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Valuing A Space Between:
Using Litigation as a Model for Facilitating Political Discourse

By

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**Valuing A Space Between:
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Somehow we've weathered and witnessed a nation that isn't broken, but simply unfinished.

Amanda Gorman, "The Hill We Climb"¹

INTRODUCTION

We live in a particularly divisive time. Information flows fast, free, and rabidly from every direction; the loud set the agenda; and the poles are becoming more distinct, polarized, and bigger. And while many particular issues are raised, there is an increasing belief that something fundamental is unbalanced and wrong. Tom Brokaw stated in January 2020:

I think the most extraordinarily powerful tool and the most destructive development in modern life is the current media. Everybody has a voice — and I think it's great for people to have a voice — but there's no way to verify what's true and what's not. It has no context; it's just a 24/7 rage about what's pissing people off across the board from the left to the right. It *could* be a unifying factor, but it's a dividing factor, frankly. And that really troubles me as much as anything. I don't know how we get beyond that. . . .

[T]his is obviously the most unsettling time I've ever experienced in national politics, and I'm not saying that just from an ideological point of view. I'm not saying that as a Democrat or a Republican. I'm saying that as a journalist and as a citizen and as a grandfather.²

The *system* is being questioned; large numbers of people believe that American democracy is breaking down or in need of serious reconfiguring. Issues of a country in crisis have been extensively debated both in the general public sphere as well as by academia. And then on January 6, 2021, almost exactly a year after Brokaw's statement, a mob descended on the United States Capital resulting in multiple deaths, destruction of property, and a fundamental shaking of the nation. The mob was pissed off and ready for revolution, triggered by false information about the 2020 election that spread like wildfire on social media and was stoked by politicians and the President of the United States, Donald Trump. Within days of the Capital riots, among

other media reactions, Twitter had banned President Trump and various companies had refused services forcing Parler (a conservative alternative platform) offline. On January 13, 2021 President Trump was impeached by the Democrat-led House of Representatives (with ten Republicans joining) for inciting insurrection.³ But then, on January 20, 2021, on schedule, Trump left Washington, and Joe Biden was sworn in as the new President of the United States.

We are in a moment of hate. It is not a moment simply of political disagreement, it is total distrust and disgust. According to a recent Axios poll, 79% of Americans believe that “America is falling apart” (83% of Republicans and 78% of Democrats).⁴ There is little *discourse*, there is yelling, finger pointing, deafness to opposing viewpoints and facts, and growing righteousness. Writing for *Time* on January 14, 2021, Ian Bremmer surmised: “The Capitol riot was not just years in the making, but decades. That’s because of three distinct features of American society that have been ignored by U.S. politicians for far too long: the enduring legacy of race, the changing nature of capitalism, and the fracturing of our collective media landscape.”⁵ With respect to the media, he stated that “[p]lenty are quick to point their fingers at the tech companies for fracturing our media landscape, but in hindsight the evolution of social media has followed a familiar path—talk radio, cable news and blogs were all once mass media ways of communicating that over time fragmented into more and more niche offerings until consumers could ‘enjoy’ only those viewpoints that reinforced their own.”⁶ He asserts that “the truly disruptive element tech companies have introduced is algorithms—actively designed to capture more ad revenues and attention, often achieved by promoting extremist and misleading content. And it has come at the cost of a healthy and informed citizenry.”⁷ In attempting to explain Twitter’s ban of President Trump, its CEO, Jack Dorsey, said on January 13, 2021:

*I do not celebrate or feel pride in our having to ban @realDonaldTrump from Twitter, or how we got here. After a clear warning we'd take this action, we made a decision with the best information we had based on threats to physical safety both on and off Twitter. Was this correct?

*I believe this was the right decision for Twitter. We faced an extraordinary and untenable circumstance, forcing us to focus all of our actions on public safety. Offline harm as a result of online speech is demonstrably real, and what drives our policy and enforcement above all.

*That said, having to ban an account has real and significant ramifications. While there are clear and obvious exceptions, I feel a ban is a failure of ours ultimately to promote healthy conversation. And a time for us to reflect on our operations and the environment around us.

*Having to take these actions fragment the public conversation. They divide us. They limit the potential for clarification, redemption, and learning. And sets a precedent I feel is dangerous: the power an individual or corporation has over a part of the global public conversation.

*The check and accountability on this power has always been the fact that a service like Twitter is one small part of the larger public conversation happening across the internet. . . .⁸

Returning to Brokaw: How do we get beyond this? How do we share a country with people we vehemently disagree with? Is such sharing desirable? Is healthy communication a necessary prerequisite to being able to share a country without violence? If so, what is healthy communication? If not, what is needed? Does everyone need to be converted? To what? These are the questions that ground my exploration herein. I don't seek to provide an answer to these large questions, they simply guide my thought. In disruptive and unsettling times like the present, a reflexive reach towards unity or consensus seems natural. It seems to be a given desired starting point for figuring out where to go from here. These questions are meant to give pause to that inclination and put that idea also on the table for thought. With these questions in mind, in this paper, I address two overarching themes: How can we get better information for political debate or consideration given the current information environment? And what processes or formats may help facilitate discussion about political topics?

Discourse is “written or spoken communication or debate.”⁹ Typically the goal is framed as *civil* discourse. Such framing points to discourse having a particular style aside from the substance of a conversation or debate. While I think style matters, I find the word *civil* problematic or at least in need of challenge and examination. Communication is “the imparting or exchanging of information or news.”¹⁰ People can have a polite conversation where they talk past one another without meaningfully imparting or exchanging any information; they politely talk and let others talk, but they are not listening, they may even be discounting the speaker’s words or the speaker themselves in their head. This could be considered *civil*, but arguably it’s not discourse. Conversely, people could interact in a way that may seem rude or uncivil (especially in the genteel sense) but walk away digesting new information. That could be discourse that was not *civil*. I don’t believe that civility is unimportant. Rather, I find a focus on civility misleading and sometimes controlling and counterproductive. For this reason, I think of the aim as effective discourse. By this I mean some format or interaction where views are shared in a way that people can feel heard and opposing information has a *chance* to be considered by the parties themselves or by third parties. This framing keeps an eye on both how information is conveyed and how it likely will be received. As I discuss in more detail herein, this does not mean an exchange that results in agreement among the parties themselves. Genuine consideration is not validation or agreement; it is curiosity, an openness to broader understanding.

I participated in a community mediation training program and find a lesson from that training helpful on this point. There was a repeated focus on being open as a facilitator to agreement among the parties but not driven by that goal as a metric of success. It was okay if the parties left without an agreement. Success was defined by whether the mediation process had

opened a space for the participants to hear each other in a way that they were unable to do on their own. *Hearing* (not just being quiet while someone speaks) opens the door to understanding and it also helps align conversation.

Thus, this is a formulation of discourse that focuses not only on the ability to speak to one another, but also the opportunity to be heard and to feel heard (something that need not equate with agreement). People can attempt to improve this type of discourse on their own, or a process can help guide conversations. This project is about the latter because the ability to hear one another has completely broke down and because such a guiding process is one that typically involves skill and training.¹¹ Calls for unity can minimize the complexity of the comprehension divide. This paper is about how the American litigation process provides a useful conflict facilitation and knowledge discovery model for how a political debate-facilitating process could be crafted, one that does not require such unity.

Commenting on Adam Grant's new book *Think Again: The Power of Knowing What You Do Not Know*, Nicholas Kristof states that "[r]esearch suggests that what wins people over is listening, asking questions and appealing to their values, not your own."¹² Grant recommends "'complexifying' issues so they become less binary and more nuanced, enabling someone on the other side to acknowledge areas of ambivalence."¹³ Kristof concludes:

Researchers find that it is easier for people to reach agreement on difficult issues if they have been prepped to see the world as complicated and full of grays. It's a painstaking, frustrating process of building trust, keeping people from becoming defensive, and slowly ushering them to a new place.

All this is tough to do after four traumatic and polarizing years, especially when fundamental moral issues are at stake. But it's precisely because the stakes are immense that we should try to learn from the science of persuasion and emphasize impact over performance.¹⁴

Kristof asks us to “learn from the science of persuasion.” Although it may seem counter intuitive, I argue that litigation process and procedure is a different kind of or approach to the science of persuasion, one that is at least as good, if not better, of a model to learn from as it applies to our present political environment. It is also one that is well suited for practical implementation and experimentation.

As explored in this paper, litigation is a training and practice in how to complexify issues and persuade third parties. And hundreds of years of experience has fine-tuned techniques and strategies for more effective knowledge discovery, challenge, and conveyance. Importantly, litigation generally is able to do this and confront a wide range of competing positions without getting captured or derailed by frivolous or ungrounded arguments or positions. As one example for how information operates differently in the political arena compared to litigation, in the public domain and media Trump’s “stop the steal” campaign raged and spread; in the courts, facing the process and rules of litigation, it quickly hit a brick wall and ended.¹⁵ In short, we are at a point of political information and engagement inflection where there is a break down in discourse and a knowledge landscape that is spiraling out of control. I argue for a different way for thinking about how to approach these issues using a model that already exists.

This paper is organized in three parts. Part I provides background for how I view the political debate arena and challenges in a historical context, and why I think the litigation process is suited to addressing some of the challenges. In Part II, I raise the idea for a project for political discourse based on the example of litigation. To explain why I think this makes sense, I explore the mechanics of litigation and highlight some lessons relevant to political debate as well as areas of difference. Finally, in Part III, I provide an explanation for my proposed project around how a political discourse method could actually be implemented.

BACKGROUND

The American Political Arena.

Drama, Jefferson knew, was one of the prices one paid for democracy.

Jon Meacham, *Thomas Jefferson: The Art of Power*¹⁶

There is the idea of America, and there is American reality. The idea has always been more of an aspiration. Sometimes it's delusion. In the present moment, I find the reality of American history (with all its imperfections) more comforting and inspiring than the exceptionalized version. We are in a dark moment, but we are not in a generally unprecedented moment. Bitter political partisanship leaning to tribalism, slander and untruths, and political shenanigans bringing us to the edge of crisis (or over it) have regularly been part of American politics. Commentators often respond to division (especially hyper-division) by reaching toward theories based on civility and/or consensus and unity. Efforts to champion things like deliberative democracy fall into this category.¹⁷ But America has always been an experiment that is as much about differences as it is about similarities. Relatively peaceful disunity in a very large and diverse country is part of the miracle of America.¹⁸ In this section I briefly explore our historical political stage both to get some bearings that may be helpful for thinking about where we are now¹⁹ and also to raise the idea of looking for experiments that lean into the history of who we are instead of trying to fight against it or gloss over it.

Competing Visions. The election of 1800, ultimately resulting in Thomas Jefferson being sworn in as President, was the first transfer of power between parties, and it was not smooth. During the election, the sitting President, John Adams, “was under assault from all directions,” including from his own party.²⁰ There was a bitter divide between the Federalists and the Republicans over the direction of the country: the Republicans fearing that the Federalists were

sliding back toward aristocracy and monarchy, and the Federalists fearing that the popular democracy of the Republicans would tear the new nation apart.²¹ It appeared that the election could end in a tied vote of electors.²² In thinking about this prospect at the end of 1800, Jefferson stated that the situation had “produced great dismay and gloom on the republican gentlemen here, and equal exultation in the federalists, who openly declare they will prevent an election, and will name a President of the Senate pro tem by what they say would only be a *stretch* of the Constitution.”²³ The election did end in a tie.²⁴

The partisans prepared for battle, political and actual. “Jefferson’s enemies were indeed at work, open to considering any scenario that would keep Jefferson out of power.”²⁵ There was the belief among Federalists that “the government would not survive the course of moral and political experiments to which it would be subjected in the hands of Mr. Jefferson.”²⁶ On the other side of the aisle, “Jefferson partisans considered arming themselves to march on the capital.”²⁷ In Pennsylvania, Governor Thomas McKean “believed in preparing for the worst” and, to this end, “[t]he Pennsylvania militia was to be readied.”²⁸

It took seven days of balloting in the House before Jefferson finally prevailed.²⁹ He “had come into power in 1801 promising to undo all that Federalist monarchal corruption and to restore the true republican spirit of 1776.”³⁰ The election was fraught and contested, the transition environment charged but ultimately resolved without armed conflict, and the outgoing president on his way out of Washington before the inauguration ceremony. Intervening elections have involved varying levels of drama, but the presence of partisan, hyperbolic competing visions for the direction of the country has been a constant.

Of the People and Their Interests. The party visions of the 1800 election represented competing but related views of who the country was aiming to be. The aristocratic views of the

Federalists as compared to the advocacy for expanded popular rule by the Republicans were grounded in beliefs about the *types* of people who were appropriately equipped to rule. Gordon Wood noted that Jefferson believed that “[p]rogress . . . was on the march, and science and enlightenment were everywhere pushing back the forces of ignorance, superstition, and darkness. The people in a liberal democratic society would be capable of solving every problem, if not in his lifetime, then surely in the coming years.”³¹ Many elitist Federalist politicians, on the other hand, found commoners unfit to rule.³² Although the two parties differed about the type of persons who were fit for political rule, the presumption of all of the founders was that politicians should be motivated by the public good, and not private interests, and that a common focus on higher ideals could connect Americans.³³ As Wood highlights, however, quoting Alexis de Tocqueville: “Aristocracy made a chain of all the members of the community, from the peasant to the king; democracy breaks that chain and severs every link of it.”³⁴ “People increasingly felt so disconnected from one another and so self-conscious of their distinct interests that they could not trust anyone different or far removed from themselves to speak for them in government. American loyalist democracy grew out of this pervasive mistrust.”³⁵

Commoner legislators however were aggressively challenging this higher ideal rationale for elite rule arguing that “[t]o expect most people to sacrifice their private interests for the sake of the public good was Utopian. . . Human beings were like that: their ‘engrossing motive was self-interest.’”³⁶ Moreover, they asserted that elites were no different than everyone else in this respect—“[h]owever educated and elevated such gentry might be, they were no more free of the lures and interests of the marketplace than anyone else.”³⁷ As Wood recounts, William Findley, a Scotch-Irish weaver from western Pennsylvania and a “backcountry legislator,” took this one step further.³⁸ Not only were elites also acting in self-interest, but “[t]hey had no right . . . to try

to pass off their support of their personal cause as an act of disinterested virtue.”³⁹ Furthermore, politics motivated by self-interest “was quite legitimate, as long as it was open and aboveboard and not disguised by specious claims of genteel disinterestedness.”⁴⁰ Wood characterizes Findley’s position as “a rationale for competitive democratic politics that has never been bettered.”⁴¹ While the reality of the observation may be sound, it has never sat well with our aspirations towards higher ideals or the image for many of what politics should be about.

Even one of the original populist champions, Jefferson, was unhappy with the people-direction of the country later in his life.⁴² The “[o]rdinary people, in whom Jefferson had placed so much confidence . . . were not becoming more enlightened after all.”⁴³ Wood states:

The founding fathers were unsettled and fearful not because the American Revolution had failed but because it had succeeded, and succeeded only too well. What happened in America in the decades following the Declaration of Independence was after all only an extension of all that the revolutionary leaders had advocated. White males had taken only too seriously that they were free and equal with the right to pursue their happiness. Indeed, the principles of their achievement made possible the eventual strivings of others—black slaves and women—for their own freedom, independence, and prosperity.

...

A new generation of democratic Americans was no longer interested in the revolutionaries’ dream of building a classical republic of elitist virtue out of the inherited materials of the Old World. America, they said, would find its greatness not by emulating the states of classical antiquity. . . . Instead, it would discover its greatness by creating a prosperous free society belonging to obscure people with their workaday concerns and their pecuniary pursuit of happiness—common people with their common interests in making money and getting ahead.⁴⁴

And, in fact, our political history is full of examples of interest politics outweighing ideals when put to the test. For example, in the years leading to the Civil War, “[f]or Northern Democrats, there was a brutal bargain at the heart of party membership: the rewards of party power were tied to preserving slavery. In exchange for the former, they accepted the latter.”⁴⁵ In the debates over universal suffrage after the civil war, women’s suffrage was shelved (leading to a 50 year struggle won by interest politicking, not a triumph of ideals).⁴⁶ The Compromise of 1877 helped

resolve a disputed presidential election at the expense of Reconstruction, setting the stage for the Jim Crow South.⁴⁷ In the 1930s, President Franklin D. Roosevelt strategically was silent during debates over anti-lynching legislation to maintain Southern support for New Deal policies.⁴⁸ With the greater mental and actual freedom allowed when speaking of the past, former Congressman Charles Rangel recently made the following observation related to the 1994 Crime Bill:

There were some of us who had the luxury—not the courage, but the political support—to look at the far-reaching negative impact of the bill. . . . Whether it was Reagan or Clinton, the whole idea was that longer and tougher jail sentences [were] going to, in the long run, be another burden that our community would face at the expense of not having access to education and other social programs. Only people that came from a district that had no national reelection problems had the luxury of voting against this type of legislation.⁴⁹

Such sentiments are rarely acknowledged in real time but are useful as a reminder of the prevalence of competitive self-interest as a guiding political motivation (on all sides) despite the rhetoric of high ideals.

Effected Through Representative, Combative Competition. This aspect of competitive self-interest captures not only the competing personal interests of politicians. In our system, competitive self-interest also is representative. Politicians are leaders, but they also are mirrors and servants of their constituents. In order to be able to represent their constituents, politicians typically must be representative (or the more representative) of their constituents.

In the early days of Washington as the new capital, people “had high hopes” that the “social collisions” of people from all over the country would bridge the interest and sectional divides and “unify the nation.”⁵⁰ That was not the case. The close proximity of the groups did not encourage unity, rather, it made the country’s dispersed divisions plainer by providing a forum for regular and direct confrontation.⁵¹ Heightened tensions from differing visions and

differing interests was not ameliorated by a common place of representation. As Joanne Freeman explains in *The Field of Blood: Violence in Congress and the Road to Civil War*, “[p]arty membership was more than a label; it was a kind of pledge, a statement of loyalty to a political worldview that bound men together in reputation and purpose.”⁵² She states that “[m]anhood and honor were fundamental to this band-of-brothers form of politics, particularly in the public forum of Congress.”⁵³ This situation was exacerbated because “men from different regions had different ideas about manhood, violence, lawfulness, and their larger implications”⁵⁴

As Freeman explains, Congress was comprised of “[f]ighting men, non-combatants, and compromisers” such that, “when congressmen studied pathways of power to chart a legislative course, they knew which men were in which categories and planned accordingly.”⁵⁵ When she refers to “fighting men,” she means yelling as well as physically brawling congressmen. In one instance in 1838 the result was the killing of Jonathan Cilley, a congressman from Maine, by William Graves, a Kentucky congressman.⁵⁶ The dispute had arisen over an honor insult.⁵⁷ What is particularly interesting about this incident for my purpose is not the details of the insult or the particulars of the road from insult to death, but the fact that the two congressmen “had no ill will between them.”⁵⁸ The situation did not come about because of “anger or thirst for revenge;” they were apparently nice enough people.⁵⁹ They were “*pulled* into fighting,” because “[l]ike most congressmen, both men assumed their honor was bound up with the honor of all that they represented: their party, their constituents, even with their section of the Union.”⁶⁰

The most inflammatory topic during these years was slavery. In 1845, in response to an anti-slavery speech by Joshua Giddings, an Ohio congressman, John Dawson, a Louisiana congressman, “vowed that he would kill Giddings and cocked his pistol, bringing four armed Southern Democrats to his side, which prompted four Whigs to position themselves around

Giddings, several of them armed as well.”⁶¹ Freeman highlights that “[s]uch grandstand performances didn’t necessarily change congressional votes. But they might change public opinion, and that could change everything.”⁶² For Freeman this was “performative representation of a powerful kind; congressmen were performing sectional rights on the floor.”⁶³ Freeman’s performative representation formulation recognizes that one aspect of “someone like himself” was behavior, someone who communicates with cultural familiarity and demonstrates a literal willingness to fight for his constituents’ interests. Thus, congressional representation included modelling constituent behavior and social mores, including bullying—even by congressmen *not* considered by their opposing colleagues personally to be bad people.⁶⁴

One moderating factor during this period was the role played by what Freeman refers to as “border-state congressmen.”⁶⁵ She notes that the cultural differences between opposing groups was significant enough that sparring groups literally did not understand each other; they needed “translators.”⁶⁶ These border-state congressmen were “[c]ulturally bilingual” and “less defensive about antislavery rhetoric than their deeper south peers, and likely to be law-and-order Whigs.”⁶⁷ As such they “were perfectly positioned to negotiate fights;” Freeman states that “[i]t’s no accident that the period’s most renowned legislative compromisers were virtually all from border states, nor is it any more accidental that these same men were fight mediators of the first order.”⁶⁸

While these border-state congressmen helped alleviate tensions during this period, coerced attempts at silence had the opposite effect. Because slavery was a hot button topic, it also was a political tool. In the 1830s challenges to slavery, including anti-slavery petitions, were increasingly making their way into Congressional debate.⁶⁹ In 1837, a “group of

Southerners devised a new gag rule.”⁷⁰ Freeman summarizes the rationale for the rule as follows:

It was a strikingly simple solution to a menacing problem: stop the words. Its underlying logic was straightforward, if flawed. If we can stifle antislavery talk in Congress, we can keep its Union-threatening dissonance to a low hum.⁷¹

While the gag rules silenced certain speech, overall, it actually helped to spread the antislavery message. Freeman notes that, “[e]ventually, even the rule’s staunchest supporters saw its failings. Instead of stifling dangerous talk, gag rules inspired it, causing dissension on the floor, drastically increasing the number of antislavery petitions, and rousing the Northern public to demand their rights of representation, petition, and free speech, and to elect congressmen who shared their convictions.”⁷² She states that “two of the five most violent Congresses between 1827 and 1861 met during the [nine years of the] gag rule debate.”⁷³

Finally, the performative aspect of competitive representation was exacerbated by technology. The introduction of the telegraph “drastically reduce[ed] the news lag around the nation, and congressmen had to grapple with the impact.”⁷⁴ They had “less time and power to tame their words,” and “it was difficult if not impossible to speak to different audiences with different voices.”⁷⁵ Freeman notes that “[b]y networking the nation during a rising sectional crisis, the telegraph complicated national politics.”⁷⁶

Freeman’s book does an excellent job of showing the feedback loop between constituents and representatives and the complications that this can cause in times of heightened tensions. It is not enough to look to politicians or partisan elites to calm raging competitive political fires. Such fires are a sign of deep divisions in the people bubbling upward. While this presently may be concerning (or even alarming), I find this history hopeful because, however messy it has been, whatever its flaws, somehow we have made it through dramatic inflection points and are still

here, so much the same but also more evolved towards our ideals. With these brief historical political arena bearing points, I turn to my background and how that frames my inspiration and approach to this project.

