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Arguing with Friends

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Arguing with Friends
William Baude & Ryan D. Doerfler*

Abstract: It is a fact of life that judges sometimes disagree about the best outcome in appealed cases. The question is what they should make of this. The two purest possibilities are to shut out all other views, or else to let them all in, leading one to concede ambiguity and uncertainty in most if not all contested cases.

Drawing on the philosophical concepts of “peer disagreement” and “epistemic peerhood,” we argue that there is a better way. Judges ought to give significant weight to the views of others, but only when those others share the judge’s basic methodology or interpretive outlook – i.e., only when those others are methodological “friends.” Thus textualists should hesitate before disagreement with other textualists, and pragmatists should hesitate before disagreeing with like-minded pragmatists. Disagreement between the two camps is, by contrast, “old news” and so provides neither additional reason for pause. We thus disagree with a recent proposal by Eric Posner and Adrian Vermeule, that would give presumptive weight to the votes of all other judges, regardless of methodology.

We also suggest that judges should give weight to the views of *all* of their methodological friends, not just judges. And we suggest, even more tentatively, that our proposal may explain and to some extent justify the seemingly ideological clusters of justices on the Supreme Court. The most productive disagreements, we think, are ones that come from arguing with friends.

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Introduction

Consider two basic institutional facts about the judiciary:

The first is that judging is a social experience. Though judges take an individual oath and we often think of them as obligated to follow their own judgment, they hold office as part of a broader legal system. Though trial judges generally sit alone, the appellate judges whose rulings make up the important precedents of the legal system generally sit in groups. And when sitting in groups, they deliberate, collaborate, and even perhaps compromise. Their courts, like the judiciary as a whole, are a “they,” not an “it.”¹

The second is that judges do not always think the same way, not about every case, not all the time. Indeed, the possibility that each judge can think for him or herself, might catch a point that others miss, is a reason for having appellate judges sit in groups in the first place. It is therefore only natural that when deciding cases, judges should take into account what others think. But the question of *how* judges ought to do so – how they ought to balance the views of others against their own first instincts – remains unsettled.

One recent proposal comes from Professors Eric Posner and Adrian Vermeule, who think that all judges ought to become more humble in the face of just about any disagreement with other judges.² To be more precise, they argue that, presumptively, when judges learn that their colleagues disagree with them about how to interpret a legal provision, they ought to conclude, at a minimum, that the provision’s meaning is unclear. This presumption should push judges toward deference to agencies, toward officer immunity from constitutional torts, and toward solicitude for criminal defendants under the rule of lenity.³

Drawing on rational choice and decision theory, Posner and Vermeule argue “for a presumption that judges not only may but should consider the votes of other judges as relevant evidence or information, unless special circumstances obtain that make the systemic costs of doing so clearly greater than the benefits.”⁴ While they concede that their view “is not absolutist . . . [i]nterdependence should be the norm, and solipsism the exception, so that

¹ Adrian Vermeule, *The Judiciary Is A They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

² Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159 (2016).

³ Posner & Vermeule, *supra* note 2, at 159-160. Here we assume, with Posner and Vermeule, that the doctrines in question have to do with the *clarity* of the law. See, e.g., *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1875 (2013) (“[I]f ... the court determines that Congress has spoken clearly on the disputed question, then ‘that is the end of the matter.’” (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, (1984))). We note, however, that at least some might or should have to do instead with something like the *predictability* of legal mistake. Cf. *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 n.3 (1994) (Scalia, J.) (cautioning against reliance upon Webster’s Third New International Dictionary, which “portray[s] ... common error as proper usage”).

⁴ *Id.*, at 162.

unless judges have good reason to do otherwise they should take into account the information contained in other judges' votes."⁵

We think Posner and Vermeule are on to something, but their argument is in need of some friendly amendments. We follow them in thinking that judges should care others' votes on the cases they have before them. That is valuable information which should not be categorically discarded. But we have a very different view about *how* that information ought to be considered – one that we think is better grounded both as a matter of formal philosophy and common sense.

Simply put, we think that much turns on the question of legal methodology, rather than legal status. Judges ought to consider the votes of those who share their interpretive methodology, approach, or outlook – who we call their methodological “friends” – much more than, almost to the exclusion of, those who do not. Moreover, we are inclined to extend the same point to suggest that judges should look to *all* of their methodological friends who have studied the case and express a firm view about it – judges on other courts, lawyers, professors – and not just to their immediate. The upshot of these two arguments is that rather than looking to the votes of other *judges*, as Posner and Vermeule's title suggests, judges ought to look to the votes of their methodological *friends*.

This analysis is also grounded in formal epistemology, and provides occasion to develop the important concepts on “peer disagreement” and “epistemic peers” in the context of legal interpretation. Philosophers' study of epistemology provides several important insights about when and how it is rational for us to change our minds after learning that others disagree with us. We deploy those concepts here, arguing that they place great emphasis on disputes over methodology.

We conclude our analysis with a consideration of its implications. If judges do give substantial weight to the votes of their methodological friends on and off the bench, we would expect to see clusters of like-minded judges whose votes tend to align with one another, and with certain academics and interest groups who follow the cases. As it happens, many observers have documented exactly this phenomenon on the Supreme Court today. But while those observers have generally attributed such clustering to politics, our account provides an alternative, more charitable, more legally-driven, explanation.

The rest of this essay proceeds through these three points. In Part I, we apply both common sense and formal epistemology and argue that judges ought to heavily weight only the views of their methodological friends. In Part II we extend those arguments to suggest, albeit more tentatively, that judges presumptively ought to consider *all* of their friends, regardless of whether or not they are judges. Finally, in Part III we consider the implications of these conclusions, and the judicial behavior they explain.

⁵ *Id.*

I. Judicial Friends

As noted above, we start from the premise that judges should consider how others would vote. We therefore join Posner and Vermeule in rejecting the “solipsistic” model of judging (attributed to Ronald Dworkin), in which judges ignore what their colleagues do.⁶ Instead, we suppose that judges should “take into account the votes of colleagues in deciding how to vote themselves.”⁷ This might be a specific recognition of the institutional plurality of the judiciary or might reflect the more general intuition that judges ought to consider “all logically relevant evidence,” whatever its type and character.⁸

Still, we think the important question remains: how and under what conditions should they do so? In our view, the answer starts with a key distinction—one that Posner and Vermeule do not accept. That distinction is between other judges who share one’s own methodology, orientation or approach, and those who do not. As a matter of both common sense and more rigorous epistemology, judges ought to give far more weight to the votes of other judges who share their approach, who we might call their “friends.” By contrast there is little reason to give much weight to judges with very different approaches.

A. Understanding Epistemic Peers

The central motivating scenario that Posner and Vermeule present is a surprising vote at the conference table after oral argument:

[F]ive Justices say that the ordinary meaning of the statute is clearly X, and four say that it is clearly Y. Each camp is astonished to hear the other camp’s view. Each is astonished to hear that the other camp not only fails to realize that (X or Y) is the clear meaning, but actually, and quite perversely, believes that instead (Y or X) is not only one possible reading, but is actually the clear meaning.⁹

Posner and Vermeule declare: “all nine justices need a stiff dose of epistemic humility.”¹⁰ They plausibly argue that in this scenario, the justices ought to update their views based upon their respective discoveries, becoming

⁶ *Id.*, at 159.

⁷ *Id.*

⁸ See William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 545 (forthcoming 2017).

⁹ Posner & Vermeule, *supra* note 2, at 163.

¹⁰ *Id.*

much less confident that they are right about what the statute means. “If other colleagues, who are presumptively reasonable, agree that the statute is clear, but believe that it is clear in precisely the opposite direction,” Posner and Vermeule reason, “it would be indefensible epistemic practice to simply ignore their views.”¹¹

So far, so good. We would add that Posner and Vermeule’s argument fits into the more general philosophical literature on the phenomenon of “peer disagreement,”¹² which will provide a useful lens for examining disputes about legal interpretation. But because this philosophical literature is generally new to legal interpretation, we will somewhat patiently introduce the key terms:

Peer disagreement is a dispute between “epistemic peers,”¹³ those who are equal in a certain sense. In particular, epistemic peers are individuals who are equally likely to get things right (or wrong) with respect to a given issue.¹⁴ Generally speaking, two people are epistemic peers when they are (1) equally rational and (2) have access to the same evidence.¹⁵ For instance, two expert meteorologists issuing forecasts on the basis of the same meteorological data, or two expert linguists looking at the same text, are likely to be epistemic peers. But a lawyer explaining a complicated legal situation to his client, or an eye-witness describing a scene to somebody who was not there, are not.¹⁶

A natural instinct in response to peer disagreement is that the two peers ought to try to reconcile their beliefs. In particular, if I learn that my epistemic peer disagrees with me, I ought to reduce my confidence in my own

¹¹ *Id.* at 164.

