

CAN WE REASON ABOUT REASON?
ON ADRIAN VERMEULE'S
LAW AND THE LIMITS OF REASON

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One cannot stay indifferent to Vermeule's *Law and the Limits of Reason*. Vermeule has succeeded in writing a provocative book suggesting that we reallocate constitutional decision-making authority to enhance the role of legislatures (through statutes and constitutional amendments) and reduce the role of the Supreme Court. Alternatively, he suggests, we should diversify the professional composition of justices so that at least one would be a lay justice or hold a dual competence in law and an unrelated field. The optimal solution might be a combination of the two proposals, implementing each partially. Both proposals share a common characteristic: transfer of power from law justices to lay decision-makers, whether on the Court or in other branches of the government.

Why should we do that? On epistemic grounds; that is, on the assumption that legal institutions "can do better or worse at tracking the truth" [7]. Vermeule argues that legislatures might do better than justices at pursuing truth, however we define that truth. Furthermore, lay justices will diversify the composition of the Supreme Court, thus enhancing justices' independence when reaching decisions. This, in turn, will improve the Court's epistemic performance.

This book was written as an answer to those of us who are "epistemic legalists," which Vermeule assumes includes a large number of Anglo-American legal theorists; Edmund Burke, H.L.A. Hart, Friedrich A. Hayek, David Strauss, and Kathleen Sullivan, to name but a few. By legalists, Vermeule means that these scholars "prefer judicial lawmaking to lawmaking by other institutions" [2]. By epistemic legalists, Vermeule means that they justify their legalist position on an argument of the limits of

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reason.¹ That is, according to Vermeule, this scholarly position argues for the enhanced competence of courts based on the virtues of a “many minds” argument and for the reduced capacity of legislatures based on an “unintended consequences” argument. The common law method enables justices to either aggregate the information of many justices (minds) or, through the mechanisms of an invisible hand, to evolve towards efficiency or embody implicit knowledge. In contrast, statutes or constitutional amendments are futile at best or cause unintended, undesirable consequences at worst, because legislatures cannot foresee their results in advance of their adoption.

Vermeule attempts to reclaim the idea of the limits of reason from epistemic legalists and employs it to bolster the legislature’s role in constitution-making. He positions himself with Jeremy Bentham and James Bradley Thayer, updating their critique of judicial lawmaking to accord with modern conditions and theory. But while Bentham’s critique of the judicial work was primarily sociological, attributing inappropriate motives to judges, Vermeule’s critique is focused solely on epistemic grounds.

Vermeule writes the book in a vivid style showing his mastery of diverse bodies of knowledge. In support of his thesis, he draws from literature in law, history, economics, and sociology. Throughout the book, Vermeule includes a cautious portrayal of rival visions of constitutional law and a discussion of their relative strengths and weaknesses. He then offers an alternative view and explains how his various proposals relate to each other. The book purports to be purely analytical, suggesting we have no choice but to join his conclusions and understand that we have committed an “intellectual error” [22].

This review will proceed in five parts. Part I will present Vermeule’s thesis in a nutshell, trying to do justice to its subtle complexities and fine distinctions. Part II will focus on the comparative analysis of the epistemic competence of legislatures versus courts. Part III will discuss the viability of recharacterizing the Court’s role as a contributor to the legislature’s “many minds” process in what amounts to be a claim of “cumulative epistemic legalism.” Part IV will comment on Vermeule’s idea to diversify the professional make up of the Supreme Court. Part V will respond to his suggestion that we reinvigorate the Article V constitutional amendment process and adopt a regime of a codified constitution.

¹ Reason is limited due to many considerations, including the costs of collecting information, processing capabilities of the brain, the difficulty to attribute the correct weight to various considerations, distortions caused by emotions or biases and so forth: ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON I* (2009).

I. VEREMEULE'S EPISTEMIC PROJECT

Law and the Limits of Reason discusses the allocation of lawmaking authority and the design of institutions in light of epistemic considerations alone. It does not purport to argue how this division of power and design of institutions should look when incorporating insights from other non-epistemic perspectives.

It argues that epistemic legalists have largely monopolized the use of “many minds” and “unintended consequences” arguments to defend the Court’s predominant role in constitution-making. Vermeule aims to set the record straight. He argues that the “many minds” argument is problematic and, if it has any meaningful force in the constitutional field, it is in the direction of bolstering the legislative body at the expense of the Court.