Choosing Sides and Standing in the In Between.

I am litigator. I have taken sides and gone all in advocating for a position in adversarial proceedings. I also spent three years (on two different occasions) as a federal judicial clerk in the legal space between sides. Leaning more into developing skills for the space between conflict, I trained to be a facilitative community mediator. These experiences have taught me the value of aggressive partisan advocacy as well as the value of engaged detachment. Engaged detachment is a central concept for my project. Efforts to stand in a space between parties to a conflict may be thought of pejoratively as disengaged or seeking compromise or a middling position. Today, this is often even characterized as complicity, a silence that aids harm. There are calls to pick a side, to stand vocally on one side or the other. I reject this framing as desirable for everyone. There may be people who abstain from taking any position but standing in the in between can also represent an active and valuable contribution to discourse, as I further explore in this paper. Judges and mediators (and Freeman's border congressman) are active participants. They are more detached from position however so that they can be engaged as a bridge and/or a facilitator in a space of greater knowledge exploration and sharing.

Prior to this program, I had begun to more deeply think about the concept of nonjudgment as *engaged* detachment. This period coincided with the Trump campaign and beginning of his presidency. As partisan rhetoric increased and fact checking and truth became daily debated, I continued to be drawn to the idea of processing political news and issues with a

litigator mindset in a process akin to litigation procedure. As odd as it may seem, a litigation model seems to me a natural complement to the challenges we are facing because it allows for partisan and interest advocacy while also creating a space of mediation between parties through the employment of a structured process and the involvement of engaged but detached actors. As I explore in detail in Part II, there is a built-in division of labor in litigation that does a lot of work. It does work through a division of knowledge search functions, and it also does work by combining engaged and issue attached actors (advocates) with engaged and issue detached actors (judges and juries).

My views on this project also have been impacted by my recent experience running a rural grocery store in a small, very politically split town while also participating in this program. It was an experience that put me at the crossroads of some of the worst aspects of the present political climate, and I ultimately closed the store partially out of concern for my physical safety. This experience reinforced for me that our emotionally charged political situation is impacting not only politics but also daily life for many people. It is one thing to watch events on television or even to watch protests or riots combust, it is another to watch average people in a no-special-where place with nothing extra special going on becoming more angry and hateful and recognizing that such animosity and societal breakdown could boil over.

Hannah Arendt stated in 1972 at a conference hosted by the Rockefeller foundation:

Values are personal, like spirit. They cannot be manipulated or engineered. I think it would be a great mistake for a foundation to believe that it can solve the basic problems of the era; no single one of us can do that. But there is something else that one can do, and what a foundation like this could do, and that is to prepare an atmosphere in which things are being talked about. . . . What Socrates apparently believed—I'm not so sure Plato believed in it—was talking about justice makes a man more just. And in talking about courage—even if you don't find any nice definition of what courage is—you may inspire men at a given moment to be courageous. So we create an atmosphere in which we may have a chance, at least, to meet the problems and understand them as they come along.⁷⁷

After my experience with the store, reading this re-centered me and reminded me of what I had aimed to do with this project. I want to use my experience and some creativity to advocate for a different way of looking at and talking about political problems. I don't think it needs to be able to solve the problems. I think it is worthwhile to work toward something that tries to improve the situation, even if incrementally. I don't think it matters that an experiment or effort is popular or would be attractive to a lot of people (things right now that generate high ratings, or many thumbs up or get many views are often things I find corrosive). Instead, I think we are all America. I think the challenge of the moment is not what grand things any one person or group can do, but what part each of us can play in reaching toward the country that we hope to be.

The Function of Litigation.

There is a fine line between a very diverse group of people who mostly peacefully coexist (even with rancor) and the violence or real threat of violence of the Hatfields and McCoys. (I feel like I have been living in the latter.) Litigation, particularly civil litigation, was designed to be an alternative dispute mechanism to violence, an aid to an orderly society. Almost by definition, if individual people are engaged in litigation, they are pretty mad and/or feeling wronged and are seeking a solution to a problem that they cannot solve among themselves. Litigation is time consuming, expensive, stressful, imperfect, and often raises tensions before it resolves issues. While defendants are dragged into court, plaintiffs (those who file lawsuits) choose it. And they often choose it thinking they will be victorious because they are totally right. Defendants often indignantly engage in a defense under duress (versus quickly settling) convinced they will be vindicated because their actions were justified and the demands of the plaintiffs are unreasonable.

When a client seeks counsel and begins to tell their story demanding that something be done, attorneys often think to themselves (sometimes out loud), what isn't being told, what shoe will drop during litigation that will complicate this story because shoes almost always drop (on each side). Information harmful to an argument does not only come out because people are hiding things or lying. More often, information that doesn't fit a narrative is unconsciously suppressed or manipulated or seems unimportant from a particular perspective. Additionally, many times the motivating factor of the anger—the issue that really needs to be addressed to resolve the dispute, is not what is being nominally argued about in the litigation; the legal claims are a proxy. (This is true of many personal disputes.) The litigation process, however, is designed to uncover information, test the veracity and completeness of facts, and to provide an ordered structure for the challenging of arguments and truth assertions that gives equal opportunity for each side to be heard. For this reason, the stories both sides start off with rarely remain wholly intact throughout the process. A side may still have a more persuasive position, but it's rarely as strong and one sided as each party believes at the outset. This occurs not because sides work toward finding common ground. It is a partisan process; no one is required or encouraged to be objective. On the contrary, the task is for each side to put on their best case that is supported by evidence. The parties are the authors of the arguments; the court is more like a referee, with the jury as the judge of the facts⁷⁸ and the story based on those facts.

Litigation is a procedure for Americans as they are; it both accepts reality and calls us to something higher. Generally, Americans like sugar coatings. It's a mindset of Grape Dimetapp or gummy vitamins; medicine goes down better when delivered in a sweet tasting vehicle. But there is no nice coating to litigation; it's a process for how to battle through our lesser and/or more self-interested selves to solve real problems that we are unable to solve among ourselves.

Maybe that is part of the reason why it gets such a bad rap. While I understand its flaws, I think its underlying practical genius is underrated.

To that point, before turning to an exploration of the mechanics of the litigation process, I turn back to history. In the early 1770s, John Adams represented British soldiers on trial for the murder of several colonists.⁷⁹ Dan Abrams and David Fisher explored the trial in a book released last year, *John Adams Under Fire: The Founding Father's Fight for Justice in the Boston Massacre Murder Trial*. In an interview with *History.com* about the book, Abrams was asked why Adams had risked so much to take the case. He responded:

The main reason was that he felt everyone was entitled to a defense. But I also think he learned a little about the case and thought there was a legitimate defense—because the events were not as clear cut as some patriots wanted to make them out to be.⁸⁰

In answering how Adams balanced the needs of his British clients with the passions of his fellow patriots, Abrams highlighted Adams' focus on the issues. He stated:

[T]he thing that Adams did in this case that some [defense attorneys today] don't was to defend them in a way that wasn't scorched earth. Adams didn't blame the city for initiating the skirmish. He kept it very, very focused on the facts of this particular instance—what happened, who was there, the specific individuals—and did not make it a broader indictment of the Sons of Liberty and others who had supported violence against the British soldiers.⁸¹

In explaining the impact of the trial on the future American legal system, Abrams said:

I think part of the reason certain aspects of this case became enshrined was because this case was viewed in such a positive light historically. At the time, colonists were frustrated at the result, but I think they realized the trial had been fair. And if you can have a case with this much emotion and passion and get a mixed verdict, which was generally unsatisfying to the colonists—and yet have it accepted—that is the kind of case that serves as effective precedent.⁸²

Abrams was then asked why he thought the verdicts were accepted without violence. He said:

The Boston Massacre certainly could have led to the revolution six years earlier, but it didn't because people accepted a very controversial verdict. As we talk about in the book, part of the reason the trial transcript was so important was so

anyone who wasn't in court could still review what the witnesses said. It wasn't just British soldiers haphazardly firing on colonists.⁸³

A POLITICAL DISCOURSE PROJECT: THE LITIGATION MODEL

Our political discourse isn't presently working; it's a mess. It is such a mess that an increasing number of people are turning to violence; it is not just threatening our political institutions, it is disrupting families and friends; it is disrupting our social fabric. I believe that a large part of this breakdown is not just that the discourse is hyper-partisan, it is that it's almost all partisan, with elevated rhetoric and few, if any, credible mediating influences (credible to the opposing sides). The equivalent of Freeman's border congresspeople who can translate and mediate between different constituencies is missing in action in mainstream media as people must pick a side and go all in and their lives and beliefs are so very far apart. The situation is further exacerbated by changing technology that makes information spread very fast, allows that information to be "validated" by many questionable sources making it seem legitimate, and allows for the brutal shaming and silencing of anyone trying to temper the tides (including often any statement deemed the least critical of your own side—this can generate actual death threats). In this environment, righteousness, not rightness, drowns out almost everything else.

People talk of bridges, and I think that is a useful metaphor. Where the span between the two ends is narrow, no or little in between support is needed. As the gap to be spanned widens, however, support is needed—the greater the distance, the more footings and the stronger they need to be to bridge a divide. There may be many options for footings, I argue in Part III that creation of a group that filters and organizes and tests political information using a method inspired by litigation is one such potential. For reasons that I explore in this Part, I think lessons from litigation are especially suited for our time because they lean into some of the biggest present discourse challenges: hyper-partisanship, a need for the skill of expert fact filtering and checking in a vast sea of information, a need for knowledge humility, and an understanding of

the importance of procedural equality (both-side-ism isn't a bad word) and credibility (not just of information but of source). And, a process based on a litigation model is one that can practically be tried, not simply theoretically pondered.

Using litigation as a model for political discourse however is not obvious. I think this is partially because litigation is at once familiar and foreign. Familiar because so much entertainment is legal and courtroom based, litigation and attorneys are often in the news, and some aspect of law affects most people's lives at some point. It seems like something that most people know something about. But these views are partial, sometimes inaccurate, and often capture the negative or more dramatic aspects while obscuring the positive and actual functionality. What works about litigation is often not highlighted. In this respect the litigation process is foreign. Thus, before I turn to the specifics of my proposal, I explore the mechanics of the litigation process to provide grounding for why I think it is useful as a model for political debate.

Because the details of the topic are not familiar and because I seek to highlight points that may be counter-intuitive, this section is long. But it is extraordinarily short compared to the scope of litigation procedure, a subject of complicated rules and exceptions to those rules. Thus, this explanation is not meant to be comprehensive, it is an effort to raise points for thought. I focus on federal courts, and there are exceptions to almost everything discussed; it is beyond the scope of this paper to make note of them.

There are four objectives of this section. First, I explain how litigation works to put ideas on the table for thought. Second, I seek to raise these points of thought as high-level concepts that may be more generally used to improve critical thinking about and engagement with information, and particularly partisan political information. Third, I seek to complicate the idea

that information is easy to sift through, evaluate, and persuasively convey (especially to opposing viewpoints). This aspect recognizes that, while there may be techniques of information evaluation that anyone can use in their everyday life, there are skill and resource aspects to knowledge discovery, testing, and conveyance that favors the involvement of institutional or mediating bodies to do much of the analysis work. I explore why I think that a litigation mindset and model are particularly well-suited to this task in our present political environment. Fourth, institutions or mediating information sources can take many different approaches. Typically, they either are partisan, or they seek to be “objective” or “balanced” or “nonpartisan.” Litigation is a process that has aspects of both, and I aim to highlight the value of this approach.

Overview of the Litigation Process.

Litigation is not law, or rather not only law. Litigation is a part of legal practice that involves disputes; it is a mediated debate of partisans that is hyper focused on facts and the stories that they can reasonably tell within a framework of issues and legal rules. It is a search for some truth through a very critical and challenged lens that occurs in a highly structured environment of procedures and evidential rules. There are often emotional and dogmatic partisans, mounds and mounds of evidence in a variety of forms, and competing views of the facts, the issues, and what is right or should be done. There are areas of expertise and areas of lay (or common) judgment. In this section, I give an overview of this process.

There are six primary steps in litigation, and they all address the collection and testing of facts as compared to claims in some way.

First, a person or entity files a lawsuit (the plaintiff).⁸⁴ To do so, they must file a document listing the defendants and the legal claims they are asserting and a brief statement of the facts supporting the claims.⁸⁵

Second, the defendants respond. They can do so by filing a Motion to Dismiss the claims or they can file an Answer.⁸⁶ Motions to dismiss are common and can be brought for many reasons,⁸⁷ but one thing that generally cannot be challenged at this stage are the plaintiff's facts; they are assumed to be true.⁸⁸ The question at this stage is whether there is a facial legal deficiency in a plaintiff's demand. Some of the more common challenges that occur in this type of motion are that the lawsuit has been raised in an incorrect court, that it has incorrect defendants, or that it is too late or too early, or, very commonly, that it fails to state a claim. Failing to state a claim means that, even if the court believes that the plaintiff's facts are all true, the assumed true facts don't support the legal claim asserted. In common language: I hear what you're saying, but it just doesn't legally add up the way you think. If a case gets dismissed at this stage, depending on the reason, plaintiffs are often given a chance to try to fix the error.⁸⁹ If another chance is not permitted or fails, the case ends here—an assumption of true facts does not always equal a valid broader claim. Assuming that the case survives a motion to dismiss, the defendants will answer, and they may assert counterclaims. This is a common stage where some cases settle. The next stage is one of the most time consuming and expensive, so both parties need to be committed enough to their positions and believe they have something more to gain than the process will cost (in money, reputation, energy, unwanted information sharing).

Third, once a case passes the basic legal hurdle, it turns to discovery.⁹⁰ This is discovery of facts. Literally, attorneys dig for information and investigate on their own according to a plan set through the court. Discovery is *expansive*. Among other things, it can include long lists of documents that must be turned over by each side, written answers to questions by each side, expert reports, and depositions. Depositions typically are an examination (questioning) under oath of a live witness by opposing counsel.⁹¹ Like discovery generally, depositions are

expansive, limited primarily by the time allotted. Unlike the questioning of factual evidence at trial, which is limited by many rules, a witness must answer most questions in a deposition.⁹² Although attorneys are trying to challenge facts at every opportunity and there may be some gotcha attempts in a deposition, the primary aims of questioning at this stage are to make sure that you are not missing information you need to know and to box witnesses in on their testimony. Boxing in means that enough questions are asked about a particular (important) fact that it will be difficult for the witness to change their story at trial without looking like they are lying. Good boxing in can often matter more than whether the fact at issue is good or bad for a side. It means you can be prepared for the story the other side will tell at trial, and they deviate at their own risk. A deposition can be very short (a few questions) or it can be extensive, although, even in big cases, most depositions don't extend beyond one day. And a deposition is all questions. The deposing attorney is not debating the witness; an attorney is sitting in a room simply asking a mixture of open-ended and specific questions one after the other. Attorneys can literally spend years deeply probing fact questions on any given case. This can result in tens of thousands or even millions of pages of potential evidence to be used. Attorneys sift through all the raw factual data to build support for their claims or their defenses.⁹³ They craft a story, and as more evidence is uncovered (favorable and unfavorable), the stories on each side get tweaked.

Fourth, after discovery has ended according to the deadlines set by the court, one or both parties may file a Motion for Summary Judgment.⁹⁴ Like a Motion to Dismiss, this is a motion to end some or all of the claims. At this stage, however, a party seeking to dismiss one or all claims aims to show that there are no disputed facts that are material to the claim(s) being challenged in the motion. A party making this motion must cite to evidence obtained in discovery to support its arguments, and, at this stage, the evidence cited needs to be meet the

rules to be admissible at trial.⁹⁵ All information collected in discovery may not be used at this stage or at trial (as discussed in more detail in the next section). To defend against this type of motion, the opposing party will cite to evidence showing that there is a *genuine dispute over material fact(s)*.⁹⁶ If the motion fails and the case moves forward, this is a common stage where cases settle because this means that no side is clearly “right;” a reasonable jury could potentially find either way depending on which alleged facts and story they find more persuasive.

Fifth, at this point a trial schedule will be set, and there often will be pretrial motions. These motions typically focus on trying to exclude certain factual or expert evidence at trial or constrain how it can be used.⁹⁷

Sixth is the trial. A trial is almost all about facts, facts as presented primarily through live witness testimony that is subject to direct examination (questioning) by the side calling the witness and cross examination by the side opposing the witness. Different rules of questioning apply depending on whether examination is direct or cross; there is generally more leeway on cross.⁹⁸ The fact finder is either the jury or a judge (called a bench trial).⁹⁹ If a jury is demanded, the jury determines which facts to believe and makes a decision in the case. Because trials can go either way, no matter how strong one side thinks their facts and arguments are, cases do settle during trial or while waiting for a verdict. Although clients may regularly discuss their case with their attorneys, there is a reality of watching facts unfold and being challenged at trial that can have a different impact than discussing your own case with your own attorney even when your attorney is harshly prepping you for trial. Particularly with individuals (as opposed to corporations), people often think their cases are stronger and clearer than they turn out to be when well challenged.

Lessons from Litigation Relevant to Political Debate.

