER & VERMEULE, *supra* note 3, at 82-83.

103. *Contra id.* at 61.

B. The Flaws Inherent in Older Governing Structures

Rather than proceed act by act, I will now shift focus and look at a few crucial events throughout the play. Shakespeare has offered a deeply realistic view of a regime somewhere in between benevolent monarchy and liberal constitutionalism by first rejecting the extremes of both. I note the obvious truth that, *in the universe of the play*, the regulation of sexual mores is well within the purview of the government and of the law to address.

1. Law's Empire¹⁰⁴

The play is a savage critique of “the self-referential claims of law to fairness, universality and a fundamental alignment with justice.”¹⁰⁵ Angelo is repeatedly characterized as “precise” throughout the play, most frequently when people are discussing his enforcement of the law.¹⁰⁶ The Shakespearian irony of this categorization is made clear in how the law's operation is subverted and defiled throughout the play. If the greatest argument for the rule of law is its supposedly neutral fairness, Shakespeare shows how this very quality devolves into abuse, and consistently fails in its aspirations to precision.

Shakespeare elaborates on the problems of formal “law” during Angelo and Escalus's conversation before Pompey's trial.¹⁰⁷ Angelo opines on the law's limitations: “What's open made to justice/that justice seizes . . . but what we do not see/we tread upon and never think of it.”¹⁰⁸ Law is blunt and clumsy and struggles to act as a necessary curb on behavior. Escalus echoes these limits in opining that even in a just legal regime “some rise by sin, and some by virtue fall./Some run from brake of vice and answer none:/and some condemned for a fault alone.”¹⁰⁹ This fundamental critique of law's blind spots and inevitably faulty operation is illustrated by the farcical trial to come. When Pompey the bawd/tapster is brought in for his trial before Escalus, it is by Elbow, the comical and nearly incompetent constable.¹¹⁰

104. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986).

105. Halper, *supra* note 55, at 221.

106. There is a question of what the word “prezie” means in some texts. It is beyond this paper's scope to deal with potential corruptions in the manuscripts, or with what may be Shakespeare cleverly altering the meaning of the word “precise.” For my purposes the repeated use of the word precise is sufficient and I treat the word “prezie” as a scrivener's error. See Maus, *supra* note 92 at 2023.

107. See Halper, *supra* note 55, at 240 (“Angelo is flawed; so too the law is flawed. . . the outwardly rigorous, inwardly weak Angelo is only one of the Law's flawed representatives; Constable elbow—thick inefficient incomprehensible laughable—is another while the hangman who is paid and hated for plying his trade, yet a third. And Vincentio who cannot bring himself to enforce his own laws, may be a fourth.”).

108. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 1.

109. *Id.*; see also AUDEN, *supra* note 93, at 186 (“Law . . . has to ignore what the individual does when he is not in relation to law, when he is not obeying it or disobeying it, and it has to ignore the individuals' uniqueness.”).

110. For an argument that our justice system has largely adopted the administrative inquisitorial system of criminal justice, see Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66

And the power of even the wisest of judges is presented as structurally incapable of carrying out a meaningful function in legal enforcement and social regulation. The vision of the true power of judges is very circumscribed.¹¹¹ Shakespeare offers no vision of benevolence in the impotent pardoning of Pompey when Escalus summarizes the entire scene: “Mercy is not itself that oft looks so./Pardon is still the nurse of second woe.”¹¹² Pompey has been begrudgingly spared, as the judge concludes the scene lamenting that “[t]here is no remedy”¹¹³ or pardon available to the truly deserving Claudio.

If we shift our perspective to the more allegorical and assign to Escalus a dual role as both a representation of judges in the law courts, and as the concept of formally enacted law trying to enforce its edicts, the critique of law is harsher still. Keeping in mind that Escalus represents the height of legal ability and wise juridical learning, a very long, purely comic, scene is his reward. Escalus conducts a lengthy fact finding which fails in its goal of getting to the root facts of why Pompey and Froth, a supposed customer of Pompey, have been arrested. Between the myriad malapropisms of Elbow and the preposterous facts of the case, we hear a tale about the violation of Elbow’s wife at a brothel in which Pompey is employed. But no resolution of any value is forthcoming. Escalus says as much to Elbow when he orders Pompey released: “because he hath some offences in him/that thou wouldst discover if thou couldst, let him/continue in his courses till thou knowest what they are.”¹¹⁴ And Angelo has already exited the scene in disgust, condemning the prolixity of the fact-finding that will “last out a night in Russia,/when nights are longest there.”¹¹⁵

The totality of the judge’s learned wisdom yields him only the ability to become exasperated with Elbow’s misspeaking, and leaves him ultimately powerless to stop Pompey’s behavior without the needed proofs. The law operates slowly, is bogged down by myriad procedural hurdles, and is ultimately backward facing; formal law is incredibly limited in the regulation of behavior and policy.¹¹⁶ And, despite the reader having no reasons to doubt Escalus’s uprightness, his pardoning of Froth after first

FORDHAM L. REV. 2117, 2118 (1998).

111. See VERMEULE *supra* note 5, at 4.

112. See WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 1. For a discussion of necessity-based arguments for administrative law, see HAMBURGER, *supra* note 1, at 419-39.

113. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 1.

114. *Id.*

115. *Id.* Some commentators have interpreted this to mean that Angelo is shown as impatient while Escalus is depicted as a virtuous judge. I do not quarrel with that assessment, rather I note that Escalus has no real power while Angelo does. Therefore the lesson is not comparative but structural: a virtuous judge is ultimately impotent compared to both the social forces at work and the power of the state. Accord CORMACK, NUSSBAUM & STRIER, *supra* note 64, at 11 (“[The] middle position [between mercy and legalism] is represented in the play by Escalus, who judges the case of Pompey carefully and wisely while simultaneously trying to help out the effective but self-undermining constable, Elbow.”).