A. WHAT ARE MANY MINDS ARGUMENTS?

“Many minds” arguments claim that the judgment of many minds is better than the judgment of one mind. Vermeule names four filters that “many minds” arguments have to pass in order to have validity: first, a defensible definition of the denominator—i.e., whose minds should matter; second, an explanation as to why an increase in numbers would not endogenously effect quality for the worse due to selection effects,² incentives for free-riding,³ and emotional or social influences;⁴ third, the absence of epistemic bottlenecks or chokepoints, wherein the decision of many is filtered through the decisions of a few or one; last, a theory about how “many minds” arguments illuminate institutional comparisons of “many” to “many minds.”

Why might many minds be better than one? For three main reasons according to Vermeule: First, the aggregate judgment of many minds might embody dispersed information, an idea best associated with the Condorcet Jury Theorem, which will

² The idea is that the more members needed to fill in an Assembly the more one has to compromise on the competence of its members since “epistemic competence is an extremely scarce resource.” VERMEULE, *supra* note 1, at 45.

³ As Elster wrote and is quoted by Vermeule, “[t]he greater the number of voters the less the weight and the value of each vote, the less its price in the eyes of the voter, and the less of an incentive he has in assuring that it conforms to the true end and even in casting it at all.” VERMEULE, *supra* note 1, at 46.

⁴ This is sometimes described in the literature as the “Madisonian nightmare.” Madison suggested in Federalist no. 55 that “the number [of legislators] ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude... Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.” VERMEULE, *supra* note 1, at 48.

be discussed below; second, the judgments of many minds over time might discard bad policies through evolutionary “invisible hand” processes, an idea associated with Burke and Hayek; last, deliberation among many minds might contribute diverse perspectives, an idea associated with Aristotle.

B. COMPARATIVE ANALYSIS OF THE EPISTEMIC COMPETENCE OF INSTITUTIONS VIA THE CONDORCET JURY THEOREM

The Condorcet Jury Theorem, which is the “most widely invoked model of information aggregation” [28], posits that, in a choice between two alternatives of which only one is correct, “a majority vote among a group of sincere voters who are better than random [‘more likely to be right than wrong’] will approach perfect accuracy as the size of the group increases, as individual accuracy increases, and as the correlation of biases within the group decreases” [19-20]. This theorem has been extended also to situations in which there are numerous options, in which case the option receiving plurality support is most likely to be the correct one, under certain assumptions.

Using this theorem, Vermeule suggests that legislatures are epistemically superior to courts when it comes to constitutional lawmaking for several reasons. First, they have the advantage of numbers. Vermeule assumes that the ability of legislators to choose between alternatives is better than random choice because they are selected from a larger pool than available in past centuries, especially the time of Condorcet’s writings. The ratio of representatives to constituents has fallen substantially over the years. Second, the legislature is composed of a diverse professional body, as opposed to the Court, which is staffed by lawyers alone. This, in turn, compromises the theorem’s requirement that members of the group are statistically independent of each other, having no correlated biases arising from common training.⁵ Third, representatives have better institutional tools for gathering information when compared to the Court, both directly, through access to constituents, legislative staff, and tools of legislative inquiry, and indirectly, through access to the executive and administrative bodies.

In contrast, Vermeule explains, those asserting judicial epistemic superiority base it mainly on the assertion that justices are free from political biases and that they use precedent. To this Vermeule replies that political insulation is too costly in terms of access to relevant information. And, as to precedent, there actually exists a *Burkean Paradox*, which means that the more the Court relies on precedent for

⁵ Statistical independence means that A would vote the same regardless of how B votes. VERMEULE, *supra* note 1, at 30.

its latent wisdom, the less the continuing existence of the precedent conveys any epistemically valuable information. This is because judges do not exhibit independent judgment when adhering to it. Its informational value may thus reflect an anachronistic independent judgment that has little if any contemporary value in light of the rapid rate of change in the social and political environment. On the other hand, the less the Court relies on precedent for its own sake and exhibits independent judgment, the more its judgment will reflect the view of a few current minds, rather than the judgment of many minds over time. In other words, it is a lose-lose situation. In addition, Vermeule emphasizes that precedent should be differentiated from social custom or tradition, since precedents embody the translation by judges of the social practice of many actors. It thus reflects an epistemic bottleneck as defined above. Furthermore, relying on precedents reflects sequential rather than simultaneous decision-making, which in turn may present “reduced epistemic value” due to free-riding or undue influences among other things [49]. It also undermines the requirement, under the Condorcet Jury Theorem, that many minds address the same common question, since courts operating under the weight of precedent decide differently from the courts that originally created the precedent and thus did not have to also consider the effect of the existing precedent.