As referenced by Abrams in discussing the pre-revolutionary Boston Massacre trial, the American legal system is a continuation of pre-American legal traditions; it was not formed out of whole cloth. It is a system that has a long pedigree of experience but also built-in mechanisms of adaptation. This adaptability applies not only to the laws themselves but also to the rules and procedures governing proceedings. In 1935, the Supreme Court “established a rules advisory committee . . . to help draft the Federal Rules of Civil Procedure.”¹⁰⁰ As noted in an explanation on the United States Court system website, “[t]oday, Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, Criminal Procedure, and the Rules of Evidence carry on a *continuous study* of the rules and recommend changes to the Judicial Conference through a Standing Committee on Rules of Practice and Procedure.”¹⁰¹ These committees include a variety of law professionals: “federal judges, [and] also practicing lawyers, law professors, state chief justices, and high-level officials from the Department of Justice and federal public defender organizations.”¹⁰² In this sense of continuous evaluation and adaption by those with experience using litigation tools, litigation is both a practical process of dispute resolution and a laboratory. In this section, I highlight some lessons about knowledge discovery, testing, and conveyance that can be gleaned through the understanding of litigation practice as encapsulated in its rules and procedures, and I point to these lessons’ applicability for political discourse. In Part III, I explain how these practices could be adapted for analysis and debate of political topics.

Fact Checking is Not Easy. There is a crisis over facts and truth right now. There are statements about clear facts, questions about truth, and angst about how our democracy can survive in a post-fact or alternative fact world where the truth is not accepted. There is no in

between here; regardless of topic (and regardless of side), the line of argument often proceeds directly from asserted facts to claims of a broader truth. Thus, those who watch or read news and commentary from only one side are presented with very different pictures of the facts and what those facts mean, and increasingly believe that the other side is lying to suit their own agenda. Recognition of statements or positions as opinions or arguments and acknowledgment of reasonable differences of opinion are becoming rare.

In the public arena, identifying whether a statement is a fact or an argument or opinion matters for at least two reasons. The first is a question of power. Generally, “[f]acts are beyond agreement and consent, and all talk about them—all exchanges of opinion based on correct information—will contribute nothing to their establishment.”¹⁰³ In other words, true facts are coercive—they command acknowledgement and as such most people consider them off the table for debate. So, if the true facts are on your side, then it could be argued that you are right, and others should agree, or they are unreasonable and wrong. From this idea of right or wrong fact statements has sprung a focus on fact checking (and fact checkers checking fact checkers).¹⁰⁴ There is a wide-spread idea that facts are easily identified things that *objectively* can be checked for accuracy and verified once and for all. Such fact verifications or not can then be used affirmatively to command agreement or mark for derision the non-agreers. This is not to imply that there are not true facts. Rather, it is to recognize the importance of designations for discourse.

The second reason the distinction between fact and argument is important is because, as noted above, true facts are gateways to broader truth claims. By this I mean that true fact statements often morph into truth claims in everyday use, skipping the possible in between. John Dewey recognized this tendency:

If one wishes to realize the distance which may lie between “facts” and the meaning of facts, let one go to the field of social discussion. Many persons seem to suppose that facts carry their meaning along with themselves on their face. Accumulate enough of them, and their interpretation stares out at you.¹⁰⁵

In other words, there seems to be a belief in a sort of math of facts. As pointed to by Dewey, there are two aspects of this: an automatic adding up of facts to discern a meaning, and the thought that that meaning is an answer. He alludes however to something lying between facts and the adding up to meaning even though people generally don't recognize this distance. In everyday terms, this distance is bridged by inference. You come home and see cat treats spread on the floor and the cat has no interest in dinner, and you think that the cat has knocked down the treats and eaten them.¹⁰⁶ That is an educated *guess*, and it may be a good one, and it may be the correct one, but it need not be. Maybe unbeknownst to you, your three-year-old has been messing around with things on the counter, likes the cat treats, and separately gives the cat lunch meat, which you find out later from your partner (who forgot to go back and pick up the spilled treats). Or maybe there is no definitive way to tell what happened, there is only a more or less persuasive story bridging the distance. We couldn't get through life if we had to question everything in detail, and so we don't, and a lot of the time it doesn't matter. We make meaning guesses so often that are unchallenged that, as Dewey notes, in social discussion we often fail to recognize the distance between individual facts and the meaning we ascribe to them; they just add up to an answer.¹⁰⁷ We lose the ability to recognize true factual matter as opposed to interpretations based on facts; asserted true facts seamlessly morph into a believed broader true meaning.

Because uncovering and verifying facts is foundational to litigation and many litigation rules expressly treat facts, opinions, and arguments differently, litigators are experts in making these distinctions. Litigators directly confront Dewey's distance and challenge the dots

connecting individual facts and meaning. They do so according to detailed and specific rules that have been crafted from experience. In this section, I explore some insights around facts and fact checking that the litigation process illuminates. First, often when we use the term fact in everyday discourse, we are really talking about arguments. This distinction makes an important mindset difference because, as noted above, one implies something beyond debate, and the other implies something up for discussion. Second, thorough fact checking that allows a fact to be wielded like a sword, requires more time, energy, and skill than is applied in most public debate. And third, the litigation system is a fact identification and checking system extraordinaire that was developed through practical experience over a very long period of time.

In litigation, the presentation of different types of information (facts, opinion, and argument) is governed by the Federal Rules of Evidence (“Rules” or “FRE”).

FRE 102 states the purpose of the Rules as follows:

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.¹⁰⁸

Litigation, thus, is a structured truth and justice seeking process that must balance these functions with the practical necessity of resolution as opposed to continuous debate. It is a system that attempts to find the best truth available in a given contested situation in a manner that holds legitimacy for the parties, even for the party who does not prevail.¹⁰⁹

Cases begin with broad claims—for example, “you breached our contract” (you didn’t do what we agreed), but those claims are argued about, supported, and established (or not) from the *bottom up*—facts, to arguments, to claims. *Arguments* connect the dots between singular facts and the meaning of those facts in relation to the claim being made. There are arguments about whether a fact is true or not based on supporting evidence, what a fact means when combined

with other facts, which facts matter and which facts don't, and whether combined facts establish the broader claim.

Arguments *must* be supported by admissible factual material. At a minimum, to be admitted as evidence, facts must be relevant to the issue being addressed and they must have a foundation that meet the requirements of the evidence rules.¹¹⁰ In simple terms, a foundation for a fact asks how the fact is known; it is the context of the knowledge of the fact. For example, let's say there is a cup on a table. It is not enough for a worker, Blake, to testify that the cup in question is Sally's cup, they must explain how they know that. Rule 602 provides that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."¹¹¹ For example, Blake may testify that they know it is Sally's cup because they gave Sally the cup. On the other hand, evidence that is not first-hand is excluded unless certain exceptions apply.¹¹² So, unless an exception applied, a different co-worker, Ryan, could not testify that it was Sally's cup based on information told to them by someone else. These rules address two issues: 1) first-hand evidence is considered more reliable¹¹³; and 2) second-hand information cannot be challenged in the same way as first-hand information (Ryan simply cannot answer the same questions as Blake, which may block relevant information from being uncovered).

The distinction between facts and arguments matters not only for application of the evidence rules in the presentation of facts, but it also matters because of the defined roles of trial actors. As previously noted, there is a division of labor in litigation. The presentation of evidence by witnesses is for fact or expert opinion information. Attorneys examine witnesses to present and challenge factual matter. In other words, attorneys may elicit factual information through the questioning of witnesses, but they may not directly present facts. With respect to

witnesses, non-expert witnesses are limited in their ability to offer opinions; they generally must stick to the facts. Rules 701 and 702 address opinion evidence. Rule 701 provides:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.¹¹⁴

Notes of the Rules Advisory Committee to Rule 701 state that non-expert “[w]itnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion.”¹¹⁵

In other words, litigation experience has shown that people have a hard time talking in *facts*; what they call facts are often something more. Rule 702 provides that experts (who meet certain requirements) may testify in the form of opinion.

In addition to examining witnesses, attorneys make arguments to the judge and jury. Juries are the fact finders—they make the factual determinations, and they decide which claim(s) as presented by the attorneys is more persuasive based on the evidence. Judges manage a trial and resolve legal arguments, and, in the case of a bench trial,¹¹⁶ act as the jury. Because of this division of labor, determining the character of a statement (as fact, opinion, or argument) is important as each type of trial actor is constrained in the use of certain types of information.

This process of distilling the facts from opinions or arguments starts with “fact statements” being broken down by litigators into constituent parts. Another way of saying this is that attorneys are disaggregating information into basic factual building blocks, what I’ll call micro-facts. Imagine you are given a LEGO construction. A person could look at it and call it a dinosaur because that is what the completed object appears to them to be. Someone else could see a bird. And then someone takes away the construction, begins disassembling it, and comes back with chunks. One person may look at a chunk and see a tail, another may see a sword. If

you take the entire object apart you end up with a bunch of colored pieces that looks like a bunch of colored pieces. That's similar to a micro-fact. At this point a litigator will pick up a piece and test it to see if it is what it appears to be.

Returning to Sally's cup to see how this fact/argument separation process applies to a more everyday topic, let's imagine a conversation between two of Sally's co-workers. Blake asks Ryan how they think Sally has been doing in a new role. Ryan responds that they have concerns that Sally is not sufficiently conscientious. When asked why, Ryan points to an instance recently when Sally left a confidential client document on a table in a public space. Afterwards, Blake confronts Sally and asks her about it, and Sally denies leaving the document there. Confused, Blake goes back to Ryan and asks if they saw Sally leave the document there? Ryan responds: "No, but Sally's personal coffee cup was left by the document." First, we need to separate the arguments from the asserted factual matter. "Sally is not a conscientious worker" is the claim Ryan is making, and that claim is based on two *arguments*. The first is that, if a person leaves a confidential client document in a public space, they are not a conscientious worker. This is not a fact-based argument; it is grounded in values or rules. The second is that we know that Sally left a confidential document in a public space because her cup was found next to the document. This is argument for a certain interpretation of alleged smaller facts. Because the first argument is not fact-based, even if the second fact-based argument is true, Ryan's ultimate claim depends on something other than just facts. Thus, when we fail to explore the distance and identify the type of statement components underlying positions, value determinations can become hidden, and it can seem like all we need to make a claim clear is fact checking. Litigation training challenges this tendency.

In this scenario however the supposed “facts” also are contested. Without trying to be exhaustive, litigators would disaggregate the broader “fact” statement by asking things like: How do you know the cup was Sally’s; even if it was her cup, how do you know she left it there; how do you know the cup and document were left by the same person; how do you know the document wasn’t left with another appropriate person in the room; and so on until they identified many more micro-facts. If the litigator was supporting Sally, they would then put them back together arguing for a (supportable) interpretation of what happened challenging Ryan’s accusation.

While basic (if not complete) follow ups like the one by Blake above could occur in normal conversation, another possibility in real life is that Blake, without even realizing it, fills in their own dots. Instead of asking Ryan whether they saw Sally leave the document in the room, Blake assumes that is what Ryan meant. At that point, Blake may jump to the conclusion that either Sally or Ryan is lying. Maybe this even makes sense to Blake because Sally and Ryan do not really get along. If Blake relays the story to someone else to get advice about what to do, the story may now be: Ryan says Sally left a confidential document in a public space, but Sally denies doing it, what should I do? And from here, there are so many ways this can go further off course when maybe no one was lying. No matter how messy a story gets, a litigator’s job is to unwind it and take a hard look at the pieces through questioning, and then to evaluate the new more complete or verified information and make an argument as to the meaning to be derived from the facts.

So, what does this breaking down process look like in real litigation? Below is an excerpt from a deposition I took in preparation for a valuation trial. The person being deposed was a

Chief Financial Officer of a company, and I was trying to understand the meaning of items on a spreadsheet in a billion-dollar case.

Q: Can you tell me what MAA SUBLGR2ADV means?

A: That is not on this piece of paper, or can you guide me to where it is?

Q: In the GL accounts, it's the 70060, it's on that page.

A: This page?

Q: Yes.

A: 70060?

Q: Yes, it says MAA space SUBLGR2ADV. Can you describe what that means?

A: [gives explanation]¹¹⁷

This deposition lasted about 7 hours and resulted in 317 pages of pre-trial testimony for this witness all in the format like the above excerpt.¹¹⁸

A more entertaining example is found in the movie *My Cousin Vinny*. In 2019, Justice Merrick Garland, writing for the United States Court of Appeals for the District of Columbia in the case *Novato Healthcare Center v. National Labor Relations Board*, began the opinion with reference to the movie: "In 1992, Vincent Gambini taught a master class in cross-examination. Trial counsel for the National Labor Relations Board and the National Union of Healthcare Workers apparently paid attention."¹¹⁹ Justice Garland was referencing questioning in the movie about the witness's breakfast which was used to challenge the timing of an alleged identification. As Justice Garland notes, "[o]n direct examination, [the witness] testified that he was sure only five minutes had passed [a key timing fact] because he saw [the defendant] go into the store as he started making breakfast, and the shot rang out just as his breakfast was ready to eat."¹²⁰ By the end of cross-examination, however, Judge Garland states "it was clear that [the witness] could not have cooked his breakfast of eggs and grits in just five minutes."¹²¹ Justice Garland includes the questioning in the opinion. It goes as follows:

Q: Well, how much time was they in the store?

A. Five Minutes.

Q. Five minutes? Are you sure, did you look at your watch?

A. No.

Q. Oh, Oh, I'm sorry, you testified earlier that the boys went into the store, and you had just begun to make breakfast, you were ready to eat, and you heard a gunshot So obviously it takes you five minutes to make breakfast.

A. That's right

Q. Do you remember what you had?

A. Eggs and grits.

Q. Eggs and grits. I like grits, too. How do you cook your grits? You like 'em regular, creamy or al dente?

A. Just regular, I guess.

Q. Regular. Instant grits?

A. No self-respecting Southerner uses instant grits. I take pride in my grits.

Q. So, Mr. Tipton, how could it take you five minutes to cook your grits, when it takes the entire grit-eating world 20 minutes? . . . Perhaps the laws of physics cease to exist on your stove? Were these magic grits?

. . . .

Q. Are you sure about that five minutes?

A. I may have been mistaken.¹²²

This basic questioning undermined the timing testimony. The other notable aspect of this exchange (aside from the granular level) is that, even though questions were raised about the accuracy of the identification, no one was trying to lie. Without the adversarial digging and challenging, however, a crucial bit of information would not have come to light.

The above examples represent the tedious level at which fact “checking” in a court room operates. Singular facts, even if separately checked and verified, rarely say much by themselves about the ultimate question being challenged. Instead, micro-facts are separately identified and challenged, and then collected together and given meaning through competing *interpretations* and *arguments* by attorneys. In short, litigators weave micro-facts into stories that they argue as claims; there is rarely a clear math of facts in the sense of an unchallengeable answer that stares clearly out for contested issues.

This may seem like framing that is only applicable for legal disputes since it occurs in the specialized setting of courts, but it is not. The rules of evidence and trial practice were not developed simply as specialized tools of a specialized occupation. The opposite is true. In order

to resolve real disputes between people who had competing views of the facts and competing stories about those facts, the judicial system over time developed rules to determine more systematically the hallmarks of facts that were most likely true. Litigation is a dispute resolution system. As discussed below,¹²³ the topics handled by courts are not limited because this system can only address certain types of disputes. Subject matter is limited by design, including for purposes of the separation of powers.¹²⁴ If a topic can be debated, it could be debated and tested using a litigation structure. For example, in the Prempro litigation over hormone replacement therapy, a question at issue was what causes cancer.¹²⁵ In short, the litigation fact checking process may be used in a special setting, but it is a process grounded in dispute resolution and fact checking practice and, as such, it can be more broadly applied.

The difference between normal conversation and litigation is not how claims and arguments are constructed or originally supported, but, as Dewey highlighted, that in ordinary conversation, facts and arguments can become conflated and underlying facts are invisible or can fade to where the debate is happening at the level of an *argument* but framed and believed to be fact—a true fact that feels solid. In a trial, because of the division of labor, such conflation and fading are policed by adverse parties.

This policing is not easy because it's not always easy to identify the line between fact and argument. The commentary notes to Rule 701 acknowledge that “a century of litigation” makes clear “the practical impossibility of determining by rule what is a ‘fact.’”¹²⁶ For this reason and, as noted above, the Rules are subject to updating or amendment; they are not rigid or set-in stone. Thus, even for people who spend all day identifying and checking facts, it is a sufficiently difficult process that the Rules are not only complex, but they are periodically updated, including revisions to make them more consistent and easier to apply.

Litigation also shows that fact checking is not easy even when it is clear that you are dealing with facts. As noted in the litigation overview, there is a trial only where there are genuine issues of material fact *after* extensive discovery and argument by the parties. Thus, if there are no contested facts or contested arguments about what the facts mean, there is *no* trial; trials resolve disputes where the underlying facts and their meaning are contested. If determining true facts and the meaning of those facts was as easy (both in skill and time and resources needed) as many seem to assume, there would be fewer lawyers and drastically reduced litigation.

A lesson that is not meant here is that people in everyday life should act more like litigators. As the questioning excerpts show, this level of fact challenging is beyond normal conversation. The point is to understand that comprehensive fact challenging or checking likely is not taking place in everyday life, and, as a result, a lot of information in the public domain may not be as strong as we believe it is. It's a nod in favor of approaching "fact" claims with more humility.¹²⁷

True Facts Can Be Misleading. Just as true individual facts do not automatically equate to true arguments or claims, true facts can do the opposite. They can be misleading (intentionally or accidentally). There are several evidence rules that together are meant to make sure that information necessary for deciding an issue is permitted in a way that is not misleading; all true facts are not admissible. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and b) the fact is of consequence in determining the action."¹²⁸ Relevancy is usually broadly construed. But, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay,

wasting time, or needlessly presenting cumulative evidence.”¹²⁹ This means that facts may have a potential truth value that is low compared to a distorting emotional valence or confusion potential.¹³⁰ A common example in criminal trials is that a person’s past convictions are often not admissible.¹³¹ Although the prior convictions are true, unless an exception applies, they are viewed as too prejudicial.

Returning again to Sally, let’s say that Sally’s position is that her cup had been taken from the kitchen a week before the incident in question. Evidence that the cup at some point had been in Sally’s possession is relevant, but excessive repeating of this fact may confuse the issue by overemphasizing Sally’s prior connection to the cup when what is more relevant is who had the cup that day. A court could choose to allow a few examples of Sally’s past cup possession, and then refuse additional evidence that was merely cumulative, especially if there was no evidence that she had the cup recently.

A related concept involves the situation where one party attempts to introduce only an excerpt of a writing or recording. When this happens, an opposing party “may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”¹³² Commentary to the Rule states: “The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial.”¹³³ This commentary is a pretty concise summary of at least some of the serious issues with headline and social media driven information sharing.

These rules are not concerned with false information. Instead, they recognize that true facts can be misleading; true facts can be used to support false claims or to confuse the issues. Misuse of true facts is also present in political debate. The Washington Post fact checker

acknowledges this by including in its half-true determination items where factual error is not necessarily involved but there are other factors resulting in a statement being misleading.¹³⁴

More Than One Answer May Plausibly be “Right”. In today’s political debates, alternate stories or policy positions often are viewed as not just wrong, but illegitimate. It is not just us and them. It is a good/right us versus a bad/wrong them, not only at the level of issues or policies but as people. We are positioned as mutually exclusive. On the one hand we recognize and celebrate diversity, and, on the other, we seek to define its “legitimate” boundaries. We struggle to agree to disagree on a wide range of issues both in visions of who we are as a country and in facts.

The ubiquitous post-fact designation and fact checking gives the impression that you can do some work and the one right answer can be revealed. Because of examples of “alternate facts” that appear patently incorrect, the idea of disputed facts is popularly colored with a negative connotation that makes *any* claim to a disputed view of facts for a given situation seem unreasonable. This is not to say that there are not false facts, it is to say that examples of false facts are used to squeeze out other legitimate disagreements. By legitimate disagreements, I point back to the fact discussion above about foundation. In litigation, arguments must be supported by facts meeting certain criteria. I mean something similar here—disagreements that each are supported by facts with a foundation or disagreements where supportable facts could lead to different interpretations.

From a litigation perspective, there are “alternate” “facts.” Much of litigation is a battle between competing alleged facts and the stories that may be told from those facts. The pre-trial litigation process (which often takes years) is designed to test that there are *genuine* issues of *disputed* material fact; this is the actual rule to proceed to trial.¹³⁵ In plain terms, this means that,

in a trial, either side could reasonably prevail depending on which facts hold up better under challenge and which story crafted based on the supported facts is more persuasive given the claims, how those claims are argued, and the particular group judging the debate. Although this seems more like a theory when looking at a singular case because, only hypothetically, could it have turned out differently (unless a case has been overturned on an appeal and retried), it is clearer when looking at large litigation examples.