¹² See generally David Christensen, *Disagreement as Evidence: The Epistemology of Controversy*, 4 PHIL. COMPASS 756 (2009).

¹³ See, e.g., Thomas Kelly, *Peer Disagreement and Higher Order Evidence*, in DISAGREEMENT 29, 31 (Richard Feldman & Ted A. Warfield eds. 2010).

¹⁴ See Adam Elga, *Reflection and Disagreement*, 41 NOÛS 478, 487 (2007) (“[Y]ou count your friend as an epistemic peer—you think that she is about as good as you at judging the claim.”). And though a true peer is a true equal, peerhood can also be a matter of degree. See *infra* n. 40 and accompanying text.

¹⁵ See Christensen, *Disagreement as Evidence*, *supra* note __, at 756-57 (characterizing an epistemic peer as “one’s (at least approximate) equal in terms of exposure to the evidence, intelligence, freedom from bias, etc.”); Thomas Kelly, *The Epistemic Significance of Disagreement*, in OXFORD STUDIES IN EPISTEMOLOGY 167, 168 n.2 (John Hawthorne & Tamar Gendler eds. 2005). But see Elga, *Reflection and Disagreement*, *supra* note 14, at 499 n.21 (explaining why such factors are best understood as rough proxies).

¹⁶ Though we focus on the well-developed concept of peer disagreement, similar points have been occasionally made in other areas of philosophy as well. See, e.g., Dagfinn Føllesdal, *Indeterminacy of Translation and Under-Determination of the Theory of Nature*, 27 DIALECTICA 289, 298 (1973) (“Thus, for example, if a native dissents from a sentence that I am inclined to translate as ‘Rabbit here,’ while I assent to the latter sentence, I will no longer give any weight to our disagreement if I discover that the rabbit that I see is hidden to the native by a big tree.”).

position. This is the instinct reflected by the Posner and Vermeule proposal, and in the literature on peer disagreement it is known as “conciliationism.”¹⁷

The instinct for conciliationism is easiest to see in cases of an easily falsifiable disagreement. To take an example from the literature:

Suppose that five of us go out to dinner. It’s time to pay the check, so the question we’re interested in is how much we each owe. We can all see the bill total clearly, we all agree to give a 20 percent tip, and we further agree to split the whole cost evenly, not worrying over who asked for imported water, or skipped desert, or drank more of the wine. I do the math in my head and become highly confident that our shares are \$43 each. Meanwhile, my friend does the math in her head and becomes highly confident that our shares are \$45 each.¹⁸

Here, conciliationism is common sense. One of us is in the right, and if we are equally rational, and proceeding on the same evidence, then it is equally likely that it could be you, or me.¹⁹ Thus, goes conciliationism, it is equally likely that the correct calculation is either \$43 or \$45, so I should significantly reduce my confidence that \$43 is right.²⁰

¹⁷ See Christensen, *Disagreement as Evidence*, *supra* note __, at 757; Adam Elga *How to Disagree About How to Disagree*, in *DISAGREEMENT* 175, 175 (Richard Feldman & Ted A. Warfield eds. 2010) [hereinafter Elga, *How to Disagree About How to Disagree*].

¹⁸ David Christensen, *Epistemology of Disagreement: The Good News*, 116 *PHIL. REV.* 187, 193 (2007).

¹⁹ *Id.* For this reason, conciliationism is sometimes referred to as the “equal weight” view. *E.g.*, Kelly, *Peer Disagreement*, *supra* note __, at __ (describing the “equal weight” view as the view that “[i]n cases of peer disagreement, one should give equal weight to the opinion of a peer and to one’s own opinion”).

²⁰ Arguments for conciliationism are thus similar to but distinct from Robert Aumann’s famous proof that two rational agents with shared priors but different conclusions as to some event will ultimately converge as their posteriors become “common knowledge.” See Robert J. Aumann, *Agreeing to Disagree*, 4 *ANNALS OF STAT.* 1236 (1976). Aumann’s agreement theorem assumes that both sides process information identically (and correctly), and on this assumption their disagreement must be because they have different information. As their differing views become common knowledge, each infers that the other has private information, in turn adjusts her view, and thus indirectly takes that private information into account. This process repeats again and again until both sides ultimately converge. *Id.* at 1238. Cases of peer disagreement fix a different assumption—it is assumed that the information available to both sides is the same, such that the disagreement can only be owed to a failure by one or both in information processing. See Kelly, *The Epistemic Significance of Disagreement*, *supra* note __, at __ (“Disagreement among epistemic peers then, is disagreement among those who disagree despite having been exposed to the same evidence. Thus, our question concerns a case which stands outside the range of cases for which Aumann’s result holds.”) Posner and Vermeule describe judicial disagreement as situations in which judges reach different conclusions “based on the same sources and arguments,” *supra* note 2, at 159-60, so peer disagreement, rather than Aumann’s theorem, is a better match.

The philosophy of tip-calculation may seem trivial, as well as academic, because with a little bit of time and basic arithmetic we can check the results by hand, and learn for sure (or at least pretty close) whose guess was right rather than assign them equal weight.²¹ But conciliationism extends further, to differences in perceptual judgment as well. For instance, most philosophers agree that mutually reduced confidence is appropriate in the following scenario as well:

You and I are traffic cops watching the cars pass on Main Street. We are equally good, equally attentive cops, with equally reliable eyesight. We see a truck pass through the intersection. I think that it ran the red light. You think it got through on yellow.²²

Now to be sure, conciliationism is subject to various objections. One is that the position is self-defeating: Insofar as numerous intelligent, well-informed philosophers reject conciliationism, how can it be rational for conciliationists to hold steadfast in their conciliationism?²³ Another concern is that conciliationism, if true, would lead to rampant skepticism. As one philosopher puts it, “The worry is that there is a lot of disagreement out there: if it is epistemically significant, then it will turn out that we aren’t rational in believing much of anything.”²⁴ This concern might seem especially warranted once we move beyond epistemically settled zones like arithmetic and visual perception to domains such as morality, religion, or politics.²⁵

We think that conciliationism can plainly withstand most of these objections if it is properly understood.²⁶ The key, however, is to understand that coming to regard someone as an epistemic peer is not as easy as it might seem. And this means that, in the legal context, not all judges should neces-

²¹ See David Christensen, *Disagreement, Question-Begging, and Epistemic Self-Criticism*, 11 PHIL. IMPRINT 1, 8-11 (2011) (discussing cases in which the disputants each check their math carefully) [hereinafter Christensen, *Disagreement, Question-Begging, and Epistemic Self-Criticism*].

²² Katia Vavova, *Moral Disagreement and Moral Skepticism*, 28 PHIL. PERSP. 302, 307 (2014).

²³ See, e.g., Brian Weatherson, *Disagreement, Philosophical and Otherwise*, in THE EPISTEMOLOGY OF DISAGREEMENT: NEW ESSAYS 54, 55 (David Christensen & Jennifer Lackey eds. 2013).

²⁴ Katia Vavova, *Confidence, Evidence, and Disagreement*, 79 ERKENNTNIS 173, __ (2014).

²⁵ See, e.g., Hilary Kornblith, *Belief in the Face of Controversy*, in DISAGREEMENT (Richard Feldman & Ted A. Warfield eds. 2010); Christensen, *Epistemology of Disagreement*, *supra* note __, at 189 (recognizing the concern that conciliationism yields an “unacceptable degree of skepticism about controversial areas”).

²⁶ Most of the arguments here go to the concern that accepting conciliationism would lead to rampant skepticism. As to the argument that conciliationism is self-defeating, see Elga, *How to Disagree About How to Disagree*, *supra* note __, at __-__ (arguing that “partly conciliatory views have good independent motivation for treating the case of disagreement about disagreement differently from cases of, say, disagreement about the weather.”).

sarily regard all other judges as epistemic peers.²⁷ In our view, Posner and Vermeule’s approach neglects a key distinction relevant to judging – the role of judicial outlook or methodology. Not all judges share the same outlook, and these disagreements in outlook are an important ingredient in divided votes on multi-member appellate courts. Understanding these disagreements is key to applying the concept of peer disagreement to legal interpretation.

