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Lawyers and the Theory of the “Big Lie”

Research Paper 22-019

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> "And thanks to your bullshit, we are now under siege"
> Greg Jacob, counsel to Vice President Pence, to John Eastman[1]

Disputes over the 2020 election are now playing out in disciplinary proceedings against some of President Trump's election lawyers. Among others, Rudolph Giuliani, Sidney Powell, and John Eastman are subject to such proceedings. An organization called the 65 Project has been formed to try to initiate proceedings against more Trump election lawyers,[2] at least two judges have referred Trump election lawyers to state bars to consider discipline,[3] and new complaints continue to be filed.[4]

There are two ways to think about this push for discipline. One might think of it as aiming to punctuate President Biden's victory. On this view, the point would be that his win was so clear that challenges to it deserve discipline as part of the "Big Lie" that the election was stolen. Some calls for discipline read this way. They assert that some of the legal arguments made by Trump election lawyers were misstatements of fact, implying that Biden's victory was beyond the ability of legal rhetoric to dispute. To the extent discipline aims to reinforce Biden's victory, it will not succeed. Tens of millions of people believe Joe Biden was not elected legitimately,[5] and there is no reason to think state bar discipline will change their minds. Persons believing the 2020 election was stolen are likely to view disciplinary proceedings as partisan payback.[6] If anything, discipline probably would reinforce such persons' belief that government institutions are biased against them.[7]

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[1] *Eastman v. Thompson*, No. 8:22-cv-00099, 2022 BL 4119, at *10 (C.D. Cal. Jan. 20, 2022).

[2] The "65 Project" seeks to initiate disciplinary proceedings against a greater number. The 65 Project, https://the65project.com/ (last visited Aug. 21, 2022). *See* Justin Wise, *65 Project Leader Talks Holding 'Big Lie' Attys Accountable*, LAW 360 (Mar.16, 2022, 4:39 PM), https://www-law360-com.sandiego.idm.oclc.org/pulse/articles/1473254.

[3] Judge Boasberg referred Erik Kaardal in *Wisconsin Voters Alliance v. Pence*, No. 1:20-cv-03791, 2021 BL Document 23, (D.D.C. Dec. 22, 2020); and Judge Parker referred Sidney Powell, Lin Wood, Emily Newman, Julia Haller, Brandon Johnson, Scott Hagerstrom, Howard Kleinhendler, Gregory Rohl, and Stefanie Lynn Junitila to their respective bars. *King v. Whitmer*, 556 F. Supp. 3d 680, 735 (E.D. Mich. 2021).

[4] For example, on July 28, 2022, the 65 Project wrote the clerk of the Supreme Court seeking to have Eastman disbarred from that Court. Michael Teter, *The 65 Project's Complaint Against John Eastman*, THE 65 PROJECT (July 28, 2022), https://the65project.com/ethics-complaint-against-john-eastman/.

[5] Polls vary in specifics. A January 2022 poll concludes that only 55% of Americans believe President Biden was elected legitimately, while 26% believe he was not and 16% are not sure. Brianna Richardson, *Axios|Momentive Poll: January 6th revisited*, SURVEY MONKEY (2022), https://www.surveymonkey.com/curiosity/axios-january-6-revisited/. Roughly 155 million voters cast ballots for President in 2020. U.S. Census Bureau, 2020 Presidential Election Voting and Registration Tables Now Available (Apr. 29, 2021), https://www.census.gov/newsroom/press-releases/2021/2020-presidential-election-voting-and-registration-tables-now-available.html. The 16% figure implies roughly 25 million people believing the election result illegitimate. To the extent it matters, I am not one of these people, and find these data cause for significant concern. Renee Knake Jefferson argues that these data imply a need for professional discipline against Trump election lawyers. Renee Knake Jefferson, *Lawyer Lies and Political Speech*, 131 THE YALE L.J. 114, 133-136 (2021).

[6] Partisanship may play a role, but that would not mean discipline was not warranted. One may be selectively prosecuted and guilty just the same.

[7] Sidney Powell made this point in a motion to dismiss disciplinary charges filed against her in Texas:

> The page bare-bones petition of the Bar asking for baseless, politically motivated and harassing complaints diminishes the credibility of Bar already riddled with problems and makes it appear to be nothing more than tool of and in the pocket of the "*Left*."

But calls for discipline need not be understood as calls to put the knee in when bringing down an opponent. There is a better way to view such calls, and the disciplinary proceedings initiated to date. On this view, disciplinary proceedings reflect the organized bar's attempt to distinguish what President Trump's election lawyers did from things the profession routinely accepts. Lawyers elaborate theories to change constitutional meaning all the time. The right to government-provided counsel is a lawyer-driven constitutional innovation,[8] as are a cluster of rights that trace to *Griswold v. Connecticut*,[9] which graft a variation of Mill's harm principle onto the Constitution.[10] Lawyers opposed to capital punishment have come up with a variety of theories nominally aimed at its implementation, with the goal of achieving its abolition. Many such theories argue that a penalty referenced in constitutional text is unconstitutional.[11] Part of the litigation strategy against the death penalty in the 1960s and early 1970s was to postpone enough executions to put the Supreme Court in a bind — either strike down the death penalty or take responsibility for massive numbers of executions.[12] In other words, the strategy was to try to play "chicken" with the Supreme Court, betting that the justices would not have the stomach for a ruling that led to so many deaths. Tort lawyers came up with the idea of recruiting state and local governments to sue tobacco, pharmaceutical, gun and other companies to enjoin practices not banned by positive law or to recover incremental costs imposed on government programs. Some of the theories stretched common law chestnuts such as nuisance or unjust enrichment to

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Sidney Powell's Motion to Dismiss Under Rule 91a at 7, Commission for Lawyer Discipline v. Powell, No. 22-02562, 2022 WL 704600 (2022).

[8] *See* William Baude, *Is Originalism Our Law?*, 115 COLUMBIA L.REV. 2349 (2015) ("Since the Sixth Amendment at the time of the Founding was thought only to vindicate the right to hire one's own counsel, *Gideon* seems like it ought to be a rejection of originalism." Baude argues that *Gideon* was about precedent, not originalism, which shows only that orginalists are perfectly capable of bending to decisions their method would not justify but which are popular in relevant communities). For a detailed discussion, *see* Alexander Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L.Q. REV. 1, 7–8 (1944).

[9] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[10] *E.g. Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking ban on sale of contraceptives to married persons); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking ban on sale of contraceptives to unmarried persons); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking ban on sodomy); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (striking ban on same-sex marriage).

[11] *E.g.*, Joseph Blocher, *The Death Penalty and the Fifth Amendment*, 111 NW. U.L. REV. 275 (2016).

[12] *E.g.*, Michael Meltsner, *Litigating the Death Penalty: The Strategy Behind Furman*, 82 YALE L.J. 1111, 1112 (1973):

> [T]he courts had to take a fresh look at the venerable institution of capital punishment. In turn, to catch the conscience of the courts, the death penalty had to be a "problem"-one that was discussed, attracted attention and, in a more immediate way than in the past, affected the lives of the judges and prison officials who administered it. Abolition needed a symbol, a threat of crisis, to overcome inertia and win favor from a reluctant judiciary. One way to promote this end was to raise the entire range of capital punishment arguments in every case where execution was imminent, thereby stopping the killing and eventually presenting any resumption of it as likely to lead to a blood bath.

seek recovery of state Medicaid payments,[13] or to seek abatement of public health problems,[14] and critics asserted that the structure in which government hired private lawyers on a contingent fee basis "created what one of those trial lawyers affectionately calls a `fourth branch of government.'"[15]

These are impressive achievements, but there is no political valence to creative legal theories. The Right has gained traction with originalism and strict textual interpretation, which are far more prominent today than in, say, 1990. To welcome such developments as desirable or condemn them as retrograde is to acknowledge that the Constitution has few fixed meanings,[16] and even those are often supported by consensus that is achieved through rhetorical entrepreneurism within the law.[17]

The election challenges were part of a narrative that threatened to undermine the democratic transfer of power, and thus threatens — to this day — such democracy as we have in America. It is fair to read calls for discipline as a reaction to this fact, but there is a noble and a cynical perspective on the relationship between the two. The noble view would be that some things are too important to be run through the mill of ordinary lawyering.[18] Lawyers getting clever with words and interpretive method may be fine for ordinary cases, the argument would go, and might even be fine when cleverness enmeshed government in litigation that generated legal fees that might influence the political process,[19] but not when democracy itself is on the

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[13] Mississippi's original suit alleged nuisance and unjust enrichment. Statutory claims were added over time in various jurisdictions. *E.g.*, Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. REV. 329, 333 (1999) (discussing theories of early tobacco suits). On the entrepreneurial aspect of this movement, *see* Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 570 (2001) ("Viewed as of the time the suits were filed, the tobacco suits had no support in either case law or statutory law, and thus constituted a governmental experiment in entrepreneurial litigation.")

[14] San Francisco v. Purdue Pharma L.P., No. 3:18-cv-07591, 2022 BL 1578, (N.D. Cal. Dec. 18, 2018).

[15] William H. Pryor, Jr., *Comment*, 31 SETON HALL L. REV. 604, 609 (2001). Mr. Pryor wrote as the Attorney General of Alabama.

[16] Those supported by text for which there exist standards of interpretation supported by sufficient consensus that one would expect members of a relevant interpretive community to converge on a single reading.

[17] Such as the application of the equal protection clause to women. *United States v. Virginia*, 518 U.S. 515 (1996) (male-only state military college violated equal protection clause). I take it as given that the extension of the equal protection clause to women is safe for now, but it was an achievement at odds with conventional forms of originalism. *Id*. at 567 ("it is entirely clear that the Constitution of the United States-the old one-takes no sides in this educational debate"). Originalism is far more elastic than it pretends to be, and, in keeping with the point made in the text, perfectly capable of stretching its rhetoric to embrace popular rulings. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1 (2011).

[18] *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377, 381 (3d Cir. 2020).

[19] A criticism Professor Brickman made of the state attorney general tobacco cases. Daniel J. Capra, Lester Brickman, Michael Ciresi, Barbara S. Gillers, & Robert Montgomery, *The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827, 2832 (1999).

> The settlements, in reality, are public contracts between the states and the tobacco companies that effectuate certain public policies regarding the advertising and sale of tobacco products, in some cases determine how the tobacco payments are to be spent, and in all cases violate state laws that require appropriations of state funds to be approved by the legislature. This is public policy writ large. Indeed, these alliances are nothing less than a new source for the creation of public policy.

line. The noble view thus raises the question why normal rules are acceptable for cases involving liberty, property, injury, divorce, and so on, if they are not acceptable for elections.

A more cynical view might bridge this gap. The cynical take is that a line needs to be drawn because President Trump's election lawyers threatened to undermine the conditions necessary for lawyers to do many of the things President Trump's election lawyers did, in games where the stakes are lower. From this perspective the problem is that the election challenges threatened the game itself, not just a rule within it. A line must be drawn here because it does not exist on its own and if it is not drawn here the game may be up. Left to their own devices, professional custom and practice would devour the profession. Once the line is drawn, lawyers may go on spinning stories and contriving theories in other cases. This cynical view is no less sound for its hypocrisy.

Lawyers advance implausible theories and interpretations based on tendentious evidence all the time. Call it hand-waving, zealous advocacy, or just bullshit, the profession tolerates it and often praises it. That is a problem for the bar. It needs to at least take the position that President Trump's lawyers crossed a line no lawyer should be allowed to cross because only then can the profession as a whole escape the indictment implied by viewing what these lawyers did as the kind of things that lawyers do.

President Trump's election challenges had theoretical and factual components. Calls to discipline President Trump's election lawyers are no doubt influenced by factual assertions that were not credible at the time they were made, and which have fared even more poorly over time. These include assertions that voting machines were hacked, the U.S. Postal Service was corrupted to favor President Biden, and employees of voting machine companies rigged the election. I do not address the factual aspects of the election challenge in this Article because in judging a theory it is helpful to assess whether it is intrinsically unsound or just unsupported. Outrage at some of the factual assertions made in election challenges is understandable, and I do not mean to question it, but it is not the subject of this piece. The issues regarding the theory discussed in this Article would exist even if there were no questions regarding voting machines or falsified mail-in ballots. Procedural questions, such as the use of drop boxes or signature comparison requirements, would still exist.

This Article addresses controversies over two theories that together comprise what I call the endgame theory. The endgame theory turned on the assertion that, under the Twelfth Amendment, Vice President Pence had the power to reject or postpone consideration of electoral slates certified by certain states. The 12th Amendment claim was the second step in the endgame theory. The first step rested on another theory, which is popular enough to have earned its own brand: the Independent State Legislature ("ISL") theory.[20]

Professor Brickman stated that "it was inevitable that in many of the states the selection process [for private counsel] would be, let me call it, tainted by the volume of money that was going to be passing through. . . . Secrecy surrounded the hiring of the lawyers in most of the states by the attorneys general. In most states, the hiring was done on a pay-to-play basis." *Id*. at 2848-49.

[20] Named and criticized strenuously in Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2022 SUP.CT. REV. 1. A cogent summary of the theory is found in the complaint in *Wisconsin Voters Alliance v. Pence*, No. 1:20-cv-03791 BL 1 at 6-7, 14-16, 24-27, 109-113 (D.D.C. Dec. 22, 2020).

ISL theory asserts that only state legislatures may set the "Manner" of voting in presidential elections. Other state actors—including executive branch actors and judges—may not vary statutory text. That theory is not fully articulated, and to date no majority opinion from the U.S. Supreme Court endorses it. Four sitting justices have shown sympathy for some form of the ISL theory, however, and it may command a majority soon. Criticisms of President Trump's election lawyers tend to gloss over this step of the endgame theory by noting that Trump lost his election challenges, which is true. But the ISL theory can stand on its own, and it has enough acceptance within the profession that assertion of the theory is not sanctionable–not even close. It follows that the first step in the endgame theory was not sanctionable, and that the endgame theory cannot be assessed fairly apart from the ISL theory. Moreover, even apart from present controversies over discipline, because ISL theory can stand on its own, to ignore it is to understate the threat democracy faces from legal theory.

Some criticism of the endgame theory maintains that advocacy of the theory violated various disciplinary rules, but such criticism misses a larger point. The theory sheds light on the relationship between ethics rules and interpretive practices, and the relationship between lawyers, who commonly seek to change the course of the law, and the ability of the law to serve its primary function of coordinating behavior. The law is constantly remaking itself and lawyers are the principal (though not sole) makers. The endgame theory tests whether law can effectively impose internal limits on this process. The answer to that question ultimately is "no," which suggests that calls for discipline are not sufficient to address the larger questions called by President Trump's election challenges.