In the earlier 2000s, around 10,000 women across the country filed lawsuits against the makers of a menopause drug called Prempro claiming that it caused breast cancer.¹³⁶ Sometimes in litigation of this magnitude, test trials will take place for the sides to judge the strength and weakness of the arguments for settlement purposes. In other words, the parties may not agree on what a case like this is worth to settle so they take a few cases to trial to better test the strength of their positions. Twenty-one cases were tried and presented to different juries.¹³⁷ The plaintiff won in 11 of the cases; the drug company in 10.¹³⁸ The earlier cases were litigated by Wyeth, who won 2 out of 11.¹³⁹ After Wyeth was acquired by Pfizer in the middle of this process, Pfizer litigated the cases and won 8 of the remaining 10.¹⁴⁰ Although there were differences in the personal facts of the individual plaintiffs, the material arguments (and expert testimony) in the cases were very similar, and yet, different juries came to different conclusions. There are a few possible takeaways from this. One is to say that there were two supportable versions of the possible truth and no definitive way to answer the question posed (that the facts and arguments were fairly evenly balanced). Another says that who is arguing matters, and that, the cleverer and more persuasive the speaker, the better the chance of an outcome in their favor. And yet another way says that who is deciding matters; different groups of people can view the same facts and come to a different conclusion of the meaning of those facts. All are relevant to political debate.

Regardless of how you look at it, the cases could go either way and winning the day is not a definitive affirmation of some universal rightness.

A not uncommon training exercise in law school writing courses is to be assigned to brief a side for mock argument against another student. The students do not get to read the information and then pick a side; the side is assigned. They are graded on the initial brief. Next, they have to switch sides and write a brief for the other side (and maybe also participate in oral arguments). They are graded on this as well. Because most law students are reasonably serious and competitive, the desire to do well overrides the initial hand wringing about how it will be possible to mentally switch sides and make reasonable and strong arguments. The interesting thing is that, even if you are not convinced of the switch, like Abrams' observation of Adams' mindset near the beginning of the Boston Massacre case, in the effort of taking the exercise seriously and trying to find facts and arguments to work with, students often discover there *are* legitimate facts and arguments to work with.

In real life, there are cases where one side's positions are meritless and/or their facts totally unsupported, but such cases are not the norm and they are weeded out in the pre-trial litigation process. As noted in the introduction, Trump's stop the steal litigation is an example of this.¹⁴¹ In most cases which pass the frivolous hurdle you can be ethical and make reasonable arguments in support of either side (not that all attorney argument is ethical in any particular case). Although it may not seem like it when looking at blustering attorneys, this experience encourages knowledge humility. It also makes it easier to separate differences of opinion on cases or positions from judgment of a person. Jon Meacham recently wrote:

Engagement, especially at a time of heightened conflict, has its perils: Those motivated by what they see as extremism on the other side are likely to view politics not as a mediation of difference but as a total warfare where no quarter

can be given. The country works best, however, when we resist such tribal inclinations.

...

Wisdom generally comes from a free exchange of ideas, and there can be no free exchange of ideas if everyone on your side already agrees with one another.¹⁴²

My favorite example and inspiration for this concept was the relationship between Supreme Court justices Antonin Scalia and Ruth Bader Ginsburg—political opponents, best of friends.¹⁴³ Justice Ginsburg believed that Justice Scalia’s harsh criticism pushed her to make her arguments better.¹⁴⁴ Justice Scalia counselled a former clerk: “Some things are more important than votes.”¹⁴⁵ These are two people who were not just on opposite ends of the ideological divide, they were actually opposing each other in their jobs on issues that had wide ranging impacts and in which they deeply believed. There are examples of partisanship political action that is disingenuous, it does not represent what the actor really believes but instead is what they believe will strengthen or increase their power. But some partisan positions are because different people deeply believe in different things. In some cases, the distinction may be without a meaningful difference when the position itself seems so out of the pale, but, in other cases, it is distinction that allows for disagreement that does not sow total personal division. Whether people can understand it or not, Justices Ginsburg and Scalia vehemently disagreed on the issues but respected one another as people. And if you respect either one of them, maybe they can stand as an example of this possibility.

There May Be More Than One Way to Get to the “Right” Answer. Litigation is more like strategy than science. Just as litigation highlights that a common set of facts may reasonably support opposing answers (in more or less persuasive ways in general or to different groups of people), litigation also highlights that there are often different paths to the same or similar answer. Litigation is goal, not rationale, driven. Cases cannot proceed without a statement of

the remedies being sought; there is a defined end goal from the beginning. But litigators are not bound to identify one reason or what they believe to be the best reason justifying the identified desired outcome; they can choose to argue any and all rationales that plausibly could support the outcome—including inconsistent positions.¹⁴⁶ In popular understanding this kitchen sink approach can seem opportunistic or lacking a genuine intellectual purity or belief. And that can be the case in a particular instance, but this rule and process exists for two important reasons that both have knowledge consequences.

First, until you really dig into and test the facts, it may be difficult to tell which arguments will be most persuasively supported. This is especially true when experience tells litigators that digging deeper will often change the initial perceived factual landscape. As such, multiple theory argument paths keep options open. This is more like chess than a linear hypothesis approach. But it has a real secondary knowledge benefit too. Litigators start digging into and testing facts with several possible theories in mind, both their theories and opposing theories. This widens the mental focus and helps open the mind when viewing evidence; a litigator wants to take in all the information and understand how it could be viewed from multiple vantage points. This does not mean that litigators are indifferent as to theory, they ultimately will have theories they think are stronger or more rhetorically favored. But it does mean that they attempt to keep multiple pathways to success open. To this end, “even if” argumentation is common. These are arguments that hypothetically concede an opposing point and then proceed to explore and demonstrate how it doesn’t matter for purposes of the ultimate question. This means that litigators dig below opposing arguments and test factual support even when they think their position is strong.

Second, litigators understand that not only may additional facts or fact testing change how arguments are perceived, but different people—judges or juries, may perceive the evidence and arguments based on the evidence differently than they do or different from each other. Although litigators want to craft great theories, ultimately they want to win the remedy sought for their clients. There is an external incentive for rationale and argument flexibility that is responsive to other points of view.

The theory of multiple-path and opposing viewpoint mentality as an aid to understanding is not unique to litigation knowledge exploration, but litigation training and procedure provide concrete ways to put these theories into practice. And in responding to real situations with real people over time, these practices have evolved to become more fine-tuned to multiple vantage point understanding. In this respect, litigation procedure and practice combine elements of both broad theme argumentation which is closer to national political debate with a grassroots approach to policy and coalition building. Grassroots political advocacy also is a bottom-up approach that is most effective when more avenues for crafting debate are left open for argument experimentation.

A good example of the difference between rationale commitment and flexibility can be seen through the politicking of the suffrage movement. In *Suffrage: Women's Long Battle for the Vote*, Ellen Carol DuBois provides great detail and color of the legislative strategies and paths leading to women's right to vote.¹⁴⁷ The preferred rationale, the one thought to be morally the right one, was that women in a democracy should have the same right as men to vote.¹⁴⁸ That argument, framed on women, was not winning the day, and it became clear that a national solution was unlikely as a starting point.¹⁴⁹ Because of this, suffragists became expert lobbyists, understanding how to use different rationales with different constituent groups to further the

overall goal, experimenting along the way with strategies that resonated more or less broadly.¹⁵⁰ For example, at various times between the late 1800s and early 1900s, the following were some of the rationales used for suffrage advocacy: temperance and the ballot as “home protection,”¹⁵¹ “equal suffrage” instead of “women’s suffrage” to appeal to certain men’s organizations,¹⁵² and workers’ rights to undercut unfair competition.¹⁵³ Ultimately, it was a combination of interest-based rationales over time that culminated in the national constitutional amendment. To be effective, such multiple rationale strategies are not simply clever argument variations, they require a real and much deeper understanding of various facets of issues, facts, and constituent impacts. They keep an eye on a common goal, but in providing room for experimentation, they also open gateways to greater knowledge generation and incorporation around a central theme.

Because of the need to influence third parties, including people who may be disinclined to a side’s view,¹⁵⁴ litigators are trained and practiced in this multi-vantage point knowledge exploration and messaging. Thus, as with other areas, what is particularly useful about a litigation mindset and the procedure is not that it is aware of types of knowledge generation or testing that other disciplines are not, but that the structure and nature of the process requires confrontation with those concepts in live settings and, as such, has developed procedures and training over a very long period of time resulting in deep practical experience.¹⁵⁵

Knowledge Comes in Many Forms. Some well used hot button words of the day are science, experts, educated, and voting against interests. This at least partially implies that different views between the sides are present not because there are reasonable different views, but because one side is ignorant and incompetent. There is a right side and a wrong side. In support of “rightness,” we are told to listen to the experts and be guided by the right priorities. These appeals to “higher” powers of “knowledge” and morality point to an idea of clearly

superior answers and sources more likely to have that information. How we view knowledge and the hallmarks of knowledge is very important in political debate. The long-running elite versus commoner knowledge historical debate carries on. Like the aristocrats of old, experts often are presented as above the fray of politics, simply imparters of objective knowledge.

In litigation, knowledge competence also is very important, and the need for experts for many questions is well recognized. Commentary to FRE 702 states:

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.¹⁵⁶

Unlike common usage, however, “expert” is broadly defined. The notes provide further explanation:

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by “knowledge, skill, experience, training or education.” Thus, within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called “skilled” witnesses, such as bankers or landowners testifying to land values.¹⁵⁷

Going back to *My Cousin Vinny*, the idea of expert knowledge in litigation is expansive enough to allow Ms. Mona Lisa Vito to qualify as an expert witness for general automotive questions based on practical experience to counter other expert testimony proffered by a credentialed and educated witness (the more generally accepted idea of “expert”).¹⁵⁸ This doesn’t mean that anyone can call themselves an expert. Experts not only have to lay a foundation for the content of their findings, an expert, if challenged, must be able to establish (in simple terms) that the methods used are generally recognized and accepted in their area of competence and that the expert has the credentials accepted in that field.¹⁵⁹ If an expert is challenged, determining

whether these criteria are met is generally determined by the judge prior to the presentation of the evidence.

Perhaps more importantly, in litigation, while expert knowledge often is viewed as necessary to answering a question, experts are not treated as objective or above the fray only sharing knowledge; expert testimony is presented by a side, and it is subject to adversarial questioning. This recognizes that experts can be partisan, they can be intentionally or unintentionally biased in ways that affects their knowledge or validity of their tests, or they could be technically wrong or wrong in application of the technical knowledge to the issue. This is William Findley's view on interest-based partisanship in action.

In the same valuation case referenced earlier, I deposed a distinguished Harvard finance professor. Had he been a guest on a news show, he is the type of person who likely would be listened to without much doubt and be unquestionably cited later as support for "facts." This would be especially likely if he was making statements supportive of the position the listener held. His credentials and demeanor are designed to have that impact. But, in this case, our side believed his opinions were far-fetched. It wasn't that we questioned his ability to perform financial calculations, as argued at trial, it was that we believed he was using inappropriate assumptions that had insufficient support. So, I sat and asked seven hours of deposition questions that he made clear to demonstrate were silly, and they *were* very basic. While his confidence never waned, the attorneys for his side were growing visibly more uncomfortable throughout the day (expert egos present special challenges for *their* attorneys). His answers were terrible, and it didn't appear to register. By the end of the trial, the professor's testimony had been sufficiently challenged that his opinions were not credited (it was a bench trial, where the judge makes the decision).¹⁶⁰ This wasn't because I or the attorney who examined him at trial

are more clever or knowledgeable than the professor or did a particularly special job. We were able to challenge what he said (both directly and through other experts), and we didn't give him any starting benefit of the doubt because of his credentials.

The point here is *not* anti-expert. Our side relied on experts. The point is that litigation is anti expert *worship*, both in terms of knowledge and purity of motivation. Kind of like the humility encouragement mentioned in the prior section, when litigators regularly confront expert witnesses and work through their strengths *and* flaws it puts expert knowledge in a more human perspective. It highlights the benefit of all information being subjected to adversarial challenge no matter the source. In the fictional world of *My Cousin Vinny* and Ms. Vito as expert, she was able to see something different than the prosecutor's specialized expert because her focus was less narrow.¹⁶¹ The prosecutor's expert was a convincing witness who was honest and forthright and competent, he simply missed something because he had been asked by his side to opine about tires and so was focused on tires.¹⁶² In the movie, the tire expert had Ms. Vito's knowledge (he confirmed that she was correct to the prosecutor), but he hadn't looked at the question the way that she did in response to prompting from the other side.¹⁶³

And this raises the last expert thought point for the litigation model. Experts are not *judged* by experts. Experts are judged by non-experts. The litigation system believes that although certain skill or knowledge may be beyond the average person, understanding it at the necessary level to pick between competing views, is not. This means that attorneys and experts must translate complicated subjects into more accessible terms and stories. This makes it harder in litigation to obfuscate through the use of technical jargon.

In everyday life, there can be power in using language and terms that are *uncommon*; it can make the basis of the knowledge being conveyed not generally comprehensible and, hence,

unchallengeable. Credentials and fancy terms also can make a hearer think that any confusion or lingering doubt about what an esteemed person is saying results from a lack of *their* own knowledge, making them less likely to question what they are hearing. In litigation, however, attorneys are not doing their job if they are wowed by credentials and defer to the other side. Whether I would or could challenge the finance professor at a social event is different than whether I can sit down across from him and question him in a case, treating him like anyone else. When he submits an opinion, it will not be considered in the case unless he sits down and subjects himself to adverse questioning about it.

Open Partisan Debate Has Benefits. The ability to have *your* voice or representatives who you feel represent *you* is fundamental to political debate. Right now, there are loud, disaffected, and sometimes violent groups on both sides of the political spectrum (acknowledgment of such presence is not equating the two). One thing in common between these two groups is that, justified or not, they are feeling left out. Some are feeling silenced. And as the pre-Civil War congressional southerners learned with the gag rule and Jack Dorsey acknowledges in his statement on the banning of Trump, silencing is divisive and does not often completely silence (and it likely could only do so with authoritarian measures). It may also intensify violence in violent times. Calls for objectivity or speaking within constrained limits is a form of silencing, and as such it can inflame or leave real issues simmering below the surface, and it provides its own rationale for opposition.

Generally speaking, litigation doesn't require silence or compromise. As noted above, it is a partisan process; it is not a process where people must aim to be or pretend to be objective, it is overtly and unapologetically partisan. It is true to Findley's view. But it is a *mediated* partisan process. Mediation occurs through the division of labor (including the need to convince

third parties and the different roles of position attachment and detachment), the requirement of complying with rules and procedures, and by the fact that something real is immediately at stake. Having a process that can be orderly and constructive while still allowing partisans to aggressively advocate for their position (sometimes while hating one another) has several benefits.

First, parties (usually through attorneys) are the authors of their own cases. Parties have their own voice. The court's role is mostly responsive. Within some bounds, parties and their attorneys get to say what they want to say and focus on what they think is important. They may get cut off by a judge in the management of proceedings, but generally they are not permitted to get cut off by each other. And, although it is not always perfectly implemented, most procedural decisions in a case are either required to or do follow what may be referred to as a goose gander rule: what's good for the goose, is good for the gander—procedures are evenly applicable. A court room is one place where, as much as no one wants to be there, people get to have their say, while being listened to, and while their opponent has to listen—quietly.

Second, because parties (and not the court) drive the process, judges as referees have more room to be distanced and impartial. Judges are focused on enforcing the legal boundaries (typically only when raised by the parties) and making sure that the battle is procedurally fair and efficient. If they got in the middle of arguments to steer them toward being more “balanced” or “better chosen” or “better supported” or “more likely to gain agreement between the parties,” it would be that much harder for the judge's own views not to influence the outcome.

Third, because parties are distinct and separated and the arguments all flagged as relating to a partisan side, it is easier to contextualize arguments and facts. The potential for bias is not hidden; it is acknowledged and accepted as reality that there are sides, and that litigators for each

side will choose to develop a story (based on supported facts) that is in their client's interest. In other words, not only are parties not required to be objective, they cannot pretend to be. Everyone acknowledges that they are arguing *one side* no matter how strong they believe their side to be.

Fourth, when you know what you have to say is going to be directly challenged by someone who wants you to lose, and you know you have to convince a third party of your view, arguments are sharpened, and poor arguments are more quickly discarded or conceded. As acknowledge by Justice Ruth Bader Ginsburg in reference to Justice Antonin Scalia, adversarial challenge makes arguments stronger. In an opinion piece on their relationship in the New York Times, the author begins by asserting: "There is a lot for us to learn, not just from their friendship, but from their intellectual combat."¹⁶⁴ The author provides the following commentary in support of this position.

This is not to say that Scalia did not write pitiless opinions, at times so searing they could grill their own steak. But Ginsburg chose to not take them personally, and sometimes viewed them appreciatively, of all things. In the 1996 case, *U.S. v. Virginia*, which finally allowed women to attend Virginia Military Institute, Scalia made a point of sending Ginsburg his dissent as quickly as possible, so that she might better reckon with it in her majority opinion. "He absolutely ruined my weekend," Ginsburg told Irin Carmon, co-author of "Notorious RBG," "but my opinion is ever so much better because of his stinging dissent."¹⁶⁵

Litigation does not shy away from combative positioning; it embraces it and creates an environment where it can be a knowledge benefit. Core to that environment is the balancing and moderating impact of the mediating elements of the process.

Credibility Matters, A Lot. Although I've included credibility last, it is the lesson of litigation that I view as one of the most important for thinking about political debate. In mainstream political discussion (especially recently), the connection between source credibility and fact persuasiveness either is unrecognized or underappreciated. *Res ipsa loquitur*—the facts

“speak for themselves,” is a phrase that is used in the legal context, but it is used in a specialized manner. In everyday life, on the other hand, it operates more as a generalized axiom. True facts are believed to speak for themselves and be beyond partisanship. And they are often believed to be beyond “irrelevant” issues of source credibility. Facts should be able not only to speak for themselves, but to shine through, untarnished, a tarnished source. One issue is that each side believes this for their own facts; however, opposing facts coming through opposing tarnished sources often are viewed differently, then the tarnishing may not be viewed as irrelevant. We tend to rationalize our own side’s credibility issues because we can; one side doesn’t have to convince another side of their positions and so issues of credibility are easier to ignore and undervalue. Litigators don’t have that luxury. Because they must try to convince third parties of their views and because they understand the importance and impact of credibility issues, just like they are experts in identifying and working with micro-facts, they are also (or should be) experts at understanding issues of credibility at a very granular level.

Whatever role people think source credibility should play in analyzing facts, the reality is that it matters a lot for how facts will be seen by opposing or undecided viewpoints.¹⁶⁶ As with some of the other lessons identified above, a primary value of litigation experience versus more theoretical explorations of credibility, is just that, the experience gained through practice with real people in real situations. And litigation practice indicates that if you want facts to be believable to opposing viewpoints, then source credibility is extraordinarily important in ways that may seem totally irrelevant or not obvious. Understanding this is important for my project because it is not simply about the uncovering, testing, and organizing of facts and arguments (as explained more in Part III) but about creating an environment where political topics can be

talked about in a way that they have a chance to be heard and considered by people who may not agree. With this in mind, I turn to how credibility impacts litigation practice and strategy.

Like in real life, even in the constrained world of a single trial, there are too many facts to challenge or verify individually (especially when working at the micro fact level). Jurors have to find a way to choose between competing facts when they are close in plausibility. One of the natural filters is whether they believe that the person who is testifying is being truthful and forthcoming or not. To raise credibility concerns, an attorney does not need to show that everything a witness says is inaccurate or questionable, they just need to point to a few examples. The greater the doubts, the less that source will be trusted—period. A witness who loses credibility often will not be believed even if some of what they say actually is true. Because litigators know this, always keeping a focus on credibility is extraordinarily important.