In particular, we think that two judges ought to consider one another “epistemic peers” only to the extent that they share the same judicial outlook or methodology. This shared approach to judging is what marks the judges as “equally rational” from each other’s point of view, and committed to looking to the “same evidence.”²⁸ The philosophical label may be slightly unfortunate, because it seems impolitic to label another judge “irrational” in the colloquial sense,²⁹ but the substance is a square match. In substance, interpretive disputes are disputes about what things to look at, and what to do with those things.³⁰ Judges who converge on those points are epistemic peers in the technical sense; judges who dispute them are not (or at least not so far as either can tell³¹).

In other words, our concern is that Posner and Vermeule’s original motivating scenario – the surprising vote at the conference table – elides one of the key variables needed to figure out whether a given vote would be surprising. To see why, consider two variants on their scenario:

At the conference after oral argument, one judge, a conservative textualist, says that the meaning of the statute is clearly X. She reasons that X is the only interpretation that squares with ordinary usage of the language at issue. A second judge, also a conservative textualist, says that the meaning is clearly Y. She also claims to be moved primarily by ordinary language examples, albeit examples that come out the other way. Each judge is astonished to hear the other’s view.

Or alternatively:

²⁷ Cf. Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U.L. REV. 1, 39 (2013) (“The relationship that creates epistemic authority might be viewed as dyadic--a relationship between a pair consisting of the possible epistemic authority and the individual who might defer to the epistemic authority. A given lower court judge, say Learned Hand, might not view a given Supreme Court Justice, say Tom Clark, as an epistemic authority or even as an epistemic peer or equal.”).

²⁸ See supra notes 13-15 and accompanying text.

²⁹ We emphasize that the thought here is not that one’s methodological foe is “irrational” or “unreasonable” *in general*. It is, instead, just that this otherwise capable, intelligent person is really, really bad at, say, interpreting statutes.

³⁰ William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1112-18 (2017).

³¹ See infra notes ___-___ and accompanying text.

At the conference after oral argument, one judge, a conservative textualist, says that the meaning of the statute is clearly X. She reasons that X is the only interpretation that squares with ordinary usage of the language at issue. A second judge, a liberal purposivist, says that it is clearly Y. She explains that Y is the only interpretation that is compatible with Congress's apparent policy aim. Each is dismayed but unsurprised to hear the other's view.

Whether as a matter of formal epistemology or common sense, there is an important difference between these two scenarios. In the first case, the judges have learned something important from their disagreement, and should become much less confident in their respective readings of the statute. In the second case, by contrast, the judges have learned nothing new from one another and have little reason to update their views.

One can see this, perhaps more simply, by focusing not just on whether there is disagreement but on what judges *learn* from it. As Posner and Vermeule emphasize again and again, the whole rationale for judges updating their beliefs on the basis of the votes of other judges is that those votes contain “information” that those judges did not already have.³² Indeed, Posner and Vermeule build this point into their narrative when they emphasize that the justices involved are “astonished” to learn of the imagined disagreement.³³

A disagreement between those who share a methodology – methodological “friends” – involves the discovery of something new. One learns that one's own methodology might lead to a different result in the case at hand. By contrast, a disagreement between those with opposed methodologies – methodological “foes” – pretty much comes as “old news” to the parties involved.³⁴

Start with the case of methodological friends. In that scenario, both judges see eye to eye on how to interpret statutes. Their jurisprudential and interpretive methodological commitments are the same. More still, to the extent that non-legal normative attitudes inform legal interpretation, their attitudes are in alignment.³⁵ (As longtime colleagues, we can assume that they know about this convergence as well.) Given these similarities, and given that each has access to the same legal arguments (e.g., those articulated in the briefs, at oral argument, etc.), each judges would predict that the other

³² Posner & Vermeule, *supra* note 2, at 159.

³³ *Id.* at 163.

³⁴ Vavova, *Confidence, Evidence, and Disagreement*, *supra* note __, at __.

³⁵ As we explain below, even if non-legal normative attitudes are *irrelevant* to interpretation, ideological alignment is plausibly still relevant to the determination of whether another is an epistemic peer with respect to statutory interpretation. See *infra* Part I.B.

would interpret the statute the same way. They would be even firmer in this prediction once determining that its meaning is clear.³⁶

Against the backdrop of these predictions, the two friends' diverging interpretations would be incredibly surprising to each. Previously, each was of the view that the application of the correct (by their lights) interpretive methodology to the substance of this case yielded a clear answer. Now, each judge learns that one of the two of them is quite wrong. Each is left to wonder which of the two of them was the one who applied the methodology incorrectly. It is likely, and rational, for each judge to reconsider with diminished confidence.

Now consider the case of methodological foes. There, the two judges are utterly at odds about how to interpret statutes, and again as longtime colleagues they presumably know about this dispute. For that reason, neither would have a great deal of confidence in the first place that the other would interpret the statute at issue in the same way. The other judge will be looking at different materials, or looking at them in a different way, so it will be little surprise if they come out with a different answer in the end. As each considers the arguments in isolation, each would start to predict that the other would disagree, recognizing that, for example, ordinary usage points one way and apparent purpose another. And, at conference, when their disagreement is revealed—as well as the reasons in support of their respective readings—each would respond with a sigh: “Yet another case where the wrong methodology (or wrong ideology) produces the wrong result.”³⁷

To summarize: Because disagreements between methodological foes is unsurprising,³⁸ the ‘discovery’ of such disagreements reveals little information to the parties involved and so provides little reason for those parties to change their beliefs. Such disagreements thus contrast with disagreements between methodological friends, which are surprising and so provide more information, and, in turn, more reason for the parties involved to up-

³⁶ If, by contrast, each had a confidence level just higher than .5, each would presumably have only limited confidence that the other would come out the same way.

³⁷ To be fair, judges might learn *something* from their foes' votes – such as what the opposing methodology requires in this case, or how committed one's foes are to following their inferior methodology. To the extent that judges engage in a sort of continual reflective-equilibrium process to evaluate interpretive methodologies, *cf.* Richard H. Fallon Jr., *Arguing in Good Faith about the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123 (2017), this information might have a little bit of influence on the margin. But we doubt that any particular case provides an effect of real significance. *Cf.* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 299–300 (2017) (describing “the sign fallacy,” viz: “a pervasive error within the economic analysis of law, which is to identify the likely sign of an effect and then to declare victory, without examining its magnitude--without asking whether it is realistic to think that the effect will be significant.”).

³⁸ Unsurprising, that is, given the context. There is a wider frame in which judicial disagreement is always surprising, because most applications of the law are easy and obvious. *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1227 (2009).

date.³⁹ Disagreement between methodological foes is more like a tip disagreement between a skinflint and a spendthrift.

Importantly, we have somewhat stylized the disagreement between friends and foes by considering only two polar cases. In reality, judicial views may lie on a spectrum, with more similar judges being more “friendly” in the methodological sense, and more dissimilar judges being more adversarial. For that reason, the true implications of our argument are scalar rather than binary: the more similar two judges are in their interpretive methodologies, the more reason they have to reduce their confidence in the face of disagreement.⁴⁰ But our stylized description communicates the outline of our argument, which is the centrality of methodology.

B. Immediate Objections

In their foray into this topic, Posner and Vermeule do anticipate that some readers will insist on the importance of methodology and they deploy two preemptive responses – an argument that judges ought to display the same epistemic doubts at the level of their own methodology, and an argument that different methodologies overlap so much that the problem largely evaporates.⁴¹ Neither argument, we think, is really convincing.

1. Second-Order Humility

First, Posner and Vermeule argue that the same principles of epistemic humility ought to apply to disagreements over methodology itself – that the fact of methodological judicial disagreement ought to weaken judges’ confidence in their own methodologies. This is second-order epistemic humility. As they explain:

On our view, epistemic humility should extend to the meta-level as well, at least presumptively. All nine Justices should recognize that reasonable minds can disagree about the proper approach to interpretation, at least within conventional boundaries

³⁹ In Bayesian terms, disagreement between methodological foes could best be described as a difference in priors. Because methodological foes disagree about what evidence to look to, or as to the appropriate significance of that evidence, and because this disagreement is itself common knowledge, it is utterly unsurprising to each of them that they reach different conclusions from the same new evidence. *Cf.* Aumann, *supra* note 20 (arguing that rational agents *with shared priors* will converge in their posteriors); *see also* note __ *supra*.