116. See POSNER & VERMEULE, *supra* note 3, at 61.

confirming that Froth is a moneyed gentleman, can be read as Shakespeare's unobvious hint that even in the most carefully circumscribed legal arena, and in the wisest of judicial determinations, corruption and bias are ever present.¹¹⁷

Additionally, if we leave the courts and enforcement, and instead think on the passage and cumbersome legislative process which formal law must undergo in our own polity, Shakespeare has given us the voices of the subjects of Vienna as further commentary on law's shortcomings. There is ample discussion throughout the play about how impossible it is for static law to respond to changing realities effectively.¹¹⁸ Pompey observes how the closing of the brothels in the suburbs will be easily subverted due to the loophole created by the dispensation given to city brothels. He comforts Mistress Overdone in telling her that: "though you change your place, you need not/change your trade."¹¹⁹ Law is easily subverted throughout Vienna. The Duke says as much regarding the emergency situation: "laws for all faults,/but faults so countenanced that the strong statutes/stand like the forfeits in a barber's shop/as much in mock as mark."¹²⁰ And Elbow, the law's enforcement mechanism, is an easily duped comic figure incapable of exerting any real influence on public norms. As Pompey explains that the government should rather go after "the drabs and the knaves"¹²¹ than the proprietors of the sex trade, and later notes that the legality of usury will continue to degrade the city regardless of the sexual regulations, we are left with the trial scene's suggestion that law will always fall short of its just aims and fail to change in time, as that which it seeks to constrain finds new avenues of expression.

To conclude, Shakespeare shows that at least in Vienna the classic model of the judge applying the law, and of static enacted law as highest sovereign, is not so much flawed, as it is too backward facing, too bogged down by procedure, too easily thwarted in its aims, and too small in the impact of individual cases to truly make a dent on public behavior:

Pompey who is probably guilty, manages, by clever lawyering and the dimwittedness of his adversary the constable, to escape punishmentso when Escalus tells Pompey the law will not allow

117. See Halper, *supra* note 55, at 245. See also Goddard, *supra* note 58, at 24 ("When at last we realize that the blessing of the law (which cannot be exaggerated) are due to the wisdom and goodness of man, and its horrors (which also cannot be exaggerated) to his cruelty and greed, we have grasped the fact that law is just an instrument—no more good or bad in itself than the stone we use as a hammer or a missile—and we will never again be guilty of thinking of law and war as opposites, or of confusing peace with the reign of law.").

118. See VERMEULE, *supra* note 5, at 60 ("The architects of modern administrative law believed that a government that always forms undistorted judgments and always acts from welfare-maximizing motives, and that therefore never abuses its power, will do too little, do it too amateurishly, and do it too slowly.").

119. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 2.

120. *Id.*

121. *Id.*

his trade any longer, Pompey scoffs that unless the youth of the city are neutered, they will to't. The law cannot police desire, as the play so well reveals.¹²²

If we cabin this remark to law understood only through the more formalist lens, it resembles Vermeule and Posner's insights regarding the failure of an executive totally constrained by law, to meet the challenges it is called to answer.¹²³ The entire trial scene cries out for an authority to bend the rules in the interest of justice, and to quickly alter the regulatory lattice to account for the cunning maneuverings of the cleverer members of the body politic. But as we will see, Shakespeare does not allow this critique of law to resolve into praise of absolute monarchical authority.

2. Executive Truly Unbound

If the scene with Escalus and Pompey is one depicting the limits and flaws of a legalistic society then the scenes between Angelo and Isabella can be understood as depicting the horror of absolute authority—an authority which uses law merely as a fungible tool to validate its actions.¹²⁴ I focus heavily on Isabella's appeal to Angelo, ignoring how it is resolved at the end of the play. Before Act 5, Angelo has no democratic check akin to the one Posner and Vermeule argue constrains our own executive.¹²⁵

As I have noted, there is no mention of what the law Angelo has started enforcing actually says. It is merely the background principle which is cited to legalize and validate the authority exercised by Angelo.¹²⁶ It is enough to say that there are laws against sexual vice on the books, and it is to the discretion of the administrator how to interpret and how to enforce them with no time wasted in any interpretative battles over the exact lettering of the law.¹²⁷ It is clear that Angelo is well within his authority to change the policy of lax enforcement and begin punishing people who once felt they had license to commit the behaviors in question.¹²⁸

122. Halper, *supra* note 55, at 247.

123. POSNER & VERMEULE, *supra* note 3, at 61.

124. Halper, *supra* note 55, at 245.

125. POSNER & VERMEULE, *supra* note 3, at 153.

126. Goddard, *supra* note 58, at 40 (“Authority always lie[s]. Because it perpetuates itself by lies and thereby saves itself from the trouble of crude force”).

127. See *U.S. v. Mead Corp.*, 533 U.S. 218, 227 (2001) (*Chevron* deference is appropriately applied in circumstances where Congress has explicitly left a gap to fill, the agency has been delegated express authority to elucidate the law by regulation). See also *Chevron v. NRDC*, 467 U.S. 837, 843 (1984) (“The power of an administrative agency . . . necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress . . . there is an express delegation . . . to elucidate a specific provision of the statute by regulation.”) (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (courts must defer to agencies interpretations of their own rules); *Bowles v. Seminole Rock*, 325 U.S. 410, 414 (1945) (explaining that “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”).

128. See, e.g., *Perez v. Mortgage Bankers*, 575 U.S. 92, 95 (2015) (notice and comment procedures are not required when an agency “wishes to issue a new interpretation of a regulation that deviates

Isabella comes to Angelo imploring mercy for her brother. Isabella's plea contains no legal argumentation because it is incontrovertible that Angelo has the absolute authority to declare that "[t]he law hath not been dead, though it hath slept."¹²⁹ The only avenue remaining is an appeal to mercy from an unquestionable authority.¹³⁰ And Shakespeare has given us Angelo as that authority—a dangerous man unsuited to wield such power:¹³¹

Though Angelo describes himself as a saint, he would have represented to an audience of royal supporters at the court the common stereotype of the puritan whose superficial rectitude covers intense and unregulated passions and above all the hypocrisy to hide that disjunction and dictate morality to others.¹³²

Despite Angelo's statement that "It is the law, not I, condemn your brother,"¹³³ "[t]he entire play might be said to have been written just to italicize that lie."¹³⁴ The "law" itself may be impartial, but the decisions made by Angelo—how to resurrect such a law, how and when to apply it, and how forcefully to carry out judgment—are anything but neutral judgments. And Angelo gives a valid justification for his policy—a policy that spares the past offenders but now clamps down on those guilty of the same sin—by stating "[t]hose many had not dared to do that evil if the first that did the edict infringe had answered for his deed."¹³⁵ He has made a policy decision, and sufficiently justified it with reasons.¹³⁶ Isabella's retort, "[w]ho is it that hath died for this offence?/There's many have committed it"¹³⁷ is irrelevant as Angelo is not bound by her concept of fairness, or past enforcement choices; he has already been authorized to interpret and implement the law based on his evolving reasoning.