Part I of this Article describes the endgame theory. Part II discusses how elements of that theory fared in litigation, including in a civil discovery ruling by a judge in the Central District of California, finding a preponderance of evidence that extrajudicial advocacy of the theory furthered crimes. This Article concludes that, based on present publicly available information, it is possible to imagine a disciplinary official reasonably making a formal case for discipline based on extrajudicial advocacy of the endgame theory. Even so, however, prudence would counsel caution in pursuing such a claim. Even such a formal case is harder than calls for discipline acknowledge, and if President Trump's election challenges prove anything it is that not every argument that can be made should be made. Particularly as the ISL theory looms, beyond the reach of discipline, the threat to democracy posed by legal theory is not going to be materially lessened by pursuing discipline against President Trump's election lawyers.

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President Trump's election challenges took different forms in different places. Probably it would be wrong to impute a single legal theory to them, unless "by any means necessary" counts as a theory in this context. An endgame theory emerged after other theories failed in court, however, and it can be specified succinctly. A complaint the United States Democracy Center[21] submitted to the California bar regarding John Eastman frames the issue:

[21] UNITED STATES DEMOCRACY CENTER, https://statesuniteddemocracy.org/ (last visited Aug. 21, 2022).

> Mr. Eastman also assisted in Mr. Trump's dangerous efforts to prevent or disrupt the counting of electoral votes at the January 6, 2021, Joint Session of Congress. The core of that strategy was to pressure Vice President Mike Pence to violate his legal obligations under the Electoral Count Act of 1887 and the Constitution by refusing to count the lawful electoral votes from numerous states—thereby throwing the election to Mr. Trump—or by delaying the count until some undefined time after an indeterminate "investigation"—thereby provoking a constitutional and national security crisis in which no president has been lawfully elected. Mr. Trump sought to execute this strategy by threatening to destroy Mr. Pence's political career if he did not comply.[22]

According to the complaint, Eastman "knew" his conclusions were "thoroughly wrong" or was willfully blind to that fact. Like any good opening statement, the complaint created expectations almost strong enough to overlook the absence of a citation to authority rejecting the endgame theory.[23]

A. The Endgame Theory.

The endgame theory proceeded in three steps: (1) The ISL theory of Article II; (2) an historical interpretation of awkward text in the Twelfth Amendment; and (3) the claim, depending on (2), that the Electoral Count Act of 1887 was unconstitutional. One court has ruled, albeit in a discovery dispute, that extrajudicial advocacy of this theory was a step in a criminal conspiracy. The Democracy Center complaint cites two memoranda Eastman wrote. I first discuss the theory, then its use in litigation, and then the memoranda.

Interpretive method is important to each step of the argument. The ISL theory is a formal, strictly textualist reading of Article II. Other, more purposive, approaches are possible and make more sense. In contrast, step two is not textualist, and indeed is at odds with textualist analysis. It instead rests on historical examples that are open to interpretation. To put the theory in context, it is useful to consider a hypothetical Mr. Eastman posed, presenting a risk the endgame theory is supposed to hedge:

> Suppose a Democrat governor in a state Trump clearly won—North Carolina, perhaps, or Kansas — were to certify the Biden slate of electors and transmit that certificate and the subsequent electoral votes to the president of the Senate (that is, the vice president of the United States). Republican legislators in the state howl

[22] Stephen Bundy et al., *Re:Request for Investigation of John C. Eastman, California State Bar No. 193726* at 2. https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf

[23] Bundy *supra*, at 22:

> There is no doubt that Mr. Eastman's memoranda were wrong in their core claim that the Constitution gave Mr. Pence unquestioned and unreviewable authority to declare the Electoral Count Act and Concurrent Resolution unconstitutional and to refuse to count or delay the counting of the "swing state" Electoral College vote certificates, even though those certificates were proper in form, had withstood all timely legal challenges, and were not opposed by any valid competing slate of electors. Other lawyers who looked at the question—many of them stalwart conservatives and Trump supporters—believed that that advice was absolutely wrong.

> about the fraud, but because the governor refuses to call the Legislature into special session, they can do nothing about it except send a letter notifying the vice president of the fraud. Is it really the case that nothing can be done?[24]

One might dismiss this hypothetical as fanciful — the equivalent of attempting to justify torture by positing that a bomb is about to go off in some populous place — but for the moment, and for theoretical purposes, fairness requires taking the example on its own terms. The conclusion reached may be that, if something like the hypothetical occurs, then the country will have sunk to depths from which no Court, much less state bar discipline, could save it, but that sort of rhetorical surrender is a form of concession that the hypo has force, a concession that should not be made if other flaws in the endgame theory cause it to implode on its own.

1. Step One: The ISL Theory.

Article II, Section One, of the Constitution — the "Electors Clause" – provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ."[25] Using conventional textualism, it is easy to argue that the specific reference to "Legislature" must mean something different from "State" and, in particular, that the word "Legislature" must exclude something the broader term "State" might encompass. Maybe governors, secretaries of state, or state supreme court justices are among the things excluded?[26]

The foundation of the endgame theory was a formal, textualist claim that the word "Legislature" in Article II excludes state governors, secretaries of state, or supreme courts from tinkering with the Manner of election, even if a state's constitution gave those branches a role to play. As Mr. Eastman put it:

> This entire dispute turns on the question of whether the electors were legally appointed, and the whole foundation for my memo, and for my ultimate advice, was that they were not, precisely because non-legislative officials in the several states at issue altered or suspended state election law in violation of the Constitution's Article II grant of that power exclusively to the state legislatures.[27]

From a textualist point of view, the presence of the word "Legislature" gives the ISL theory a hook that presumptively places it within conventional bounds of lawyering. One may compare that word to the Sixth Amendment right "to have the assistance of counsel."[28] When adopted those words did not require the government to provide a criminal defendant with their

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[24] John C. Eastman, *Setting the Record Straight on the POTUS "Ask,"*, THE AMERICAN MIND (Jan. 18, 2021), https://americanmind.org/memo/setting-the-record-straight-on-the-potus-ask/.
[25] U.S. CONST. art. II, § 1, cl. 1.
[26] The obvious and practical rejoinder to this argument is, in Justice Ginsburg's words, that Article II "does not create state legislatures out of whole cloth, but rather takes them as they come-as creatures born of, and constrained by, their state constitutions." *Bush v. Gore*, 531 U.S. 98, 123 (2000) (Ginsburg, J., dissenting). But that was a dissent.
[27] John C. Eastman, *Constitutional Statesmanship*, CLAREMONT REV. OF BOOKS (Fall 2021), https://claremontreviewofbooks.com/constitutional-statesmanship/.
[28] *See supra* note 8.

own lawyer.[29] But the phrase is there, and nothing in legal ethics forbids lawyers from trying to wield rhetoric to turn it into a government entitlement, even if doing so deviates from some flavor of original understanding.[30] *Gideon v. Wainwright*[31] is hailed as a milestone case, but at bottom it reflects the success of lawyers and judges acting as legal rhetorical entrepreneurs to create a new meaning for the text.

A version of the ISL argument has prevailed in one circuit court. *Carson v. Simon*[32] dealt with a claim by electors for President Trump challenging an action of the Minnesota Secretary of State that allowed absentee ballots received after a statutory deadline to be counted.[33] The Eighth Circuit held that the district court erred in holding that persons nominated to be Trump electors lacked standing and in denying a request for preliminary injunction. The court remanded with instructions to the district court to enter a preliminary injunction segregating the late-received ballots. The court held that "the Secretary's actions in altering the deadline for mail-in ballots likely violated the Electors Clause" because

> By its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the `Legislature` of each state. Consequently, only the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota.[34]

The ISL argument also has some support in the Supreme Court.[35] Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*[36] argued that, while generally "the distribution of powers among the branches of a State's government raises no questions of federal constitutional law" the Electors Clause changes things for elections: "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent

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[29] *Id.*

[30] I do not mean to endorse originalism. But there is no serious question that advocacy of originalism is not sanctionable, and the ascendance of originalism as an interpretive method illustrates nicely the role of lawyers in remaking the law.

[31] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[32] *Carson v. Simon*, 978 F.3d 1051, 1059–60 (8th Cir. 2020). The Third Circuit reached a contrary decision on standing. *Bognet v. Sec'y of Commonwealth of Pa.*, 980 F.3d 336, 351 n.6 (3d Cir. 2020) ("Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under Bond to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. . . . The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding Bond beyond this context, and the Carson court cited none.")

[33] The secretary of state entered into a consent decree resolving a case brought by the Minnesota Alliance for Retired Americans Fund. The case alleged the statutory deadline violated the Minnesota Constitution. *Carson*, 978 F.3d at 1054.

[34] *Id.* at 1059-60.

[35] In reverse chronological order, the modern cases would include *Republican Party v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (mem.) (Thomas, J., dissenting from the denial of certiorari); *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2020) (mem.); *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020) (mem.) (Kavanaugh, J. concurring); and *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). In the Wisconsin case Chief Justice Roberts wrote a concurrence distinguishing the Court's choice not to intervene in the Pennsylvania cases, which challenged state court interpretations of state law, from the Wisconsin case, which involved a federal court interpreting state law.

[36] *Bush*, 531 U.S. at 112-113.

significance."[37] For this claim he cited *McPherson v. Blacker*[38] to support the conclusion that state legislative power over the Manner of elections is "plenary," such that "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question."[39]

The 2020 election cases showed that ISL theory continues to have support on the Supreme Court. Opinions pertaining to challenges to Pennsylvania's voting procedures illustrate the point. *Republican Party of Pennsylvania v. Boockvar*,[40] discussed more fully below, challenged a Pennsylvania Supreme Court ruling that in part allowed ballots received after a statutory deadline to be counted. The Republican party sought a stay of the order pending a decision on its petition for a writ of *certiorari.* Justice Alito referred the petition to the Court, which denied the stay by a 4-4 vote.[41] A motion to expedite consideration of a petition for writ of *certiorari* was also filed and denied. Justices Alito, Thomas, and Gorsuch disagreed. Justice Alito wrote:

> The Supreme Court of Pennsylvania has issued a decree that squarely alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to its authority under the Constitution of the United States to make rules governing the conduct of elections for federal office. . . .
>
> there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution. The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.[42]

The ISL theory is not fully formed. Important questions remain open. "Manner" might not be as readily susceptible to a plain meaning argument as "Legislature." Does "Manner" refer to any procedure specified by statute, or only to whether electors are selected by popular vote rather than by legislative vote? On the latter reading, "Manner" does not encompass administrative matters such as whether state officials must compare a signature on a mail-in ballot with a signature on file, or whether a grace period for receiving votes cast in a pandemic may be adopted.[43] The Supreme Court has not definitively interpreted this clause in a case

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[37] *Id*.
[38] *MacPherson v. Blacker*, 146 U.S. 1 (1892).
[39] *Id*.
[40] *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2020).
[41] *Id*. at 2.
[42] *Id*. at 1-2.
[43] Concurring *Chiafalo v. Washington*, 140 S. Ct. 2316, 2330 (2020), a case pertaining to the 2016 election, Justice Thomas wrote that "Article II requires state legislatures merely to set the approach for selecting Presidential electors, not to impose substantive limitations on whom may become an elector." The district court in *Trump v. Wisconsin Elections Comm'n*, No. 20-CV-1785-BHL, 2020 WL 7318940 (E.D. Wis. Dec. 12, 2020), *aff'd*, 983 F.3d 919 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1516, 209 L. Ed. 2d 253 (2021), read this concurrence to support a distinction between "the `Manner' of appointing presidential electors — popular election — with underlying rules of election administration." The court held "Plaintiff's complaints about the WEC's guidance on indefinitely confined

challenging action taken by state actors other than a legislature.[44] But at least Justices Alito, Thomas, and Gorsuch would extend "Manner" to encompass things beyond selection by popular vote. Chief Justice Rehnquist's concurrence in *Bush v. Gore* evinced a similar approach.

In addition, does ISL theory create an affirmative right of action to invalidate votes and, if so, who has standing to assert the theory? Under the textually similar Elections Clause, individual voters who assert only a general interest in enforcement of the clause lack standing.[45] Whoever might have standing to assert the ISL argument, does the theory prevent state legislatures from delegating to other state officials the responsibility for the Manner of elections? As shown by one 2020 election challenge, in its strongest (and implausible) form ISL can assert itself as a type of non-delegation doctrine, forbidding state legislatures from authorizing executive officials to certify electoral votes, for example.[46] From a pragmatic point of view this argument seems crazy—it denies legislative choice in the name of protecting it, thus emasculating federalism in the name of preserving it. The idea that an unelected national body (the U.S. Supreme Court) is the right place to defend the prerogatives of a representative state body (a state legislature) would be irony were it not closer to satire. But nothing in the law of lawyering precludes hypocrisy.

The ISL theory also is not yet clear on the relationship between state constitutions and state statutes. Some state constitutional provisions may be worded very generally while others might be more specific. Does ISL theory distinguish between the two? Also open is whether federal courts should defer to state court interpretations of state laws pertaining to the Manner of

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voters, the use of absentee ballot drop boxes, and corrections to witness addresses accompanying absentee ballots are not challenges to the `Manner' of Wisconsin's appointment of Presidential Electors; they are disagreements over election administration." This interpretation of "Manner" would effectively gut the first step of the endgame theory. In *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 986 (7th Cir. 2020), the Seventh Circuit affirmed the district court ruling. The court of appeal acknowledged that multiple readings of the text were possible but held this ambiguity did not matter because the district court was correct under either of the two most plausible readings. ("Defining the precise contours of the Electors Clause is a difficult endeavor. The text seems to point to at least two constructions, and the case law interpreting or applying the Clause is sparse. This case does not require us to answer the question, as the Commission's guidance did not amount to a violation under the two most likely interpretations."). The Supreme Court has not ruled on this point in this context. It is worth noting, however, that both in *Bush v. Gore* and more recent pronouncements Justice Thomas adheres to the ISL theory as articulated in the endgame theory.

[44] *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), contains some suggestive language (stating of the clause "the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself"). Citing *McPherson*, the *per curiam* opinion in *Bush v. Gore*, 531 U.S. 98, 104 (2000), refers to state legislative power as "plenary." The per curiam opinion did not reach the question whether a state supreme court could establish an election standard not found in a statute. *Id*. at 105 ("it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition").

[45] *Lance v. Coffman*, 549 U.S. 437 (2007).