⁴⁰ *See, e.g.*, Elga, *supra* note 14, at 478-79 (“There are experts and gurus, people to whom we should defer entirely. There are fakes and fools, who should be ignored. In between, there are friends and other advisors (including our own future and past selves), whose opinions should guide us in a less than fully authoritative way.”).

⁴¹ They do allow that “it is possible that judges should disregard the votes of other judges based on those judges’ reasons” but only under conditions that they “suspect . . . are rarely satisfied.” Posner & Vermeule, *supra* note 2, at 181.

that comfortably include self-identified textualists, self-identified purposivists, self-identified intentionalists, and various hybrids.⁴²

Just as judges should become less confident in specific interpretations upon learning that other judges interpret the same text differently, so too might judges be less confident in their preferred interpretive theory once acknowledging that other judges find different theories persuasive.

There is some intuitive force to this argument. After all, why should there be anything magical about interpretive methodologies that exempt them from normal principles of epistemic humility? If nobody else is a pure hearted originalist, shouldn't that make the stout-hearted originalist worry that he is doing something wrong?⁴³ To the extent that we have methodological commitments or outlooks, many of us have formed them through ongoing discussion and give-and-take with others. So perhaps the continuing presence of others who disagree with us should shake our faith in our own methodological commitments.

But despite this intuitive force, we do not think second-order humility is appropriate when judging particular cases. When judges hear, at conference, that some of their colleagues do not share their interpretive approach, they are hearing "old news," not learning anything new. (This is true, at least, after the first few times the judges sit together.) With no new information, there is no reason to update their views about the case.

This argument was implicit in our discussion of methodological foes above. Disagreement with one's methodological foes is a non-event, epistemically speaking, because such disagreement is "old news" to both sides. The same is just as true for second-order humility. It is precisely because those parties are aware of each other's methodological positions that the specific disagreements between them are unsurprising.

This does not necessarily deny that second-order humility has a place in reaching one's own methodological views – just to deny that that place is the judicial conference table. By the time lawyers become judges, they are already well aware of different legal methodologies—they may even have become aware of them back in law school, before they were lawyers. Moreover, those judges have doubtless been *reminded* of those disagreements ever since. Justices Scalia and Breyer relived their methodological disagreements every time they took their act on tour.⁴⁴ As such, judges have had ample opportuni-

⁴² Posner & Vermeule, *supra* note 2, at 166.

⁴³ On pure hearted originalism, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). On the relative prevalence of commitment to more and less pure forms of originalism, see generally William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

⁴⁴ See, e.g., *Breyer and Scalia Take Their Roadshow Inside*, THE BLOG OF LEGAL TIMES (Mar. 24, 2010), <http://legaltimes.typepad.com/blt/2010/03/breyer-scalia-take-their-road-show-inside.html>.

ty to rationally update on the basis of those fundamental disputes. Hearing, one more time, that their colleagues have a different approach, tells them nothing new. Whatever degree of second-order humility is appropriate has, presumably, already been baked into their views.⁴⁵

There are also more fundamental philosophical arguments against second-order humility, namely that it pushes conciliationism beyond its conceptual limits. As philosopher Adam Elga has observed, conciliationism does not apply to instances of “deep” or fundamental disagreement.⁴⁶ The reason is that “if a disagreement goes deep enough . . . there is little or no independent ground from which to evaluate our respective epistemic credentials,” *i.e.* no way to determine whether the person with whom one disagrees is in fact one’s epistemic peer.⁴⁷

To see why, it is important to remember that epistemic peerhood requires us to step outside of the individual disagreement we are evaluating. A naive response to peer disagreement would be to automatically deny that anybody who disagrees with us can be a peer. “I thought that we were both relatively observant, but now that I hear you deny that the truck ran the red light, I see you cannot be trusted!”⁴⁸ But this response is obviously question-begging.⁴⁹ For the concept of an epistemic peer to do any work, peerhood must be “*based on reasoning that is independent of the disputed issue.*”⁵⁰ Thus one’s determination whether another person is equally rational must be made setting aside this particular observation – based on track record, vantage point, or whatever else.

All of this means, however, that independent peer evaluation becomes unavailable when disagreement runs too deep. Elga imagines two friends at “opposite ends of the political spectrum” considering whether abortion is morally permissible.⁵¹ As Elga notes, even setting aside their disagreement about abortion, neither friend regards the other as their epistemic peer about politics or morality. Each friend considers the other to have a terrible track record when it comes to moral and political questions generally—as demonstrated by their disagreements about affirmative action gun control, etc.—and so to be the other’s epistemic inferior.⁵²

One might be tempted to say that the two friends ought to “attend to the larger disagreement,” and set aside not only their reasoning about abor-

⁴⁵ Here it is worth noting that versions of conciliationism that call for dramatically reduced confidence in the face of persistent, deep disagreement, see *infra* notes ___-__ and accompanying text, are a great deal more revisionary than the one defended here.

⁴⁶ Elga, *Reflection and Disagreement*, *supra* note 14, at 493-97.

⁴⁷ Vavova, *Moral Disagreement*, *supra* note __, at 319.

⁴⁸ See *supra* note 22 and accompanying text for the red light example.

⁴⁹ See Christensen, *Disagreement, Question-Begging, and Epistemic Self-Criticism*, *supra* note __, at 2.

⁵⁰ Elga, *Reflection and Disagreement*, *supra* note 14, at 492.

⁵¹ *Id.* at 492-93.

⁵² *Id.* at 493.

tion, but about moral and political matters generally.⁵³ But having set aside all of politics and morality, neither friend has any basis left upon which to judge whether the other is an epistemic peer.⁵⁴ The question becomes: “Setting aside everything you think about morality and politics, do you think she is just as likely as you to get things right when it comes to morality and politics?” The reasonable response is: “I have no clue.”

Elga’s reasoning provides reason to doubt second-order humility in the legal domain as well. If two methodological foes are asked to set aside only their disagreement about the case at hand, each one would deny that the other is an epistemic peer. Each one would conclude that the other has a terrible track record when it comes to interpreting statutes generally. If each were instead asked to set aside not just their disagreement about the instant case, but about methodology in general, i.e. if the two were then to “attend to the larger disagreement,” neither would have any basis left upon which to assess their respective epistemic credentials. Thus, once again, neither judge would have reason to be less confident in their views.⁵⁵

Advancing one step further into epistemological theory, we acknowledge one more possible counterargument: one might still think that even if one cannot tell whether another person is an epistemic peer, having set aside all of one’s theoretical commitments, one also cannot *rule it out*, and that that alone should be enough to trigger epistemic humility.⁵⁶ In other words maybe reduced confidence is the right response to disagreement, ab-

⁵³ *Id.* at 495.

⁵⁴ *See id.* at 496 (“To set aside [one’s] reasoning about all of these issues is to set aside a large and central chunk of her ethical and political outlook. Once so much has been set aside, there is no determinate fact about what opinion of [the other] remains.”); Vavova, *Moral Disagreement*, *supra* note __, at 315 (“This suggests that there is an inverse relation between how confident I should be that you are my peer and how deep our disagreement goes. The deeper the disagreement, the less confident my evaluations of your epistemic credentials. And the less confident those evaluations, the less significant our disagreement can be.”)

⁵⁵ Here we assume that the judges involved are what one might call ‘philosophical’ adherents of their respective methodologies, which is to say that each regards the other’s methodology as either incoherent or as premised upon some fundamental misunderstanding. *See, e.g.*, Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Aug. 24, 2012) (“A legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute’s aim but is not a good fit with its text.”); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 22 (Amy Gutmann ed. 1997) (“It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.”). Second-order humility is, like first-order humility, *see supra* __, scalar rather than binary: the more fundamental the methodological disagreement, the less basis each disputant has to assess the other’s status as an epistemic peer.