Isabella exclaims, "It is excellent/to have a giant's strength, but it is

significantly from one the agency has previously adopted"); *Dominion Energy LLC v. Johnson*, 443 F.3d 12, 16-17 (1st Cir. 2006) (deference to agency determinations on procedural due process).

129. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2.

130. The two speakers may be allegorical representatives of Justice and Mercy or "as a debate between Law and Religion." See Bradbrook, *supra* note 83, at 7, 10.

131. See Kornstein, *supra* note 64, at 55-56 ("[W]e see what happens when power is delegated to the wrong person . . . he is not a leader but a follower . . . being a natural underling makes him prone to legalism.").

132. See Halper, *supra* note 55, at 236-37.

133. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2.

134. See Goddard, *supra* note 58, at 24.

135. See WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2; see also *SEC v. Cheney Corp.*, 332 U.S. 194, 202-203 (1947) ("The fact that the EPA has from time to time changed its interpretation of the term "source" does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute. An agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.") See also Vermeule, *supra* note 5, at 85 ("The de facto retroactivity of agency changes of course is a legitimate concern, but not a trump; it is a consideration, a harm to reliance interests, a cost.").

136. See *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) ("The Court's only task is to determine whether the NRC had considered the relevant factors and articulated a rational connection between the facts found and the choice made.").

137. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2.

tyrannous/to use it like a giant.”¹³⁸ Yet, the policy decision made by Angelo, unlike the blundering Escalus’s efforts, is both forward thinking and vastly more effective at curbing behavior.¹³⁹ The tradeoff between rule of law and absolute authority is clear: Shakespeare is showing that the sacrifices in deliberative process and due process, in perceived fairness, and in legal formality can be recompensed by efficiency, speed, mutability, volume, and temporal orientation. It is therefore only tyrannous if the giant uses his strength for evil, because, alas, mercy is the only relief available to subjects.

To bring the comparison to our present state, if Angelo were subject to democratic removal for violating the trust by which he was empowered, it could be argued that Isabella’s talk of tyranny is overblown and that tyranny in context is in fact an inflated term, meant to criticize policy decisions one does not like.¹⁴⁰ But Angelo is not subject to any check, at least not yet, and so his is a more truly unbound authority. Angelo turns out to be exactly the giant who misuses his power; *Measure for Measure* is no less critical of the potential for evil inherent to absolute authority than it was of law’s deficiencies.

The appeal ends with a shocking statement from Isabella. “Hark how I’ll bribe you’ good my lord, turn back.”¹⁴¹ The word bribe, a word that appears nowhere else in the play, seems intentional. As Goddard notes:

[W]hat other Isabella, or what devil within the innocent one, had put that fatally uncharacteristic and inopportune word “bribe” on her tongue. It is one of those single words on which worlds turn that Shakespeare was growing steadily more fond of.¹⁴²

I believe that Isabella knew what she was doing, and it is possible that Claudio had foreseen this avenue of relief when he sent her to appeal on his behalf. And it is this single word which reveals Angelo as the always eventual tyrant King.

Isabella’s attempt to bribe Angelo into separating divine justice—the moral condemnation of her brother’s sin—and earthly law—a pardon from the law’s force—backfires spectacularly. She pleads, “’tis set down so in heaven, but not in earth,”¹⁴³ that creating illegitimate child is equal to murder; the institutions of man cannot be as strict as the draconian judgements of heaven. But Shakespeare flips this on its head. Instead of the

138. *Id.*

139. *But see* Harriett Hawkins, “*The Devil’s Party*”: *Virtues and Vices in Measure for Measure*, in WILLIAM SHAKESPEARE’S *MEASURE FOR MEASURE*, *supra* note 56, at 81, 93 (explaining that Shakespeare “challenges the assumption that human nature can be made to perform according to a scenario of the Duke’s contriving”).

140. *See* POSNER & VERMEULE, *supra* note 3, at 176-205. *But see* HAMBURGER, *supra* note 1, at 409-79.

141. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2.

142. *See* Goddard, *supra* note 58, at 27.

143. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2.

earthly sovereign giving Claudio a more just pardon than heaven might for his sins, Angelo instead decides to trade an earthly pardon for the earthly violation of Isabella's body, and so also of her soul.¹⁴⁴ He announces that she "must lay down the treasure of [her] body to [him]"¹⁴⁵ or else Claudio must die. If the shortcomings of being ruled by law were shown in Pompey's trial, we now see the mutilations made possible by unbound authority above law. The unchecked ruler may always "give [his] sensual race the rein"¹⁴⁶ and rule tyrannically. Angelo is of course capable of superseding the law's dictates with benevolence and mercy; but his position above law also carries with it the power to commit monstrous earthly injustice and spiritual violations against Isabella.¹⁴⁷

To conclude, in only two acts, Shakespeare has compared and contrasted the rule of legal institutions with one of unbound authority and found both to be lacking. The play cynically obliterates the concept of effective justice under law, and shows the risk of unchecked authority. But this is not the ending. As I will strive to show, the Duke's behaviors leading up to his actions in Act 5 show this play imagining a regime which strives to resolve the problems between the two earlier depictions.

3. The Duke of Dark Corners

It is my contention that the character of Duke Vincentio, specifically throughout Acts 3-5, is Shakespeare's attempt to imagine a form of rule which mitigates the deficiencies of both a liberal legal society and one of absolute authority. The end of the play imagines a regime between these two modes with much in common with Vermeule and Posner's descriptions of the administrative state. As the Duke never left Vienna, it is quite correct to point out that in abdicating but remaining in the city "[h]e is really not so much giving up his power as increasing it by retaining it in secret form."¹⁴⁸ One may then judge his entire plan as a vivisection of his subjects, aimed at using the information gained to rule more effectively.¹⁴⁹

a. Claudio

After having been condemned to death Claudio awaits his end in prison

144. See Goddard, *supra* note 58, at 42 (The play makes clear that "Power lives by Authority and that Authority is always backed by two things, the physical force that tears bodies and the mental violence that mutilates brains.")

145. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2.

146. *Id.*

147. See Marcia Riefer, "Instruments of Some More Mightier Member": *The Constriction of Female Power in Measure for Measure*, in WILLIAM SHAKESPEARE'S *MEASURE FOR MEASURE*, *supra* note 56, at 131, 144 (The play "exposes the dehumanizing effect on women of living in a world dominated by powerful men who would like to re-create womanhood according to their fantasies.")