[46] *Trump v. Pence*, No. 1:20-cv-03791, 2020 BLOOMBERG 1, at 14 (D.D.C. Dec. 22, 2020) ("Defendant States have legally acquiesced to the federal laws by enacting statutes transferring post-election certification from the state legislatures to state executive branch officials: Ariz. Rev. Stat. § 16-212 (B) (Arizona Secretary of State), Ga. Code Ann. § 21-2-499 (B) (Georgia Secretary of State and Governor), Mich. Comp. Laws Ann. § 168.46 (Michigan State Board of Canvassers and Governor), Wis. Stat. § 7.70 (5)(b) (Wisconsin Elections Commission); and 25 Pa. Cons. Stat. § 3166 (Secretary of Commonwealth and Governor). These state laws also violate Article II which establishes the state legislative prerogative to post-election certification of Presidential votes and of Presidential electors.)."

election. Professors Vikram and Akhil Amar write that "[p]rominent believers in ISL are coy about whether their approach means de novo review by federal judges, or instead federal review with some (limited) deference to state judicial and executive interpretations."[47] The point matters to evaluating the endgame theory, because *de novo* review lessens the weight one might otherwise give to state court rejections of voting challenges. It is commonly noted that President Trump filed and lost over 60 cases challenging the 2020 election results. That is true but, even setting aside losses on procedural grounds rather than on the merits, if ISL challenges are reviewed *de novo* then, for at least some claims, an attorney might reasonably treat a state-court loss as provisional. Relatedly, Chief Justice Rehnquist referred to "significant" departures from state statutory law. What counts as "significant" is obviously important, but there is little guidance to date on how to assess that condition.

Is there a causation element to an ISL cause of action? At a minimum, one would hope the Court would require a plaintiff to prove a reasonable probability that the number of votes cast contrary to the legislative Manner of election would change the results of the election. By analogy, a defendant who shows their criminal lawyer was incompetent must still show a reasonable probability that a competent lawyer would have produced a better result.[48] If that standard is proper for matters (literally) of life and death, one might think there is no reason it should not apply to an ISL cause of action as well.

Perhaps most importantly, what is the remedy for an ISL violation? Must all votes affected by an administrative or judicial departure from the statutory "Manner" be discarded? Is there a prejudice requirement, such that votes would only be discarded if there was some probability that the affected votes decided the election? What verbal test would describe that probability? And if there is a prejudice requirement, could it be circumvented through a pre-election challenge yielding an order that the statutory Manner of election be followed, so that the claim is one for contempt rather than a substantive ISL claim?[49]

At least one Supreme Court opinion pushes against the ISL argument. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[50] the Court interpreted the textually similar "Elections Clause" of Article I, which states that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." [51] Arizona had delegated redistricting to an independent commission rather than the legislature. By a 5-4 vote, with Justice Kennedy in the majority, the court held that Arizona's delegation did not violate the clause. Chief Justice Roberts wrote an atypically caustic

[47] *Supra* note 20 at 18.
[48] *Strickland v. Washington*, 466 U.S. 668 (1984).
[49] A prejudice element would not obviously be required to obtain pre-election injunctive relief. Such relief would in essence just instruct a state to follow what the Supreme Court or other federal court thought the (state) law was. That difference may be significant, as one can expect future litigation that uses observations (expert reports) gleaned in a primary election to seek injunctive relief in a subsequent general election. The prospect of using data from a primary election to challenge practices in a general election also could bear on standing and ripeness issues.
[50] *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015).
[51] U.S. CONST. art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

dissent.[52] The district court that imposed sanctions on Trump lawyers in a 2020 election challenge in Michigan cited this decision in denying preliminary relief,[53] but such a close decision on a different (though textually similar) provision is not a strong foundation for discipline. Justice Kennedy is retired, and the Court recently granted review in *Moore v. Harper*,[54] an Elections Clause case that may strengthen the ISL theory to the extent the Elections Clause bears upon it.

Moore involves a challenge to a decision of the North Carolina Supreme Court invalidating on state constitutional grounds redistricting maps drawn by the legislature, which the North Carolina appellate court characterized as "`extreme partisan outliers[,]` `highly non-responsive' to the will of the people, and `incompatible with democratic principles[.]'"[55] North Carolina legislators persuaded the U.S. Supreme Court to hear the case. They argue that the Elections Clause empowers state legislatures to enact voting maps contrary to a state constitution because the federal constitution gives state legislatures independent federal power to draw maps subject, presumably, only to federal constitutional restraints. The basic assertion of federal power as against state constitutions is the same in both the Elections Clause and Electors Clause arguments. That fact, and the textual similarity of the provisions, suggests that the premise of the ISL theory may be close to becoming the law of the land.

2. Step Two: The Twelfth Amendment.

The second step of the endgame theory uses history to interpret the text of the 12th Amendment, clause 3:

> the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."[56]

From an interpretive perspective this awkwardly worded passage provides some ground for plain meaning arguments, but those arguments push against the endgame theory. A strict textualist might note that the text states that the President of the Senate must open the certificates but the text does not specify, and thus does not limit, who may count the votes.[57] An interpretive theory that insists that the Constitution imposes only limits found in the text (and thus not a right to

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[52] *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. at 825 ("What chumps! Didn't they realize that all they had to do was interpret the constitutional term "the Legislature" to mean "the people"?").
[53] *King v. Whitmer*, 505 F. Supp. 3d 720, 737 (E.D. Mich. 2021).
[54] *Moore v. Harper*, 142 S. Ct. 2901 (2022).
[55] *Harper v. Hall*, 2022-NCSC-17, ¶ 5, 380 N.C. 317, 323, *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022). The case is being briefed as this Article is written. Professor Muller has discerned multiple variations of possible ISL standards from the initial briefing. Derek Muller, *What, exactly, would a judicially-manageable standard under the Elections Clause look like after Moore v. Harper?*, https://electionlawblog.org/?p=131801#more-131801.
[56] U.S. Const. Amend. XII.
[57] *Cf. Dean v. United States*, 556 U.S. 568, 572 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability."); Anita S. Krishnakumar, *Passive-Voice References in Statutory Interpretation*, 76 BROOK. L.REV. 941, 942 (2011). Matthew Seligman makes this point in the context of the Eastman memo. Matthew Seligman, *The Vice President's Non-Existent Unilateral Power to Reject Electoral Votes*, (Oct. 1, 2021), https://ssrn.com/abstract=3939020.

abortion, or same-sex marriage, for example) is hard-pressed to conjure from the text of the 12th Amendment a limitation on who may count votes.[58]

Nor does the text say anything about resolving disputes. A textualist inference is that the text therefore does not limit Congress's power to specify dispute resolution procedures, which is what the Electoral Count Act[59] effectively does.[60] Under that Act, a dispute regarding competing slates of state electors is resolved by Congress, each house acting separately. The two houses may by agreement reject a slate of electors. If they disagree, the slate certified by the state's governor is counted as the true slate. Presumably that is why Eastman's hypothetical has the governor acting corruptly.

To the extent the endgame theory advanced a textualist argument, it was that the text assigns an active role only to the Vice President, and thus implies that the Vice President must do the counting. By further implication, the argument goes, the person who does the counting should resolve disputes over what shall be counted. The implied power to count is said to include an implied power to decide what to count. The constitutional text does not say that, but strict textualism is only one mode of interpretation. Before the 2020 election conservative scholars John Yoo and Robert Delahunty noted that litigation over state procedures was pending, and that further litigation was certain.[61] They foreshadowed President Trump's litigation strategies, focusing on mailed ballots and swing states, and they argued that:

> Though the 12th Amendment describes the counting in the passive voice, the language seems to envisage a single, continuous process in which the Vice President both opens and counts the votes.[62]

"Seems to envisage" is not a particularly analytical statement, and this assertion omits the traditional use of "tellers" to do the counting,[63] but in fairness the authors wrote in a popular journal. They have since written a more formal argument, defending Vice Presidential power to

[58] A textualist might also argue that the switch to the passive voice must be given effect by differentiation — the passive voice "counters" must mean something different from the active-voice "President of the Senate" because the text is worded differently.
[59] Counting electoral votes in Congress, 3 U.S.C. § 15 (1948).
[60] John Yoo and Robert Relahunty raise the separate argument that the Constitution may not grant Congress the power to pass a law, such as the ECA, specifying a procedure for resolving disputes over electors. Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, (Apr. 6, 2022), https://ssrn.com/abstract=4072083. They argue the Constitution does not contain a grant of authority sufficient to empower Congress to enact the ECA and that "Congress has no constitutional power to dictate to other constitutional actors – here, most relevantly, the Vice President – how they are to discharge the functions that the Constitution assigns to them." *Id.* at 38. The latter point could be extended to courts.
[61] John Yoo & Robert J. Delahunty, *What Happens if No One Wins?: The Constitution Provides for Election Crises, and its Provisions Favor Trump*, THE AMERICAN MIND (Oct. 19, 2020).
[62] *Id*.
[63] Documented in Seligman, *supra* note 57 at 17.

count, [64] though a power limited by conditions that were not present in 2020.[65] They see the text as "indeterminate."[66]

An article by David Fontana and Bruce Ackerman has been invoked in favor of step two.[67] That article documents a formal flaw in Georgia's electoral vote documentation in the election of 1800.[68] No opposition to counting the votes was voiced, but there is a strict textualist case that the votes should not have been counted.[69] Nevertheless, Vice President Thomas Jefferson counted the Georgia votes. Fontana and Ackerman wrote:

> [T]here can be no denying that Jefferson did more than "open" the Georgia ballot on that fateful day. He asserted his authority to decide the merits on a contestable issue. If some future Senate President were to claim a similar authority, he or she would not be wrong in pointing to Jefferson's precedent.[70]

Fontana and Ackerman offered a kind of textual justification, noting that "the Constitution delegated to Jefferson, and only Jefferson, an affirmative role in the vote-counting ritual."[71] Regarding tellers, the authors wrote that, while it was "debatable whether the text gave [Jefferson] the authority to make a decisive ruling, it is abundantly clear that the tellers had absolutely no authority to resolve the matter. . . ."[72] They caution, however, that in their view Jefferson's actions were designed to give effect to substance — which candidate Georgia really voted for — rather than form. They warned that if a future candidate deviated from this principle "[h]e would be converting Jefferson's precedent into a fig-leaf for a desperate act of political usurpation."[73] That is a fair description of what the endgame theory sought to do, and it would be unfair to lay the theory at Fontana and Ackerman's doorstep.[74] History is history, available for all to use.

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[64] Robert J. Delahunty & John Yoo, *Who Counts?: The Twelfth Amendment, the Vice President, and the Electoral Count*, CASE WESTERN RESERVE LAW REVIEW (Mar. 31, 2022), https://ssrn.com/abstract=4072083. They argue that Vice Presidential power is limited to situations in which a Vice President receives "two electoral slates from a single state, one blessed by the legislature and another blessed by the governor . . ." None of the alternative self-appointed Trump electors in 2020 swing states had been approved by a state legislature. Absent such approval, they argue, if the Vice President "receives only one set of electoral votes from the state institutions identified under the laws of Arizona, Georgia, and Pennsylvania, she can only accept them as legitimate." Their argument does support the endgame theory in the conditions they specify, however, because their argument entails that the dispute resolution provisions of the Electoral Count Act are unconstitutional.

[65] *Id*. at 5 ("On the facts of the 2020 election, no dispute over the electoral votes existed that justified intervention by the Vice President.").

[66] *Id*. at 17.

[67] David Fontana & Bruce Ackerman, *Thomas Jefferson Counts Himself Into the Presidency*, 90 VA. L. REV. 551 (2004) (discussing examples of the election of 1796 and 1800).

[68] *Id*. at 587-92.

[69] *Id*. at 592-93.

[70] *Id*. at 642.

[71] *Id*. at 608.

[72] *Id*. Pertaining to 1800, this statement did not need to account for the provisions of the Electoral Count Act.

[73] *Id*. at 643.

[74] The theory also invoked an example from 1960, in which multiple slates of electors were certified—one for Senator Kennedy and one for Vice-President Nixon.

One can imagine (without endorsing) an argument that step two is textualist by extension, meaning that the point of step two is to ensure that someone will enforce the law as constructed through the ISL theory. Eastman's hypothetical hints at this argument. The point would be that if one accepts the ISL theory, and further accepts that in some states votes were counted that the ISL theory would condemn as illegal, then something would have to be done to enforce "the law." If the Supreme Court shirked the responsibility through procedural rulings, the argument would go, then someone would have to step up. The Twelfth Amendment can be read, with some strain, to be sure, as pointing to the Vice President as that person. In Part II(B) I show that this argument fits best with the sequence of events in late 2020 and the first week of 2021. The burden of a disciplinary proceeding is to show why, as a theory, it is sanctionable.

Step two is the weak point in the endgame theory. Its interpretive approach contradicts the first step, it has no judicial precedent to rely on, and its historical precedents rely on actions by Adams and Jefferson that the endgame theory treats as assertions of Vice-Presidential power but which did not resolve actual disputes.[75] Nevertheless, the text does not explicitly refute step two, and opaque text is an uncertain basis for discipline. More saliently, the analytic weakness of the theory is not a sufficient basis for discipline. The ISL theory is rife with analytic problems, too.

3. **Step Three: The Alleged Unconstitutionality of the ECA.**

The third step in the endgame theory holds that, if steps one and two are sound, then the Electoral Count Act is unconstitutional because it specifies procedures for resolving disputes over electors other than a Vice-Presidential ruling.[76] The third step is at least in tension with the concurrence of Chief Justice Rehnquist and Justices Scalia and Thomas, in *Bush v. Gore*, which presumes the validity of the Electoral Count Act.[77] There is a sense in which this, too is a textualist argument, because the ECA does in fact specify procedures,[78] but the argument is sound if and only if the second step is sound.[79] Grant step two, and step three follows. The issue is step two.

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[75] As Larry Lessig put it, "these `precedents' stand for nothing. Because in none of these three moments did anyone in Congress actually contest what the Vice President did." Lawrence Lessig (lessig), MEDIUM, https://medium.lessig.org/dear-john-eastman-not-so-fast-7f65ab1c7485 (last visited Aug. 21, 2022).

[76] Seligman, *supra* note 57, at 11.

[77] The concurrence argued that voting in Florida needed to stop counting in order to give effect to the Florida legislature's intention to take advantage of a safe harbor for electoral procedures established in the Act. *Bush*, 531 U.S. at 113 ("If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by § 5" of the Act). That argument has no bite if the ECA is unconstitutional. For an explicit assertion of a form of step three, *see* Trump v. Pence, *supra*, Docket 1 at 14 ("The federal laws regarding the Presidential electors, codified at 3 U.S.C. §§ 5, 6 and 15 are constitutionally unauthorized and violate Presidential voters' rights to state legislative post-election certification.").

[78] *See supra* note 59.

[79] Eastman apparently presented Vice President Pence and his staff with options based on this three-step argument. They ranged from the Vice President disqualifying electors certified by certain states to declining to count those electors' votes until further investigation in the relevant states had occurred.

B. Application of the Endgame Theory.

Step two of the endgame theory was never the subject of a merits decision in court. The ISL step of the theory was tested in various cases, however, and the dispositions of those cases are relevant to assessing the endgame theory itself.

1. The ISL Theory in Court.

President Trump's election challenges asserted various themes, but prominent cases included what was styled as a cause of action for violation of the Electors Clause and which rested on the ISL theory. That was true of the four cases Sidney Powell filed,[80] as well as litigation in Pennsylvania, which is representative for present purposes.