Vermeule concludes that “the epistemic interpretation of Burke leads, via Condorcet, to the views of James Bradley Thayer—to deference to legislatures in constitutional adjudication” [60].

C. COMPARATIVE ANALYSIS OF EPISTEMIC COMPETENCE OF INSTITUTIONS VIA EVOLUTIONARY MODELS

Evolutionary models argue that common law constitutionalism evolves towards efficiency and embodies collective wisdom through “invisible hand” mechanisms. The two main mechanisms driving this evolution are supply and demand. On the demand side, litigants are more likely to challenge decisions that impose deadweight losses on society, thus performing a function similar to Darwin’s “natural selection.” On the supply side, Gennaioli and Shliefer, following an insight offered by Cardozo, have suggested that justices attempting to promote their individual policy contribute by distinguishing earlier cases, thus leading the law to embody relevant current knowledge.⁶

⁶ Nicola Gennaioli & Andrei Shliefer, *The Evolution of Common Law*, 115 J. POL. ECON. 43 (2007).

But Vermeule rejects the applicability of supply side models in the constitutional setting, where polarization of judicial opinions is high and decisions tend to fluctuate between extreme positions by which a precedent might be overruled rather than an earlier case distinguished. As to demand side models, they are subject to internal problems. First, litigants may be differentially organized and, thus, we may see rent-seeking litigation on the one hand, and inefficient decisions that go unchallenged on the other hand. Second, even if common law constitutionalism evolves towards efficiency, at any given moment it may be inefficient, especially in light of the rapidly changing surrounding social and political environment. Third, common law is path-dependent, and it is costly to deviate from precedents. Legislation, on the other hand, while exhibiting the first difficulty of the demand side model described above, is ultimately advantageous because it can change with more rapidity and is not path-dependent. At any point in time, legislation may thus be more efficient than common law constitutionalism--assuming that common law constitutionalism aims or should aim towards efficiency in the first place, which is doubtful. Vermeule concludes yet again that interpreting “Burke via Darwin and Hayek leads to Thayer” [105].

D. ON CUMULATIVE EPISTEMIC LEGALISM

Should we treat common law constitutionalism as a cumulative enterprise with legislative lawmaking? Under this suggestion, judicial review over primary legislation adds rather than detracts epistemic value, since there are many more diversified minds present, which bring different information to bear on the particular case than when enacting statutes alone. Under the Condorcet Jury Theorem, this would seem to be a superior epistemic process.

But Vermeule rejects this analysis for several reasons, apart from his suggestion that this analysis is not widely used among epistemic legalists to begin with. First, when the Court exercises judicial review and strikes down a statute, its judgment replaces the legislature’s judgment on the constitutionality of the statute; it doesn’t supplement it. This is done, Vermeule argues, even though the legislature is the epistemically superior institution as compared to the Court. Why does the Court override the legislature’s judgment? Primarily because it relies on precedents for which the epistemic value is problematic, as explained above. Second, this cumulative enterprise of legislature and Court should worry us, since it encourages the legislature to free-ride, relying on the Court to correct its judgment. In this way, legislative judgment will be less valuable epistemically in the first place. This concern was stated by Thayer at the end of the

nineteenth century.⁷ Thus, according to Vermeule, common law constitutionalism amounts to an epistemic bottleneck and chokepoint.

E. DIVERSIFYING THE PROFESSIONAL COMPETENCE OF THE COURT

Vermeule argues not only about the allocation of lawmaking authority between the legislature (including the executive branch) and the Court, but also about the design of the Court. He calls for professional diversity on the Court through the appointment of lay justice(s) or a justice with professional expertise in both law and an unrelated field. This would enhance the Court's epistemic competence on Condorcet Jury Theorem grounds. When judges are from the same professional group, they may suffer from correlated or systemic biases "arising either from their professional training or from the self-selection of certain types into the legal profession" [20].