148. Goddard, *supra* note 58, at 25.

149. AUDEN, *supra* note 93, at 191 ("He creates an educational process that allows the characters to undergo and emerge from their sufferings."). See generally 5 U.S.C. § 553.

while nursing the slim hope that his sister may win an appeal on his behalf. Here he meets Friar Lodivico—the Duke in disguise—and is treated to a bizarre mockery of his last rites. The duke’s speech, far from being comforting, can only be described as nihilistically bizarre.¹⁵⁰ He urges Claudio to “be absolute for death”¹⁵¹ and proceeds to describe life as a sequence of frustrated hopes, maladies without cure, and dire circumstances which should welcome the curative release of death:

Reason thus with life:
 If I do lose thee, I do lose a thing
 That none but fools would keep: a breath thou art,
 Servile to all the skyey influences . . .
 What’s yet in this That bears the name of life?

Commentators have puzzled over this bizarre speech which seems designed to torture Claudio rather than help ease his soul.¹⁵² Claudio’s initial stoicism is soon revealed as false bravado in the scene to follow in which he begs his sister to sacrifice both her body and her honor to Angelo so that he may be pardoned. We see the impact of the Duke’s torments when Claudio utters a pure distillation of the universal terror of mortality:

[T]o die, and go we know not where;
 To lie in cold obstruction and to rot . . .
 ‘tis too horrible!
 The weariest and most loathed worldly life
 That age, ache, penury and imprisonment
 Can lay on nature is a paradise
 To what we fear of death.¹⁵³

It is clear to me what the Duke has actually done. If we imagine the initial problem of the play to be that any law used to solve an emergent problem is likely to be flawed in two directions—under inclusive in that it misses violations done by the powerful and can’t address adjacent behaviors which function to eliminate the impact of the law; and over inclusive in that it condemns a violator like Claudio, who has impregnated his future wife, in the same way it condemns serial offenders or killers—then, the Duke, in pardoning Claudio only after torturing his conscious, has carried out the law’s true aim while operating outside and above the law. Keeping in mind that Claudio is ultimately spared and married to Julietta, the Duke has both performed a mercy before the law’s dictates and successfully punished

150. See BLOOM, *supra* note 54, at 3 (“[W]e cannot accept the reality of this speech as comfort, intended or actual. . .”).

151. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 1.

152. See Goddard, *supra* note 58, at 58 (arguing that the Duke’s speech is anything but a Christian comfort to the dying rather his lines are emphatically anti-Christian and “are a temptation—to despair”); BLOOM, *supra* note 54, at 372 (“[The Duke is] a savage reductionist who has emptied life of all value . . . [w]e are our anxieties; no more, no less, and so we are well out of it all.”).

153. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 1.

Claudio. If we here imagine Angelo's enactments as the broad policy principle set in motion to combat the emergency situation in Vienna, then the initial punishment of death to Claudio was too harsh a decision. The Duke has, after learning of the effects of the law, and after forcing Claudio to truly contemplate his own oblivion, fashioned a better remedy.¹⁵⁴

By not revealing himself at first the Duke has tormented Claudio with visions of a wasted life and mandated that Claudio, after breaking the laws of both God and man, must ponder—truly ponder—the horrors of visceral infernal punishment, divine justice, hell, and oblivion.¹⁵⁵ This is a finely tailored and uniquely crafted remedy fit and measured out to Claudio. What's more, it is effective in a way that a formal law could never be; by acting as a different kind of agent—a sovereign unbound by legal process yet one who uses his power only to accomplish the stated goal of the broader law's scope—the Duke has crafted a perfect remedy for Claudio and Julieta's violations.¹⁵⁶ The Duke's behavior in enacting the law, studying its effects, and modulating its enforcement upon the behaviors the law seeks to control is both a model of administrative action as described by Posner and Vermeule, and becomes the Duke's method of operation going forward.

b. Isabella

The Duke's rescue of Isabella from the clutches of Angelo via the bed trick with Marianna is easy enough to understand: by substituting Marianna for Isabella the Duke has preserved Isabella's dignity, and has set in motion a trap which will lead to the marriage of Angelo and Marianna—an "Old contracting"¹⁵⁷ that Angelo had unjustly reneged on prior to the play. However, the Duke's marriage proposal to Isabella at the end has baffled commentators. By asking for her hand in marriage, "the Duke succeeds in committing 'in a legitimate and honorable way, the crime which Angelo attempted in vain.'"¹⁵⁸ Additionally, the Duke's rationale for his proposal is never given, and his rationale for deceiving Isabella about her brother's death—"I will keep her ignorant of her good,/to make her heavenly comforts of despair/when it is least expected"¹⁵⁹—is hardly satisfying.

154. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947) ("There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

155. See Phoebe S. Spinrad, *Measure for Measure and the Art of Not Dying*, in WILLIAM SHAKESPEARE'S *MEASURE FOR MEASURE*, *supra* note 56, at 111, 118 ("[A]ll [of Shakespeare's contemporary audience] would have . . . pointed out that to bargain for life at the expense of one's soul is a mortal sin.").

156. For a discussion on the now inquisitorial role of the prosecutor, see Lynch, *supra* note 110, at 2118.

157. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 2.

158. Riefer, *supra* note 147, at 144.

159. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 4, sc. 3.

However, if we adopt the view that a primary theme of this play is the regulation of and guidance toward healthy sexuality, I believe this view offers insight into the Duke's final judgments.¹⁶⁰ Like the remedy he fitted to Claudio's vices, the Duke has, by lurking around dark corners as the friar, gained insight into the very nature of Isabella. He again has crafted the proper remedy for his subject's purgation. A careful reader may ask, "What purgation? She has not broken any laws and was in fact a novice nun?" I answer that, if we view sexual mores merely as an area subject to state control (in the play only!) and so a domain in which all people in a polity take part, law breakers are not the only concern of the regulator.¹⁶¹

Much has been written about the subtle themes of sadomasochism and perverted sexuality that bubble to the surface in Isabella's speeches.¹⁶² We first meet her longing for a harsher restraint to be placed upon her order, the votaresses of Saint Clare, an order already reputable for draconian restraint.¹⁶³ So too has her initial rejection of Angelo's proposal, "The impression of keen whips I'd wear as rubies,/And strip myself to death, as to a bed/That longing have been sick for ere I'd yield/my body up for shame," titillated commentators.¹⁶⁴ And her vicious rage toward her brother when he entertains the notion that she should sleep with Angelo to save him is replete with sexual disgust. She curses him and screams "is't not a kind of incest to take life/from thine own sister's shame"¹⁶⁵ before praying that her mother had cuckolded her father so that she in turn could deny any relationship to Claudio. It is clear to me, and to the Duke who overhears the scene, that Isabella possesses no healthy, or—if that word is too offensive to the modern sensibility—gentle or nonviolative, vision of sexuality. And this inability to comprehend unperverted sexuality permeates her religious nature, as shown by her introductory scene.¹⁶⁶