In October 2019, Pennsylvania adopted a statute that allowed people to vote by mail without having to show they would be absent from their voting district on election day.[81] In July 2020, the Pennsylvania Democratic Party and certain Democratic elected officials filed a petition seeking declaratory relief with respect to certain issues raised by the new statute. The Pennsylvania Supreme Court exercised extraordinary jurisdiction to answer the questions before election day.[82] The court allowed the Pennsylvania Republican Party and certain Republican election officials to intervene.[83]

Among the questions presented were requests by the Democratic Party for a declaration allowing ballots to be counted if they were postmarked by election day and received within three days after election day; the statute provided for counting ballots only if they were received by 8:00 pm on election day. The Democrats also sought a declaration that the statute authorized the use of drop boxes to deliver ballots.[84] A separate challenge in federal court argued that Pennsylvania violated the Electors Clause by not comparing signatures on mailed ballots to signatures on file with local election boards.[85] With respect to each issue, the Republican position effectively asserted the ISL theory to try to invalidate ballots the Democrats wanted to have counted. With respect to each issue, the first question was how to interpret state statutory language.

a. Resolving Ambiguity: Drop Boxes.

The relevant language regarding the drop box issue required ballots to be sent by mail or delivered in person "to said county board of election."[86] Did that text authorize the election board to create drop boxes throughout the county? The Democrats fairly argued that the statutory plan gave election boards lots of discretion; the Republicans fairly pointed out that nothing in the

[80] In Arizona, Georgia, Michigan, and Wisconsin.
[81] *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 352 (Pa. 2020), *cert. denied sub nom. Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 209 L. Ed. 2d 164 (2021).
[82] *Id*.
[83] *Id*.
[84] The party also sought a declaration that certain predictable deviations from procedures specified by statute could be cured by giving a voter a second chance. These procedures included the use of a secrecy envelope (an envelope for the ballot that was to be inserted in a mailing envelope) and the provision by the voter of certain information.
[85] *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, (W.D. Pa. 2020) .
[86] *Bookvar*, 238 A.3d at 357 (quoting 25 P.S. § 3150.16(a)).

statute spoke of drop boxes. Republicans noted that a different provision stated that mailed ballots "must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election," and they fairly argued that a box is not an office.[87]

The Pennsylvania Supreme Court thought each side advanced reasonable interpretations and concluded the statutes were ambiguous relative to drop boxes.[88] The Court invoked interpretive rules in the form of a policy to protect the franchise and to construe statutes liberally to protect the right to vote. The Court concluded the legislative intent behind the statutes was to provide voters with options to vote other than traditional polling places and it ruled in favor of the election boards.[89] Each side presented reasonable arguments. But if ISL requires *de novo* review by a court devoted more to textualism than to notions of legislative intent, a position espoused by several current U.S. Supreme Court justices, then one can have no confidence that the U.S. Supreme Court would agree with Pennsylvania's Supreme Court. The U.S. Supreme Court declined to review the ruling of the Pennsylvania Supreme Court, but that (prudent) decision does not endorse the state court's reading of the statute. One is thus left wondering whether the drop boxes violated the ISL theory, and whether this issue should count as a merits loss by the Trump legal team.

b. Formal Textualism: Signature Verification.

Eastman has described the Trump campaign's ISL challenge to signature verification in Pennsylvania with great certainty:

> In Pennsylvania, for example, the secretary of the Commonwealth's unconstitutional elimination of signature verification requirements resulted in a dramatic decrease from prior election cycles in the number of fraudulent ballots that were discovered and invalidated, from as high as 8% in some counties to a mere 0.28% in 2020, affecting as many as 150,000 ballots on that issue alone—nearly double the Biden margin of victory in that state.[90]

This claim appears to refer to September 11, 2020, guidance from the Pennsylvania Secretary of State informing county election boards that "Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections."[91] The statutory language at issue was:

> (3) When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots . . . the board ***shall examine the declaration on the envelope of each ballot . . . and shall compare the information thereon with that contained in*** [specified files] . . . . If the county board has verified the proof of identification as

[87] *Id*. at 358 (quoting 25 P.S. § 3150.16(c)).
[88] *Id*. at 360-61.
[89] *Id*. at 361.
[90] Eastman, *supra* note 25.
[91] *In re Nov. 3, 2020 General Election*, 240 A.3d 591, 596 (Nov. 3, 2020). The guidance was affirmed after the Pennsylvania Supreme Court's opinion in *Boockvar*. *Id*. at 596-97.

> required under this act and is satisfied that the declaration is sufficient and the information contained in the [specified files] verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.[92]

The Trump campaign made the not-crazy argument that a signature was part of a declaration on a mail-in ballot envelope, and thus part of the "information" on that envelope, which had to ("shall") be compared to a list.[93] The district court made the not-crazy point that this language does not mention the word signature and that "proof of identification" is defined by statute with a list that does not include a signature.[94] The district court held "the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications."[95] The district court noted that the election law specifically required signature comparison for in-person voters, so it found the omission of an explicit requirement for mail-in voters telling.[96] The district court held that individual voters lacked standing to challenge the Secretary of State's determination,[97] and it granted judgment in favor of the Secretary on this issue.[98]

While the federal case was being litigated, the Secretary invoked the original jurisdiction of the Pennsylvania Supreme Court to rule on her actions.[99] That court ruled ten days after the federal district court, and it reached the same conclusion: "we decline to read a signature comparison requirement into the plain and unambiguous language of the Election Code, as Intervenors [the Trump campaign] urge us to do, inasmuch as the General Assembly has chosen not to include such a requirement at canvassing."[100] Presumably that decision would be decisive for a textualist U.S. Supreme Court, but strict textualism is less constraining than advertised, and

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[92] 25 Pa. Stat. Ann. § 3146.8 (West) (emphasis added).

[93] Response to Defendants' Cross-Motions for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment, Donald J. Trump For President, Inc. v. Boockvar, 2020 WL 6736392 (W.D.Pa.) The district court suit was filed by President Trump's campaign. Eastman described the state case in his January 3, 2021, memorandum, but the state case did not raise the signature verification issue.

[94] *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 400 (W.D. Pa. 2020) ("The Election Code defines "proof of identification" as the mail-in/absentee voter's driver's license number, last four digits of their Social Security number, or a specifically approved form of identification.").

[95] *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 398. The district court found the issue so clear that abstention under *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), was not required. *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 398 ("the Court concludes . . . that the Election Code is clear that signature comparison is not required and further, that Plaintiffs' competing interpretation is not plausible"). The text can be read as requiring comparison of information (including signatures) in the declaration on the envelope but requiring verification only of "proof of identification" as defined. But that reading points in two different directions, tending to support the district court's finding that the statute was ambiguous.

[96] *Id*. at 401.

[97] The federal case was a pre-election filing, and the plaintiffs only argued that the rulings they challenged created a risk of vote dilution through counting of unlawful votes. The court found this argument insufficient to show a "certainly impending" injury necessary to establish standing. *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 343.

[98] *Id*. at 397-99.

[99] *In re Nov. 3, 2020 Gen. Election*, 244 A.3d 317 (Pa.), opinion after grant of review, 240 A.3d 591 (Pa. 2020), *cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451, 209 L. Ed. 2d 172 (2021).

[100] *In re* Nov. 3, 2020 General Election, 240 A.3d 591 (Pa. 2020).

the Trump campaign had enough of a textual argument to give one pause as to how the U.S. Supreme Court would have decided the issue had it not avoided it.

c. (State) Constitutional Purposivism: Deadlines.

The deadline for counting ballots presented either a harder or an easier question, depending on one's point of view. The relevant statute provided that, other than for overseas military ballots, "a completed absentee ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election."[101] Pretty clear; there are ambiguous statutes in the world, but this is not one of them. That was the Republican position. The Democrats argued that vague language in the state constitution[102] rendered this provision unconstitutional as applied. They argued that primary elections had been a nightmare because of unexpected demand for mailed ballots, resulting in substantial disparities among counties, that the post office was likely to experience delays in delivering ballots, and that the Election Code implicitly empowered courts to grant relief during natural disasters or emergencies.[103] The Republicans responded with the ISL argument and a citation to the Chief Justice's concurrence in *Bush v. Gore*.[104]

The Pennsylvania Supreme Court agreed that the statutory language was clear, and that the statutory deadline was not itself constitutionally suspect. It nevertheless relied on precedent, its own declaration that the COVID-19 pandemic was a natural disaster, and the premise that the postal service could not operate as quickly as it would in non-pandemic times, to hold that, as applied, the deadline had to be extended "to prevent the disenfranchisement of voters."[105] As noted above, this decision conflicts with the Eighth Circuit's resolution of a similar issue in *Carson v. Simon*.[106]

The Pennsylvania Supreme Court decision issued on September 17, 2020. On October 19, 2020, the United States Supreme Court denied, by a 4-4 vote, a petition for a stay of that ruling.[107] On October 28, 2020, the Pennsylvania Secretary of State issued guidance instructing county election boards to segregate ballots received after 8:00 pm on election day but before the deadline set by the Pennsylvania Supreme Court's decision. On November 6, three days after the

[101] 25 Pa. Stat. and Cons. Stat. Ann. § 3146.6 (West 2020)
[102] The Free and Equal Elections Clause provides that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right to suffrage." Pa. Const. art. I, § 5 (quoted in Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 362 (Pa. 2020).
[103] Pennsylvania Democratic Party v. Boockvar, 238 A.2d at 362-63. The General Counsel of the USPS had sent a letter to the Secretary of State, which the Court considered, stating that the October 27 deadline for requesting a ballot did not line up with the USPS's timeline for deliveries, which could be five days. A voter asking for a mail ballot within the deadline might not receive it until November 2, the day before election day. *Id*. at 365.
[104] Pennsylvania Democratic Party v. Boockvar, 238 A.3d at 367 (citing Bush v. Gore, 531 U.S. 98, 114 (2000)). The Republicans also pointed to a statutory provision stating that election code provisions were not severable, such that invalidating one of them would invalidate the authority for mailed ballots, and that to change one date would create a cascade of chaos and confusion with respect to other election code deadlines. Boockvar, 238 A.2d at 367.
[105] Boockvar, 238 A.2d at 371.
[106] Carson, supra note 33, at 1062.
[107] Republican Party of Pennsylvania v. Boockvar, 141 S. Ct. 643 (2020)(Thomas, J., Alito, J., Gorsuch, J., , and Kavanaugh, J., would have granted the stay).

election, Justice Alito granted an emergency application for an order instructing county election boards to follow the segregation procedure.[108]

On February 22, 2021, the Court denied a petition for writ of certiorari.[109] By that time the 2020 election was over, the Capitol had been invaded, and President Biden inaugurated. Justice Thomas dissented from the denial of the petition for certiorari. His dissent began with an unmistakable endorsement of the ISL theory:

> The Constitution gives to each state legislature authority to determine the "Manner" of federal elections. Art. I, § 4, cl. 1; Art. II, § 1, cl. 2. Yet both before and after the 2020 election, nonlegislative officials in various States took it upon themselves to set the rules instead. As a result, we received an unusually high number of petitions and emergency applications contesting those changes. . . .
>
> For more than a century, this Court has recognized that the Constitution "operat[es] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" to regulate federal elections. *McPherson v. Blacker*, 146 U.S. 1, 25, 13 S.Ct. 3, 36 L.Ed. 869 (1892). Because the Federal Constitution, not state constitutions, gives state legislatures authority to regulate federal elections, petitioners presented a strong argument that the Pennsylvania Supreme Court's decision violated the Constitution by overriding "the clearly expressed intent of the legislature." Bush v. Gore, 531 U.S. 98, 120, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (Rehnquist, C. J., concurring).[110]

2. The Short-Lived Declaratory Judgment Action.

The endgame theory was alleged in an action for declaratory judgment filed on December 27, 2020, in the Eastern District of Texas by Representative Louie Gohmert and the Trump electors from Arizona.[111] The complaint alleged that the dispute resolution provisions of the Electoral Count Act are unconstitutional because they instruct the Vice President:

> (1) to count the electoral votes for a State that have been appointed in violation of the Electors Clause"; (2) limits or eliminates [the Vice President's] "exclusive authority and sole discretion under the Twelfth Amendment to determine which

[108] Order, Republican Party of Pennsylvania v. Boockvar, 141. S. Ct. 643 (No. 20A84), https://www.supremecourt.gov/orders/courtorders/110620zr_g31i.pdf.

[109] Republican Party of Pennsylvania v. Degraffenreid, 141 S. Ct. 732 (2021).

[110] *Id*. at 735-36 (Thomas, J., dissenting). His dissent continued with references to mailed ballots and the risk of fraud, *id*. at 735-36, which, though fair in the abstract, has a regrettably partisan ring to it in context. No issue of actual ballot fraud was before the Court, so the statement reads as just a condemnation of the liberalization of voting methods. He cited a 2012 *New York Times* article and a 1994 example of absentee ballot misconduct — all information predating the Pennsylvania legislature's 2019 adoption of more lenient mailed voting procedures. If the 2020 election showed anything, it was that despite the efforts of phalanxes of lawyers and hired experts, no reliable evidence of fraud was presented to the courts. Justice Thomas rightly noted, however, that post-election litigation is an unusually undesirable way to attempt to remedy deviations from lawful practice. The timelines are simply too condensed to create robust records. His main point — that pre-election certainty about what the law requires would be desirable – was sound.

[111] Complaint, Gohmert v. Pence, 510 F.Supp. 3d 435 (E.D. Tex. 2021) (No. 6:20-cv-00660) 2020 WL 7698879 .