The deposition of Bill Gates almost twenty years ago in the anti-trust case by the United States against Microsoft is an extreme example of this concept in action.

The most important part of the case, [David] Boies told me, was persuading Judge Jackson that he couldn't just take everything Microsoft told him at face value (*especially as to complicated technological matters*). Boies and his colleagues achieved this goal by catching Microsoft witnesses—including Bill Gates, whose deposition testimony was played at trial, to devastating effect—in statements that were evasive, not entirely accurate, or inconsistent with documents or plain common sense.¹⁶⁷

In certain circles, Bill Gates' deposition in that case is sufficiently notorious that it was recently highlighted in a 2020 article, "Revisiting the spectacular failure that was the Bill Gates deposition," discussing current issues of technology company market power.¹⁶⁸ The author of this article, Dan Goodin, covered the case two decades ago. Goodin notes:

The plan from Gates' army of lawyers and PR handlers seemed to be to wield his image as a software wunderkind who dropped out of Harvard to bootstrap his company and went on to become the world's richest man. Team Gates planned to use that same domineering force of will to beat back government lawyers.¹⁶⁹

The problem was

Gates had never in his life grovelled for a job or suffered many of the indignities most of us experience on a regular basis. He regularly berated reporters for asking what he'd say were stupid questions. Publicly lauded as the wise sage, consummate businessman, and industry visionary, Gates was accustomed to being treated with obsequious deference from all but a small number of peers. As such, he had little or no experience tolerating—let alone encountering—dissent, criticism, or challenges to his authority.¹⁷⁰

After “three days of intense questioning,” Goodin reports, “Gates came off as argumentative, petty, and someone badly losing ground to a more formidable rival.”¹⁷¹ Goodin gives an example of Gates’ problematic deposition testimony.

Boies: What non-Microsoft browsers were you concerned about in January of 1996?

Gates: I don't know what you mean “concerned.”

Boies: What is it about the word “concerned” that you don't understand?

Gates: I'm not sure what you mean by it.

Boies: Is—

Gates: Is there a document where I use that term?

Boies: Is the term “concerned” a term that you're familiar with in the English language?

Gates: Yes.

Boies: Does it have a meaning that you're familiar with?

Gates: Yes.¹⁷²

This type of interaction has nothing directly to do with the facts or issues in the case, and yet, it is very important. Portions of the Gates’ deposition were played during opening statements and throughout the trial. Goodin notes that

[s]itting in the gallery of the federal court room in Washington, DC, reporters broke into laughter more than once. Some of them had spent entire careers listening to Gates regularly launch verbal broadsides or wage one-sided arguments. For the first time, the tables were turned.¹⁷³

His performance was such a disaster that Microsoft’s attorneys tried to stop the deposition from being shown any more, arguing that it was becoming a “side-show.”¹⁷⁴ The request was denied.

Judge Jackson stated: “If anything, I think your problem is with your witness, not with the way

in which his testimony is being presented.”¹⁷⁵ A lack of credibility by an indisputable technology expert, highlighted not only by battling facts, was significant in losing a case and changing the technology business environment. Litigators know that if the facts they present are to be believed, credibility matters no matter how smart the witness or how solid the litigator believes the facts to be, because if the source of your information loses credibility, the facts they convey very well may not be credited.

If this seems silly or doesn't really make sense when there are *facts* to be checked, that's the point. When people must choose between duelling views of the facts and what they mean, it is sometimes hard to pick on the merits alone, so the decider factors in which of the duelling *sources* seems more likely to be telling the truth, and the type of information that goes into this calculation may be something totally different than simply whether the fact itself appears accurate. Because fact finders are often ordinary people, the experience and understanding of the nuances of credibility that litigators gain through this process is useful beyond a courtroom setting; it is a window into how people in general evaluate conflicting information and the sources of that information.

Looking at a simple version of this in public debate, the following is an example of source credibility flags in the news, one that was the actual trigger for my thoughts about the value of litigation lessons for political debate. On January 27, 2017, a CNN headline read: “Poll: 36% approve of Trump’s job performance.”¹⁷⁶ On February 2, 2017, a Drudge Report headline read: “Poll: Trump 53% Approval . . .”¹⁷⁷ That’s a big difference. But both of these headlines (and the stories) were factually accurate insofar as a Quinnipiac poll showed a 36% approval rating, and a Rasmussen Reports poll showed a 53% approval rating.¹⁷⁸ If you got your information from CNN, President Trump was approved of by only about one third of Americans.

If you got your information from Drudge (or Fox with similar headlines), a majority of Americans approved. If you were not really into political polls or did not have the time or inclination to look at more sources, this was your takeaway, supported by real facts. If a person were a Drudge reader and later someone shared a news post on Facebook saying something like “Only a third of voters approve of Trump,” they may think it was inaccurate. If the source cited was a “liberal” outlet and they didn’t dig into it further, the person may think: typical liberal bias. See, you can’t trust that source. In reverse, a CNN watcher may view a post saying “majority approve of Trump,” see a conservative source, and think: conservative delusion.

Going back to the approval polls, of six polls highlighted on Real Clear Politics on February 2, 2017, for the period 1/20/2017 to 2/1/2017, the 36% approval rating was the lowest, and the 53% poll was the highest; approval numbers on the other four highlighted polls were 43%, 46%, 46%, and 47%.¹⁷⁹ For some period of time afterwards (I stopped looking at some point), CNN reported using the lowest poll and Drudge highlighted the highest, a very few other sources reported the variety of polling results. This is not likely to occur in litigation. Such best/worst cherry picking, which can be very misleading, is too easy to call out if you are looking at data for both sides, and credibility is too important. A side may make an argument for why the 36% poll is the most persuasive, but it would be an *argument*, and it would be acknowledged as a poll among many. This raises two issues. First, if something so easy as a poll result is not put in perspective, then what cherry-picking is happening in other reporting that is much harder to identify (and who has time to figure that out). Second, if a source—for ratings or pettiness (because it isn’t lack of reporting ability or knowledge of other facts), can’t be more balanced on something minor like whether Trump is liked or not, how is bias impacting (intentionally or unintentionally) topics that matter more. To be clear, this is not to minimize that sometimes one

side does have false facts and that the spreading of false facts can be dangerous. It is to explore the environments that make it easier for false facts to spread. When opposing sources are not only seen as opposing but as untrustworthy or not forthright, then people become more siloed in their own information echo chambers. Lack of credibility by opposing or purported neutral sources is like kindling to a false or incomplete fact wildfire.

Sometimes reporters honestly make mistakes, but many times lately there is unnecessary pushing of the partisan envelope by an ever-greater number of sources which means there are fewer sources relied on by a cross section of viewpoints. When I read news and opinions in the media lately, particularly television sources (i.e., versus more traditional pure print sources), I often cringe at the damage the rhetoric and cherry picking is doing to the factual *environment*. It may be generating ratings and profits, but it makes it extraordinarily difficult for information to be credited or even considered from opposing sources.

A much smaller but related item to credibility is accessibility. In litigation, attorneys are trying to convince a group of jurors or a judge that they have the more persuasive story. It is thus important to make sure that they are actually communicating to the jury or judge in a way that is understandable. To do this, litigators have to have some understanding of the audience and talk to them, not over or past them, and definitely not down to them. The arguments must be accessible to the particular audience in a case. Similar to credibility, this opens the mindset of litigators from only focusing on and understanding the information they have to convey as they understand it or as they see its value, to also understanding the audience and thinking about how the information may be more effectively and favorably received.

Aspects of Litigation Not Obviously Transferable to Political Debate.

While there are aspects of litigation procedure which are more directly transferable to political debates, other aspects either are not directly transferable or require more substantial modification. In this section, I address a few of the more significant transferability challenges.

Topics Are Provided Not Chosen. What subjects are considered presents two separate challenges. First, in litigation, topics are chosen by parties. The court deals with what is put before it; it does not pick issues it desires or chooses. This lack of choosing cases or topics I find to be a beneficial aspect aiding impartiality. When you pick a subject to study or write about, people may be more likely to have some interest in or ideas about a topic attracting them in that direction. This doesn't mean that you cannot be impartial with chosen subjects, but I find it an added benefit that a court accepts what comes before it and acts more as a shepherd and referee. With political topics, a group would need some way to choose. I don't see this as a problematic difference as much as something to think about and worth trying creatively to approximate.

The second aspect of topic is less about an actual transferability issue rather than a perceived one. The law and legal issues seem specialized. There are matters that courts hear and matters they do not. In our system, they don't hear political matters; those are reserved for other branches. So, it is easy to think of it as unsuited for political topics. But the reason courts don't wade into politics is not lack of ability to evaluate political issues, but for political and legal reasons—there is a separation of functions between the branches. Article III of the Constitution limits the topics that a court may consider.¹⁸⁰ In *DaimlerChrysler Corp. v. Cuno*, the Supreme Court reinforced the importance of this boundary and stated: “This Court has recognized that the case-or-controversy limitation is crucial in maintaining the ‘tripartite allocation of power’ set

forth in the Constitution.”¹⁸¹ In rejecting the plaintiff’s attempts to expand the scope of cases that could be litigated, the Court found that

Plaintiff’s reading of [prior cases], therefore, would amount to a significant revision of the Court’s precedent interpreting Article III. With federal courts thus deciding issues they would not otherwise be authorized to decide, the “tripartite allocation of power” that Article III is designed to maintain . . . would quickly erode.¹⁸²

In other words, courts are not limited in topics because they do not have the capacity to analyze others, but because our system removes some topics from their consideration for other reasons.

Litigation is a mediation and arbitration system, the procedures are not designed for certain *types* of topics, they are designed for resolving disputes between people. Most of the procedures and rules concern the structuring of the debate, while taking account of human nature and the challenges of fact verification. Such rules of organization and testing could be applied to any argument, and it probably would be surprising to many people the wide range of topics that are actually issues in lawsuits. In Part III, I use climate change as an example for how a litigation-based model could be used to work through a topic of current political debate.

Additionally, as with other litigation lessons, not only could a litigation model be applied to political topics, but it could be additive to the debate. For example, in 2019 Marist polling examined the question of whether abortion rights should be restricted or expanded.¹⁸³ The polling showed that about 75% of Americans are in favor of legalized abortion, but a “strong majority” believes there should be restrictions.¹⁸⁴ Only “13% overall say [*Roe v. Wade*] should be overturned.”¹⁸⁵ The director of the Marist polling stated: “What [the results] speaks to is the fact that the debate is dominated by the extreme positions on both sides. . . . People do see the issue as very complicated, very complex. Their positions don’t fall along one side or the other. . . . The debate is about the extremes, and that’s not where the public is.”¹⁸⁶ In other words, the

political debate is not in line with *the people*, it is captured by certain aspects which skew the discussion. A more moderated analytical approach would not be captured by political agendas or the more attention-grabbing (and revenue-generating) points of most difference. Litigation identifies areas of agreement as much as it identifies and challenges areas of disagreement.

Cross Examination is Fundamental. There is a difference in understanding and persuasiveness of information depending on whether factual stories are told in a summary writing by an attorney in a brief or through live adversarial questioning. Especially where issues are hotly contested, live challenging of evidence through witnesses adds an important element. This was the point Abrams made about the importance of the trial transcript in the Boston Massacre case. Likewise, anyone who has ever said, I wish I could have had that conversation in person versus in text or email has felt this. There is so much more that can be gained from information obtained without the sterilized filter of writing, both in content and in clues as to meaning. This is even more true when adverse parties can ask follow-up questions.

A project that bases most of its research on information in the public domain, even if it does a thorough job of excavating, verifying, and organizing partisan information would be missing one of the primary components of litigation—live witness adverse questioning, both from the aspect of research and understanding, and also as a product that is available for evaluation by those using the information to make judgments. Even if live questioning or debate could not be obtained, I believe that litigation methods applied to political information would be an improvement on the current structuring and filtering of this information, but this would be a high priority for creative thinking and experimentation. One possible area of experiment could be with expert information. For supplementation of expert opinions, there could be a request to participate in various forms of questioning like written follow up or something like a TedTalk

session of questioning in a standardized format. Although evidentially supported expert opinions would not be excluded if no follow up questioning was agreed to, there could be a challenge level category associated with the opinions. For example, many experts go on television. If an expert was willing to talk about their work in a 2-minute segment but not more meaningful questioning (without going to the extreme level of litigation), that could be noted. If they were willing to submit to friendly but not adverse questioning that could be noted, etc. Since the goal would be to try to encourage experts to voluntarily submit to sharing additional information, the task would be to find a balance. A fair process actually could increase the validity of their positions or allow them to strengthen their arguments.

Immediate and Tangible Interests Are at Stake. In litigation, people *must* comply with the rules and procedures both because of the rules and because something personal, tangible, and important is immediately at stake. This is not an issue if the object is simply collating and re-organizing publicly available information. But if you want team members who zestfully advocate while also being responsive to challenges by the other side (*i.e.*, conceding when they have a very weak but supportable argument, as can occur in litigation) or want action from people outside the group (for example, participating in a live debate as noted above), this is something that has to be taken into consideration. Because of the scope of my project, which does not require mass interest or participation, as I discuss in the next part, this is an area I view as an important planning consideration, but not an insurmountable or even large obstacle. Job performance or school performance are factors that can motivate toward compliance with a mission and structure.

Controversies Are Concrete. With rare exception, court cases are about a live controversy with lived facts. They are backward looking to make a judgment on something that

has already occurred. Political debates typically (but not always) are forward looking and often involve opinions on what may or should happen. Because evidence rules are evolving and are responsive to the types of issues and questions typically involved in litigation, there may be fact relevancy or substantiation issues that arise in the public debate arena that evidence rules currently do not typically deal with. Just as the present Rules evolve with experience, so too could the filters and testing rules applied to political information adapt. Where the issues are backward looking or have aspects that are backward looking, like the issue of reparations, there is little difference.

A POLITICAL DISCOURSE PROJECT: THINKING OF DISCOURSE AS METHOD

Yet a man who uses an imaginary map, thinking that it is a true one, is likely to be worse off than someone with no map at all; for he will fail to inquire whenever he can, to observe every detail on his way, and to search continuously with all his senses and all his intelligence for indications of where he should go.

E.F. Schumacher, *Small Is Beautiful: Economics as if People Mattered*¹⁸⁷

Before I discuss what thinking of political discourse as method means and could look like, I address what it is not meant to be. I am not advocating for many people to learn how to think like a litigator in order to apply that skill to their personal evaluation or discussion of political information. This would be completely unrealistic and undesirable as a use of time. That would be like a historian suggesting that people research and read source information for a better understanding of history rather than reading the historian's book. If the historian is using a method and approach that makes sense for understanding their subject, why wouldn't most people want to rely on the summary, especially if they can take it as *a* data point.

Much like the process of a trial, I am proposing a knowledge discovery and vetting process that operates adversarially at an institutional level. I'm proposing an institutional experiment that thinks differently—beyond partisan or not partisan. As discussed below, the

political knowledge “discovery” and “briefing” would happen within an organization based on information in the public debate arena as a way to better test, compile, and package information around political topics. That information then would be used to facilitate engagement with the general public and other political stakeholders, like a trial presentation to a jury. This framework does not require people in their everyday lives to engage in partisan conversations in a different way. The goal is try to give people better information to evaluate in a way that has a chance of being genuinely considered, especially across party lines.

I have no illusions that engaging with the output of my project would necessarily be appealing to masses of people (although a goal would be for the output to be accessible). It likely would not be as exciting as the drama that now gets clicks, nor would it be as self-satisfying because it would challenge information on both sides and likely be much drier than the hyperbole that is commonplace. But I think this type of project could serve as an example that standing in between by some people is not only valid, it is valuable. And it would help make available a more organized, balanced, and tested summary of issues and information for those who are more suited to being mediators (and I think more of those people are quietly out there than it may seem). If nothing else, even if it did neither, maybe at least it would be a tool to sharpen the partisan arguments and improve the factual information in the public domain by testing it more thoroughly and packaging it in a more accessible and understandable manner, making it harder for partisans to dissemble or conceal weaknesses in their own arguments.

Discourse Through the Lens of Method.

Method is often thought of as a way to obtain a better or more accurate end. It is a means to an end; the substantive end is the real focus. But I think there also can be value in some

methods as ends in themselves, the journey being viewed at least as important as the outcome. When I look at the mess that is our political debate, it's not the ends of that debate that strike me most or how we may be able to communicate better to come up with "better" answers that intrigues me. What strikes me is how so many people are so sure of their own maps that they can't see anything else. This doesn't just block access to knowledge, it increases angst and anger because so many people are enemies. It is not that I don't think there are some issues that should inflame passions, or that I don't recognize that some people have to make political decisions, but right now everything is inflamed, and that in itself is damaging and I think lessening the likelihood that good information is out there and that good decisions will be made.

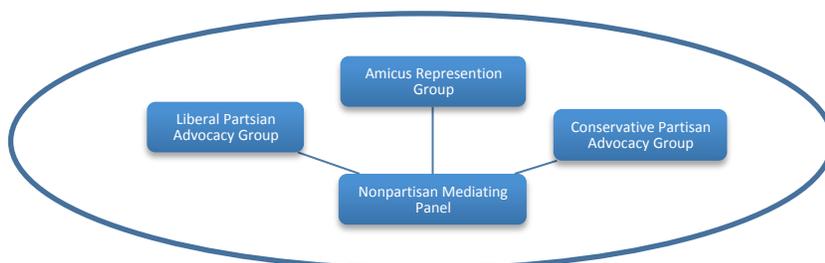
Centering method over outcomes in thinking about political debate can serve two purposes. First, it can help free the mind facilitating a more thorough testing and understanding of the content of present issues in debate. Second, it can be a thought tool for developing habits of open and reflective critical thinking in this new information age. Working to develop and improve a process model can be its own exercise in developing skills that some aspire to in their political lives: tolerance, humility, respect, and fairness. For these reasons, for my project, I want to stop the process before judgment. In other words, my project is about preparing information underlying debates on political issues to be available for judgment by others. Taking a position or working toward an internal decision reduces the appearance of impartiality even if there is an attempt to be balanced, and I don't think is necessary. There are plenty of people who can judge, and different constituent groups may judge differently. In fact, I view the freedom to reach for greater understanding without needing to give an answer a positive difference than the requirements of litigation. Basically, by focusing on method, I seek to add the idea of a division of labor to the thinking about political debate, including combining

functions of engaged detached actors to the mix of advocates. I can let go of my need to have a substantive voice in policy in exchange for being an advocate for a system that works on behalf of all of us.

Structuring the Project.

Just as litigation process and procedure provides a good starting model, legal education has good examples that could act as jumping off points for how such a project could be structured and implemented. The first example is law school clinics; the second is mock trial competitions. Law school clinics are generally area focused groups (like an environmental law clinic) of attorney staff and students who work through the cases or projects on their plate at any one time. The regular staff keep the projects ongoing while students get to do real work, learning in the process. Mock trial competitions are just that, simulations of trials. Mock trials may be part of student education, and they are sometimes used in large litigation and by groups like the Department of Justice for training and to test arguments in preparation for trial. Combining elements of these and the functional division of labor in courts, I think, provides a good starting framework.¹⁸⁸

Staffing. I envision a project run as a nonprofit or associated with an educational institution.¹⁸⁹ The organization chart could look something like the following:



The nonpartisan mediating panel would function as briefing managers, rule arbitrators, and the rule and procedure development committee (a modified court and advisory committee

role) (an engaged but position detached role). Like a trial court, each specific political policy area could have one primary assigned mediator with appeals for certain decisions available to a panel. This could be staffed by professionals or volunteer professionals, with students or interns acting as clerks. This group, I think, should be a mix of litigators and people with training in other types of dispute resolution methods. The ability to be actively engaged in a space of nonjudgment (like a judge or mediator) is generally not natural, it is developed through training. There likely would be the necessity to have a manager or scheduler role to coordinate the process, but that person would operate in a non-hierarchical and independent function from the primary groups (like a clerk of the court (different than a law clerk), an administrative not legal role). This could be handled by the mediating panel group or by a separate person.