The Duke witnesses her complete refusal to comfort her brother with any semblance of grace, patience, or prayer. Rather she exclaims, "I'll pray a thousand prayers for thy death,/no word to save thee,"¹⁶⁷ when Claudio asks her to sleep with Angelo. Later, upon learning that Angelo has betrayed his part of the bed trick, and has executed Claudio, she again erupts in violent imagery toward Angelo: "O, I will to him and pluck out his eyes. . . . Injurious world! Most damned Angelo."¹⁶⁸ Quite simply, Shakespeare has

160. *But see* Riefer, *supra* note 147, at 136 ("The word 'healthy' could hardly be associated with female sexuality in such an environment").

161. *See* AUDEN, *supra* note 93, at 186-87 (on the blindness of formal law).

162. *See generally* BLOOM, *supra* note 54.

163. *Id.*

164. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 4; *see also* Goddard, *supra* note 58, at 28-29.

165. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 1.

166. *See generally*, BLOOM, *supra* note 54.

167. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 1.

168. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 4, sc. 3.

her leave the cloister to appeal on her brother's behalf because she is not suited for the cloister.

In again performing his investigations of the city and its reactions to the new law, the Duke comes to understand her nature better than she does, and his two-part sentencing of Isabella at the end is again a perfect remedy. After forcing Angelo to wed Marianna, the Duke sentences him to death for the same crime he tried to enforce against Claudio: premarital fornication.¹⁶⁹ And it is Isabella who finally for the first time in the play shows true nun-like grace in appealing for his pardon when she pleads:

A due sincerity govern'd his deeds . . .
Let him not die.¹⁷⁰

She speaks these words while still under the belief that Angelo has executed her brother, making them all the more shocking.¹⁷¹ The duke has successfully taught her the charity and grace of a nun, qualities that she had so far lacked. And his final proposal to her of marriage, regardless of what some scholars say about it, offers her salvation from her sexually-warped motivations for joining the convent.¹⁷²

c. *Barnardine*

The most puzzling action taken by the Duke at the end of the play is his pardoning of the criminal Barnardine. We and the Duke first hear of Barnardine as a condemned prisoner who has been in prison for nine years, and is finally sentenced to die having recently been conclusively proven guilty. He is "a man that apprehends death no more dreadfully but/as a drunken man's sleep; careless, reckless, and fearless/of what's past, present, or to come;/insensible of mortality, and desperately mortal."¹⁷³

We finally meet the man himself in Act 4 when the hangman and Pompey attempt to carry out his death sentence. As the executioners attempt to carry out their charge, Barnardine grumbles that he has been "drinking all night" and so is "not fitted for" execution.¹⁷⁴ They plead with him to "rise and be

169. It is worth noting here that "[t]he law is not only subverted to the end of sparing Angelo, but is boldly flouted precisely by the very highest earthly authority" the Duke. See Halper, *supra* note 55, at 238. See also SCHMITT, *supra* note 60 at 10 ("Who assumes authority concerning those matters for which there are no positive stipulations, for example, a capitulation? In other words, Who is responsible for that for which competence has not been anticipated?").

170. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 5, sc. 1.

171. Herbert Weil Jr., *Form and Contexts in Measure for Measure*, in WILLIAM SHAKESPEARE'S *MEASURE FOR MEASURE*, *supra* note 56, at 61, 74 ("Because her choice of mercy is not inevitable, her truly merciful behavior to Angelo is the moral climax of the play.")

172. For a perspective from which one could analyze the Duke's proposal as an example of pernicious coercion versus one of benign paternalism, see Cass Sunstein & Richard Thaler, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 178 (2003).

173. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 4, sc. 2.

174. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 4, sc. 3. I somewhat playfully note that Pompey has been re-trained into a new vocation by the government which has, via regulation, eliminated his old profession. See David Bevington, *Equity in Measure for Measure*, in CORMACK, NUSSBAUM &

hanged,”¹⁷⁵ and the disguised Duke eventually joins the chorus. Barnardine dismisses them with a roar: “I will not die today, for any man’s persuasion.”¹⁷⁶ Bloom has argued that in the insane world of *Measure for Measure* “Barnardine’s function is to expose this nonsense; [his] other use is to represent, with memorable starkness, the unregenerate human nature that is in Vienna or the world, invulnerable to all the oppressions of order.”¹⁷⁷ Even the Duke is baffled and confesses that the man is “unfit to live or die.”¹⁷⁸ He is truly unsuited for imprisonment or for society.¹⁷⁹

As Barnardine baffles and delights literary critics I believe modern administrative law offers a tentative explanation for the Duke’s pardon; the Duke pardons Barnardine and requests that he “take this mercy to provide for better times to come.” The Duke’s decision may baffle the onlookers and even some readers, but I believe he is making optimistic assumptions about Barnardine’s potential for grace. In making a decision on Barnardine’s case—a decision he cannot avoid making, pardon or no, since it is by his authority that Barnardine will be executed or released—the Duke has reached the limit of fact-finding ability and so acted in the face of uncertainty. There is no better actor to sentence Barnardine than the Duke, and, since a judgment must be made, his judgment is not for us to question.¹⁸⁰

4. The Democratic Check on the Duke

It is obvious that the Duke is not a democratically elected ruler; but the democratic checks on his exercise of power track closely with Posner and Vermeule’s arguments. *Measure for Measure* supplies us with many instances of how the populace may interact with and provide feedback to a responsive executive. Furthermore, Shakespeare is almost devilishly ambiguous as to who within the play should be believed in their evaluations of the Duke and his reign. What is the character of the Duke and how effective can any “democratic-ish” mechanisms be to constrain an executive

STRIER, *supra* note 64, at 169 (“the Provost’s program of rehabilitation goes about to teach a new and necessary trade that will at least keep Pompey off the streets.”).

175. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 4, sc. 3.

176. *Id.*

177. BLOOM, *supra* note 54, at 376.

178. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 4, sc. 3.

179. Bloom also views Barnardine as a kind of protest against the total state or “a minimal hope for the human as against the state.” BLOOM, *supra* note 54, at 380.