> slates of electors for a State, or neither, may be counted"; and (3) replaces "the Twelfth Amendment's dispute resolution procedure–under which the House of Representatives has sole authority to choose the President."[112]

In addition, the complaint alleged that the Act violates the Electors Clause by giving state executives, rather than state legislatures, final say over which slate to certify in the event of a conflict.[113] The Arizona Plaintiffs alleged they had standing in part because,

> On December 14, 2020, pursuant to the requirements of applicable state laws and the Electoral Count Act, the Arizona Electors, with the knowledge and permission of the Republican-majority Arizona Legislature, convened at the Arizona State Capitol, and cast Arizona's electoral votes for President Donald J. Trump and Vice President Michael R. Pence. [114]

They portrayed themselves as candidates, and invoked *Carson v. Simon* as showing their standing.[115] They alleged they were "certain or nearly certain to suffer an injury-in-fact caused by Defendant Vice President Pence, acting as Presiding Officer, if Defendant ignores the Twelfth Amendment and instead follows the procedures in Section 15 of the Electoral Count Act to resolve the dispute over which slate of Arizona electors is to be counted."[116]

On January 1, 2021, the district court dismissed the case for lack of standing. It held that Gohmert "alleges at most an institutional injury to the House of Representatives," which was not enough to establish his standing individually.[117] The court held the purported Arizona electors "allege an injury that is not fairly traceable to the Defendant, the Vice President of the United States, and is unlikely to be redressed by the requested relief."[118] The court reasoned that the purported electors were complaining that the Biden electors had been certified, but the defendant (the Vice President) did not certify them. That had been done by Arizona's governor, who was not a party, and Vice-Presidential disregard of the certification would not reverse the certification.[119] Plaintiffs filed a notice of appeal the same day (New Year's Day) and appealed to the Fifth Circuit on January 2, 2021. That same day, the Fifth Circuit affirmed the district court's ruling.[120] In a truly unfortunate bit of timing for the Trump lawyers, on January 6, 2021,

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[112] *Id*. ¶ 2.
[113] *Id*. ¶ 3.
[114] *Id*. ¶ 20.
[115] Id. at 56 (citing Carson, supra note 33, at 1062)
[116] Complaint, Gohmert, supra note 113, at 58.
[117] Gohmert v. Pence, 510 F. Supp. 3d 435, 437 (E.D. Tex.), *aff'd*, 832 F. App'x 349 (5th Cir. 2021) (citing Raines v. Byrd, 521 U.S. 811, 830 (1997)). The court also noted that "Congressman Gohmert's alleged injury requires a series of hypothetical—but by no means certain—events." *Id*. at 441.
[118] Gohmert, 510 F. Supp. 3d at 438.
[119] *Id*. at 442-43.
[120] Gohmert v. Pence, 832 F. App'x 349, 350 (5th Cir. 2021).

plaintiffs filed with the Supreme Court a petition for emergency relief.[121] The petition was denied on January 7.[122]

3. **The Eastman Memo.**

John Eastman advocated the endgame theory during the period leading up to the counting of electoral votes, and the attendant riot and invasion of the Capitol building on January 6, 2021. There is some uncertainty, discussed below, regarding what exactly he said. But two memoranda document at least part of the content of his pitch—a short memo drafted on Christmas Eve, 2020, and second, somewhat longer memo on January 3, 2021.[123] Eastman states that the first was a partial draft, preliminary to the second, so I will discuss the second.[124]

Eastman's second memorandum is six pages long and is largely in bullet-point form. Although headed "Privileged and Confidential," the memo was given to counsel for Vice President Pence.[125] Section One of the memo recited alleged "illegal conduct by election officials."[126] The ISL theory was the premise for the points listed: "important state elections laws were altered or dispensed with altogether in swing states and/or cities and counties."[127] Among other things, he asserted violations of signature verification requirements in Georgia[128] and Pennsylvania,[129] that Wisconsin utilized unmanned voting drop boxes not authorized by state law (a position the Wisconsin Supreme Court agreed with in 2022),[130] that Michigan mailed absentee ballots to all voters, contrary to state law,[131] that a federal court in Arizona expanded

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[121] Petition for Emergency Relief, Gohmert v. Pence, https://electioncases.osu.edu/wp-content/uploads/2020/12/Gohmert-v-Pence-SCOTUS-Emergency-App.pdf.
[122]Order Denying Application, Gohmert v. Pence, https://electioncases.osu.edu/wp-content/uploads/2020/12/Gohmert-v-Pence-SCOTUS-Order-Denying-App.pdf.
[123] John C. Eastman, January 6 Scenario [hereinafter "Eastman Memo"], https://www.washingtonpost.com/context/john-eastman-s-second-memo-on-january-6-scenario/b3fd2b0a-f931-4e0c-8bac-c82f13c2dd6f/.
[124] John C. Eastman, *Here's the advice I actually gave Vice President Pence on the 2020 election*, https://www.sacbee.com/opinion/op-ed/article254812552.htm. Eastman states that neither version of the memo reflects his verbal discussions with counsel for Vice President Pence. *Id*.
[125] See supra note 125. Because Eastman represented President Trump, any privilege that might have existed was lost. As reflected in Vice President Pence's rejection of the endgame theory, the two did not have a common legal interest that might otherwise have preserved privilege.
[126] See *supra* note 125, § I.
[127] *Supra* note 125, § I.
[128] Trump v. Kemp, No. 1:20-cv-05310 (N.D. Ga. Dec. 31, 2020). Numerous other cases had been filed in Georgia before this straggler, filed only the week before Eastman's memo. The ISL theory was the explicit basis for the complaint, which sought an emergency mandatory injunction "directing Defendants to de-certify the election, that the certified following an election that was conducted contrary to the `Manner' for choosing presidential electors that had been established by the Legislature of the State of Georgia in violation of Article II and the Due Process clause of the United States Constitution and, thus, certification of illegal votes . . . ." *Id*. at 2.
[129] See supra note 125 (the memo noted the Pennsylvania Supreme Court decision but not the federal trial court ruling discussed above).
[130] On July 8, 2022, the Wisconsin Supreme Court ruled that the relevant statutes did not authorize the use of unmanned ballot drop boxes. Teigen v. Wisconsin Elections Comm'n, 2022 WI 64, ¶ 57, 976 N.W.2d 519, 540.
[131] This claim was error — Michigan mailed *applications* for absentee ballots to all voters. *See* John Danforth, Benjamin Ginsberg, Thomas B. Griffith, David Hoppe, J. Michael Luttig, Michael W. McConnell, Theodore B. Olson, & Gordon H. Smith, *Lost, Not Stolen, The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election*, at 37-38, https://lostnotstolen.org/.

the time before the election in which persons could register to vote, and that Nevada used machine inspection of signatures rather than human inspection.[132] Eastman then stated that "[b]ecause of these illegal actions . . . the Trump electors" in the above-named states and New Mexico met on December 14, voted for Trump, and transmitted their votes to Vice President Pence.[133] He concluded that in view of these actions "[t]here are thus dual slates of electors from 7 states."[134]

Eastman's memorandum did not advance a textual case for the endgame theory beyond quoting the relevant text of the 12th Amendment. In later comments he has invoked the argument made by Fontana and Ackerman — the text assigns an active role only to the Vice President.[135] After quoting the text the memorandum asserted:

> There is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes (as Adams and Jefferson did while Vice President, regarding their own election as President) and all the Members of Congress can do is watch.[136]

Eastman then presented a series of scenarios describing possible results depending on what Vice President Pence did. Among these scenarios was a delay strategy in which the Vice President declared that he would not count the votes until pending election challenges were resolved.

Eastman concluded with a bolded assertion that "this Election was stolen by a strategic Democrat plan to systematically flout existing election laws for partisan advantage; we're no longer playing by Queensbury Rules, therefore" and he advanced a correspondingly bold recommendation:

> The main thing here is that VP Pence should exercise his 12th Amendment authority ***without asking for permission – either from a vote of the joint session or from the Court***. Let the other side challenge his actions in court, where Tribe (who in 2001 conceded the President of the Senate might be in charge of counting the votes) and others who would press a lawsuit would have their past position -- that these are non-justiciable political questions – thrown back at them, to get the lawsuit dismissed. The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind.[137]

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[132] A claim rejected by the trial court in Law v. Whitmer, No. 20 OC 00163.
[133] Eastman Memo, *supra* note 125, 3.
[134] *Id*.
[135] Eastman, *supra* note 25.
[136] *Id*.
[137] Eastman Memo, *supra* note 125, at § IV (emphasis added). Eastman's seeming relish at showing liberal law professors (who he depicts as having advocated in the 2000 election that state actions such as Florida's recount presented nonjusticiable political questions) to be hypocrites if they suddenly demanded that the Supreme Court rein in the Vice President, as they surely would have done, provides an important lesson. The prospect of making one's opponents squirm in hypocrisy may be satisfying, but the prospect does not provide a sound basis for advice. Hypocrisy is common enough in law that no one is likely to squirm in any event. One suspects the risk of hypocrisy would not have deterred Eastman from denying to Vice President Kamala Harris the power he claimed for Vice

These words were written after a long string of litigation losses, which Eastman's memorandum did not discuss. A prudent lawyer would take the case to court and, if they lost, take their lumps and sit down. But that notion of prudence implies acceptance of the claim that courts have the exclusive or ultimate power to interpret the Constitution. The endgame theory challenged that premise in two respects.

First, ISL theory suggests that a state court interpretation of a state law might not be decisive, depending on what standard of review ISL theory presumes and what interpretive techniques the U.S. Supreme Court employs. Under ISL theory, state court losses are not necessarily definitive, even with respect to construction of state law. Instead, a ruling by a state court might raise, rather than decide, the federal constitutional issue, as was the case with respect to the Pennsylvania Supreme Court's ruling that ballots returned after the statutorily specified date could be counted. There is strong, though not conclusive, reason to believe that at least four justices would have agreed that the extension was invalid under the ISL theory.

Second, rulings on procedural issues such as standing, as in *Gohmert*, leave merits issues unresolved. The same is true for decisions by the Supreme Court not to stay or review a lower court decision. In 2020, the Court prudently refrained from wading into the election first by denying a motion for a stay the Pennsylvania Supreme Court's ruling, then by denying a motion to expedite a ruling on a petition for writ of certiorari, and finally, after the election was well and truly over, by denying a petition for cert. On that issue, Eastman might argue that the Supreme Court had chosen to tolerate violation of the Electors Clause because to do otherwise would be imprudent. Eastman essentially argued that Vice President Pence was not obliged to share the Court's vision of prudence.

A formalist devoted to strict textualism would not view the absence of a judicial ruling as decisive on a constitutional question. Professor Michael Stokes Paulsen summarized the argument succinctly, in the context of what he saw as a clear (if technical and immaterial) violation of the Constitution's Emoluments Clause:

> There is a terrible tendency on the part of lawyers-including executive branch lawyers-to equate the absence of standing to challenge some government action with lawful authority to engage in such action. This tendency is bred from the bad habit, inculcated in law school and reinforced by judges, of thinking of law solely as the product of court decisions rather than as an objective body of commands and prohibitions. Where there is (and can be) no decisional law, there is thought to be no law. Such an approach is as wrong as wrong can be. A constitutional violation is no less a constitutional violation simply because of the absence of a judicial ruling to that effect. The President takes an oath to uphold the Constitution. That

President Mike Pence; he could just argue the facts instead of the law, or wield interpretive techniques in different ways. Greg Jacob testified on this point before the January 6 Committee. See https://www.npr.org/2022/06/16/1105683634/transcript-jan-6-committee. From an academic perspective this point may seem trenchant criticism, but hypocrisy may be part of the job. Just as an unsound but effective argument may constitute good lawyering, so intellectual consistency is not a required professional virtue. At least in principle, and certainly for purposes of professional discipline, lawyers represent clients, not concepts.

> duty exists whether the courts are able to act on a matter or not. The Constitution is binding law for the executive branch as well as for the courts.[138]

Perhaps there is an academic case to be made for this position, and thus for pursuing the endgame theory in the face of judicial disinclination to tinker with the election, but one could be forgiven for concluding that this fact just shows only that law professors should be kept locked away in schools where they can do little harm. As we see below, the recommendation to avoid courts, and a verbal concession that his position would not prevail in the Supreme Court, has caused the most trouble for Eastman.

4. The Crime-Fraud Ruling.

Particularly if one listens to the erudite podcast conversation among Eastman, Larry Lessig, and Matthew Seligman, it is not obvious that the endgame theory crosses a line distinguishing permissible from impermissible legal theories.[139] In a privilege ruling by Judge David Carter in the Central District of California, however, Eastman's exposition of that theory has been held to be part of a scheme to violate the law.[140]

The ruling came in an action Eastman filed to enjoin enforcement of a subpoena issued to Chapman University, Eastman's former employer, by the Congressional Select Committee to Investigate the January 6th Attack on the United States Capitol. The subpoena sought documents on Chapman's servers. Eastman sought to enjoin enforcement on various grounds, including privilege and work product. The court granted a temporary restraining order,[141] but denied a motion for preliminary injunction.[142] The court allowed Eastman to raise privilege and work product objections to production of particular documents, which he did.[143]

The government argued the crime-fraud exception to privilege applied; the court agreed in part.[144] It held that Eastman and Trump likely traduced 18 U.S.C § 1512(c)(2), which makes it a crime corruptly to "obstruct[]" or "impede[]" any official proceeding, and a federal criminal conspiracy statute, 18 U.S.C. § 371.[145] Applying a preponderance standard appropriate to what at that point was a civil discovery dispute, the court held that "President Trump attempted to obstruct an official proceeding by launching a pressure campaign to convince Vice President

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[138] Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 Stan. L. Rev. 907, 916 (1994).
[139] Another Way, Discussing The John Eastman Memo with John Eastman, (Sept. 27, 2021) https://equalcitizens.us/discussing-the-john-eastman-memo-with-john-eastman/.
[140] Eastman v. Thompson, No. 8:22-cv-00099- Doc. 260.
[141] Eastman v. Thompson, No. SA CV 21-00099-DOC (DFMx), 2022 BL 21004 (C.D. Cal. Jan. 20, 2022).
[142] Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, 2022 BL 48187, 2022 US Dist Lexis 25546 (C.D. Cal. Jan. 25, 2022).
[143] *Id*.
[144] Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, 2022 BL 111001, 2022 US Dist Lexis 59283 (C.D. Cal. Mar. 28, 2022). The court found the exception applicable on the grounds discussed in the text. It concluded that ten of 11 documents withheld did not further the crime that triggered the exception and thus did not fall within the exception. With respect to these 10 documents the court found no compelling need sufficient to trump the work product doctrine. Id.
[145] Section 371 forbids any person to conspire "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose . . ." 18 U.S.C. § 371.

Pence to disrupt the Joint Session on January 6."[146] The court held Eastman facilitated this campaign, and conspired to violate Section 1512, in meetings where he pressed his theories and proposals on the Vice President and his staff.[147] The court held that Trump and Eastman acted "corruptly" within the meaning of Section 1512 because Trump probably knew the scheme was wrongful and allegations of fraud used to justify it were baseless.[148] The court rejected Eastman's argument that Trump was advised that several state elections were tainted by fraud on the ground that by early January over sixty courts had dismissed such claims for lack of standing or for lack of evidence and that Trump likely knew there was no basis for the claims.