The liberal and conservative advocacy groups would be the primary partisan groups (structured like law clinics) working to compile and present aggressive but supportable partisan position papers through a process similar to motion briefing, as explained in more detail below—*i.e.*, position papers would be developed in a challenged adversarial process working with the mediator. These groups would work organizationally independent of each other. People driving the process in the advocacy groups would not need subject matter expertise or prior knowledge; they would need research and analysis skills and a commitment to following defined rules and processes.

In litigation there is the ability for a court to consider amicus briefing. This is referred to as friend of the court briefing. This occurs when a nonparty interest group believes there is a special interest argument that should be considered. For example, Planned Parenthood may file an amicus brief in abortion cases focusing on specific issues. The amicus representation group

would be responsible for making sure that special interest group positions were incorporated in the process.

Staff and interns for the three advocacy groups could be, but would not need to be, attorneys or law students. For education purposes, I think there is value in having interns assigned randomly to groups and maybe even participating in different groups for different issues. Additionally, while I would envision a core group of staff participants in each group, I would seek to have volunteer advocacy assist in different functions.

Procedure and Outputs. The participants in the various groups would be operating according to a job description or grading/intern parameter that requires adherence to a set of governing procedural and evidential rules, *e.g.* the job descriptions of the advocacy groups would be to produce partisan position papers according to a pre-identified structured, adversarial process. This is one of the aspects that allows for the project to have two different but complementary goals: 1) producing substantive output that can help facilitate political debate and knowledge in the public sphere, and 2) experimenting with processes that help facilitate knowledge production where diverse interests exist and are expected to persist. On the second point, this is similar to the idea of the rules committees in the legal arena; the rules and processes can be reviewed and adjusted over time for effectiveness and further experimentation.

At a high level, I envision a starting procedure that operates with something like the following steps. Here, I outline the steps generically. In the next section, I provide an example for how this could work with a specific topic.

- Step 1: Topic Selection. The process would begin with a primary topic selection through something exterior like Pew Research polling or another widely recognized political issue identification group. For example, lists identifying the top areas of political divide or of political priority. At this moment some examples of primary topics are race equity, climate/energy policy, education policy, immigration policy, healthcare policy. I use primary to mean the broader policy debate versus a specific

policy proposal like the Green New Deal. Analyzing specific policy proposals has a place in the project, but the starting point would be the broader policy framework.

- Step 2: Issue Identification briefing. I compare this stage to something like the complaint stage in litigation (see p. 22). The point here is to identify the issues and line them up, not to test facts or have researched all the facts or to try to make complex or thorough arguments. One side (the moving side) would start (randomly or chosen by some process) with a limited page brief designed to outline the topic background and issues at a high level, supported a summary list of fact positions (no citations or specifics would be needed at this stage). The briefing would be required to fit a particular format. The other side would then file an equal length opposition brief that counters (or concedes) the arguments, with the opportunity to add additional arguments it thinks were not addressed. The moving side would then get a shorter response (that cannot raise new arguments).¹⁹⁰ Because this stage is simply to identify the issues for further detailed research, who goes first is not particularly important. What is important is that each side identify the main questions it thinks are important to the overall policy discussion. These briefs would be submitted to the mediator.
- Step 3: Issue Summary and Advocacy Schedule. At this stage, the advocates would meet informally with the mediator to create a common list of issues for further research and develop a schedule and timing plan. This is similar to discovery management facilitated by a magistrate in court or the summary stage in a facilitative mediation session where the mediator assists the parties in framing both of their arguments under broad headings. Here the mediator is not adding content. They are clarifying and facilitating an issue list to ground further work.
- Step 4: Research. This stage is where the partisan groups dig into the support for their arguments and counter-support for the other side's arguments. This is a key element of litigation research; the focus is as much on countering arguments as supporting your own—these are not seen as co-extensive efforts. A side is not just explaining and supporting their own arguments well, they are directly addressing counter-positions and showing why they are not persuasive or figuring out how to deal with problematic facts. Much like the statement by Justice Ginsburg, this process is not just about countering a position, it makes you think more deeply about opposing arguments to assist in crafting your argument better. Deeper digging with an open mind also may uncover areas of greater agreement than expected.¹⁹¹ There would be some deadline where each side would need to exchange a list of evidence to be relied on. This could be accomplished through the creation of an evidence bank where supporting information is posted by each side.
- Step 5: Substantive Supported Briefing. At this stage, each side would submit simultaneous briefing supported with citations to evidence where appropriate. Each party would have an opportunity to challenge any evidence relied on according to a pre-defined set of rules. Challenges would not be for differences of opinion; it would be for testing base reliability. For example, a side may argue that an expert cited is

- not qualified in the area or uses methods not generally accepted, or that an argument has been made without factual support identification. This makes opposing sides the primary fact checkers with the mediator available to resolve disputes. After any challenges to support are resolved, each side would produce an opposition brief. These briefs would be submitted to the mediating panel.
- Step 6: Oral Argument. This would be a structured argument in front of a mediating panel with clarifying questioning by the panel. Each side would get an equal and set amount of time to present their argument, with an equal smaller amount of rebuttal time. Mediator questioning would be for the purpose of clarifying areas that seem weak or unclear or where there seems to be agreement or highlighting key points of disagreement. It could be interesting at this stage to have a mock jury panel listen to the arguments and then give feedback on positions, facilitated either through the mediators or directly with the advocates.
 - Step 7: Revised Draft Position Papers. Each side would revise the briefing as a draft position paper. At any of the stages, revisions are *not* meant to be a tempering of arguments. In other words, identifying and dealing with flaws in your own arguments or addressing raised questions (or not) is not meant to push toward a lesser or middle position. It could be that is warranted, but it does not need to be. Revisions are meant to use any new information or challenges to think about how to make your arguments more clear, stronger, and more responsive to all relevant information.
 - Step 8: Specific Challenge Discussions. There is room here for creativity that would depend on the project structure and affiliations/sponsors. Ideally, the above steps would have better clarified the strongest points of substantive dispute. Working with the mediator, the sides could decide on a list of areas to try to get more interactive source contribution. The goal would be targeted discussions/questioning on specific areas of contention. For example, one side could request assistance arranging expert challenge on a particular key area. The mediators could assist in arranging a panel discussion or TedTalk-like discussion where experts are asked to participate in answering questions by both sides' advocates on a specific topic with mediator moderation. Although there are not the same compulsive incentives that exist in litigation, there should be some participants who are motivated by the opportunity to further explain and defend positions they believe to be worthwhile and important. Obviously, the better the forum and sponsors, the better the likelihood of participation.
 - Step 9: Policy Papers and Media. After the further testing in the prior step, the sides would then update the papers to be publicly posted as position papers (with linked citation to an evidence bank). These papers would be written with a general audience in mind. The goal, however, would be that they would individually be more responsively fine-tuned than standard partisan papers, and that something additional could be gained by seeing competing (adversarially vetted) papers together in a responsive argument format.¹⁹² The step process of argument building and paper and position revision with different focuses at different stages allows for arguments to

more naturally thicken and transform. The process itself and division of labor and steps does its own work. To increase accessibility, this could be accompanied by a mediated podcast discussion of the parties supplemented with shorter or other format media. For example, there could be visual or bullet proof summaries or highlight documents. The goal here would be technology and format experimentation to balance accessibility and engagement potential without engagement or entertainment capturing the process. Outputs at this stage would represent the base policy analysis on the broad topic that could be updated periodically. Without opening a general comment free-for-all, it could be useful here or at an earlier stage to solicit outside input as to issues that are missed or items that are viewed as off base or to have broader mock jury exercises.

- Step 10: Specific Topic Papers. Off of this base framework, as specific policies become the subject of debate, a similar process could be applied. For example, papers could be generated on the Green New Deal as a specific possible solution under a broader climate/energy policy heading.
- Note: Just as the amicus group could provide specialized briefing and research, the primary briefing or policy papers for a “side” could be split if the interests are significantly diverged and incompatible. Although this does not happen in every or even most cases, the litigation process recognizes that sometimes individual parties on one side may have competing interests that cannot be represented fully by the same advocate. The parties stay on a “side,” but they have different attorneys who pursue their own strategies at the same time. This approach may be especially useful in a political climate when ideology often clashes internally with differing priorities or interests of political subgroups. Thus, while litigation is framed as two competing sides, it has developed room for more nuanced positions.

All of these steps would be on a timeline with deadlines. Although in this setting more time could be permitted, the papers themselves should not require tremendous amounts of time. For a litigation frame of reference, general briefing deadlines are 10 days to file an opposition and 7 days to file a reply.¹⁹³ Parties do request and get extensions, but even in large cases, it is not the briefing that takes the most time. Discovery (research) and court rulings are often where big gaps of time occur. The very structured process, time deadlines, and page and argument limits keep the process manageable and focused on what really matters.

This basic structure has such good existing role models that I think it (with tweaks and learning adjustments) is reasonably doable and adaptable.

An Example: Climate Change Policy. I provide the following example for illustrative purposes only. It is not meant to be an explanation of the particular issue or to capture proposed substantive arguments—which I think should be developed by groups in advocacy hats. It is a high-level example of how a litigator mindset may start a project along the lines as proposed herein.

In April 2020, the Pew Research Group published an article called “How Americans see climate change and the environment in 7 charts.”¹⁹⁴ A cursory look at these polls could raise initial points like the following: 1) a solid majority of Americans (in both parties) favor prioritizing the development of alternative energy forms; 2) the vast majority of Americans (in both parties) favor the expansion of solar and wind power; 3) the reasons motivating these positions does not appear to be consistent among the parties as most Republicans do not believe that human activity contributes to climate change a great deal, whereas 73% of Democrats do; 4) on point 3, this position is not impacted by scientific knowledge—Republicans with the highest scientific knowledge are the least likely to agree that human activity “contributes a great deal to climate change;” 5) few people in both parties think policies aimed at reducing climate change will do more harm than good, but there is a big split among the parties in whether such policies will make any difference or do good; 6) when looking at expected impact on the economy neither party has a majority who believe that climate policies will have a good impact on the economy, although Democrats are just below a majority; 7) with respect to expected economic impact, the biggest difference between the parties is that a majority of Republicans believe climate change policies will harm the economy; 8) there is a big difference between the parties as to whether the costs of the regulations are worth the benefits, with moderate Republicans more likely to consider the cost benefit tradeoff worthwhile; and 9) the view on whether climate

change impacts local communities varies by region.¹⁹⁵ On points 1-3 above, a 2005 poll by Yale found “overwhelming public desire for new energy policy direction,” with “86 percent want[ing] increased funding for renewable energy research.”¹⁹⁶ Furthermore, “[b]uilding more solar power facilities [was] considered a ‘good idea’ by 90 percent of the public; [and] 87 percent support expanded wind farms.”¹⁹⁷ A driving rationale behind these numbers was the need for energy independence.¹⁹⁸ The authors noted that while “[t]he survey also revealed broad support for action to improve air and water quality,” there was “growing discomfort with ‘environmentalists,’” and “the public’s confidence in TV news as a source of environmental information [had] fallen sharply.”¹⁹⁹ Consistent with some of the recent Pew data noted above, this indicates that there are substantive disagreements but also potentially messaging impacts that hide some areas of outcome agreement.²⁰⁰

Using an overview like the one above (or more preferably one at this level but with broader starting reference points), a summary of Step 2 issues briefing could look something like the points in the table below. A number “1” represents a moving brief position; a number with an “O” (“1O”) represents a possible opposition; and a number with an “R” (“1R”) represents a reply brief position. In briefing, these positions would be supported by short descriptions of the arguments and expected factual support. Counterpoints represent additional points that are added by the non-starting side. These positions would be refined and tweaked throughout the process. As noted above, this stage would be to flesh out the main arguments to be further explored.

Liberal	Conservative
1. Americans agree that expansion of renewable energy sources should be a priority, with overwhelming support for expanded solar and wind. ²⁰¹	1O. There is a need for expansion of alternate renewable energy sources, but the driver is energy independence and cost effectiveness for Americans, not climate change. This

	difference impacts the scope and timeline of needed policy changes.
<p>Note: This highlights that there is a starting point of agreement of certain important outcome points even if the rationale differs. In litigation, such baselines are very useful and serve to set a floor for remedies that is already checking off at least some of your boxes. The deeper research phase in the next step could flesh out this baseline.</p>	
<p>2. The science is indisputable that human activity contributes a great deal to climate change and must be radically adjusted to avert greater climate disasters. 97% of global scientists agree on this point.</p> <p>2R. The scientists who disagree on this point are not reputable and/or using incorrect analysis. Even if they are reputable and there is some counter position, it is against the strong weight of opinions, whose analysis is significantly more persuasive, and waiting to see if another position could possibly turn out to have some merit is predicted to be catastrophic and irreversible.</p>	<p>2O. The science is disputable. Science does not become indisputable because a majority or even a vast majority of scientists take one position. Many scientific positions have turned out incorrect and innovations often come from dissenting voices because they turn out to be right.</p>
<p>Note: Many mainstream sources state the 97% as a given that ends the science question.²⁰² Adversarial framing would require more analysis and explanation of the other scientists and why they should not be credited or why they should not be totally ignored (even if only to say some caution is needed). The liberal answer could be, it doesn't matter if they could be right, almost all disagree, and there are dire warnings. Or, given growing conservative support²⁰³ (including of younger conservatives²⁰⁴) for policies addressing climate change, digging deeper may simply highlight that there is less of a science agreement gap than polls may indicate on the surface.</p>	
<p>3. Implementation of recommended climate policies needs to be immediate, including a goal of total replacement of fossil fuels.</p> <p>3R. The technology does exist or could be further developed to meet expected needs, but expansion of development and use is blocked by big energy and big automotive interests who are disincentivized to adjust and/or are</p>	<p>3O. Even if the science was indisputable, an immediate implementation policy would be reckless and potentially economically and socially catastrophic. The technology does not currently exist to meet expected energy demands solely through renewable sources and would simply make the U.S. reliant on corrupt foreign powers. The best path is a combination plan that expands renewable</p>

protected from fair competition.	energy and increases clean domestic fossil fuel energy production.
Note: In a 2019 New York Times article, “Climate and Energy Experts Debate How to Respond to a Warming World,” this is a primary point of disagreement. ²⁰⁵	
<p>4. To meet target climate goals, beyond eliminating fossil fuels for energy, there must be increased environmental protections and reduced use of fossil fuel derived products.</p> <p>4R. Changes to the American way of life are necessary but expected everyday impacts are overblown and are meant to stir up anger and fear. Climate change will affect us all and must be addressed.</p>	<p>4O. Even if we agreed on the science, environmental protections advocated for go beyond those that could have any impact, and other changes would require a total adjustment in the American way of life, which is realistically infeasible-across all groups. There is no mass support for the lifestyle changes that would need to take place to make an impact according to the climate scientists cited by the other side. What they are proposing are targeting impacts that will devastate certain communities (who are not their constituents), and which will have no meaningful overall impact.</p>
Note: This would focus the argument on what it would actually take in practice to meet the goals, even if you accepted the goal as valid.	
<p>5. Not only is transitioning energy policy needed to address climate change, but transitioning to greener power will have a net positive impact on the US economy.</p> <p>5R. Policy should not be driven by individual communities where the overall impact is greater. Further, analysis will show that climate change policies will benefit the overall economy. The way to solve pocketed harms is targeted solutions, not avoidance of needed policy changes altogether. Additionally, because of the expected climate catastrophe, even if policies have an overall economic cost, the cost is worthwhile.</p>	<p>5O. While long term economic impacts may possibly be more net neutral (and this is disputable), there would be serious negative economic impacts in the short and medium term. Proposed policies will devastate communities across the U.S. It is not enough to say that people elsewhere could get jobs or people could move. This is particularly true when the proposed policies are unlikely to be effective at meeting the asserted climate goals.</p>
Note: Digging deeper on the cost impact question likely would highlight underlying priority arguments. Who loses and what is to gain is a large emotional aspect of this particular policy argument, with costs and benefits perceptually lined up along fault lines that are broader	

<p>than the specific issue.²⁰⁶ In litigation, the need to dig and build bottom up can help highlight issues in a less emotional way or at least provide greater non-rhetorical grounding to particular debates.</p>	
<p>Counterpoint</p>	
<p>10. The U.S. must take a lead in these initiatives. There are ways globally to put pressure on other countries to comply with global standards, but this cannot be effective without strong U.S. participation and example. The expected results of nonaction by the U.S. will be catastrophic. It is not an option to not take action because others may not do their part. And, the issues are not mutually exclusive. Addressing climate change will also address increasing our own energy sustainability.</p>	<p>1. Even if we agreed on the science and the policy as to its ability to reduce U.S. emissions and contribution to global warming, unless other major global polluters take the same or similar steps—which is unreasonable to expect, we simply cannot meet the overall climate change targets. As such, the policy and energy focus should be on protecting U.S. energy sources and access and innovation to minimize climate impacts.</p>
<p>Note: Exploring such questions through a bottom-up approach likely would highlight and/or focus data on what policy makers and scientist think is achievable at a more specific level. In other words, digging deeper and more directly challenging arguments is likely to clarify and check factual support as well as highlight value judgments inherent in the policy debate.</p>	

From this type of higher-level issue identification briefing and mediator assisted summary of issues, the following is a non-exhaustive starting short list of example research questions that could then be further explored or not as each side felt appropriate:

- Where is the baseline starting agreement point on alternative energy sources? What do these numbers really mean and what is driving the level of agreement on energy priorities but disagreement on other metrics—there seems to be an inconsistency, what is it?
- Who are the 3% of scientists who disagree with the bulk of experts? Is there no basis for what they say or is it just a very minority position? Of the 97%, is there agreement only on the human cause factor or also 97% agreement on what is needed to meet the targets, *i.e.*, what is really meant at a basic level by statements of scientific consensus?
- What are expected energy needs over the period in question? Does technology exist to meet those needs without fossil fuels? If it does not, what is the basis for thinking that strict phase-outs can reasonably take place?
- Is it possible for fossil fuel production or use to be made cleaner/clean enough?
- What specifically would need to happen to everyday living to produce the results recommended by climate change experts?

- What are anticipated specific economic impacts of changes necessary to meet climate goals? Where would the costs fall? What benefits are expected? Where would the benefits be expected to fall?
- What is the impact or not of failure of global actual compliance? What is the likelihood of compliance by key players? What is the grounding for viewpoints on why this matters or not?

The expectation is that information relevant to all of these or other raised questions already exists. The point of this phase would be to review data and arguments in a different way and organize it and/or summarize it differently. Primarily, the expectation would be to engage with the issues more deeply and with opposing data not only looking for the weakness of other arguments but also the strengths, not avoiding them.

On some litigation teams that I worked on, it was common to create best/worst lists: what are our 10 best facts, 10 worst facts or 5 best cases, 5 worst cases. I have given research assignments on particular legal issues to make the best arguments for the *other* side—*i.e.*, I want you to go research X as if you were on the other side. This was for the purpose of identifying any weaknesses in our argument and to be prepared for arguments we expected to need to counter. I tended to do this when I thought the research was coming back too rosy. So, you research deep within your internal teams with an open mind, really trying to search out the best and worst for both sides, including addressing arguments *they* make (regardless of whether you initially think they are invalid or silly). Once there is better understanding of the overall facts and arguments, you then bring your argument back up to a higher, more simplified level, with more refined and stronger arguments in favor of your side. Again, this is something very different than a process that moves partisan positions toward compromise arguments or more “objective” positions. Rather, it forces each side to more openly deal with opposing argument framing and weaknesses in their own arguments, and then make arguments highlighting strengths while dealing with weaknesses. Compromise is something that can take place (or not) by the *users* or

judgers of the information, but the litigation process allows those users to evaluate the strongest (supported) partisan arguments that can be made for each side.

The remaining steps further test and refine arguments and support for those arguments, and work toward clear, concise presentation of competing positions in common language to serve as a resource for judgment by others.

Conclusion.