180. *See, e.g.,* *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) (“The Court’s only task is to determine whether the NRC had considered the relevant factors and articulated a rational connection between the facts found and the choice made.”); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2012) (an agency may change policies without a showing of comparative policy evaluation: “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates”); *EME Homer City Generation, L.P. v EPA*, 572 U.S. 489, 524 (2014) (“[t]he possibility that the rule, in uncommon particular applications, might exceed EPA’s statutory authority does not warrant judicial condemnation of the rule in its entirety”).

not constrained by law?

Scholars puzzle over this play for a reason: on one reading the Duke seems like a cleverly concealed director, manipulating things behind the scenes in order to better govern the state and bring his subjects to the good.¹⁸¹ I have offered several examples above which jive with this reading. But as others note, the Duke is not exactly flawless or even competent in his designs upon the city.¹⁸² So what are we to think about the Duke? I share the view of Herbert Weil that the “presentation of the Duke as a well-meaning powerful figure who delights in his own [maneuvering] but who fails to understand his own weaknesses will help explain many otherwise perplexing details” of the play.¹⁸³ I will highlight a few elements of his all-too-human rule.

To start, the Duke himself admits that it was he who “for . . . fourteen years . . . let slip” the “strict statutes and most biting laws” of the city.¹⁸⁴ How did it happen that “Liberty plucks Justice by the nose”¹⁸⁵ in Vienna? As the dialogue between the friar and Duke in Act 1, scene 3 reveals, the Duke has empowered Angelo almost primarily to avoid seeming “too dreadful”¹⁸⁶ to Vienna’s subjects. The duke is responsible for the poor governance of the past due to his reluctance to face the reprobation of the common people. Claudio’s comment that “surfeit is the father of much fast”¹⁸⁷ serves as an admonition to the Duke himself that in being too receptive to public will he has erred in governing. His dismissal of the “aves vehement”¹⁸⁸ of the masses betrays a guilty conscience. The Duke himself explains that, by clothing Angelo in his authority, he will escape blame for his own new policy:

We may recognize here the sentiments of every official, major or minor, down to the present day: the desire to be loved as a beneficent figure and a source of recourse against one’s own rigorous enforcement agencies.¹⁸⁹

His delegation is intended to dupe the people into blaming Angelo for the

181. See A.P. Rossiter, *supra* note 85, at 54 (“What one makes of the ending . . . depends on what one makes of the Duke’ But I do not quite know what to make of the Duke.”).

182. BLOOM, *supra* note 54, at 1 (“The Duke’s manipulations, though ultimately (and rather mechanically) benign in their effects, are as theatrical and amoral as Iago’s or Edmund’s, and his motivations always must remain inscrutable.”).

183. Weil, *supra* note 171, at 72 (The Duke is “a hero pompous and apparently successful, yet failing to recognize his own weaknesses.”).

184. Consider “the Duke, far from being God, is an unpleasant busybody who flees responsibility in a world of salacious seediness that he can cope with only through incredible tricks.” Louise Schleiner, *Providential Improvisation in Measure for Measure*, in WILLIAM SHAKESPEARE’S MEASURE FOR MEASURE, *supra* note 56, at 95.

185. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 1, sc. 3.

186. *Id.*

187. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 1, sc. 2.

188. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 1, sc. 1.

189. Spinrad, *supra* note 155, at 111, 127.

resurrection of the law; ensuring his own “nature [is] never in the fight”¹⁹⁰ against vice is his way of remaining popular despite the policy change. And this ploy is confirmed as effective in Act 1, scene 3 when Lucio, upon seeing Claudio sentenced, advises him to appeal to the Duke against Angelo’s new edict.¹⁹¹

And the Duke’s vision of himself is hardly reflective: he believes he is of upright moral character and has only ever been concerned for the betterment of Vienna. He praises himself for not relishing the “loud applause”¹⁹² of the common people, despite abdicating his seat to avoid their slanders. So too are we treated to his lamentations when Lucio suggests that he may have a darker side:

No might nor greatness in mortality/can censure scape; back-wounding calumny/the whitest virtue strikes. What king so strong/can tie the gall up in the slanderous tongue?¹⁹³

In fact he accurately describes the modern reciprocally negative relationship between a distant ruler and the throng of subjects, all of whom have various true and false understandings of the regime’s actions:

O place and greatness! millions of false eyes/are stuck upon thee: volumes of report/Run with their false and most contrarious quests/Upon thy doings: thousand escapes of wit/Make thee the father of their idle dreams,/And rack thee in their fancies.¹⁹⁴

This is the very nature of a ruler sensitive to and impacted by mass public opinion, and it is clear what the ruler thinks of the machinations of hoi ploy regarding his benevolence. “It is the lament of all modern celebrities, political and theatrical, in the era of instant journalism.”¹⁹⁵

And Shakespeare presents more than enough evidence to suggest that the people are right—the Duke may not only be incompetent, but may be a hypocrite.¹⁹⁶ As I have already noted, he appointed Angelo, a man whose character he obviously overrated, for his rectitude. And the bed trick fails to spare Claudio’s life; the Duke is rescued in his ploy only by the random appearance of a dead ringer for Claudio found within the jail who happens to also be sentenced to die. But the clues go far deeper than that. In Act 3, scene 1 we are treated to a comical scene in which Lucio speaks ill of the

190. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 3.

191. To bring this comparison to our present regime, it is obvious that such a ruler will not only enact policies but take measures to shift the blame and blind the people to the new realities. Accountability may be easily thwarted. In the state described by Vermeule and Posner, it is highly doubtful that information channels can operate in such a way as to preserve anything like a valid, informed, and meaningful political check on the executive.

192. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 1.

193. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 2.

194. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 4, sc. 1.