At the level of theory, the court rejected Eastman's insistence that his theories represented good-faith constitutional analysis:

> "[I]gnorance of the law is no excuse," and believing the Electoral Count Act was unconstitutional did not give President Trump license to violate it. Disagreeing with the law entitled President Trump to seek a remedy in court, not to disrupt a constitutionally-mandated process. And President Trump knew how to pursue election claims in court—after filing and losing more than sixty suits, this plan was a last-ditch attempt to secure the Presidency by any means.[149]

The court echoed this point in finding the crime-fraud exception met with regard to Section 371 as well, and the court also held that a conspiracy violates Section 371 when carried out by "deceit, craft, trickery, or at least by means that are dishonest."[150] The court found Eastman met this standard in part because testimony from Vice President Pence's counsel, Greg Jacob, indicated that in meetings on January 4 and 5, Eastman acknowledged that his proposed course of action would violate the Electoral Count Act.[151] An e-mail from Eastman to Jacob confirmed: "I implore you to consider one more relatively minor violation [of the ECA] and adjourn for 10 days to allow the legislatures to finish their investigations . . . ."[152]

In context Eastman's point was that the ECA included many formal provisions, including a two-hour limit on debating objections to a state's electoral votes,[153] which Congress was not following anyway.[154] And of course he maintained that the ECA's dispute resolution provisions were unconstitutional in any event, so he could argue that he was urging compliance with a higher law.[155] Nor did the court's order did not distinguish between claims of fraud, as to which evidence was lacking, and claims of illegality under ISL theory, which presents the more complicated problems discussed above. The court's reasoning suggests that it believed Eastman's mistake was pressing the Vice President to sidestep judicial review. In other words, from Judge Carter's perspective it likely was a crime to advise the President and argue to the

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[146] Eastman v. Thompson, supra note 144 at 32.
[147] *Id*.
[148] *Id*.
[149] Eastman v. Thompson, supra note 145, at *20.
[150] *Id*.
[151] Eastman v. Thompson, supra note 145, at *21, n.256.
[152] Eastman v. Thompson, No. 160-16 Ex. N, p.2.
[153] 3 U.S.C. § 17.
[154] Eastman v. Thompson, No. 160-16 Ex. N, p.2.
[155] Delahunty and Yoo come to a similar conclusion. *See supra* note 64, at 38-43.

Vice President as Eastman did, but not to advance the same arguments in court, as Gohmert and the Arizona electors did.

5. The Endgame Theory on its Own Terms.

From a practical perspective the endgame theory summons to mind a crazed driver — hair and clothes disheveled, eyes bulging, knuckles white on the wheel, foot pushing the pedal through the floor as he races toward a cliff, high on textualist positivism, cackling with manic glee.[156] The frightening part is that the rest of the country is along for an involuntary ride in the back seat. For those inclined to write the endgame theory off as a crazed aberration it is a comforting image, only a little less so for its unfairness, and it certainly implies that the driver's license ought to be taken away. Lawyering under the influence of theory, as it were.

Particularly if we focus on the second step in the argument, it is hard to see Eastman as he describes himself – as the person trying to apply the brakes to an election tainted by violations of the Constitution.[157] One might hope no practical person would use a Thomas Jefferson story from 1800 as a basis for deciding a modern presidential election, even setting aside the question of how to interpret the example. It is true, however, that the current Court is willing to invoke history to decide matters, such as state gun policies, with significant social consequences.[158] And from the perspective of the strict textualism of ISL theory, Eastman would argue that acceptance of the votes of several states targeted by the Trump campaign was contrary to Article II and thus illegitimate. Because the ISL theory is nascent, it is hard to say whether or how far Eastman was wrong on that score.

The real question, discussed below, is how far President Trump or Vice President Pence were required to acquiesce in a judicial vision of prudence, as reflected most notably in the Supreme Court's refusal to intervene in election disputes premised on the ISL theory. That the endgame theory might imply a practical disaster — prolonged uncertainty regarding the identity of the President, multiplication of recurring legislative combat over electors, the almost certain descent into violence and bloodshed, as happened in Washington on January 6, 2021 — need not matter to a strict textualist.[159]

II

As Part I shows, interpretive technique matters a lot to the plausibility of the endgame theory. The ISL argument rests on a positivist formalism as implemented through strict textualism; it gives little weight to functional or purposive analysis. In contrast, the second step

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[156] Think Christopher Lloyd in *Back to the Future*.

[157] As he put it in an opposition to a motion to compel documents over which he asserted privilege and work-product protection, his perception is that "at every turn, Dr. Eastman's efforts were designed to protect Democracy by ensuring that illegality and fraud did not alter the results of the election, and that full and transparent investigations into the serious anomalies would be had, even if the outcome of those investigations simply confirmed the initial certifications." Eastman v. Thompson, No. 345 at 4:5-9.

[158] See New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022); District of Columbia v. Heller, 554 U.S. 570 (2008).

[159] Indeed, that sort of textualism can devolve into a perverse form of conservative virtue signaling — the more impractical the result, the greater the analyst's fidelity to law.

is arguably inconsistent with strict textualism and, as noted above, requires a willingness to delve into post-enactment historical examples to inform interpretation. The two approaches pull in different directions.

Throughout its history, the Constitution has been altered by innovations pushed by lawyers who use interpretive techniques to gain a foothold for theories with little explicit textual support (contraception, abortion, same-sex marriage) or to empty a piece of text of its original understanding and refill it with more practical ideas (the right to counsel) or to update and extend prohibitions based on vague language (cruel and unusual punishment). Novelty and a lack of textual support do not render a theory impermissible, much less cause for discipline. Given the success progressive lawyers have had in such work, there is some reason even for progressives to be cautious about going after people's licenses for urging improbable theories.

It is important for discussions of professionalism–legal ethics in general and discipline in particular–to separate normative disagreement from critiques of professional performance. Lawyers do lots of unsavory things with impeccable professionalism. It is easy for disagreement with an interpretation or interpretive practice to bleed into *ad hominem* condemnation of the interpreter. Some interpretations seem so bad that opponents find them easy to read as a pretext for some undisclosed malign motivation, and thus to support moral condemnation of the interpreter. The distinction between moral and professional criticism is especially important when the normative stakes of a question are high and the technique employed is positivism in the form of strict textualism. It is fine to critique positivist lawyering (or any other kind) on moral grounds, but it is a mistake to ground a professional critique solely or even largely in morality.

A recent historical example is relevant to this point. Calls for discipline of President Trump election lawyers echo in many respects the criticism of lawyers in President George W. Bush's Office of Legal Counsel ("OLC"), who drafted memoranda relating to interrogation of persons suspected of having knowledge relating to terrorism. The memos were popularly known as the "Torture Memos," and critics argued that they did not provide independent advice but showed that the lawyers, particularly Jay Bybee and John Yoo, were telling the Bush administration what it wanted to hear rather than telling it hard truths about what "torture" really means.[160]

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[160] For a brief precis of such criticism, *see* David Luban, *The Torture Lawyers of Washington*, in LEGAL ETHICS & HUMAN DIGNITY 178 (2007). The first memorandum was entitled "Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A." It recites that the OLC was asked for its opinion of "the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340–2340A of title 18 of the United States Code. 18 U.S.C. § 2340A makes torture a criminal act. 18 U.S.C. § 2340(1) defines torture to mean –

> an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

18 U.S.C. § 2340(2) defines "severe mental pain or suffering" to mean
the prolonged mental harm caused by or resulting from—

> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

With the example of the OLC memos in mind, we can see that to get a handle on the disciplinary case against the endgame theory requires background on what it means to say that lawyers must obey the law. What — if anything — distinguishes interpretation from distortion? Any such distinction presumes an ability to identify some range of acceptable meanings relative to a relevant rule. As William Simon aptly pointed out years ago, to follow the law one must know what it says, and there is more than one way of achieving (a deliberate verb) that knowledge.[161]

A. How and Where Does One "Follow the Law"?

There is a large and inconclusive literature on whether and how legal ethics relate to morality. Legal ethics refers to rules and practices that define what lawyers must, may, and may not do as lawyers. Morality refers to normative principles most people use to distinguish right from wrong. The two concepts overlap — many legal ethics rules conform to widely accepted moral intuitions — but they are distinct because to be a lawyer is: (i) to do a job in (ii) a representative capacity and generally (iii) in an institutional context rife with accepted customs and practices. Doing the job may require doing things as a lawyer that one would eschew as an ordinary person. This basic idea is known as the "standard conception" of legal ethics.[162] Its quixotic point is to excuse professional conduct from moral condemnation that would apply to the same conduct done in one's personal capacity. Many law professors – Richard Wasserstrom[163] Gerald Postema,[164] David Luban,[165] William Simon,[166] and Deborah Rhode,[167] to name just a few — found this conception wanting, though for various reasons. The standard conception focuses on whether sound grounds exist to assess professional conduct differently from personal conduct when it comes to ethics. Interpretation of legal texts was not, in and of itself, a principal object of their concern. In general, for these scholars the normative demands of a situation would dictate the appropriate interpretive tactics.

> (C) the threat of imminent death; or
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .

A significant aspect of this criticism related to the questions of whether and how far government lawyers, particularly in the OLC, are held to higher standards than private lawyers. *E.g.*, Nancy v. Baker, *Who Was John Yoo's Client*, 40 PRES. STUDIES Q. 750 (2010). That question is not relevant to the cases against Giuliani, Powell, and Eastman. For an argument that the memoranda were not sufficiently independent within the meaning of ABA Model Rule 2.1, *see* Milan Markovic, *Advising Clients After Critical Legal Studies and the Torture Memos*, 114 W. Va. L. Rev. 110 (2011).

[161] William Simon, The Practice of Justice 77 (1988).

[162] There is some variation in the name. David Luban's influential book LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988), used the term, which he attributes to Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 73 (1980).

[163] Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rrs. 1, 8 (1975).

[164] *Moral Responsibility, supra* note 164.

[165] Luban, *Lawyers and Justice*, *supra* note 161.

[166] Simon, *supra* note 159.

[167] Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession*, 17-19, (2000).

A different approach, of which Brad Wendel is the most prominent advocate, has tried to find some ground to exculpate lawyers' professional conduct from moral condemnation while steering clear of the bog of morality. Wendel argued that lawyers' conduct may be defended as enforcing the political resolution of disputes through law, thereby reinforcing law as an alternative to force. On this view, lawyers must operate within the bounds of law because law can only serve its settlement function if it is respected, and that function is the only thing that empowers lawyers to act and justifies conduct by a lawyer that would be unacceptable if done by an ordinary person.[168]

Wendel focuses on legal entitlements, "which are different from mere [client] interests or desires, because they have been conferred by the society as a whole in some fair manner, collectively, in the name of the political community."[169] Fidelity to law requires, he argues, that lawyers should act only to enforce client entitlements and not to achieve client interests when the two approaches diverge. Wendel sometimes refers to this approach as positivist legal ethics but, as we will see, that description seems fair only in relation to more overt moralism.[170] Measured against strict textualism, it is not very positive at all. And there is a fundamental tension between this approach and the Realist insight that law is not independent of social forces but continually remakes itself, in large part through rhetorical forays by lawyers seeking to ensconce some moral or political belief in the law.[171] Much of that work takes the form of interpretive technique.

All interpretive approaches claim fidelity as a virtue they promote, so if the concept is to distinguish permissible from impermissible lawyering some constraint on interpretation is required. One approach to interpretation, central to ISL theory, is textualism, which aspires to limit interpretation to the text of a rule.[172] So stated it is an uncontroversial approach — no one advocates *ignoring* relevant legal texts altogether — but it comes in different flavors. Strict textualism holds that interpreters must seek only an objective public meaning based solely on the words of an enactment. The purposes and expectations of drafters or those voting for the text are not to be consulted, for none of these were explicitly approved by the procedures specified for producing "law." Only the text was. This is the idea behind the "original public meaning" flavor of originalism, but it can be applied generally. Textualism is cousin to positivism as a theory of law—the law is whatever is produced by the procedures specified as producing law; morality has

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[168] W. Bradley Wendel, *Lawyers and Fidelity to Law* at 4 (2010).
[169] *Id*. at 2.
[170] Simon refers to it as "authoritarian legal ethics," which is a bit harsh given how purposive Wendel's positivism is. William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, Colum. Public Law Research Paper No. 11-291 (2011).
[171] *See* Karl N. Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 Harv. L. Rev. 1222, 1236 (1931).
[172] *E.g.,* Richard H. Fallon Jr., *Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation - and the Irreducible Roles of Values and Judgment within Both*, 99 Cornell L. Rev. 685 (2014). As the title suggests, Fallon discusses the necessary overlap between these approaches and does not treat them as wholly distinct. On textualism in constitutional interpretation, *see* William M. Treanor, *Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007). Available at: https://repository.law.umich.edu/mlr/vol106/iss3/3 ; http://scholarship.law.cornell.edu/clr/vol99/iss4/1.

no necessary role in it.[173] Truly strict textualism is impossible,[174] but a lot of work gets done under its brand.

There are three slightly consequentialist justifications for strict textualism. The first is that texts are often compromises among persons with different purposes, so fidelity to the compromise entails fidelity to the text alone because only the text embodies the compromise. To deviate from it would risk siding with one group or another when by hypothesis that group could not secure a (textual) win through the process specified for generating law. The idea is a bit odd — it is akin to valuing plywood solely for the glue — but it is logical. The second justification is that adjudicators, most often judges, are supposed to interpret rather than to make the law, and attending to text alone helps ensure they will not inject their own preferences into the law. The final (hyperbolic) justification is that to eschew textualism and positivism risks anarchy.[175]

While they lack consensus on an interpretive approach, legal ethicists have tended to treat strict textualism as an ethically implausible approach to ascertaining the law. William Simon argued that "the plausibility of a duty of obedience to law depends on how we define law" and concluded that if law is defined in "narrow Positivist terms, then we cannot provide plausible reasons why someone should obey a norm just because it is the `law.'"[176] In contrast, the greater the moral reasons to follow a norm, the less reason there is to follow it just because it has run through a procedural mill to produce "law."[177]

Simon believed positivism and strict textualism are not normatively compelling, and he further argued that they do not describe well what lawyers do in practice in the real world. They often work around dumb or inconvenient laws, a process Simon termed "nullification."[178] Federal prosecutors acquiesce in wholesale violations of the Controlled Substances Act with respect to sale of marijuana,[179] in part for reasons of realpolitik and in part because federal law treatment of marijuana is surpassingly dumb. More generally, prosecutors may decline to bring charges for provable crimes if they view the underlying law as unjust, advocates may attempt to

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[173] Simon, *supra* note 159, at 79-80; 82-83.
[174] *E.g.*, Stanley Fish, *The Law Wishes to Have A Formal Existence*, in THE FATE OF THE LAW 159 (Austin Serat & Thomas R. Kearns, Eds.).
[175] Simon, *supra* note 159, at 80.
[176] *Id*. at 77.
[177] *Id*. Luban argued for a moral duty to obey certain laws based on the idea that it is unfair to exempt oneself from obligations one's community accepts through laws. *Lawyers and Justice*, *supra* note 160, at 44-45. He excepts from this principle laws that are inegalitarian in the sense that they disrupt the hypothesized community, reinforcing differences within it. *Id*. at 46. For a realist this hypothesized community is a fiction, or at least too insubstantial to generate normative requirements. To borrow his example, it is easy to agree that the Freedom Riders acted morally, and to agree that they sought equality not preference. They nevertheless sought to disrupt the community that existed in the real world, and often in the law, because it was based on inequality. There will always be a fight about how to conceive the hypothesized community, which will subsume arguments about an obligation to obey the law that derive from any particular conception of community.
[178] Simon also noted that a purely moral approach to obligation gives no reason to follow the law as law, because one's own moral compass is then sufficient to determine action. One only follows the law as law when its commands differ from one's moral preferences. Simon rightly pointed out that positivism risks absurdity and injustice in particular cases because its sense of obligation is, in theory, invariant to context, while a purely morals-based approach could flirt with anarchy. Simon, *supra* note 159, at 85.
[179] *E.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005) (state laws legalizing marijuana use do not displace federal criminalization of such use).

induce nullification by jurors (though such attempts need to be swaddled in coded rhetoric), defense lawyers will avoid acquiring knowledge of true facts in order to sidestep prohibitions on offering testimony they know to be false,[180] and judges animated by what Holmes called their "can't helps,"[181] will strike statutes as unconstitutional.