Jeremy Waldron has described the difference between citizen involvement in politics and the work of political theorists in the following way:

Both citizens and theorists argue about politics, economy, rights, and justice: we do it in our seminars and journals; they do it in town halls and on the streets; and many of us wear both hats. The idea is that when citizens and politicians disagree with one another—about abortion, or pornography, or taxes, or welfare, or constitutional reform—they are in their disagreements just like us in our journals and symposia, with this proviso: we have the luxury of not actually having to make a decision; they have to engage not only in hard thinking about justice, but also in what we in the academy may too easily dismiss as the sordid and distasteful business of actually having to make a collective decision in the absence of moral consensus. Of course, we pride ourselves that our thinking in books, articles, and seminars is more reasoned and more profound than the thinking engaged in by working politicians and their constituents. And so it should be: in the social division of labor, it is our task to take time and energy to think these things through as carefully as it is possible to think them, free from the exigencies of log-rolling and compromise. But, on this approach, it is a mistake to regard our thinking and arguing in political philosophy as qualitatively different from that of a citizen-participant in politics. Political theory is simply conscientious civic discussion without a deadline.²⁰⁷

And that is basically what I seek to do: assist in framing a more conscientious civic discussion that operates without a deadline. Unlike Waldron's formulation, however, I don't need to interject my own topics or thoughts into the substantive conversations or attempt to make them "more reasoned" or "more profound." (I find Waldron's focus useful; it is just not my project). My attention is focused on thinking more profoundly or more thoroughly on *how* to better facilitate other people's political debate. I view my project as more like other-people-centered

political philosophy with an awareness of the value of Schumacher's nod to curiosity and wonder. Freed from picking topics or the need to make decisions or to be within a particular discipline or style, the project can carry on an open debate producing information along the way that can be extracted and used by political actors as they see fit while also using that process as a live ongoing lesson and experiment in the mechanics of knowledge discovery, testing, and conveyance.

ENDNOTES

* I thank Matthew Landauer and John McCallum for their guidance and thoughts toward my project. They were both very open and supportive of my non-traditional take on a thesis. Their comments and questions were thoughtful and helpful in my effort to improve and organize my arguments.

¹ Gorman, Amanda, *The Hill We Climb*, Jan. 20, 2021 (President Joseph Biden’s Inauguration Poem), available at <https://www.theguardian.com/us-news/2021/jan/20/amanda-gorman-poem-biden-inauguration-transcript>.

² Tafoya, Michele, “An Exclusive Interview with NBC Newsman Tom Brokaw,” *Artful Living*, Jan. 3, 2020, available at <https://artfulliving.com/tom-brokaw-interview/> (emphasis in original).

³ Fandos, Nicholas, “Trump Impeached for Inciting Insurrection,” *The New York Times*, Jan. 13, 2021, available at <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html>.

⁴ Allen, Mike, “Republicans and Democrats agree—the country is falling apart,” *Axios*, Jan. 14, 2021, available at <https://www.axios.com/poll-america-falling-apart-4a13376f-f962-46e3-8e2c-174d396f25d1.html>.

⁵ Bremmer, Ian, “The U.S. Capitol Riot Was Years in the Making. Here’s Why America Is So Divided,” *Time*, Jan 16, 2021, available at <https://time.com/5929978/the-u-s-capitol-riot-was-years-in-the-making-heres-why-america-is-so-divided/>.

⁶ *Id.*

⁷ *Id.*

⁸ Twitter, @Jack, Jan. 13, 2021 (“*” represent individual tweets); see also Diaz, Jaclyn, “Jack Dorsey Says Trump’s Twitter Ban Was ‘Right Decision’ But Worries About Precedent.,” *NPR*, Jan. 14, 2021, available at <https://www.npr.org/2021/01/14/956664893/twitter-ceo-tweets-about-banning-trump-from-site>.

⁹ Oxford English Dictionary, available at <https://www.lexico.com/en/definition/discourse>.

¹⁰ *Id.*, available at <https://www.lexico.com/en/definition/communication>.

¹¹ Mediators or arbitrators often are trained in dispute resolution, law, and/or for some settings, psychology.

¹² Kristof, Nicholas, “How to Reach People Who Are Wrong,” *The New York Times*, Mar. 3, 2021, available at <https://www.nytimes.com/2021/03/03/opinion/progressives-conservatives-think-again.html>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Thank you to Matthew Landauer for this example. See Cummings, William, Joey Garrison, and Jim Sergeant, “By the numbers: President Donald Trump’s failed efforts to overturn the election,” *USA Today*,

Jan. 6, 2021 (“Out of the 62 lawsuits filed challenging the presidential election, 61 have failed.”), available at <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

¹⁶ Meacham, Jon, *Thomas Jefferson: The Art of Power* (Random House: New York, 2013), at 289 (hereafter “Meacham, *Jefferson*”).

¹⁷ A different but related idea is found in the “Difficult Conversation Lab” at Columbia University. This project also focuses on how people communicate directly with one another. The description of the project states: “The Difficult Conversations Lab is one of [Professor Peter] Coleman’s current initiatives to study polarizing moral conflicts, and to see whether and how dialogue can succeed as a tool for reducing tension between opponents on highly politicized issues such as abortion and gun control. His team assesses participants’ opinions on divisive issues, pairs them with rivals, and then invites them to speak together on the issue in the lab. The lab technology allows Coleman’s team to track the discussants’ emotional, cognitive, behavioral and physiological experiences over the course of the conversation, which has revealed new insights into when these interactions go well or go poorly.” See <https://www.earth.columbia.edu/projects/view/1912>. My aim is not to challenge the value of such projects (I think they are very interesting and valuable), but rather to champion broadening our starting points for thinking about discourse. My project thinks about how you may be able to reduce tension and increase cross-knowledge absorption *without* a need for direct communication or “good” direct communication.

¹⁸ See Feldman, Noah, *The Three Lives of James Madison: Genius, Partisan, President* (New York: Picador, 2020), at xvii (“The ongoing tension between the ideal of concord and the reality of politics is what makes constitutional government unique. Today, Americans frequently complain about partisanship. Yet at the same time we find ourselves unable to escape its lure.”) (hereafter “Feldman, *Madison*”).

¹⁹ Meacham, Jon, *The Souls of America: The Battle for Our Better Angels* (Random House: New York, 2019), at 270 (“A grasp of the past can be orienting. ‘When the mariner has been tossed for many days in thick weather, and on an unknown sea, he naturally avails himself of the first pause in the storm, the earliest glance of the sun, to take his latitude, and ascertain how far the elements have driven him from his true course,’ Senator Daniel Webster said in 1830. ‘Let us imitate this prudence, and before we float farther on the waves of this debate, refer to the point from which we departed, that we may at least conjecture where we are now.’”) (hereafter “Meacham, *Souls*”).

²⁰ Meacham, *Jefferson*, 328-29.

²¹ *Id.* at 322-23, 333.

²² *Id.* at 330.

²³ *Id.* (emphasis in original) (letter from Jefferson to James Madison).

²⁴ *Id.* at 331.

²⁵ *Id.* at 333.

²⁶ *Id.* (quoting Delaware congressman James Bayard, a Federalist).

²⁷ *Id.*

²⁸ *Id.* at 336.

²⁹ *Id.* 337, 340.

³⁰ Wood, Gordon S., *The Radicalism of the American Revolution* (Vintage Books: New York, 1991), at 300 (hereafter “Wood, *Radicalism*”).

³¹ *Id.* at 367.

³² *Id.* at 246.

³³ *Id.* at 247, 366-67; *see also* Feldman, *Madison*, xv-xvi (In Madison’s view, “[e]xpansion [of the federal government] would dilute the effects of particular, local interests. It would produce qualified, public-spirited national leaders who would govern in the public interest . . .”).

³⁴ *Wood, Radicalism*, 365.

³⁵ *Id.* at 245.

³⁶ *Id.* at 252.

³⁷ *Id.* at 255.

³⁸ *Id.* at 256.

³⁹ *Id.* at 257.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 367.

⁴³ *Id.*

⁴⁴ *Id.* at 368-69.

⁴⁵ Freeman, Joanne B., *The Field of Blood: Violence in Congress and the Road to the Civil War* (Picador: New York, 2018), 63 (hereafter “Freeman, *Field of Blood*”).

⁴⁶ *See generally* Ellen Carol DuBois, *Suffrage* (Simon & Schuster: New York, 2020) (hereafter “DuBois, *Suffrage*”).

⁴⁷ Meacham, *Souls*, 67-69.

⁴⁸ Katznelson, Ira, *Fear Itself: The New Deal and the Origins of Our Time* (Liveright Publishing Corporation: New York), 160 (“Walter White, the secretary of the NAACP, famously reported how FDR

explained why he would remain silent during the Senate filibuster of the antilynching bill first introduced in January 1934 by two of his party's senators 'I've got to get legislation passed by Congress to save America. . . . If I come out for the anti-lynching bill, [the southerners] will block every bill I ask Congress to pass to keep America from collapsing. I just can't take that risk.'").

⁴⁹ Purdum, Todd S., "The Crime-Bill Debate Shows How Short Americans' Memories Are," *The Atlantic*, Sept. 12, 2019, at 4, available at <https://www.theatlantic.com/politics/archive/2019/09/joe-biden-crime-bill-and-americans-short-memory/597547/>.

⁵⁰ Freeman, *Field of Blood*, 50.

⁵¹ *Id.* at 53.

⁵² *Id.* at 10-11.

⁵³ *Id.* at 11.

⁵⁴ *Id.* at 72.

⁵⁵ *Id.* at 72-73.

⁵⁶ *Id.* at 75.

⁵⁷ *Id.* at 76, 91-93.

⁵⁸ *Id.* at 76-77.

⁵⁹ *Id.* at 76.

⁶⁰ *Id.* (emphasis in original).

⁶¹ *Id.* at 70.

⁶² *Id.* at 28.

⁶³ *Id.* at 160. Gordon Wood made a similar observation: "[G]rass-roots Anti-Federalists concluded that, given the variety of competing interests and the fact that all people had interests, the only way for a person to be fairly and accurately represented in government was to have someone like himself with his same interests speak for him." Wood, *Radicalism*, 259. See also DuBois, *Suffrage*, 222 ("Gardener's diplomatic gifts rested on her uncanny ability to cajole and convince powerful men to grant her political requests. . . . She taught Maud Wood Park to see politicians neither as heroes or villains, but, as park put it, merely 'representative of the run of men.'").

⁶⁴ Freeman, *Field of Blood*, 136 ("Most Southern congressmen weren't bad people, [John Quincy Adams] said. Their bullying was 'dictated far more by the passions and prejudices of their constituents than by their own.' . . . Some bullying was performed for the folks back home, though it was no less real or damaging because of it.").

⁶⁵ *Id.* at 72.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 112-13.

⁷⁰ *Id.* at 113-14.

⁷¹ *Id.* at 114.

⁷² *Id.* at 139.

⁷³ *Id.* at 139-40.

⁷⁴ *Id.* at 169-70.

⁷⁵ *Id.* at 170.

⁷⁶ *Id.*

⁷⁷ Arendt, Hannah, “Values in Contemporary Society,” *Thinking Without a Bannister: Essays in Understanding 1953-1975* (Schocken Books: New York, 2018), at 439-40.

⁷⁸ A plaintiff may waive the right to a jury and let the judge act as jury. *See, e.g.*, Fed. Rule of Civ. Proc. 38 (“Right to A Jury Trial; Demand”), *available at* https://www.law.cornell.edu/rules/frcp/rule_38. A trial where a jury has been waived is called a bench trial.

⁷⁹ Klein, Christopher, “Why John Adams Defended British Soldiers in the Boston Massacre Trials,” *History.com*, Apr. 2, 2020, *available at* <https://www.history.com/news/boston-massacre-trial-john-adams-dan-abrams>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Fed. R. Civ. Proc. 3 (“Commencing An Action”), *available at* https://www.law.cornell.edu/rules/frcp/rule_3. I have provided citation to Cornell University’s online federal rules which is a widely used accessible source.

⁸⁵ Fed. R. Civ. Proc. 8 (“General Rules of Pleading”), *available at* https://www.law.cornell.edu/rules/frcp/rule_8.

⁸⁶ Fed. R. Civ. Proc. 12 (“Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing”), *available at* https://www.law.cornell.edu/rules/frcp/rule_12.

⁸⁷ *See id.* at 12(b).

⁸⁸ *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”).

⁸⁹ *See* Fed. R. Civ. Proc. 15 (“Amended and Supplemental Pleadings”), *available at* https://www.law.cornell.edu/rules/frcp/rule_15.

⁹⁰ *See* Fed. R. Civ. Proc. 26-37 (“Title V: Disclosures and Discovery”), *available at* <https://www.law.cornell.edu/rules/frcp>.

⁹¹ Fed. R. Civ. Proc. 30 (“Depositions by Oral Examination”), *available at* https://www.law.cornell.edu/rules/frcp/rule_30.

⁹² *Id.* at 30(c)(2) (“Objections”).

⁹³ This is such a laborious and specialized process that there is an entire industry of companies that support document review and evidence management in various ways.

⁹⁴ Fed. R. Civ. Proc. 56 (“Summary Judgment”), *available at* https://www.law.cornell.edu/rules/frcp/rule_56.

⁹⁵ *Id.* at 56(c) (“Procedures”).

⁹⁶ *See, e.g., Tolan v. Cotton*, 572, U.S. 650, 660 (2014) (“The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan’s competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.”).

⁹⁷ *See, e.g., Luce v. United States*, 469 U.S. 38, 40 n.2 (1984) (“We use the term [*in limine*] in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.”).

⁹⁸ Fed. R. Evid. 611(b) (“Scope of Cross-Examination”) and (c) (“Leading Questions”), *available at* https://www.law.cornell.edu/rules/fre/rule_611.

⁹⁹ Fed. R. Civ. Proc. 39 (“Trial by Jury or by the Court”), *available at* https://www.law.cornell.edu/rules/frcp/rule_39.

¹⁰⁰ *See* “Committee Membership Selection,” United States Court website, *available at* <https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection>.

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Id.*; see also *id.* (“Each committee also relies heavily on the services of its ‘reporter.’ The reporters are prominent law professors, who are the leading experts in their respective fields. Each has been appointed by the Chief Justice. The reporters research the relevant law and draft memoranda analyzing suggested rule changes, develop proposed drafts of rules for committee consideration, review and summarize public comments on proposed amendments, and generate the committee notes and other materials documenting the rules committees’ work.”).

¹⁰³ Arendt, Hannah, “Truth and Politics,” in *Between Past and Future* (New York: Penguin Books, 2006), 236 (hereafter “Arendt, *BPF*”). See also Zerilli, Linda M. G., “Fact-Checking and Truth-Telling in an Age of Alternative Facts,” *Le foucauldien* 6, no. 1 (2020): 1–22, at 12 (“As critics of post-truth we should not simply assume that truth is a good in itself and that it presupposes an ability to determine the correctness of statements. We need a clearer sense of why truth matters for democratic politics, of how to determine who is telling the truth, and of cultivating democratic practices that make citizens receptive to those individuals who take the risk of telling the truth in political contexts where truth is at odds with power.”).

¹⁰⁴ See, e.g., “Political Fact-Checking Under Fire,” *NPR*, Jan. 10, 2012, available at <https://www.npr.org/2012/01/10/144974110/political-fact-checking-under-fire>; Ceci, Stephen J. and Wendy M. Williams, “The Psychology of Fact-Checking,” *Scientific American*, Oct. 25, 2020 (opinion piece) (hereafter “Ceci and Williams, ‘Psychology of Fact-Checking’”), available at <https://www.scientificamerican.com/article/the-psychology-of-fact-checking1/>; “Fact Check Review,” *Real Clear Politics*, (“The goal of the RCP Fact Check Review project is to understand how the flagship fact-checking organizations operate in practice, from their claim and verification sourcing to their topical focus to just what even constitutes a ‘fact.’”), available at https://www.realclearpolitics.com/fact_check_review_methodology.html.

¹⁰⁵ Dewey, John, *The Public and Its Problems: An Essay in Political Inquiry* (Swallow Press: Athens, Ohio, 2016), 59 (hereafter “Dewey, *The Public and its Problems*”).

¹⁰⁶ Thank you to John McCallum for this example.

¹⁰⁷ Hannah Arendt also contemplated on this distance. See Arendt, *BPF*, 234 (“Have not generations of historians and philosophers of history demonstrated the impossibility of ascertaining facts without interpretation, since they must first be picked out of a chaos of sheer happenings (and the principles of choice are surely not factual data) and then be fitted into a story that can be told only in a certain perspective, which has nothing to do with the original occurrence? No doubt these and a great many more perplexities inherent in the historical sciences are real, but they are no argument against the existence of factual matter, nor can they serve as a justification for blurring the dividing lines between, fact, opinion, and interpretation, or as an excuse for the historian to manipulate facts as he pleases. Even if we admit that every generation has the right to write its own history, we admit no more than that it has the right to rearrange the facts in accordance with its own perspective; we don’t admit the right to touch the factual matter itself.”).

¹⁰⁸ Fed. R. Evid. 102 (“Purpose”), available at https://www.law.cornell.edu/rules/fre/rule_102.

¹⁰⁹ Litigation procedure and *the law* are not the same. Litigation is a process for filtering, challenging, and evaluating evidence and claims given applicable law. In this paper, I am focus on the *process* of litigation, not on a concept of *the law*.

¹¹⁰ Fed. R. Evid. 402 (“General Admissibility of Relevant Evidence”), *available at* https://www.law.cornell.edu/rules/fre/rule_402.

¹¹¹ Fed. R. Evid. 602 (“Need For Personal Knowledge”), *available at* https://www.law.cornell.edu/rules/fre/rule_602.

¹¹² This second-hand information is generally referred to as hearsay and is governed by a complicated set of rules (*see* FREs 801-807 (“Hearsay”), *available at* <https://www.law.cornell.edu/rules/fre>). The rules are complicated because of the balancing required in preferencing first-hand information as the best information with the recognition that such information either is not always available or that there are some circumstances where the hallmarks of truth are sufficient given the nature of the evidence.

¹¹³ *See* “Notes of Advisory Committee on Proposed Rules” to FRE 602 (“[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact” is a ‘most pervasive manifestation’ of the common law insistence upon “the most reliable sources of information.”) (quoting McCormick on Evidence §10), *available at* https://www.law.cornell.edu/rules/fre/rule_602. *See also supra* nn. 100-102 (The United States Court system maintains rules committees to review and update rules. These committees provide notes and commentary on proposed rules).

¹¹⁴ Fed. R. Evid. 701 (“Opinion Testimony By Lay Witnesses”), *available at* https://www.law.cornell.edu/rules/fre/rule_701.

¹¹⁵ *See* “Notes of Advisory Committee on Proposed Rules” to FRE 701 (citing McCormick on Evidence §11), *available at* https://www.law.cornell.edu/rules/fre/rule_701.

¹¹⁶ *See supra* n. 78.

¹¹⁷ Catalina Dep. 69:19-70:5, Jan. 17, 2014, *Ferolitio, et al. v. Vultaggio, et al.*, Index Nos. 600396-08 and 590967-08 (N.Y. Sup. Ct., New York Cty).

¹¹⁸ *See generally id.* (84 pages) (the continuation of a November 2013 deposition); Catalina Dep., Nov. 20, 2013, *Ferolitio, et al. v. Vultaggio, et al.*, Index Nos. 600396-08 and 590967-08 (N.Y. Sup. Ct., New York Cty) (293 pages).

¹¹⁹ *Novato Healthcare Ctr. v. Nat’l Labor Relations Bd.*, 916 F.3d 1095, 1098 (D.C. Cir. 2019) (citing *My Cousin Vinny* (Twentieth Century Fox 1992) (cross-examination of Mr. Tipton)).

¹²⁰ *Id.* at 1107.

¹²¹ *Id.*

¹²² *Id.* at n.5 (quoting American Rhetoric: Movie Speech, “My Cousin Vinny (1992),” *available at* <https://www.americanrhetoric.com/MovieSpeeches/moviespeechmycousinvinny3.html> (video clip)).

¹²³ *Infra* at 57-58 & nn. 180-82.

¹²⁴ *Id.*

¹²⁵ See, e.g., *In re Prempro Products Liability Litigation*, 586 F.3d 547, at 565-66 (8th Cir. 2009) (“Wyeth and Upjohn did not challenge Dr. Naftalis’s qualifications as an expert witness before the district court, and they do not argue that the method she used, differential diagnosis, is not a sound and accepted methodology. Instead, they argue that differential diagnosis cannot be used to prove the cause of breast cancer because no one knows the cause of breast cancer.”) (rejecting this argument), *available at* <https://casetext.com/case/in-re-prempro-products-liability-litigation-201>.