⁵⁶ *See, e.g.*, Nathan L. King, *Disagreement: What’s the Problem? or A Good Peer is Hard to Find*, 85 PHIL. & PHENOMENOLOGICAL RESEARCH, 249, 268 (2012) (“[I]t is hard to see how one’s belief that P can be rational if one considers, but withholds [judgment] concerning the claim that one’s total epistemic position renders one more likely to be correct than one’s dissenter.”).

sent evidence of another's epistemic *inferiority*.⁵⁷ But as Philosopher Katia Vavova explains, this position is too demanding. It ignores the important difference between being "faced with [affirmative] evidence of error" and those in which we merely lack evidence of *absence* of error.⁵⁸ It also ultimately reduces to generic Cartesian skepticism.⁵⁹ Without a non-question-begging response to the moral skeptic or to the global skeptic (e.g., someone who denies the existence of the external world), one would be just as obligated to revise one's views in *their* directions as towards someone who is obviously a genuine epistemic peer, such as a close friend with similar evaluative outlook. Thus, the more defensible view is the more modest one, that one should revise one's beliefs only if one *has* good reason to think that the other person is epistemically equal.⁶⁰

Another way to think about these philosophical arguments is by analogy to "the principle of insufficient reason."⁶¹ That principle instructs decisionmakers to "assume[] that variables of unknowable importance, cutting in opposed directions, have equal values and thus systematically cancel out."⁶² In other words, the principle of insufficient reason tells decisionmakers to attend to considerations of known significance, to the exclusion of considerations the significance of which is unknown. Here, the argument is that judges should attend to disagreements of known significance, to the exclusion of disagreements the significance of which is unknown, and indeed perhaps unknowable, for the reasons Elga and Vavova articulate.⁶³

In sum, second order humility requires an incredibly demanding and somewhat implausible form of theoretical skepticism. The more plausible basis for peer disagreement is a principle that requires that one revise one's beliefs on the basis of disagreement only if one has reason to think that the person with whom one disagrees is one's epistemic peer. In the context of judging, this occurs, roughly speaking, only to the extent that the person with whom one disagrees is one's jurisprudential friend.

2. Overlap in Interpretive Methodologies

⁵⁷ Philosopher Katia Vavova calls this thought the "No Independent Reason Principle." Vavova, *Moral Disagreement*, *supra* note __, at 316.

⁵⁸ *Id.* at 318; see also *id.* at 314-315.

⁵⁹ *Id.*

⁶⁰ This one is the "Good Independent Reason Principle." *Id.* at 317.

⁶¹ ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 173 (2006); see also DAVID M. KREPS, *NOTES ON THE THEORY OF CHOICE* 146 (1988).

⁶² VERMEULE, *supra*, at 173.

⁶³ Attending to methodological friends and ignoring foes also meets Vermeule's two proposed criteria that there be "a pronounced informational advantage" for the attended consideration, and that the attended consideration be at least "in some rough sense, of the same order of importance as the discarded imponderables." *Id.* at 175.

Posner and Vermeule also suggest that the difference between mainstream interpretive methodologies is not so great, making methodological disagreement relatively unimportant. Thus, according to them:

Schematically, it is not the case that textualist judges consider sources or arguments {A, B, C} while purposivist judges consider sources or arguments {D, E, F}. Rather closer to the truth is a schema in which textualists consider {A, B, C} while purposivists consider {B, C, D}, or even {A, B, C, D}. There is a substantial overlap in the sources used by all the major camps of interpretive theory.⁶⁴

And from this they infer:

This overlap of sources implies that judges in both camps will often gain relevant information—relevant even on their *own* theories—from observing the votes of other judges, even judges in other camps, insofar as those other judges are considering the same sources.⁶⁵

We agree with Posner and Vermeule that textualists and purposivists consider many of the same sources (e.g., text, structure) when investigating statutory meaning, and may sometimes even share the same methods. Thus, we grant that methodological agreement is scalar rather than binary. But we do not think that this overlap in sources and methods causes adherents of different interpretive methodologies to learn much from the votes of their methodological foes.

We are not denying that judges might usefully learn from *arguments* made by other judges during the course of an appeal. Those arguments can be taken on their own terms, run through one’s own methodological filter, and accepted or discarded. But Posner and Vermeule argue that epistemic humility ought to come from other judges’ *votes* themselves. Yet these differencing votes on the same interpretive sources are often caused precisely because of methodological differences. First and most obvious, even if textualists and purposivists consider similar sources, the *relative weight* each assigns to those sources is quite different.⁶⁶

Second, even if the evidence each considers is substantially similar, the object of inquiry for textualists and purposivists is potentially quite different.⁶⁷ If, for example, textualists are trying to determine “the import that a

⁶⁴ Posner & Vermeule, *supra* note 2 at 167.

⁶⁵ *Id.*

⁶⁶ See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 76 COLUM. L. REV. 70 (2006).

⁶⁷ Baude & Sachs, *supra* note 30, at 1112-18.

reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words,”⁶⁸ while purposivists are after the reading that best advances “the statute’s goal,”⁶⁹ the fact that similar sources are relevant to each inquiry is beside the point. Both astronomers and astrol-ogists look at the stars, but neither has much to learn from the other.

Even if there are some cases where textualism and purposivism fully overlap—*i.e.*, where textualists and purposivists use the *same evidence* in the *same way*—it is not at all clear that judges can determine when this is the case. And even if they can, it is not clear it is worth the effort. Reconsider a variation of our earlier scenarios:

At the conference after oral argument, one judge, a conservative textualist, says that the meaning of the statute is clearly X. She reasons that X is the only interpretation that squares with ordinary usage of the language at issue. A second judge, also a conservative textualist, agrees. A third judge, a liberal purposivist, says that the meaning is clearly Y. She explains that Y is supported both by ordinary usage and by Congress’s apparent policy aim.

In this scenario, there seems to be some methodological overlap, but it is hard for either of the textualist judges to infer much from the third judge’s vote and rationale. If the third judge does go to the trouble to insist that ordinary usage alone would be enough to drive her vote, then perhaps the textualists should give that vote some weight. On the other hand, this is only so if the third judge is equally reliable at determining ordinary meaning, which there is some reason to doubt. The textualists might reasonably worry that the judge has allowed her assessment of the apparent policy aim to shade her assessment of ordinary usage,⁷⁰ or that she conceives of ordinary usage somewhat differently (e.g., as heavily influenced by “pragmatics” such as the apparent policy aim). Moreover, as discussed above, the third judge’s repeated insistence on interpreting statutes in the wrong way might cause them to doubt her statutory interpretation ability more generally.⁷¹

It is conceivable that through sufficient inquiry and extensive conversation, the textualist judges could figure out which is afoot in each case. But then again, maybe not. And at this point, we must ask: why go through the hassle of an extensive interrogation with limited expected utility when each

⁶⁸ John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005).

⁶⁹ WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 229 (2006) (“Purposivism sets the originalist inquiry at a higher level of generality. It asks, ‘What was the statute’s goal?’ rather than ‘What did the drafters specifically intend?’”).

⁷⁰ See Baude & Doerfler, *supra* note 8, at 552-53.

⁷¹ See *supra* notes 48-55 and accompanying text.

already has confirmation from a true epistemic peer that her initial interpretation of the statute is correct?

As methodologies converge enough, to judges might come closer and closer to being methodological friends. But if their methodologies remain sufficiently distinct as to remain foes, then we doubt that they have much to learn from one another's votes – even if textualists and purposivists do use overlapping methodologies. And, even if those votes could be mined for some information, it is highly questionable whether it is enough to be worthwhile.

C. Do Judges Really Have Methodologies?

One might object that our proposal rests on a false and academic assumption – that judges indeed have well-defined methodologies to mark out their friends and foes. Indeed, Posner and Vermeule seem skeptical of this assumption, remarking that “the controversies over interpretive theory that preoccupy academics do not necessarily carry over to judicial decision making, which is often more pragmatic in spirit,”⁷² and that “many judges are not theoretical at all and just consider all sources and arguments in a sort of promiscuous jumble.”⁷³ We are willing to defend the assumption in part, but our proposal does not really depend on it. It works just as well for judges who are “pragmatic” and impatient with interpretive theory.

So we note in passing that, some judges do seem to have self-consciously methodological disagreements with one another. Indeed, a number of recent judges have written about their methodologies, and sometimes sharply distinguished themselves from one another.⁷⁴ And other judges nonetheless obviously fall into methodological camps. One doesn't need to be preoccupied with academic theory to recognize the difference between Justice Breyer and Justice Thomas. When Justice Breyer learns that Justice Thomas disagrees with him about the permissibility of an agency action or the viability of a constitutional claim, he is less likely to be surprised, and less likely to reconsider his views, than if Justice Ginsburg disagrees with him instead.

But even putting aside judges who have pronounced views on interpretation, methodology can just be a general shorthand for the way judges think about deciding cases, whatever one calls it. A judge who takes an

⁷² Posner & Vermeule, *supra* note 2, at 181-182.

⁷³ *Id.* at 167.