Vermeule argues that "lawyers' monopoly of adjudication is socially harmful" [124]. He believes this practice has never been challenged and thus the practice itself conveys no epistemic value. He asserts that no lay justice has ever served on the Court and "no one has considered and rejected the argument for professional diversity on the Court" [130]. Furthermore, to affect change, no constitutional or statutory amendment is required, since it has been solely the practice and not the law that created the legal profession's monopoly over the staffing of the Supreme Court.

How will lay justices assist the Court in reaching the right answers and improving its overall performance? Vermeule divides the kind of cases reaching the Supreme Court to two types: "autarkic," which are cases that rely on intrinsic knowledge of the law to resolve them and are thus ill-suited to decisions by lay justices; and "nonautarkic" cases, in which outside knowledge is needed to reach a legal decision. This in turn, could be divided to two subcategories: one in which the requisite outside knowledge is professionally specific; and the second in which the outside knowledge is general. Lay justices might outperform law justices in the first subcategory, if it is in their field of specialty, or they will be no less capable than law justices in deciding both subcategories. In nonautarkic cases, lay justices enhance the epistemic capacity of the Court, either directly or by reducing group-correlated biases.

What will be the overall effect, taking into account lay justices' positive expected contribution to resolving nonautarkic cases and their negative expected contribution

⁷ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

to resolving autarkic cases? Vermeule suggests the overall effect will be to positively improve the Court's performance due to the principle of marginalism. "[T]he last increment of legal expertise is worth much less than the first increment, and the first increment of nonlegal expertise is worth much more than later increments" [144]. It may be a self-fulfilling promise, since lay justices will affect the kind of cases that reach the Court through *certiori*, thus, increasing the proportion of nonautarkic cases in the Court's total load. Vermeule strongly suggests we should at least experiment with diversifying the Court's professional make up. In fact, this proposal might obviate the need to transfer lawmaking authority from the Court to the legislature, since it cures the Court's epistemic inferiority that derives from its lack of professional diversity.

F. ON CONSTITUTIONAL AMENDMENT

Vermeule argues that, in recent decades, we almost never formally amend the Constitution, not only because it is difficult to gather support from the different branches, as required for Article V-based amendments,⁸ but also because of the "intellectual legal epistemic critique" of constitutional amendment. This critique suggests that constitutional amendments are futile at best, as suggested by David Strauss.⁹ Constitutional amendments are irrelevant, because we would have reached the same social and legal results over time without them. The intellectual critique further suggests that, at worst, constitutional amendments may cause unintended, undesirable consequences due to both limited human insight and their piecemeal or incoherent nature, as noted by Kathleen Sullivan.¹⁰ The void created by the absence of formal constitutional amendment leads, according to Vermeule, to constitutional lawmaking by the Court.

In contrast to the above legal epistemics, Vermeule argues that common law constitutionalism may suffer from the same weaknesses attributed to formal constitutional amendment. Furthermore, he asserts that, at times, common law constitutionalism may fare worse than a formal constitutional amendment due to the following three problems: first, the Court lacks professional diversity; second, its development is path-dependent and thus leads to high costs when deviating from

⁸ U.S. CONST. art. V.

⁹ David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

¹⁰ Kathleen M. Sullivan, *What's Wrong with Constitutional Amendments*, in GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE 39 (1999).

precedent; third, constitutional common law develops through hearing individual cases without a systematic view and the ability to make large scale tradeoffs.

It is therefore epistemically preferable to use Article V constitutional amendment, according to Vermeule, for the following objectives: one, to effect a large scope change; two, to effect irreversible and rigid change; third, to effect a contentious change. He suggests that “[n]othing in what I say here is incompatible with the claims of popular constitutionalism” [176]. It only affects the type of process used to codify the constitutional change. Vermeule hopes that understanding these advantages of formal constitutional amendment would lead us to mend our ways and use the formal amendment process more often.