Simon posited an example of a state with a law requiring grounds for divorce. Suppose a couple were truly incompatible, desired divorce, and had fairly divided their assets. Simon asked whether it would be wrong to help a client who was part of such a couple perjure themselves to satisfy the statutory grounds for divorce, particularly if the bench were aware of and essentially acquiesced in the practice.[182] The example may be updated — after *Dobbs v. Jackson Women's Health Organization*[183] significant numbers of lawyers will no doubt devote their work to helping women evade state prohibitions on abortion. The parameters of such work — whether they include maintaining rosters of friendly physicians to vouch for conditions that might qualify for an exception to a prohibition, for example — will develop over time. No one engaging in such work will think it unethical just because it seeks to evade a law.

Simon's argument has a lot of force, in part because he rightly observes that a truly strict textualism seems bizarre to many people. He cited as an example the Constitution's Emoluments Clause, which states that no Senator or Representative "shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time."[184] In the 1990s, Congress and the executive worked around this text to appoint Senator Lloyd Bentsen Secretary of the Treasury by reducing the Secretary's salary to what it had been when Bentsen was elected.[185] If one deemed the purpose of the Emoluments Clause as being to keep legislators from voting raises for jobs they planned to take in the future, that move worked from a purposive point of view.

From a strict textualist perspective, however, the move didn't work at all. The text of the Constitution doesn't say an officer can't be paid any salary increase, it forbids appointment altogether. Michael Stokes Paulsen, who we saw above defending the executive branch's right to interpret the Constitution even in the absence of judicial rulings on a point, insisted that "[i]t is not sufficient to satisfy the perceived `spirit' of a constitutional provision. The letter of the law must be observed as well. And the letter of the Emoluments Clause does not admit of retroactive fixes."[186] Paulsen concluded "the Constitution is often inconvenient, perhaps even insensibly so to the modern understanding. But should this imply that the Constitution rightfully may be ignored whenever it poses a policy nuisance and we fail to perceive (or regard as very important)

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[180] Model Rules of Pro. Conduct r. 3.3(a)(3)(Am. Bar Ass'n 2021) .
[181] *See* Joseph Blocker, *"The Road I Can't Help Travelling": Holmes on Truth and Persuadability*, 51 Seaton Hall L. Rev. 105, (2020) (quoting Holmes: ""All I mean by truth is the road I can't help travelling.").
[182] *Id.* at 78-79.
[183] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).
[184] U.S. Const. art. I § 6, cl. 2; William H. Simon, *Should Lawyers Obey the Law*, 38 Wm. & Mary L. Rev. 217 (1996).
[185] The Secretary's salary had been raised during Bentsen's term; the fix was to lower it to its prior level. The example is discussed in Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 Stan. L. Rev. 907, 907 (1994).
[186] *Id.* at 911.

the policy purposes of a particular provision or think a provision poorly drafted?"[187] Simon felt that, while Paulsen "expressed great distress at what he regarded as betrayal of the rule of law," Paulsen gave no real reasons for disapproval. "He did not suggest that society's tolerance of this sort of nullification has in any way weakened its ability to enforce constitutional provisions in situations where the stakes are higher," for example.[188] Simon therefore viewed Paulsen's approach to ascertaining the law to be unsound, if not perverse, from an ethical point of view.

Compared to more normative approaches to lawyer ethics, Wendel's concept of fidelity leans more heavily on the idea that only a limited number of interpretive approaches qualify as professional and thus permissible. Wendel recognized that "there is no interpretive convention that tells judges how to interpret conventionally specified materials,"[189] but at times he argued that a purposive approach to interpretation is required,[190] though he also recognizes that text and purpose may conflict or that a text may serve multiple purposes.[191] Ultimately he opted for purposivism (and thus for Lloyd Bentsen): "the law is always aimed at some end—that is, it is a purposive activity. A basic constraint on a permissible interpretation of law is therefore that it be aimed at recovering the substantive meaning of some legal norm."[192] Simon argued that Wendel Was too much in thrall to positive law,[193] but Wendel shared with Simon a low tolerance for strict textualism. For example, Wendel had no time for a technique used by OLC lawyers Jay Bybee and John Yoo to define torture — searching other statutory texts for the meaning of the statute at hand — because he thought purposive interpretation provides an obvious answer.[194]

Criticism of the OLC memos makes ethical criticism of strict textualism explicit. David Luban quoted with approval a criticism of one memo as being "textual interpretation run amok—less `lawyering as usual' than the work of some bizarre literary deconstructionist."[195] Here he quoted Peter Brooks, who argued a memo written by Jay Bybee was essentially a daisy chain of linguistic nonsense because it relied on dictionaries and language in other statutes without due

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[187] *Id*. at 914. This position was echoed in Texas's attempt to invoke the Supreme Court's original jurisdiction by seeking leave to sue Pennsylvania, largely on ISL grounds. The first paragraph in Texas's proposed complaint stated:

> Our Country stands at an important crossroads. Either the Constitution matters and must be followed, even when some officials consider it inconvenient or out of date, or it is simply a piece of parchment on display at the National Archives. We ask the Court to choose the former.

Motion for Leave to File Bill of Complaint, Texas v. Pennsylvania, Docket No. 22O155 (U.S. Dec 08, 2020)(Proposed Bill of Complaint at 1).

[188] William H. Simon, *Should Lawyers Obey the Law*, 38 Wm. & Mary L. Rev. 217, 231 (1996).

[189] W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 Notre Dame L. Rev. 1 (1999).

[190] Wendel, *Fidelity*, *supra* note 166, at 192 ("The most basic constraint on what counts as an interpretation of law is that law must be viewed as a purposive activity, as having some point or end.").

[191] *Id*. at 14.

[192] Wendel, *supra* note 192, at 177.

[193] William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, Colum. Public Law Research Paper No. 11-291 at 13 (2011) ("Wendel has neither evidence nor argument to support his contention that desirable social order depends on categorical preclusion."). "Authoritarian" seems a bit strong to me, if for no other reason than that Wendel's approach accommodates a lot of subjective moralism compared to Paulsen-ian textualism.

[194] Wendel, *supra* note 166, at 15.

[195] David Luban, *The Torture Lawyers of Washington*, in LEGAL ETHICS & HUMAN DIGNITY 178 (2007).

regard for context.[196] Luban dismissed the argument of Eric Posner and Adrian Vermeule, who said the memos reflected ordinary lawyering strategies, as "a distinctly minority view that seemed plainly to be an exercise in political damage control."[197] For Luban,

> It seems obvious that OLC lawyers simply did an electronic search of the phrase "severe pain" in the United States Code and came up with the healthcare statutes (the only ones other than torture-related statutes in the entire Code to employ the phrase). Then they decided to see how clever they could get. The result is a parody of legal analysis.[198]

Luban criticized a later memo by Jack Goldsmith as "senseless formalism,"[199] and as employing "kabbalistic textual manipulations."[200] Luban believed the OLC memos err by failing to ask what he sees as "the most basic interpretive question: *What is the point of this law*?"[201] Implicit in Luban's criticism is a premise that to act professionally lawyers must do more than get clever with words. At least in the context of the OLC memos, for both Luban and Wendel achieving the purpose of the law provides that something more.

Luban's question certainly is an interpretive question, and personally I agree it should be the most important. But it is not the only interpretive question, and opinions vary on the importance of possible questions. In addition to John Yoo and Jay Bybee, Neil Gorsuch,[202] Clarence Thomas,[203] Samuel Alito,[204] Brett Kavanaugh,[205] Antonin Scalia,[206] William Rehnquist,[207] and others might view the most important question as being: What words did the lawmakers agree on and what is the objective ordinary or plain meaning of those words? On this view, while Wendel and Luban may be right to say (in Wendel's words) "[t]he law is purposive; it is *about* something, and legal interpretation is aimed at recovering that meaning,"[208] textualism

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[196] Peter Brooks, *The Plain Meaning of Torture?*, Slate (Feb. 9, 2005), www.slate.com/id/2113314.
[197] Luban, *supra* note 197, at 178. Professor Michael Stokes Paulsen defended the memos on substantive grounds. The Lawfulness of the Interrogation Memos, Testimony of Professor Michael Stokes Paulsen, Distinguished University Chair and Professor of Law, the University of St. Thomas Law School, before the Subcommittee on Administrative Oversight and the Courts of the U.S. Senate Committee on the Judiciary 8 (May 13, 2009). Paulsen, as noted in the text, is a formalist who practices strict textualism, which accounts for the substantive difference in his analysis.
[198] Luban, *supra* note 193, at 179.
[199] *Id.* at 187.
[200] *Id*. at 189. Ironically, Goldsmith played the role of good lawyer (contrasted with an unnamed John Yoo) in a graduation speech by Yale Law Professor Dan Kahan. https://thesituationist.wordpress.com/2008/05/25/law-chicken-sexing-torture-memo-and-situation-sense/.
[201] *Id.* (emphasis in original).
[202] Bostock v. Clayton County, 140 S.Ct. 1731 (2020).
[203] McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., dissenting) (criticizing on originalist grounds the Court's constitutionalization of defamation law).
[204] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 142 S. Ct. 2228, 2284 (2022)(overruling Roe v. Wade on historical and originalist textualist grounds).
[205] Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907 (2014).
[206] *E.g.*, Siegel, Jonathan R., *The Legacy of Justice Scalia and His Textualist Ideal,* 85 Geo. Wash. L. Rev. 857 (May 2017);
[207] *Bush v. Gore*, 531 U.S. 98, 112-113 (Rehnquist C.J., concurring).
[208] Wendel, *Fidelity*, *supra* note 166 at 196. The preceding sentence states: "Law is the enactment of a political community, and a legal judgment must therefore make reference to standards that transcend the individual making

has a plausible rejoinder: what distinguishes law from philosophy or literature is that law coordinates social behavior, so interpretation must attend primarily — maybe exclusively – to the text around which coordination is to occur. One might infer from this view that how much textualism is too much is a matter of judgment, perhaps even of taste, but not of professional ethics.[209]

For this reason, traditional academic legal ethical criticism of strict textualism tends to condemn that approach as categorically inappropriate for cases where the moral stakes are high. Rather than fight on the turf of strict textualism, and argue whether it was done well or badly, legal ethical criticism has aimed to disqualify it as categorically inadmissible for at least a certain class of cases. Of the OLC memos Wendel writes:

> If one's legal conclusion is that causing someone to experience the physical sensation of imminent death is not torture, then something in that argument has gone off the rails. *It is time to abandon whatever interpretive principles led you to that conclusion, which cannot possibly be the right one, in light of the obvious purpose and overall rationality underlying the prohibition on torture*. This approach to ethical criticism takes seriously the internal point of view of a lawyer participating in the craft of making and evaluating legal arguments. It is not an external critique, on the grounds of the wrongfulness of torture in ordinary moral terms.[210]

Traditional ethical criticism inclines itself to this stance, for to criticize only the application of an approach runs the risk of legitimizing it as potentially valid, even for morally high-stakes cases. An argument about whether an acceptable approach was performed well or poorly does not provide a strong ground for moral condemnation or for discipline.

Nevertheless, criticism of the OLC memos did not rest on survey research regarding actual interpretive practice.[211] The notionally empirical fight about what was a "minority" approach hid a more fundamental tension that drove, and still drives, ethical criticism of strict textualism. At least ostensibly, strict textualists adopt their techniques to avoid reading their own morality into a text. If one views text as stitching together a compromise among competing beliefs, there is something to be said for a self-effacing approach because the text itself represents some minimal compromise that rejects the stronger views of competing groups. Text may be morally thin by design. In contrast, ethical criticism draws its strength from moral intuitions, which is why critiques of the OLC memos dwelt on factual descriptions of torture

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the judgment." *Id.* For Wendel these two points—the need for inter-subjectivity and purposive interpretation—point in the same direction. Textualism would claim there is at least a tension and in some cases a contradiction between them. Contradiction would occur when, for example, a law was a compromise among groups having divergent purposes.

[209] For a critique working from textualist premises, *see* Michael D. Ramsey, *Torturing Executive Power*, 93 Geo. . L.J. 1213 (2005).

[210] Wendel, *supra* note 166 at 15 (emphasis added).

[211] If it had, there would have been fights about the population to survey (human rights lawyers, government lawyers, or just lawyers who interpret federal laws) and how to construct the survey instrument.

techniques and used scornful language.[212] Given that discipline is meant to mark conduct unacceptable for any lawyer, not just to add weight to one side in a legal or policy argument, it is perhaps not surprising that efforts to discipline Yoo and Bybee failed.[213]

The background of the OLC memos and the ethics of interpretation are relevant to analysis of the endgame theory because the ISL theory depends upon strict textualism.[214] The ISL theory is, in its own way, as devoid of purposive reasoning as the OLC memos were accused of being. Because of its breadth and subject matter, the ISL theory is arguably more destructive to democratic values than the OLC memos were accused of being. Yet no one has, will, or should call for discipline based solely on advocacy of the ISL theory because there is too much judicial support for it. That the support may appear to some to be ends-driven, cynical, and essentially political is of no moment. What matters is that it has seeped widely enough into at least one powerful segment of the profession to immunize its adherents from professional sanction, at least to the extent of their advocacy of that theory.[215] The status of the ISL theory suggests that Posner and Vermeule were right to say that the OLC memos reflected a new generation's increased emphasis on strict textual and structural analysis.[216] The trend towards use of such interpretive techniques has only grown stronger over time.

That the ISL theory is not frivolous as a matter of positive law, and thus that advocacy of the ISL theory is not, as such, subject to discipline, highlights the tension between the normative impulses that often animate legal ethics discussions and the desire of legal ethics, in at least some of its forms, to portray itself as upholding purely professional virtues. Ethical critiques of the OLC memos, and at least some critiques of 2020 election challenges, underestimate the degree to which formalism and strict textualism are professionally acceptable. At the end of the day, many such critiques collapse into purposive analysis, in which everything depends on the purposes specified, and thus detach from any claim to purely professional criticism.

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[212] To the extent Congress intended to import moral considerations into statutory text, that choice tends to broaden rather than lessen the strategy space in which interpretive technique could flourish.