195. BLOOM, *supra* note 54, at 371.

196. See Schleiner, *supra* note 184, at 108.

Duke to the Duke himself, disguised as friar Lodovico. Lucio is adamant that the Duke would never have condemned anyone to die for fornication as “he had some feeling of the sport, he/knew the service [meaning prostitution], and that instructed him to mercy.”¹⁹⁷ Lucio knows the Duke to be intimately familiar with prostitutes and claims he “would be drunk too”¹⁹⁸ while frequenting brothels.¹⁹⁹ Suddenly the opening of Act 1, scene 3 makes sense: the scene opens with the Duke urging the other friar to “throw away that thought” that the Duke had absconded due to any “dart of love”²⁰⁰ or secret sexual relations. Why would the friar have asked such a question? Lucio indicates that the Duke’s lasciviousness is commonly known to all but the Duke.²⁰¹

Additionally, Lucio says that the Duke, in addition to being “a better woodman than” he wants to admit, was thought wise by the common people precisely because they are fools; the Duke is in fact “[a] very superficial, ignorant, unweighing fellow.”²⁰² Against the Duke’s indignation and refusal to believe Lucio is telling the truth, Lucio utters: “The Duke yet would have dark deeds darkly answered: he would/never bring them to light.”²⁰³ In context Lucio is speaking of the Duke’s late-night assignations with prostitutes. But for my purposes this devilishly clever quip serves as a condemnation of the administrative state’s mechanisms, many of which are uncheckable by the channels described by Posner and Vermeule because they are too unseen, or too highly technical, or too swift to truly be engaged with democratically.²⁰⁴

However, Act 5 also gives a somewhat positive picture of the very kind of democratic engagement proffered by Posner and Vermeule. Throughout the Duke’s sentencing of all the parties in the play, Lucio remains onstage, and, shockingly, is in constant dialogue and commentary with the Duke’s decisions. Lucio is reprimanded by the Duke no less than seven times for speaking out of turn, and yet continues to cat-call and question everything said by the Duke. Even after revealing himself and punishing Lucio, the Duke ultimately reneges on any harsh penalty and instead sentences Lucio

197. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 2; *see also* Spinrad, *supra* note 155, at 127 (“[T]he Duke discovers that his people do not universally applaud him, and he must listen to some unpleasant truths about himself even from the most slanderous tongues.”).

198. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 2.

199. As Bloom notes, “No one else in Shakespeare is as weirdly motivated (or nonmotivated) as Vincentio, and many if not most of his opacities vanish if Lucio is a truth teller and not a slanderer.” BLOOM, *supra* note 54, at 370.

200. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 1, sc. 3.

201. Suddenly Escalus’s description of the Duke: “One that, above all other strifes, contended especially to know himself” takes on a second meaning. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 2. The Duke is ignorant of his own nature.

202. WILLIAM SHAKESPEARE, *Measure for Measure*, act 3, sc. 2.

203. *Id.*

204. *See* HAMBURGER, *supra* note 1, at 355-75.

to the same fate of all fornicators in the play: marriage.²⁰⁵

The Duke's dialogue with Lucio as he attempts to carry out his final sentencings reflects the imperfect interchange between the ruler and the ruled. There is no question that the Duke possesses power over Lucio, the power to ignore and even in some cases halt his interference.²⁰⁶ Yet, Lucio is largely left alone to annoy and chastise and slander. He is "a kind of burr [that] shall stick"²⁰⁷ as a critic and feedback mechanism to the exercise of authority:

Shakespeare, while giving to the Duke and his morality the definition of the plot and the last word of judgment, nevertheless gives [Lucio] so loud, so forceful, and at times so appealing a voice in the play—he allows it so to undermine the dignity, though not the power, of the ruler.²⁰⁸

And we know enough about the Duke to know he very likely will be influenced by Lucio's observations going forward in the government. I postulate that Shakespeare has intentionally left the Duke's nature unresolved to the reader, and so has left the judgment over Lucio's interjections—are they serving a vital function or mere useless annoyances?—to our own partisan persuasions. We simply do not know how right Lucio was in his descriptions of the Duke, just as citizens in a massive federalized imperium can never truly know the total value, motivations, or outcomes of policy choices.²⁰⁹

CONCLUDING THOUGHTS

I conclude with a brief final description of the Duke of Dark Corners as literary analogue to the modern federal administrative state. The Duke is far from a master strategist: his designs often fail. So too is he far from bringing

205. *But see* Constance Jordan, *Interpreting Statute in Measure for Measure*, in CORMACK, NUSSBAUM & STRIER, *supra* note 64, at 117 ("[T]he question expressed by its 'conceit'—'who shall guard the guardians'—addresses the nature of government itself. Absent an institution of law independent of the will of a prince or a king, I think the play reveals that a government so deficient can have no sure or certain justice, no better defender than a Lucio.").

206. *But see* Riefer, *supra* note 147, at 135 ("His ultimate intention seems to be setting the stage for his final dramatic saving of the day—a day which would not need saving except for his contrivances in the first place . . . [he] is not as well-meaning as it first appears, and it should make us apprehensive about the Duke's potential to warp the experiences of those involved in his plots.").

207. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 4, sc. 3.

208. Schleiner, *supra* note 184, at 107.

209. I note here that the play contains no analogue for a political media or for institutional political parties. On one reading that is a shortcoming of the play. On the other it is a condemnation of any view of our government which claims that media can serve a meaningful explanatory function or that political parties can somehow represent diverse class interests. *See generally* POSNER & VERMEULE, *supra* note 3; Jordan, *supra* note 205, at 101-2 ("[R]epresenting the government of an absolute prince who is both rigorously punitive and mercifully forgiving. This thematic ambivalence is not easily or conveniently resolved. . . . [T]he Duke is a prince-legislator and his authority is absolute; he (or his deputy) functions as the law; he does not govern by means provided by the institution of a court of law.").

a perfect resolution to anything.²¹⁰ The stability and utility of the marriages at the end are anything but assured: “[A]lthough the Duke attempts to imitate God he is not God but a ruler dissatisfied with his past government whose efforts to imitate God in justice and mercy . . . produce comic results . . . he is a man of tests.”²¹¹

He is largely amoral though his decisions are guided by attempts at moral tutelage. His statement “craft against vice I must apply”²¹² could easily be read to mean that the proper perspective from which to assess his governance is not as a battle of good vs evil or legal versus illegal, but rather one which asks how effective or ineffective he is at designing regulations to compel behaviors. He is a designer who is a human and therefore flawed designer. As a ruler in constant dialogue with the subjects of his rule, he is responsive to the changing nature of affairs and is often capable of superseding and rewriting law to suit benign purposes: “The Duke must invent as he goes, and thus the often-noted awkwardness in his conclusion of the plot seems grounded in the situation: he is a man of many plans and preparations, forced to improvise.”²¹³

His actions are largely shrouded and incomprehensible to those they impact, but he in turn is strongly mutable and ever-vigilant of public perception and opinion. In short, the Duke of Dark Corners is the best literary parallel to the modern executive as described by Posner and Vermeule and he speaks too wisely in his description of our world:

There is scarce
truth enough alive to make societies secure; but
security enough to make fellowships accurst: much
upon this riddle runs the wisdom of the world.²¹⁴

I conclude with that purely literary thought and now turn to the principal lesson of this play which doubles as the fundamental truth of federal administrative regulation across a vast nation:

”The old moralities exemplified most often some rough and ready lesson. *Here* the very intricacy and subtlety of the moral world itself, the difficulty of seizing the true relations of so complex a material, the difficulty of just judgment, of judgment that shall not be unjust, are the

210. See BLOOM, *supra* note 56, at 4 (commenting on the play’s leaving open whether the marriages at the end will accomplish the Duke’s aims: “its protagonists’ joys are either completed or deferred, and only the disreputable Lucio and Barnardine are alive in the present”).