G. THE CODIFIED CONSTITUTION

In what kind of constitutional world would we live were we to implement Vermeule’s thesis? One that adheres to a codified constitution. Constitutional updating would comprise predominantly (80%) statutes and formal Article V constitutional amendments. Statutes would enjoy constitutional status to the extent that they fill gaps and adapt the Constitution to changing circumstances. Common law constitutionalism will set only “minimal rules of play or broad outer boundaries” [188]. The Court will defer to the legislature, unless a clear mistake is present under the Thayerian approach. In summary, Vermeule celebrates Tom Ginsburg’s findings that “constitutions work best when they are most like ordinary statutes: relatively detailed and easy to modify”¹¹ [191].

II. ON COMPARITIVE ANALYSIS OF EPISTEMIC COMPETENCE OF INSTITUTIONS

Moving from a concise and incomplete account of Vermeule’s *Law and the Limits of Reason* to some comments on the worthy challenge Vermeule presents to us, one must wonder whether we can reason at all about reason. In spite of our shortcomings outlined by Vermeule—many of them perhaps true—it seems we cannot escape doing just that.

Vermeule prudently wrote that his perspective is solely epistemic when discussing the allocation of lawmaking authority across institutions and the design of the

¹¹ Tom Ginsburg *et al.*, *The Lifespan of Written Constitutions*, at pg. 52, Law and Economics Workshop, Berkeley Program in Law and Economics, UC Berkeley, at <http://escholarship.org/uc/item/6jw9d0mf> (last visited Nov. 15, 2010).

Court, and that other conclusions may arise when taking into account nonepistemic considerations. But he clearly ascribes to epistemic theory, if the dedication to write a book on the subject is any indication, and, treating this perspective as decisive, he makes the dramatic proposals discussed above. Vermeule's broader work, and most notably this book, suggest that he is committed to a democratic perception of law in general and constitutional law in particular, which would have been helpful for readers to know up front. He could have diffused some reactions to his more radical proposals by integrating into the overall discussion this viewpoint, on which so much of what he argued is based.

One possible related ambiguity in the book's discussion is whether his epistemic critique of judicial lawmaking focuses on common law constitutionalism alone or common law more generally. In some places he is cautious to note that his conclusions pertain to the constitutional domain alone, but in other places his discussion broadly attacks judicial lawmaking power. This ambiguity is intensified by the fact that Vermeule chose to converse primarily with Burke and Bentham, denouncing the first and praising the second. Both wrote at a time when regular legislation was at its infancy, in the context of a parliamentary sovereignty system that lacked a formal constitution and had no system of "checks and balances" comparable to those in the US. Their writings do not convey the epistemic value one may derive from more recent writings by epistemic legal scholars. That Vermeule chose them reflects his more ambitious overriding project of discussing judicial lawmaking, even outside the constitutional arena. It seems, moreover, that Vermeule allows his arguments to conflate the Constitution and regular law, equating the two fields of common law and common law constitutionalism.

When we more closely examine Vermeule's analysis of the "comparative epistemic competence" of the legislature versus the Court, the flavor of Vermeule's statements hint at the very thing he accuses legal epistemics of doing. He termed this the "nirvana fallacy" [7]—that is, assuming the worst about one institution and the best about the other. But he commits the fallacy in the other direction.

Vermeule makes some bold assumptions to bolster the epistemic standing of the legislature, without offering the requisite support. These include the assumption that members of the legislature's average competence will be greater than half; that party discipline does not amount to "correlated biases"; that legislation is not path-dependent or as much so as judicial decisions; that specialization on the legislature should be praised, rather than treated as an epistemic bottleneck. In good faith, Vermeule shows his awareness of these difficulties. He suggests, for example, that representatives' average competence will be greater than half because they are chosen from a larger

pool than available in previous centuries, as discussed above. But this is weak, since it only supports the conclusion that epistemic competence of current legislatures is improved when compared to previous generations, but not when compared to random choice.

In contrast, Vermeule's arguments rest on very negative assumptions about the courts. Though he acknowledges that they may enjoy an epistemic benefit in competence because justices are few and it is easier to appoint those whose average competence is greater than half,¹² he dismisses this advantage based on their lack of professional diversity and small numbers. Nor does he tell us the relative weight of the three vectors—competence, diversity and numbers—when they point in different directions.