¹²⁶ “Notes of Advisory Committee on Proposed Rules” to FRE 701 (citing 7 Wigmore on Evidence §1919), *available at* https://www.law.cornell.edu/rules/fre/rule_701.

¹²⁷ See Dewey, *The Public and Its Problems*, 197 (“The true purity of knowledge exists not when it is uncontaminated by contact with use and service. . . . The adulteration of knowledge is due not to its use, but to vested bias and prejudice, to one-sidedness of outlook, to vanity, to conceit of possession and authority, to contempt or disregard of human concern in its use.”).

¹²⁸ Fed. R. Evid. 401 (“Test for Relevant Evidence”), *available at* https://www.law.cornell.edu/rules/fre/rule_401.

¹²⁹ Fed. R. Evid. 403 (“Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons”), *available at* https://www.law.cornell.edu/rules/fre/rule_403.

¹³⁰ For an example of this concept applied in thinking about political science, see Philip Kitcher, “Constraints of Free Inquiry,” in *Science, Truth, and Democracy* (Oxford: Oxford University Press, 2001), 93-108.

¹³¹ Fed. R. Evid. 404(a)(1) (“Character evidence”), *available at* https://www.law.cornell.edu/rules/fre/rule_404.

¹³² Fed. R. Evid. 106 (“Remainder of or Related Writings or Recorded Statements”), *available at* https://www.law.cornell.edu/rules/fre/rule_106.

¹³³ *Id.* at “Notes of Advisory Committee on Proposed Rules” to FRE 106 (citing McCormick on Evidence §56).

¹³⁴ Kessler, Glenn, “About the Fact Checker,” *The Washington Post*, Jan. 1, 2017 (“Two Pinocchios: Significant omissions and/or exaggerations. Some factual error may be involved but not necessarily. A politician can create a false, misleading impression by playing with words and using legalistic language that means little to ordinary people. (Similar to ‘half true.’)”), *available at* <https://www.washingtonpost.com/politics/2019/01/07/about-fact-checker/>.

¹³⁵ One primary stage when parties submit competing statements of disputed facts is in the filing of a Motion for Summary Judgment before trial. Rule 56 of the Federal Rules of Civil Procedure provides: “A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is *no genuine dispute as to any material fact* and the movant is entitled to judgment as a matter of law.” (emphasis added). To support the existence of *disputed fact*, the parties must cite to evidential material in the pre-trial record, such as depositions or documentary evidence, among other materials. See Fed. R. Civ. Proc. 56(c)(1), *available at* https://www.law.cornell.edu/rules/frcp/rule_56.

¹³⁶ “Prempro Settlements to Result in \$1.2B Payments for Breast Cancer: Report,” *About Lawsuits*, available at <https://www.aboutlawsuits.com/prempro-settlement-payments-breast-cancer-29138/#:~:text=Pfizer%20is%20expected%20to%20pay,women%20to%20develop%20breast%20cancer.&text=In%20the%20litigation%2C%2011%20out,in%20favor%20of%20the%20plaintiff>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See supra* n. 15.

¹⁴² Meacham, *Souls*, 267-68.

¹⁴³ Senior, Jennifer, “The Ginsburg-Scalia Act Was Not a Farce,” *The New York Times*, Sept. 22, 2020 (hereafter “Senior, “Ginsburg-Scalia Act”), available at <https://www.nytimes.com/2020/09/22/opinion/ruth-bader-ginsburg-antonin-scalia.html>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Fed. R. Civ. Proc. 8 (“General Rules of Pleading”) (“A party may state as many separate claims or defenses as it has, regardless of consistency.”), available at https://www.law.cornell.edu/rules/frcp/rule_8.

¹⁴⁷ *See generally* DuBois, *Suffrage*.

¹⁴⁸ *Id.* at 19 (“Whatever it is morally right for a man to do, it is morally right for a woman to do.”) (quoting Angelina Grimke) (emphasis in original); *id.* at 178 (“Traditional suffrage methods assumed that getting laws passed was a matter of gradually educating legislators to the justice and necessity of enfranchising women. Blatch believed that education and justice were beside the point. She insisted on the fundamental ‘connection between the advancement of woman suffrage and politics as they existed in our native state.’”).

¹⁴⁹ *Id.* at 69 (As the women’s suffrage and black suffrage movements splintered, Susan B. Anthony and Elizabeth Cady Stanton recognized that the “[w]oman suffrage was becoming its own movement, and its leaders must seek out avenues to victory wherever and however they might present themselves, regardless of the counsel of others.”); *id.* at 104 (“The [Supreme] court’s decision in the Minor case put an end to any effort to locate women’s right to vote within the general rights and protections of national citizenship. . . . Now that the Supreme Court had essentially vitiated federal control over voting, states were left with almost full control over the franchise. Suffragists began to refocus on amending state constitutions to grant women suffrage rights.”).

¹⁵⁰ *Id.* at 245 (“The ‘two Mauds,’ as they were called, developed a highly nuanced sense of the character of each senator, his vulnerabilities, and the best way to influence him. As lobbyists they were thoroughly

professional, amazingly effective, all the more so since male politicians they sought to influence expected none of those things from women.”).

¹⁵¹ *Id.* at 108 (“‘You are to speak for woman’s ballot as a weapon of protection to her home and tempted loved ones from the tyranny of drink.’ Suffrage was the way.”) (quoting Frances Willard); *see also id.* 109-110 (“Two months after her suffrage insight, [Willard] initiated a brilliant strategy for relaunching woman suffrage away from its radical associations. She rebranded ‘woman suffrage’ as ‘home protection.’”).

¹⁵² *Id.* at 135 (“Instead of temperance, Colorado suffragists were linking women’s right to vote to issues that male voters cared about, and from whom they could possibly win support. . . . In recognition of this ideological repositioning, Colorado suffragists no longer spoke of woman suffrage but of ‘equal suffrage’ because . . . ‘in the word ‘equal’ there is an appeal to justice which does not seem to exist in the word ‘woman’.”). Of note is that, by focusing on a message framing that better resonated with male voters, the suffragists had a landmark win; Colorado “was a first because a majority of male voters had supported a state constitutional amendment for woman suffrage.” *Id.* at 138. DuBois’ book shows how different rationales focused on the same goal had very different abilities to garner support from different constituencies, with some rationales having broader appeal.

¹⁵³ *Id.* at 168 (“Mary Kenney O’Sullivan sent a message directly addressed to the state’s working-class men. ‘When women organize and vote,’ she predicted, not only would women ‘get equal pay for equal work,’ but they would no longer compete unfairly with men by undercutting their wages.”); *see also id.* at 173 (“The suffragists’ goal had been to eat away at working-class opposition, and they had succeeded. ‘Maud Younger’s work in unions . . . saved us,’ a local suffragist report. Women would now have full voting rights in California.”).

¹⁵⁴ It is also worth noting that, only in rare situations (or a bench trial), can litigators be successful by winning a simple majority of people to their view. Generally, in civil cases, a favorable outcome relies on convincing a supermajority or reaching a unanimous agreement. *See, e.g.,* Fed. R. Civ. Proc. 48 (“Number of Jurors; Verdict; Polling”), *available at* https://www.law.cornell.edu/rules/frcp/rule_48. In this way, it is an actual consensus generating procedure that is born out of adverse argumentation. And, although beyond the scope of this paper, it is noteworthy that the judging process (the actual consensus determination and related discussion) is secret.

¹⁵⁵ *See, e.g.,* O’Neill, Onora, “Abstraction, Idealization, and Ideology in Ethics,” *Royal Institute of Philosophy Supplements*, Vol. 22 (1997), 55-69, at 68-69 (“The objective of building understanding between those who do not share terms of discourse requires a strategy of seeking to grasp both perspectives, not the loss or suppression of some original bearings.”).

¹⁵⁶ “Notes of Advisory Committee on Proposed Rules” to FRE 702, *available at* https://www.law.cornell.edu/rules/fre/rule_702.

¹⁵⁷ *Id.*

¹⁵⁸ American Rhetoric: Movie Speech, “My Cousin Vinny (1992),” *available at* <https://www.americanrhetoric.com/MovieSpeeches/moviespeechmycousinvinny4.html> (Voir Dires of Ms. Vito) (video clip). And it’s probably no surprise that in a popular, wide release movie, the girl without the education but with a lot of smarts had the better answer.

¹⁵⁹ See, e.g., Cappellino, Angelica, “Daubert vs. Frye: Navigating the Standards of Admissibility for Expert Testimony,” *The Expert Institute* (“The two major governing standards can be found in two seminal cases—a D.C. Circuit case, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and a U.S. Supreme Court decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The federal court system exclusively follows *Daubert* while state courts are divided between the two.”), available at <https://www.expertinstitute.com/resources/insights/daubert-vs-frye-navigating-the-standards-of-admissibility-for-expert-testimony>.

¹⁶⁰ For example, in one excerpt from the decision, the judge found:
“Mercer, with vast experience in business valuation, correctly used the company's past costs to estimate its future costs. By contrast, Ruback [the finance professor] estimated merely that Arizona's future costs will track inflation. After being evasive throughout the questions posed on this issue during his cross-examination, Ruback conceded an affirmative answer in response to the following question ‘Instead of using more detailed data to project specific cost increases, you basically simplified them and used an inflation based forecast.’ Trial Tr p. 4402. While Ruback termed this approach ‘reasonable simplification,’ he nonetheless assumes that the company's costs will increase faster than they had in the years prior to 2010. Mercer's credible testimony succinctly summarizes why such testimony should be rejected:

[Ruback] utilizes a business plan that I don't believe has any bearing in history or any bearing in any of the evidence I have seen. He conducts — he assumes a business plan that basically assumes that Mr. Vultaggio and the management at AriZona are incompetent and [in]capable of adapting to evolving business conditions. Trial Tr. p. 2476 line 24 - 2477 line 4.

In sum, Ruback’s assumption that Arizona's total costs will track inflation has never been supported by Arizona’s past historical data. The Court credits Mercer’s testimony in its entirety regarding Arizona’s anticipated costs.” *Ferolitto, et al. v. AriZona Beverages USA LLC et al.*, Index No. 004058-12 (N.Y. Sup. Ct., Nassau Cty.), Oct. 14, 2014, at 27, available at <https://law.justia.com/cases/new-york/other-courts/2014/2014-ny-slip-op-32830-u.html>.

¹⁶¹ “The Defense is Wrong,” *My Cousin Vinny*, (1992) (video clip), available at <https://www.youtube.com/watch?v=CFdJza0AbeA>.

¹⁶² *Id.* at “Mr. Wilbur Examination” (video clip), available at <https://www.youtube.com/watch?v=Ei-EeDQyDS0>.

¹⁶³ See *supra* n. 161.

¹⁶⁴ Senior, “Ginsburg-Scalia Act.”

¹⁶⁵ *Id.*

¹⁶⁶ See *supra* p. 5 & n. 14 (Nicholas Kristof highlighting the importance of “building trust” in efforts to address difficult issues).

¹⁶⁷ Lat, David, “At Lunch With David Boies, 20 Years After His Departure From Cravath,” *Above the Law* (May 23, 2017) (emphasis added), available at <https://abovethelaw.com/2017/05/at-lunch-with-david-boies-20-years-after-his-departure-from-cravath/>.

¹⁶⁸ Goodin, Dan, “Revisiting the spectacular failure that was the Bill Gates deposition,” *Ars Technica*, Sept. 10, 2020, *available at* <https://arstechnica.com/tech-policy/2020/09/revisiting-the-spectacular-failure-that-was-the-bill-gates-deposition/>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Wright, David, “Poll: 36% approve of Trump’s job performance,” *CNN* (Jan. 27, 2017), *available at* <http://www.cnn.com/2017/01/27/politics/trump-approval-rating-quinnipiac-poll/index.html>.

¹⁷⁷ *Drudge Report* (Feb. 2, 2017) (with a link to Rasmussen Reports), *available at* http://www.drudgereportarchives.com/data/2017/02/02/20170202_185804.htm.

¹⁷⁸ *Real Clear Politics* (Feb. 2, 2017) (scrolling down to the relevant dates. The current page shows all of the polls for that period; on Real Clear on February 2, they were showing the RCP average for the six polls highlighted herein (per a screen shot of that day)), *available at* https://www.realclearpolitics.com/epolls/other/president_trump_job_approval-6179.html#polls

¹⁷⁹ *Id.*

¹⁸⁰ U.S. Con. Art. III, Sec. 2 (“case” and “controversy” requirement), *available at* <https://www.law.cornell.edu/constitution/articleiii>.

¹⁸¹ 547 U.S. 332, 341 (2006).

¹⁸² *Id.* at 353.

¹⁸³ Montanaro, Domenico, “Poll: Majority Want to Keep Abortion Legal, But They Also Want Restrictions,” *NPR*, June 7, 2019, *available at* <https://www.npr.org/2019/06/07/730183531/poll-majority-want-to-keep-abortion-legal-but-they-also-want-restrictions>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Scott, James C., *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press: New Haven, 1998), 342.

¹⁸⁸ For example, a collaborative project between the law school, Institute of Politics, and the Stevanovich Institute on the Formation of Knowledge could take elements of existing legal education models and tweak and repurpose them for an experiment in political knowledge development and dissemination.

¹⁸⁹ Although the mainstream national dialogue and media are focused on the more polarizing ends of political debate, there is continued recognition of a need for greater depth of political debate and experimentation with formats working toward that goal. To this end, Vanderbilt in January 2021 launched “The Vanderbilt Project on Unity and American Democracy.” The project website notes that the “effort will yield a non-partisan hub for leading scholars, key policymakers, activists, opinion leaders, and others to develop evidence-based solutions that are not driven by ideological predispositions.” See <https://www.vanderbilt.edu/unity/about/>.

¹⁹⁰ A typical length for substantive briefing is 40-40-15 (even for large litigation). See, e.g., Local Civil and Criminal Rules for the District of New Jersey, Rule 7.2 (“Affidavits and Briefs”) (Revised Feb. 1. 2017), available at <https://www.njd.uscourts.gov/sites/njd/files/completelocalRules.pdf>. This type of format is common for briefing: primary briefs (moving and opposition) of one set length, with replies allowed a smaller number of pages.

¹⁹¹ See, e.g., Pasek, Michael and Samantha Moore-Berg, “The Divide Between Political Parties Feels Big. Fortunately, It’s Smaller Than We Think,” *Behavioral Scientist*, Nov. 23, 2020, available at <https://behavioralscientist.org/the-divide-between-political-parties-feels-big-fortunately-its-smaller-than-we-think/>. Thank you to John McCallum for suggesting this article.

¹⁹² See Ceci and Williams, “Psychology of Fact-Checking,” (“Exposure to contrasting views sometimes happens when a counterclaim appears days or weeks later or an independent fact-checker like PolitiFact requests a retraction, but the key to better cognitive reasoning outcomes is for both sides’ claims to appear simultaneously in the very same report.”).

¹⁹³ See, e.g., Local Civil and Criminal Rules for the District of New Jersey, Rule 7.1 (“Application and Motion Practice”) (Revised Feb. 1. 2017), available at <https://www.njd.uscourts.gov/sites/njd/files/completelocalRules.pdf>.

¹⁹⁴ Funk, Cary and Brian Kennedy, “How Americans see climate change and the environment in 7 charts,” *Pew Research Center* (Apr. 21, 2020) (hereafter “Funk and Kennedy, *Pew Research*”), available at <https://www.pewresearch.org/fact-tank/2020/04/21/how-americans-see-climate-change-and-the-environment-in-7-charts/>.

¹⁹⁵ *Id.*

¹⁹⁶ “Yale poll reveals overwhelming public desire for new energy policy direction,” *Yale University*, June 9, 2005, available at https://www.eurekalert.org/pub_releases/2005-06/yu-ypr060905.php.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See also DuLong, Jessica, “The Capitol riot and the danger of depicting rural America as only right-wing,” *CNN*, Feb. 8, 2021 (Elizabeth Catte: “About two years ago, there was a resurgence in Appalachia of a particularly aggressive form of black lung disease. Reporters would interview people suffering and ask, ‘Knowing what you know now, would you still go and work in a coal mine?’ They wanted people to say yes. And people often did say yes because that work gave them the chance to provide for their families. What they never ask these individuals is, ‘If you could live in a world where coal didn’t exist, would you want to live in that world?’”).

²⁰¹ See also, e.g., Tyson, Alec and Brian Kennedy, “Two-Thirds of Americans Think Government Should Do More on Climate,” *Pew Research Center* (June 23, 2020) (“Bipartisan backing for carbon capture tax credits, extensive tree-planting efforts.”), available at <https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/>.

²⁰² See, e.g., “Climate and Energy Experts Debate How to Respond to a Warming World,” *New York Times*, Oct. 7, 2019, available at <https://www.nytimes.com/2019/10/07/business/energy-environment/climate-energy-experts-debate.html>.

²⁰³ See, e.g., Gunther, Marc, “Climate Converts: The Conservatives Who Are Switching Sides on Warming,” *Yale Environment 360* (Mar. 30, 2017) (“It’s hardly being noticed, given the current political atmosphere in Washington. But a small yet growing number of Republicans, conservatives, and libertarians are starting to push for action on climate.”), available at <https://e360.yale.edu/features/climate-converts-the-conservatives-who-are-switching-sides-on-climate-change>; Meigs, James, “The surprisingly smart solution to climate change — coming from conservatives,” *New York Post* (Jan. 11, 2020) (“Growing numbers of conservatives are concerned about climate change, and they’re developing policies to fight it. Does that mean Republicans are ready to join Alexandria Ocasio-Cortez and other progressives in supporting expensive Green New Deal proposals? Far from it.”), available at <https://nypost.com/2020/01/11/meet-the-conservatives-with-surprisingly-smart-solutions-to-climate-change/>.

²⁰⁴ See, e.g., Funk and Kennedy, *Pew Research* (“But among Republicans, there are sizable differences in views by generation. Millennial and younger Republicans—adults born in or after 1981—are more likely than Republicans in the Baby Boomer or older generations to think government efforts to reduce climate change are insufficient (52% vs. 31%).”)

²⁰⁵ See *supra* n. 202.

²⁰⁶ As but one example, on a different policy issue (criminal justice reform), Michelle Alexander in *The New Jim Crow*, references prior research examining “costs of integration and racial equality.” *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press: New York, 2020) at 58. She notes that “a disproportionate share of the costs . . . had been borne by lower- and lower-middle-class whites, who were suddenly forced to compete on equal terms with blacks for jobs and status and who lived in neighborhoods adjoining black ghettos. Their children—not the children of wealthy whites—attended schools most likely to fall under busing orders. The affluent white liberals who were pressing the legal claims of blacks and other minorities ‘were often sheltered, in their private lives, and largely immune to the costs of implementing minority claims.’” *Id.* The multitude of headlines about Bill Gate’s investment in private air travel or John Kerry’s use of a private jet to accept a climate award possibly tap into similar cost fairness feelings. See, e.g., Katz, Benjamin, “Bill Gates Joins Private-Equity Firms in

\$4.7 Billion Deal for Private-Jet Company,” *The Wall Street Journal* (Feb. 5, 2021), available at <https://www.wsj.com/articles/bill-gates-joins-private-equity-firms-in-4-7-billion-deal-for-private-jet-company-11612534767>; Dorman, Sam, “John Kerry took private jet to Iceland for environmental award, called it ‘only choice for somebody like me,’” *Fox News* (Feb. 3, 2021), available at <https://www.foxnews.com/politics/john-kerry-private-jet-iceland-climate-award>. Social media further highlights easy comparisons of potentially differing impacts of policies; see also Schwab, Tim, “Bill Gates, Climate Warrior. And Super Emitter,” *The Nation* (Feb. 16, 2021), available at <https://www.thenation.com/article/environment/bill-gates-climate-book/>.

²⁰⁷ Jeremy Waldron, “What Plato Would Allow,” *Nomos*, no. 37, (1995): 138-178, at 148.