211. Schleiner, *supra* note 184, at 107.

212. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 2.

213. Schleiner, *supra* note 184, at 108.

214. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 3, sc. 2; accord KENJI YOSHINO, *A THOUSAND TIMES MORE FAIR: WHAT SHAKESPEARE’S PLAYS TEACH US ABOUT JUSTICE* 79-80 (2011) (“[T]he last Act of the play is too quick. . . . The pendulum has swung wide. The lawless Vienna of the play’s inception has become a polity in which the laws have been remorselessly enforced. Yet once the problems of the other extreme are exposed, the Duke reverts to type. Vienna seems poised to sink back into the lawlessness.”).

lessons conveyed.”²¹⁵

The word moral could easily be substituted for “legal” and become a criticism of the structures of our government. If we as legal commentators take as true the notion that we now live in a regime fundamentally different in kind from the one around which our history, early institutions, and cultural identity revolve, then further development must take place across many avenues of thought.²¹⁶ I have striven to demonstrate what a more fruitful approach to describing and engaging with our present government might look like. To recall Hamburger again, I view the battles between constitutional critiques and justifications for extralegal power as a wasteland of material devoid of any useful relationship to educating the populace or improving the function and design of the government. So too are arcane theories of interpretation or laughably inconsistent judicial methodologies wastes of time and energy in discussing the administrative state.²¹⁷ What is required from both defenders and critics of the present government is a more honest form of discourse which leaves behind squabbling about history and doctrine for more direct arguments as to why the thing itself is good or bad. I do not mean to neglect or give short shrift to the pain of dislocation—I understand all too well the outrage and discontent many feel toward our present state. But those seeking to influence its development or reclaim previous epochs have failed beyond measure to persuade by way of constitutional critique. The impersonal and distant authority of the Duke mirrors our own time and “law [has become] reducible to two features: policy choices and techniques of their implementation . . . ‘what do we want? And ‘how do we get it?’”²¹⁸ I would add that it is maddeningly unclear who the “we” in that statement ever is.

This is not a cause for despair but it should be the impetus of new directions for engagement. “One symptom of a confused state is that it has no collective memory, no sense of when things began to fall apart.”²¹⁹ To those who see in that statement an accurate description of our day the task has become less legal and more cultural. It compels commentators to ask why constitutional critiques have not moved sentiment and why what they see as such an inconsistent and strange rule as our regime was so consciously developed and preferred to a more formally legalistic one. Additionally, critique of the present state should be coupled with viable methods of answering the challenges the state is now called upon to meet.

215. Rossiter, *supra* note 85, at 58 (emphasis added).

216. As should be clear by now, I firmly believe muscular criticism of the administrative state is a vital part of making it “more so” and is rather enhanced in strength by a more honest appraisal of the present circumstances.

217. See Strier, *supra* note 64, at 186 (“What Escalus does not do is attempt any version of . . . statutory interpretation.”).

218. See White, *supra* note 26, at 686.

219. See Yoshino, *supra* note 64, at 685.

If the states and other branches have lost the ability and authority to govern without fealty to the executive, what is needed is not doctrinal chastisement but proofs and ideas on how an effective new federalism could operate. Channeling the play, there is also fertile ground for investigating just how democratic such a regime can ever be. Do the channels of communication between sovereign and governed actually work efficiently? How could they be improved? Which classes or individuals dominate political media and so control and muddy the very feedback loop by which Posner and Vermeule argue our polity remains democratic? And of course one must confront the systemic reasons behind a populace that does not care about the constitutional critiques and lacks any understanding of the myriad mechanisms of power that are never discussed or addressed in popular discourse.

Alternatively, defenders of the state should seek out more compelling evidence—not arbitrary frameworks provided by legal scholars—that a bloodless coup has not in fact occurred and devote themselves to making the state and its leaders more politically accountable to the populace that, in their own analysis, no longer can be assured of legal recourse against the neglect of their individual liberties and aspirations. As the Duke delegates his power to avoid accountability, accountability free from obfuscation should be the singular focus of those who believe our state has remained democratic. Finally, the institutions of Vienna and of our own government are almost exclusively dominated by elites who claim the mantle of representing average people for their own good. Redemption of the administrative state should require a more muscular vision of how the masses may assert their will—or how their will may be understood—in this time of a vestigial legislature.

The fundamental American issue remains, as best summarized by Pojanowski, that “[o]ur intellectual inheritance in public law identifies two elements of constitutional governance: legislative supremacy and the rule of law.”²²⁰ Yet our actual government hardly identifies either. This disconnect has led to an impoverished public discourse—which seldom if ever engages with issues as they actually exist—coupled with a niche domain of specialists arguing about inconsequential doctrines which the courts themselves have long since accepted and applied to the world. If this state can exist while preserving any notion of American democracy—as Posner and Vermeule at least seem to want us to believe that it can—a reading of the play *Measure for Measure*, as reading Shakespeare’s *Julius Caesar* once did for citizens of the Madisonian republic, provides a template for understanding the role of law, sovereignty, justice, mercy, and democratic exchange in a polity like the one in which we as Americans now

220. See Pojanowski, *supra* note 9, at 882.

find ourselves. And only through such an understanding can meaningful support, criticism, debate, or reclamation of older forms be made possible.²²¹ An understanding of the play's complexity is one of the most useful aids for discussing, by way of comparison, the flaws, aspirations, and nature of our administrative regime: "Like doth quit like and Measure still for Measure."²²²

221. *Id.* at 918 ("As defenders and critics of the administrative state will agree, the development and rise of the Fourth Branch was a three-branch enterprise. Even if the original constitutional norms have not been erased by intervening practice, any durable return to that original law will also have to be a three-branch project, and one that depends on a change in the political culture.").

222. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 5, sc. 1.