His theory of precedent rests on a narrow role for justices, which seems to contradict Vermeule's general claim of too much judicial lawmaking and discretion. If he employed a more realistic vision of precedent, the epistemic credentials of the courts would certainly be improved. It would be more realistic to portray precedent as one factor in a court's decision-- and sometimes not even the decisive one. Also, one must distinguish between the role of the Supreme Court and lower courts in the creation and maintenance of precedents. While lower courts are called upon to abide by precedents set by superior courts, it is the role of the Supreme Court to consider independently the weight of precedents and deviate from them when justified. This dialogue between the Supreme Court and lower courts on the same constitutional question is ignored by Vermeule, yet it would certainly shed a totally different light on the "many minds" in the judicial branch.

When the precedent system is given its appropriate portrayal, the *Burkean Paradox* is mitigated. Even when the Supreme Court decides to adhere to precedent, it does convey epistemic value. It means the precedent was weighed independently and confirmed. It may even be confirmed *in ratio* and adherence to it qualified *in dicta*, an issue not raised by Vermeule. Nevertheless, when the Court deviates from precedent, it does not erase the contributions of previous "many minds." On the contrary: their contribution and the information they conveyed are part of the new precedent established by the Court. Sequential voting in this respect does not manifest

¹² "The quality of minds is not independent of their number; rather, number endogenously influences quality, often for the worse. More minds can be systematically worse than fewer because of selection effects, incentives for epistemic free-riding, and emotional and social influences." VERMEULE, *supra* note 1, at 26. "[A]s Condorcet himself suggested, average legislative competence might slip below the crucial threshold of one-half precisely because of the large number of members." *Id.* at 84.

some of the major difficulties associated with it, since it will not cause previous courts to change opinions already given.

We may thus cautiously conclude that either camps' assertion of epistemic superiority amounts to what Vermeule calls a "possibility theorem" [107]. Still, we are convinced that the issues of allocation of lawmaking authority across institutions and the design of them from other nonepistemic perspectives cannot be ignored. That Vermeule has succeeded in establishing this conclusion is a major tribute to his endeavor.

III. ON CUMULATIVE EPISTEMIC LEGALISM

Vermeule rejects the vision of an integrated constitutional system, with courts and legislature contributing different features to the system's overall epistemic performance. He termed this "cumulative epistemic legalism," and he did not find support for this approach, primarily because of an apparent contradiction on his part: on one hand, treating the legislative-executive enterprise as cumulative, but, on the other, rejecting the same treatment for the Court. Vermeule explicitly views the "legislature" as incorporating the judgments and work of the executive and administrative branches of government. He writes that statutes are sometimes written in broad brush, with any gaps filled by the executive branch. He doesn't clarify why the same can't be said of the Court especially in the areas of constitutional interpretation. It should be emphasized that in his book, Vermeule discusses constitutional decision-making authority in general and does not restrict his conclusions to invalidation of (federal) statutes by the Court. In other countries, the work of the highest Court is sometimes explicitly compared to the work of the administrative branch.

Additionally, the President's veto over legislation could be viewed as a form of epistemic bottleneck. The President, definitely a "one mind" branch, may overrule congressional legislation, which appears to be a systemic epistemic bottleneck. The Senate may be viewed as another kind of epistemic bottleneck. But Vermeule does not perceive these institutions as such. Equal reasoning requires that this attitude should thus apply to the Court. Under European and even British legal thought, judicial review is a "second look" mechanism similar to the function that can be exercised by the second legislative chamber, and, in this way, the highest Court is perceived as part of the legislative process.¹³

¹³ Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMP. L. 429 (2006).

Even apart from this apparent double standard, it is questionable whether Vermeule's portrayal of the Court's work and its relations to the legislative branch does justice to it. When the Court strikes down a statute, it does so primarily because the statute does not align with the supreme normative enactment of the country—the Constitution. It is true that the Constitution needs interpretation and for that the Court relies *inter alia* on precedents, but those precedents are not just judicial. They may embody previous judgments of other branches of government. Furthermore, precedents are only one factor and not necessarily decisive of the case.