⁷⁴ Compare, for instance ANTONIN SCALIA & BRYAN GARNER, *READING LAW* (2012) with ROBERT A. KATZMANN, *JUDGING STATUTES* (2014) with Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing Katzmann, *supra* this note). Or compare Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, (1983) with Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534 (1983). Or compare ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 37-47 (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); with STEPHEN BREYER, *ACTIVE LIBERTY, INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) with David H. Souter, *Commencement Address*, 124 HARV. L. REV. 429 (2010).

atheoretical, all-things-considered approach to interpretation will learn little from the votes of a more single-track colleague. (As we discuss above, that colleague’s vote contains a *little bit* of information, but not much.)⁷⁵ By contrast, the same atheoretical judge will learn a lot more from the vote of a similarly atheoretical, all-things-considered colleague. If the similarly open-minded judge comes to a very different conclusion, one would rightly wonder whether one is missing something dispositive.

Similarly, if two different camps of atheoretical judges have consistent differences between them – whether caused by political commitments, by considered different angles of the “promiscuous jumble,” or whatever else—those different camps can be shorthanded as methodological. Nothing rides on whether the judges in those camps can describe their differences in theoretical terms, or on whether they could get an A in a statutory interpretation class.

In other words, our point about friends and foes holds regardless of terminology. One could describe judges as having methodologies, or general outlooks, or simply consistent patterns of behavior that are shared between some judges more than between others. The point remains that judges learn a lot more from the votes of judges who *reason like them* than judges who regularly reason differently.

D. Strategic Voting

Thus far, we have argued generally that in areas beset by deep disagreement one has reason to be less confident in one’s beliefs upon discovering disagreement with one’s friends, but not with one’s foes. What about the possibility of strategic voting? Posner and Vermeule consider whether the risk of strategic voting by judges undercuts their thesis that judicial disagreement is presumptively epistemically significant. Concluding that the answer is *no*, they observe that strategic voting is a “more general” problem “hardly unique” to this setting.⁷⁶ In addition, they reason that reputation is a “major check” on strategic behavior by judges.⁷⁷

We agree, but we would go further: the prospect of strategic voting provides another useful application for our approach, which assigns greater epistemic significance to disagreement with certain friends. We do not limit ourselves to the kind of strategic voting that Posner and Vermeule focus on – strategic voting made possible by a rule that judges should take the votes of other judges into account.⁷⁸ Instead we have in mind strategic voting of a much more banal variety: Voting one way to advance one’s ideological inter-

⁷⁵ See *supra* Part I.B.2.

⁷⁶ Posner & Vermeule, *supra* note 2, at 183.

⁷⁷ *Id.*

⁷⁸ See *id.* at 184 (discussing “rational epistemic free riding—acting in such a way that puts more of the burden of deciding the case on other, possibly more informed, judges”).

ests even though the law, by one's own lights, compels or at least recommends an opposite vote. If such ideologically-motivated behavior is afoot, then the differences between friends and foes become even more important – though in this application *ideological* friendship may be more central than *methodological* friendship, to the extent the two diverge.

Our theory, simply put, is that one is less likely to be misled by strategic behavior from one's ideological friends than one's ideological foes. Start with this: In a given case, an individual judge has special access to whether she is voting strategically, i.e. that judge knows whether she is casting her vote in bad faith. If a judge is voting strategically, she does not care much whether her ideological foe is as well, at least not for epistemic reasons. She is, after all, uninterested in “what the law is.”⁷⁹ Limiting ourselves, then, to cases in which a judge is not voting strategically, i.e. is voting in good faith, if the judge is voting consistently with her ideology, she has less reason to believe that an ideological friend who disagrees with her is voting in bad faith than she does an ideological foe. The reason is that, as best she can tell, the ideological friend is voting against interest and so is unlikely to be voting strategically. By contrast, her ideological foe is voting with interest, making it at least plausible that her vote is strategic.⁸⁰

Importantly, the above argument does not rest upon the assumption that strategic voting is widespread.⁸¹ Rather, it assumes only that strategic voting occurs with non-zero frequency. The argument has more significant epistemic implications, of course, the more frequent one estimates strategic voting to be. So long as strategic voting occurs some of the time, however, the argument entails that judges should take disagreements with their ideological friends at least somewhat more seriously.

To be sure, strategic voting suggests increased attention to one's *ideological* friends rather than one's *methodological* friends, to the extent those two things differ. It suggests that conservative textualists might prioritize the votes of other conservative textualists more strongly than liberal textualists, and that liberal purposivists might similarly flock together more closely than with conservative purposivists. To the extent that methodology correlates with ideology – or to the extent one is using methodology as general shorthand for decisionmaking patterns – the role of strategic voting reinforces our thesis in a straightforward sense. To the extent one thinks of method-

⁷⁹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁸⁰ We suspect that it is the typical case where a judge takes herself to be voting in a way that is at least consistent with her own ideology. Our logic would apply in reverse to the opposite case, where a judge takes herself to be voting contrary to her own ideology (e.g., if her ideological friend disagrees with her in such a case, she would have some reason to suspect her friend was behaving willfully).

⁸¹ As Posner and Vermeule observe, any normative theory of judging must assume that “judges are occasionally but not uniformly strategic,” the reason being that “[i]f *all* voting is strategic, then it is idle to argue about how judges ‘should’ vote.” Posner & Vermeule, *supra* note 2, at 182.

ology and ideology as distinct and uncorrelated, it instead provides another axis on which to refine our theory.

II. Other Friends?

We have so far suggested that it is important to narrow the concept of epistemic humility, so that it extends not to all judges but only to one's methodological friends. But it may be important to *broaden* the concept of epistemic humility in a different respect. In particular, we see no good reason for a judge's epistemic peers to be limited to other *judges*.

Mightn't judges learn not only from the votes of other judges, but also from other professionals who have studied the legal question at issue? From the lawyers, from amici, from scholars who have written commentary, or even from journalists or bloggers who cover the case? Restricting ourselves, as we have argued, to one's circle of methodological friends, why not look to *all* of one's friends, and not only the ones who wear robes?

Posner and Vermeule briefly flag this point too, asking themselves: "Does the relevant information have to come from the votes of other *judges*, or will any decisionmaker do? What about a poll of law professors, practicing lawyers, or people on the street, about whether the statute is clear – should the Justices take such information into account?"⁸² But they never return to answer their own question.

Throughout, however, Posner and Vermeule appear to *assume* that judges should look only to other judges, both from the title of their piece to their constant repetition of "judge" and "colleague" to describe their epistemic humility principle. The logic of epistemic humility, we think, points in a different direction.

Posner and Vermeule repeatedly rely on the Condorcet Jury Theorem and on the intuition that when "many other people, presumptively reasonable" disagree with you, that should lower your confidence in your own views.⁸³ But if so, the insight generalizes off the bench. American judges come from long legal careers before they take the bench, as private lawyers or government officials or scholars. Their colleagues at their old jobs seem likely to be just as reasonable as their new ones – or at least some of them will be, and need not be ignored.

The point can be made more formally as well. Recall that the two basic elements of being an "epistemic peer" are that one is "equally rational" and that one "have access to the same evidence."⁸⁴ There is no reason non-judicial actors cannot meet both of these criteria.

As we have already suggested, the most important thing in considering whether one's peers are "equally rational" is whether they are applying a

⁸² Posner & Vermeule, *supra* note 2, at 174.

⁸³ *Id.* at 180.

⁸⁴ *Supra* nn. 13-15 and accompanying text.

similar framework of reasoning to the problem – *i.e.*, a similar interpretive methodology. One need not be a judge to have, or share, a methodology. Additionally, lawyers have the same kind of legal education as judges, and plenty of them have practical experience, scientific expertise, raw brilliance, or whatever virtues one thinks that judges possess. We see no reason to assume the rationality or ability of legal analysts outside the judicial system to be unequal to those inside the system.⁸⁵

As for “access to the same evidence,” one might think that a judge is justified in assuming that only her colleagues really have the same evidence about the case, having read the same briefs and listened to the same arguments by the lawyers. But lots of other people have access to the briefs and oral arguments as well, especially in federal court of appeals cases or Supreme Court cases.⁸⁶ In a controversial case, there is often no shortage of amici and bloggers making their views known on just the same evidence that the judges are considering. Moreover, if the really important evidence in the case is not the filings but the relevant legal materials – the regulation or statute or constitutional provision at issue – access is even more widespread.