Vermeule might answer that the Court, as the epistemically inferior body, should not have the last say in constitutional matters. In gentle protest, we may suggest that the Court carries on a continuing dialogue with the other branches of government and, even when the Court strikes down a statute, this might not be the end of the story. The legislature can respond in various ways, including the reenactment of the statute in the same or a different form, or influencing the Court's personnel through appointment, mobilizing for constitutional change, and so forth.¹⁴ Vermeule provides an interesting example of this dialogue between the branches when he discusses death penalty cases [94]. This is why the interaction between the Court and the legislature should be viewed as cumulative, more than confrontational.

IV. DIVERSIFYING THE PROFESSIONAL COMPETENCE OF THE COURT

Regarding the design of the institutions themselves, Vermeule suggests that professional diversity would improve the epistemic performance of the Court. This is a valid point, but should be perhaps focused on a more generalized notion of diversity. The Court might exhibit “group think,” if at all, based on gender, age, country of origin, race, religion, or wealth, to name a few possibilities. The need for diversity seems more pointed toward diversity in general, not necessarily professional diversity. This has been acted upon by various Presidents, most notably Barak Obama.

Still, there is the looming question of whether the Court actually manifests “group think,” especially on constitutional matters. Indeed, many of the most important constitutional decisions are reached by a divided Court, and Justices are occasionally impelled to leave their mark by distinguishing themselves from their peers,

¹⁴ Christine Bateup, *The Dialogic Promise Assessing The Normative Potential of Theories of Constitutional Dialogue*, 71 BROOKLYN L. REV. 1109 (2006) (surveying the literature on constitutional dialogue); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

distinctly choosing to avoid group think.¹⁵ It would thus be interesting to analyze the circumstances in which the Court manifests uniformity and whether this uniformity reflects a bias in need of correction. Such an analysis might also reveal what kind of group diversity would best improve the diversity of its decision-making, if that is the goal. And, if diversity is needed along professional lines, the analysis might point to the professions that would best contribute to the Court's overall performance.¹⁶ It is not a certainty that we need to invite professionals from outside the legal profession or that the legal profession itself has reached such a degree of specialization that constitutional lawyers think differently than law and economics lawyers, who think differently in turn from legal historians, and so forth.

To make his argument, Vermeule divides the kind of cases the Court faces to autarkic and nonautarkic ones, but it is unclear whether the same analysis applies also to actual cases that involve both autarkic and nonautarkic aspects within the same case. Furthermore, even with regard to nonautarkic aspects, the law from within guides how they are decided. They are not free of legal guidance. Thus, Vermeule's concern that lay justices may reduce the epistemic performance with regard to autarkic cases has relevance to all cases on which lay justices sit.

Beyond this, Vermeule counters his worry that lay justices will have negative overall epistemic effect by the application of the principle of marginalism. But it is unclear how this concept establishes the conclusion Vermeule is proposing--that the marginal increase of one lay justice contributes more than the marginal decrease of one law justice detracts from the group's performance. In other words, it does not provide us with the information we need to adequately measure the comparison. Furthermore, it is unclear whether the principle of marginalism is applicable, since this is not an instance when the work can be done without the marginal justice. Indeed, the lay justice is crucial to having a decision at all. She may hold the swing vote and the decisive voice in many contested matters. Her appointment might create an epistemic bottleneck.

It would also be interesting to know something about the comparative experience with lay justices in other countries. Vermeule rightly points out that lay justices sit on various constitutional courts around the world. Apart from enumerating these nations, Vermeule did not address the literature on their performance, which would have been

¹⁵ Gennaioli & Shleifer, *supra* note 6.

¹⁶ Vermeule admits the limits of his argument for professional diversity in the following senses: He does not know what percentage of the Court's docket is nonautarkic, what kind of cases compose the nonautarkic cases; which expertise is needed on the Court and in what priority.

informative. What does the practice in those countries with lay justices suggest? Do lay justices significantly contribute to decisions or are they deferential to law justices? In Israel, for example, a lay justice named Rabbi Assaf sat on the Supreme Court and, he left no mark on the Court's performance. In the 1990s, Supreme Court President Barak offered to have another Rabbi appointed to the Supreme Court to enhance the Court's legitimacy in the Ultra-orthodox sector, but this idea did not materialize. In Britain, the House of Lords was first composed of a combination of Law Lords and lay Lords, but eventually became wholly composed of Law Lords. Britain thus manifests a development in the reverse direction suggested by Vermeule. The fact that different countries allow lay justices to sit on their Supreme Courts suggest that the idea of professional diversity has been implemented with success. In the U.S., a dually competent justice has already materialized on the Supreme Court, for example, in the form of Chief Justice Marshall, who served as the Secretary of State before being appointed to the Court.¹⁷

This idea of professional diversity is thus not as radical as its substitute: transferring lawmaking power from the Court to the legislature. In fact, it seems excessive to argue for a major shift of lawmaking power from Court to legislature if all that is required to remedy the Court's performance is to add one lay justice or even a dually competent justice that I suspect already sits (and definitely sat in the past) on the Supreme Court.