Another seeming formal difference for judges is that they take an oath and undertake an obligation to apply the law fairly.⁸⁷ But even this difference doesn’t necessarily support total exclusion of non-judges. Other government officials, and even private lawyers, take an oath as well.⁸⁸ And in any event, the oath goes to one’s *obligation* to apply the law; it does not magically increase one’s *ability* to do so. Absent an unusually formalist turn by Posner and Vermeule, we doubt that they would argue that the judicial oath or the judicial power limits their proposal to judges.

To be sure, there are some reasons that *courts* are attributed additional *persuasive* authority, but none of them are on point here. For instance, a leading treatment provides:

When does the court of another jurisdiction have authority just by virtue of being another court? I isolate three instances: First, when circuit courts cite other circuit courts, not merely for their informational or persuasive value, but because they seek to

⁸⁵ Cf. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1753 (2013) (“From [the Madisonian] standpoint, the judiciary is just another of the branches struggling to encroach upon the others or to aggrandize itself at the expense of the others; judges are just part of the invisible-hand system, not some sort of external regulator of the system.”). See also *id.* at 1757-1758 (“Judges are inside the political system, not outside it. If the system is structured and pervaded by partisan competition . . . then one cannot turn around and assume that the judges will be immune.”).

⁸⁶ See Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 847-848 (2015).

⁸⁷ See generally PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008); Diane P. Wood, *Reflections on the Judicial Oath*, 8 GREEN BAG 2d 177 (2005).

⁸⁸ Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 301 n.1 (2016).

avoid a circuit split; second, when state courts aim to harmonize their interpretation of state “uniform acts” with other states based on the fact that those other states have adopted the same uniform act; and third, in common law decisions, when states seek to harmonize their doctrines with the judicially crafted doctrines of other states.⁸⁹

Each of these instances circumstances where the ruling of a whole court creates facts on the ground with which another court must reckon. But the votes of individual judges – before conference and before the court has even ruled – do not have the same effect.

Even if there are no formal reasons to sharply exclude non-judges from epistemic humility, there might still be practical ones to give non-judges less weight. One possibility is that non-judges are more likely to engage in strategic behavior. One’s judicial *colleagues*, the argument goes, have to be honest about how the case should come out, but amici and law professors and journalists might merely be “working the ref.”⁹⁰ Again, we aren’t sure how real this difference is. Once the Posner and Vermeule regime is in place, judges have plenty of incentive to engage in strategic behavior, as Posner and Vermeule recognize.⁹¹ Instead, they suggest, judges might be “be in a better position to gauge confidence levels” of their colleagues than of others.⁹²

Perhaps. But it seems to us that the more important consideration is, as we have discussed, that strategic behavior is less of a problem from one’s methodological and ideological friends.⁹³ Moreover, it is also easier to discern strategic behavior from one’s friends because one has better access to their reasoning process and so better ability to see if it is plausibly being followed.⁹⁴

A different possibility is that judges and others have different tolerances for error, because of their different professional goals. After denying that judges have any special “expertise” or legal “knowledge,”⁹⁵ former professor, current judge Frank Easterbrook suggested that “good scholars are

⁸⁹ Chad Flanders, *Toward A Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 75–76 (2009).

⁹⁰ Brett M. Kavanaugh, *The Judge As Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 688–689 (2016) (“Sometimes, there is even ‘working the ref’ before the game is played, with blog posts and opinion commentaries. Politicians sometimes do this, journalists do this, and professors do this. And you see this of course in sports. Coach Mike Krzyzewski, a legendary basketball coach, is pretty good at working the ref during the game. Nothing wrong with that for the coaches or advocates. But as judges, we have to tune out the Coach K’s of the legal-political world who are trying to work the judges.”).

⁹¹ Posner & Vermeule, *supra* note 2, at 182–184.

⁹² *Id.* at 180.

⁹³ See *supra* Part I.D.

⁹⁴ *Cf.* Frank H. Easterbrook, *What’s So Special About Judges?*, 61 U. COLO. L. REV. 773, 782 (1990) (“Judges apply well only rules that they have internalized.”).

⁹⁵ *Id.* at 773, 774.

bolder than good judges, and accordingly are wrong more often.”⁹⁶ We could imagine this being manifested in judicial reluctance to consider overly creative academic ideas. It would not surprise us if there were more enthusiasm for *stare decisis* among members of the bench than members of the academy.

On the other hand, we can imagine this effect to be diminished when we are specifically asking how scholars would vote to decide a certain case. When writing an amicus brief or commenting on a pending case, rather than trying to market a new idea, it is not obvious to us that law professors will be substantially more “apt to err”⁹⁷ than any other lawyer or judge of similar outlook. (This optimism is of course limited, though, to briefs and commentary that actually reflect scholarly or lawyerly consideration, not just a signature.)⁹⁸

Nonetheless, Easterbrook’s hypothesis might be a reason to discount the votes of law professors on how a case should come out. On the other hand, such votes could still provide valuable information to a methodologically friendly jurist. Suppose an originalist judge is trying to consider which of various dubious precedents he should devote some energy to having overturned. The fact that one of the precedents has been singled out as wrong by an overwhelming majority of originalists might provide a good reason, all else equal, to push that one up in the queue.

In any event, our bottom line is this. We can see some reasons to think that judges may find more true “friends” on the bench than off of it, but we see no good reason to categorically exclude reasonable non-judges from the project of peer disagreement. Indeed, once one recognizes our basic point about the logic of looking to methodological friends, the most natural thing to do is to look to all of one’s friends, however they are robed.

III. Methodological Friendship in Action

Having discussed the application of peer disagreement to legal interpretation, we now consider what implications our analysis might have if judges were to implement it. Though this is our most tentative claim in the paper, we rather suspect that peer disagreement and methodological friend-

⁹⁶ *Id.* at 779. *See also id.* at 777 (“A free mind is apt to err—most mutations in thought, as well as in genes, are neutral or harmful—but because intellectual growth flows from the best of today standing on the shoulders of the tallest of yesterday, the failure of most scholars and their ideas is unimportant. High risk probably is an essential ingredient of high gain. Academic tenure is desired for reasons opposite to that of judicial tenure: scholars have freedom so that they may be creative, and in spite of the possibility that tenure may protect routinizers who unblinkingly do today what was done yesterday.”); *id.* at 779 (“A high proportion of all ideas is unsuccessful (most papers are never cited, even by their authors). A very few scholars, both in ages past and today, produce a high percentage of all the ideas we find useful.”).

⁹⁷ *Id.* at 777.

⁹⁸ See generally Richard H. Fallon, Jr., *Scholars’ Briefs and the Vocation of A Law Professor*, 4 J. LEGAL ANALYSIS 223 (2012).

ship are already hiding in plain sight. Indeed, because epistemic principles of peer disagreement line up with some common sense instincts, it may be that judges have already grasped at least some of its logic for themselves.

In rare cases, judges do offer explicit acknowledgment that the votes of their colleagues have downgraded their confidence, or even changed their mind. For instance, in the 1804 case of *Little v. Barreme*, which affirmed liability for an illegal naval seizure, Chief Justice John Marshall's wrote: "I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. . . . But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."⁹⁹

Eighty years later, we can find the UK's Lord Blackburn acknowledging in a contract case that he "had persuaded myself" of the other side of the case, and "had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them. I assent to the judgment proposed, though it is not that which I had originally thought proper."¹⁰⁰ And as Posner and Vermeule point out, in the more modern context we can occasionally find the Supreme Court acknowledging that lower courts' "differences of opinion from our own are substantial enough" to justify qualified immunity from damages because they "counsel doubt that we were sufficiently clear in the prior statement of law."¹⁰¹

Such instances may be most noteworthy for their rarity. Judges don't normally tell us how their initial inclinations changed over the course of deliberation, only what ended up as their final considered judgment.¹⁰² Nor do they specify *which* of their colleagues counted the most, or whether all had equal weight. Still, we wonder if the overall *pattern* of judicial behavior might reflect the kind of methodological friendship we advocate here.

For instance, it is well-known that the Supreme Court decides many high-profile cases by a 5-4 vote, and that in many of those cases the 5-4 votes reflect the same general alignment of Justices – Roberts and Alito and Thomas and (once) Scalia (or Rehnquist) on one side, and Ginsburg and Breyer and Sotomayor and Kagan (or Souter and Stevens) on the other, with

⁹⁹ *Little v. Barreme*, 2 Cranch (6 U.S.) 170, 179 (1804).

¹⁰⁰ *Foakes v. Beer*, (1884) 9 App. Cas. 605 (H.L.).

¹⁰¹ *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378-79 (2009); see generally Posner & Vermeule, *supra* note 2, at 168-173.

¹⁰² Posner & Vermeule, *supra* note 2, at 168 ("law takes no consistent approach to such problems").

Justice Kennedy in between.¹⁰³ Indeed, empirical research has documented this ideological clustering on the Court.¹⁰⁴

Moreover, some of the Court's most controversial 5-4 cases sometimes give rise to the appearance of influence from outside the Court. On the Supreme Court's decision in *District of Columbia v. Heller*,¹⁰⁵ Reva Siegel argues that "The correspondence between the law-and-order Second Amendment forged in culture wars of the New Right and the original public meaning of the Second Amendment that *Heller* vindicates is striking."¹⁰⁶ The Court's split decision on (and near-total invalidation of) the Affordable Care Act¹⁰⁷ has been said to be influenced by a small group of legal scholars and bloggers who "present[ed] legal arguments that professionals could take seriously" and were "difficult to dismiss" as ignorant or hacks.¹⁰⁸ And in invalidating state marriage laws in *Obergefell*¹⁰⁹ the Court "invoked the authority of the many [lower] federal court decisions" that had already done so, and "portrayed [them] as having been informed directly or indirectly by the arguments of litigants, lawyers, and society."¹¹⁰

These results are generally studied as part of the phenomenon of political influence on judging, or of the phenomenon of popular constitutionalism. Our analysis, however, suggests a different way to think about them.

These patterns of convergence – among like-minded judges and among judges and certain allies off the bench – might well be the result of a rational approach to epistemic humility. As we have discussed, under the principle of epistemic humility, properly understood, we would expect judges to more closely match the votes of their methodological friends on the bench. And we

¹⁰³ That is not to say that this is the only important voting pattern in 5-4 cases, Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1673-1674 (2016), but it is an overwhelmingly common one, *id.* at 1677-1678.

¹⁰⁴ Lawrence Sirovich, *A Pattern Analysis of the Second Rehnquist US Supreme Court*, 100 PROC. NAT'L ACAD. SCI. 7432 (2003); Paul H. Edelman, *The Dimension of the Supreme Court*, 20 Const. Comment. 557 (2004). See also Tom S. Clark, *Measuring Ideological Polarization on the U.S. Supreme Court*, 62 POL. RESEARCH Q. 146 (2009).

¹⁰⁵ 554 U.S. 570 (2008).

¹⁰⁶ Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 239 (2008). See also *id.* at 240 ("The mobilization of living Americans around the text and history of the Second Amendment did more than tutor popular and professional intuitions about the amendment's core and peripheral purposes; it imbued the amendment with compelling contemporary social meaning by connecting the right to bear arms to some of the most divisive questions of late twentieth-century constitutional politics.").

¹⁰⁷ *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

¹⁰⁸ Ilya Somin, *William Brennan Lecture 2014: NFIB v. Sebelius and the Constitutional Debate over Federalism*, 39 OKLA. CITY U. L. REV. 415, 435, 436 (2014).

¹⁰⁹ *Obergefell v. Hodges*, 135 S. Ct. 1584 (2015)

¹¹⁰ Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VANDERBILT L. REV. 1183, 1194 (2017). To be sure, Siegel points out that in fact this legitimation was *reciprocal*, since the lower courts were responding to an apparent Supreme Court invitation in *Windsor*.

would also expect them to match, perhaps slightly less closely, the votes of their methodological friends off the bench.

While Supreme Court voting blocs are often explained in terms of *ideology*,¹¹¹ they could well be the result of *methodology* instead or in addition, especially if methodology and ideology are correlated, as they seem to be on today's Court. Indeed, a methodological explanation might actually explain the Court's most recent voting patterns better than an ideological explanation. As Eric Posner has noted, in recent years the so-called conservative justices have tended to disagree among themselves more often than the so-called liberal justices.¹¹² And a methodological divide among some of the so-called conservatives would provide a convincing explanation for why.¹¹³

In essence our picture is this: Imagine the Supreme Court hears a case about whether some new statute exceeds Congress's enumerated powers under the Constitution. When the Justices reveal their tentative votes to one another, Justice Thomas thinks the statute is unconstitutional. If the late Justice Scalia had been on the fence, he would be more likely to vote to strike down the statute. By contrast, Justice Breyer or Justice Ginsburg are unlikely to gain any new information from Justice Thomas's vote, because his application of his methodology tells them little about theirs. In the very rare cases where they think a statute exceeds Congress's enumerated powers, it will be on a different methodological basis. If they take a cue from anybody, it will be from more similar Justices.¹¹⁴ And in each of these scenarios, we would expect the Justice to take a challenge to the statute more seriously when law

¹¹¹ Clark, *supra* note __, at 154 ("A primary finding in the judicial politics literature is that judges who have divergent policy preferences are less likely to vote together. These theoretical and empirical results highlight ideological disagreement as a primary determinant of vote splits among the justices.") (citing JEFFREY A SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002)).

¹¹² Eric Posner, *The Supreme Court's Conservatives Can't Agree on Anything*, SLATE (June 30, 2015)

http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/06/supreme_court_conservatives_disagreements_make_the_court_more_liberal.html. See also Kedar Bhatia, *Final October Term 2015 Stat Pack, Justice Agreement Tables*, SCOTUSBLOG (June 29, 2016) at http://www.scotusblog.com/wp-content/uploads/2016/06/SB_agreement-tables_OT15.pdf

¹¹³ See Posner, *supra* note __ ("Another explanation is jurisprudential disagreement. Here the division is between formalists (Scalia and Thomas) and pragmatists (Roberts, Alito, and Kennedy).").

¹¹⁴ Indeed, to our knowledge the two times Justice Breyer has voted that a statute exceeded Congress's enumerated powers were in *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003), where he agreed on the result only with Justice Stevens, and in *NFIB v. Sebelius*, 132 S. Ct. 2566, 2574-2575 (2012) where his vote was fully shared only with Justice Kagan. We put aside a third case, *Golan v. Holder*, where Justice Breyer and Justice Alito would have invalidated a statute under "the Copyright Clause, interpreted in the light of the First Amendment." 132 S. Ct. 873, 912 (2012). To our knowledge the only time Justice Ginsburg has voted that a statute exceeded Congress's enumerated powers was in *City of Boerne v. Flores*, 521 U.S. 507 (1997), where she joined a six-justice majority that included Justice Stevens.

professors and amici who share their jurisprudential outlook have endorsed the challenge.

That picture, we think, is a quite plausible representation of reality.¹¹⁵ So judicial reasoning among epistemic peers may *already* be in action – at least in broad strokes. If so, this suggests that what are usually described as immediately political behavior by the Supreme Court may have a more benign,¹¹⁶ or at least more complicated, explanation.

Conclusion

Two heads are better than one, even when they belong to judges. No individual judge can be sure that she is right about everything, and so she has something to learn from judicial disagreement. Posner and Vermeule are right to suggest that rational judges ought to take such disagreement into account, depending on the details, and not always shut out everybody else’s decisions when making their own. But their proposal has a great flattening effect, pushing all legal materials towards ambiguity and all judging away from committed methodological views. For those with strong methodological commitments, it might seem as if the only alternative is to resist them in toto, falling into the solipsistic or heroic model of judging.

We take a position that is both more modest and more radical. Judges ought to attend to disagreement, but they should not treat all disagreements with equal weight. To give all judicial colleagues (and nobody else) equal weight is to confuse power with knowledge. In epistemic terms, what matters is not judicial power but rather whether somebody else’s views about cases supplies a judge with new information – *i.e.*, whether that person is a reliable guide to the judge’s own methodology. Our methodological foes may have much to teach us, but not how confident we should be about individual cases.

We suspect that many judges already know this, and may already do this, even if they would not say so in terms. And if we are right, much of what cynics may be tempted to call extralegal decisionmaking really is consistent with a rational approach to legal reasoning, among friends.

¹¹⁵ We are not sure that recent work failing to document a more specific “group polarization” or “political polarization” effect at the Supreme Court, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 144-149 (2013), necessarily refutes our hypothesis, but in any event we do emphasize that it is only a hypothesis.

¹¹⁶ To be sure, one might argue that these methodologies ill serve the justices’ or the country’s interests, *Cf.* Posner, *supra* note __ (“If this is true, however, conservatives might wonder whether they are being well served by their justices. Our society has assigned legislative power to the Supreme Court, authorizing it to settle the hardest political questions by fiat. Gay marriage and Obamacare are now unshakable political facts in America, and will remain so long after the jurisprudential debates among the conservatives have been forgotten.”), but we leave those debates for another day.