V. ON CONSTITUTIONAL AMENDMENT AND THE CODIFIED CONSTITUTION

Vermeule writes that we should bolster the representatives' role in constitution-making not only through the enactment of statutes, but also through more frequent use of the formal constitutional amendment process. He assumes that, if we only understood the "intellectual error" involved in epistemic legalism, we would resort more often to Article V mechanisms. If it's true that Article V has been abandoned, a different understanding of the twentieth century neglect of Article V is plausible—that we found an easier way to amend the Constitution using the combined efforts of the federal legislature, the executive branch, and the Court. This method was first consciously utilized by Roosevelt, who explicitly argued that it was preferable to translate the mandate to constitutional change by legislating statutes and having the Court accept

¹⁷ For discussion of the need for professional diversity on the U.S. Supreme Court, see Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003).

the constitutional change by “switching” its prior positions on the topic.¹⁸ This contrasting vision makes the combined effort of the legislative, executive, and judicial branches of government the engine of change, not the Court alone. Further, under this vision it may be that the initiator of constitutional change is the representative body, with the Court only responding afterwards by accepting that constitutional change has occurred. The Court does not act here as a common law Court using common law methods, but as a constitutional player forming part of a dialogue with other branches of government. Moreover, this version suggests that the federal branches of government play a dominant role in updating the Constitution, because the people have become increasingly national, rather than federated, body politic in the twentieth century. This version also does not allow the Court, as an unelected body, to effect on its own constitutional change. It must instead operate in tandem with other representative branches of government. In this sense, Vermeule carves a larger role for the Court than acknowledged, since at times he justifies constitutional lawmaking by the Court when acting alone.

In this framework, Article V is still available for codifying constitutional amendments as one of several means to affect constitutional change. The fact that efforts were made to amend the Constitution through the formal amendment process during the twentieth century suggests that the difficulty of amendment via Article V is the obstacle, not an intellectual abandonment or condemnation of Article V.

Is Vermeule’s vision of the constitutional amendment process compatible with popular constitutionalism? One of the tenets of popular constitutionalism, at least as elaborated by Bruce Ackerman, is that those who transform constitutional law do so with regard to both content and process of change.¹⁹ Vermeule seems to prefer a formal constitutional amendment process. Furthermore, popular constitutionalism takes the constitutional enterprise seriously. It treats the Constitution as a supreme document that binds the regular bodies of government at times of regular politics. In contrast, at times of constitutional politics, the People, through the various branches of government, may transform constitutional law—not the legislature acting alone. Vermeule treats the Constitution and statutes as equal. During times of regular politics, he carves a very minimalist role for the Court to be deferential to the legislature, unless a clear error manifests itself in Thayerian fashion. The Constitution is thus left with no guardian against encroachment by the regular organs of government. Even

¹⁸ 2, BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 312-383 (1998).

¹⁹ 1, BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

under Ginsburg's findings that constitutions work best around the world when they are relatively detailed and easy to amend, judicial review is depicted as crucial for the success and endurance of the Constitution.²⁰

More than a critique of epistemic legalism, Vermeule's enterprise is that of flattening the hierarchical structure of norms, thereby placing the Constitution on the same footing as regular statutes. In Vermeule's words, "when a constitution is very old, as in the American case, its informational content has typically depreciated nearly to zero." (92) While the rest of the common law world has moved toward the adoption of formal constitutions with active judicial review over primary legislation, ours would be a common law system of Congressional sovereignty. If the great transformation all over the world towards the American common law constitutionalism lacks epistemic value, what has? Vermeule is sure to provide us with some penetrating answers.

²⁰ Ginsburg *et al.*, *supra* note 11, at 49.