[213] The history is described, from a perspective critical of the authors but with appropriate cynicism regarding some statements condemning the authors, in David Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 J. NAT'L SECURITY L. & POL'Y 455, 458 (2010) ("When one considers that they authorized the same illegal conduct, the criticisms offered by OLC heads Goldsmith, Levin, and Bradbury seem designed to distance themselves from Yoo, even as they concurred with the bottom line of the Yoo and Bybee memos that the tactics being used by the CIA were legitimate"). The Obama administration's use of drone strikes to kill suspected terrorists, with the attendant inevitable consequence of collateral civilian deaths, did not prompt similar academic criticism. *See* Milena Sterio, *Lethal Use of Drones: When the Executive Is the Judge, Jury, and Executioner*, 23 INDEP. REV. 35, 38-39 (2018).

[214] Wendel's approach does not formally exclude strict textualism. If some fraction of lawyers sufficient to signal acceptability within the profession adopted a strict textualist approach to some question, then there would be nothing wrong with (and the duty of care might require) taking a textualist approach to the question. Limitations periods provide a good example. Because they embed counting time, questions regarding limitations periods invariably have a formal element even if other, more equitable, concerns are also in play. Whatever the morality of asserting a limitations defense against a just claim, a descriptive approach would not condemn the assertion. As we see below, the ISL theory would count as a second example.

[215] The qualification "solely" is meant to indicate that the theory might fail on procedural grounds strong enough to support a referral. The sanctions opinion in Michigan and Judge Boasberg's referral in the District of Columbia both had strong procedural components.

[216] Eric Posner & Adrian Vermeule, *A 'Torture Memo" and its Tortuous Critics*, Wall St. J. July 6, 2004.

B. Discipline and the Endgame Theory.

Eastman's actions in pressing the endgame theory do not line up well with the disciplinary rules. Eastman appears to have advised President Trump that Vice President Pence had the power to resolve disputes over electoral slates, or at least to pause the counting of electoral votes. He also appears to have advised the President that pursuing the endgame theory would entail violating the Electoral Count Act.[217] It would be helpful to know exactly what was said, but presumably the President was told that, other options having failed, the endgame theory was a possible course of action, though one which would entail disregard of the Electoral Count Act. In an ordinary case much would turn on exactly how the option was presented – was it described as a sure thing (nothing publicly disclosed suggests that it was), a long shot, or just as a hardball tactic with a fig leaf of legal theory hopefully big enough to provide cover? Attacks on the competence and candor of Eastman's advice require answers to such questions.

Eastman's discussions with the Vice President are better documented. Vice-President Pence was, in legal ethics terms, a represented non-client with whom Eastman negotiated at arms' length. Eastman tried to persuade the Vice President to use the 12th Amendment to decline to count certain electoral votes or to delay counting. Accounts of what was said when and to whom vary somewhat, and if a disciplinary proceeding does go forward there will likely be findings of fact and credibility determinations on those issues. A few important points are undisputed, however.

Most cases challenging advice involve a lawyer telling a client it is OK to do something secret that allegedly violates the law. The endgame theory involved advice to Trump about Pence's supposed powers, not Trump's. Trump himself could not act on the advice other than by leaning on Pence, who had his own lawyers who were effectively negotiating on his behalf against Eastman. The substance of the advice was largely legal, concerning facts and law available to both sides. Both President Trump and Vice President Pence were advised by other lawyers apart from Eastman.[218] Those other lawyers were antagonistic to the endgame theory and counseled against it. President Trump's numerous election losses were publicly known, and the endgame theory was publicly mooted. The action Vice President Pence was urged to take would have been public and almost certainly would have resulted in litigation. Those facts create an unusual context for discipline.

Eastman's memo most resembles argument, and the rules establish standards for arguments, but those standards presume that arguments are made in a proceeding brought before a tribunal. The endgame theory was presented in *Gohmert* and was dismissed on procedural grounds with no sanctions imposed, but the more consequential work was done in offices in meetings with the Vice President and his counsel.[219]

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[217] Vice President Pence's counsel, Greg Jacob, so testified on June 16, 2022. See https://www.npr.org/2022/06/16/1105683634/transcript-jan-6-committee .

[218] Some of Trump's lawyers, such as Eric Herschman and Pat Cipillone represented the President in his official capacity — i.e., they represented the office of the Presidency. Eastman represented President Trump as an individual. For purposes of the endgame theory, however, this difference is not material.

[219] In substance Eastman tried to persuade the Vice President that the Constitution made him a sort of tribunal, though not the kind the rules of conduct have in mind. California Rule of Professional Conduct 1.0.1(m) defines tribunal:

Eastman's efforts to persuade Pence and his counsel are best be viewed as arguments made in negotiations with a represented nonclient. The most salient rule would be the one forbidding knowing misstatements of fact or law to a third person,[220] but precisely because the endgame theory most resembles argument, rather than factual assertion, it is a stretch to apply that rule to the endgame theory, particularly when Pence was independently represented and the relevant facts and law were as available to his counsel as to Eastman. Even though Eastman and the Vice President's staff argued in offices rather than in court, it makes most sense to treat the endgame theory as an argument and judge it by the standards applicable to argument: it had to be supported by existing law, or by a good faith argument for altering that law.[221] In other words, it should be judged by a standard of frivolousness.

That standard then informs assessment of advice to President Trump. As noted above, how exactly the endgame theory was presented to President Trump is a factual question, and it is possible that the theory was presented as fact. But the presence of other counsel arguing contrary provisions, and the text and structure of the Eastman memo, suggest that, at least provisionally, it is reasonable to treat the theory as advice to take a position, which implicitly casts the endgame theory as an argument. The standards for advice turn on competence, not falsity, so weaknesses in the endgame theory are relevant to assessing the quality of advice.

1. Disciplinary Standards.

Disciplinary rules state seemingly different standards for advice and litigation. In litigation lawyers may only bring claims for which there is a non-frivolous basis in law and fact.[222] A "good faith argument for an extension, modification or reversal of existing law" is enough to clear the low bar of frivolousness.[223] Advice may not further unlawful acts,[224] must be candid, and must in some sense reflect independent professional judgment.[225] The comment to ABA Model Rule 2.1 says that lawyers must sometimes tell hard truths, but the reference to "independent" advice must be read with care. Lawyers are fiduciaries and thus owe a duty of loyalty to clients, which means they must seek to advance lawful client objections, as defined by the client after consultation.[226] "Independent" cannot mean independence from client objectives,

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> (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

The ABA Model Rules definition is essentially similar.

[220] Cal. Rules. Pro. Conduct, r. 4.1.

[221] Cal. Rules. Pro. Conduct, r. 3.1(a).

[222] Model Rules of Pro. Conduct r. 3.1(a)(Am. Bar Ass'n 2021).

[223] *Id*. Federal Rule of Civil Procedure 11 adopts essentially the same standard. It provides that an attorney signing a filing warrants that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. of Civ. P. 11(b)(2)

[224] Model Rules of Pro. Conduct r.1.2(d)(Am. Bar Ass'n 2021).

[225] Model Rules of Pro. Conduct r. 2.1(Am. Bar Ass'n 2021).

[226] Restatement (Third) of the Law Governing Lawyers § 16(1)(Am. L. Inst.)

just as it cannot mean acquiescence in unlawful pursuit of them.[227] And for independence to have any meaning it must take account of the interpreter's own view of the law. The concept of independence cannot be limited to sincerity, but neither can the concept ignore it. In a memorandum declining to refer Bybee and Yoo for discipline, Associate Deputy Attorney General David Margolis distilled the relevant standards well: the rules require lawyers not to provide advice to their client that was knowingly or recklessly false or issued in bad faith.[228] As in the rules generally, "knowingly" refers to actual knowledge, which may be inferred from facts.[229]

Legal ethics scholars have argued that advice should be subject to more stringent standards than litigation conduct because litigation is transparent while advice may fly under legal radar. Wendel argues that lawyers advising clients ought to be held to stricter standards because litigation provides "an institutional solution to the problem of the indeterminacy and manipulability of the law."[230] In contrast, outside litigation "there may be no institutional mechanism to safeguard against one-sided interpretation of the law," presenting the risk that a lawyer will act as "private lawgiver" such that the law "can essentially be manipulated out of existence under the guise of `zealous advocacy'" if the "lawyer's advice is uncoupled from the possibility that the legality of the client's actions might actually be subject to evaluation by an impartial decision-maker."[231]

There is a lot to consider in this claim, which seems to equate "the law" with closure provided by a court. There is a Realist case for this equation, though the equation does not account for procedural decisions, such as standing, that avoid merits rulings. But even from the

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[227] Some legal ethical criticism disagrees with this point. *E.g.* Markovic, *supra* note 158, at 140. Such criticism would read "independent" as meaning independent from client objectives. The word need not be read that way. Regarding the Torture Memos, Associate Deputy Attorney General David Margolis concluded:

> The requirement in Rule 2.1 that an attorney exercise independent professional judgment must be read in conjunction with other obligations of the attorney and cannot mean that the attorney is supposed to exercise judgment independent of the client's objectives, but rather that the attorney should not provide dishonest advice to satisfy the client's objectives nor should the attorney provide advice when the attorney is encumbered by a conflicting personal interest or an inappropriate relationship with the client.

Memorandum from David Margolis, Associate Deputy Attorney General, to Eric Holder, Attorney General (Jan. 5, 2010) (on file with author). That is correct. If the lawyer does not take into account what the client wants to do, the lawyer is limited either to an unhelpful level of abstraction or to substituting some objective of their own for the client's. Professor Markovic argued that this reading of Rule 2.1 effectively renders redundant Rule 1.2(d), which states a lawyers shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent," though a lawyer may "assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Markovic, *supra* note 158 at 141. Margolis's reading gives effect to both rules, however (1.2 does not account for personal interest conflicts, which 2.1 does), and in truth one of the reasons Rule 2.1 is so seldom invoked is that it overlaps a lot with more specific rules. Referring to New York's adoption of this rule, Professor Roy Simon stated it was "more of a concept than a command," with the concept being enforced through other rules. Roy Simon, Simon on New Rules: Rule 2.1 Through 3(a)(1), New York Legal Ethics Reporter (Sept. 2009), http://www.newyorklegalethics.com/simon-on-new-rules-rule-2-1-through-3-3a1/.

[228] Margolis, *supra* note 224 at 26.

[229] Model Rules of Pro. Conduct r. 1.0(f)(Am. Bar Ass'n).

[230] Wendel, *Fidelity*, *supra* note 166 at 188.

[231] *Id.* at 188-89.

perspective of strong Realism the equation is at least partly unsound. It leaves no room for the idea that courts may be mistaken about the law, when common sense and experience indicate that judicial mistakes are common.

The important point about this claim for our purposes, however, is that the different standards for litigation and advice largely distinguish opaque client action from client action that is transparent and thus more likely to wind up in court. For cases likely to be adjudicated, there is little practical difference between advice out of court and advocacy in it because, in most such cases, advice in the office typically will be given with an eye to whether the action advised could be defended before a tribunal. Under this rationale, advice that leads to transparent action, and thus to a high probability of adjudication, would not be subject to a standard higher than the positions taken in the litigation itself. That conclusion fits well with the Realist tenet that the law is what law officials actually do.[232]

With respect to discipline, however, there is a more practical distinction. From a court's perspective, pressure to sidestep a court – to ask forgiveness rather than permission –is likely to seem lawless because it implies defiance of judicial power. Bar discipline occurs under the judicial power,[233] and an argument designed to persuade the Vice President to sidestep the judiciary risked incurring judicial ire. The U.S. Supreme Court and California's disciplinary system differ, of course, but at the level of judicial as opposed to executive power one might expect the courts to have a common interest. One would prefer that discipline not be pursued based on the judiciary's need to defend its turf against executive encroachment, but from the judiciary's perspective, and by extension the perspective of the bar, the endgame theory calls that question.[234]

2. Step One –The ISL Theory.

The ISL theory has received less attention than it should with respect to the conduct of President Trump's election lawyers. As shown above, many of the complaints Eastman recited in his memorandum are premised on the ISL theory. In this section I argue that, depending on how the Court elaborates it, the ISL theory of step one has the potential to ravage democracy almost as much as the vision of Vice-Presidential power asserted in step two. The theory is well enough accepted, however, that advocating it, in court or out, is not plausibly subject to discipline.

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[232] Llewellyn, supra note 169 Wendel adds references to the standard of care and the duty of lawyers to render candid advice but, provided lawyers provide a realistic assessment of the probability of prevailing, including in litigation but not necessarily limited to it, these constraints would seem to add little to the mix.

[233] Cal. Bus. & Prof. Code § 6076 ("With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all licensees of the State Bar."); Cal. Bus. & Prof. Code § 6078 ("After a hearing for any of the causes set forth in the laws of the State of California warranting disbarment, suspension, or other discipline, the State Bar Court has the power to recommend to the Supreme Court the disbarment or suspension from practice of licensees or to discipline them by reproval, public or private, without such recommendation.").

[234] A subsequent privilege ruling reinforces this impression. Referring to its previous crime-fraud ruling, the court held that 4 communications were not made in furtherance of a crime (which the court found was contemplated as early as December 2020) because they pertained to filing litigation. A fifth communication counseled avoiding the courts, and the district judge held that this document fell within the exception. *Eastman v. Thompson*, No. 8:22-cv-00099 (C.D. Cal. Jan. 20, 2022) Docket 356 at 21.

Whatever might be the hopes of those who advocate discipline for President Trump's election lawyers, discipline is far too weak to serve as a bulwark protecting democracy from lawyers.

Because ISL theory is incompletely developed, it is not easy to say how courts would rule on the specific issues Eastman identified in Part I of his memorandum. Pennsylvania might well have lost had the U.S. Supreme Court ruled on the Pennsylvania Supreme Court's extension of the date to receive ballots. The segregation of ballots received after the statutory date was dismissed in press accounts as a minor victory for President Trump because the late-received votes would not have changed the result in Pennsylvania, as Justice Thomas noted. Fair enough. But the implied endorsement of the ISL theory is significant. What if the U.S. Supreme Court had started taking cases and had disagreed with Pennsylvania's justices with respect to signature verification, or drop boxes? What if the Court had so ruled in Wisconsin or Georgia as well? If any of that happened, the question of remedy would become crucial. At a minimum, the discussion of election challenges would be very different.

The ISL theory shows that positivism and strict textualism may be used to turn election laws against democracy. With the best intentions, states have enacted myriad laws regulating elections. There is enough election law that it is not too hard to construct arguments that some votes were unlawfully cast and counted. All that remains is for candidates to use lawyers to bring claims amounting to the electoral equivalent of a pretextual traffic stop, in which technical violations of the vehicle code (windows tinted too dark, taillight out) are advanced as a reason to pull over a car in the hope of spotting a bigger violation.[235] And just as law enforcement officials would tend to focus such stops on areas they believe likely to yield evidence of more serious crimes, such cases will tend to focus on jurisdictions that are expected to vote in favor of a candidate's opponent.[236]

Two paragraphs from *Trump v. Kemp*,[237] a last-ditch filing in Georgia, illustrates the point:

> In Georgia, that election was conducted contrary to clearly established law, duly enacted by the Legislature of Georgia pursuant to authority derived directly from Article II, § 1, cl. 2 of the United States Constitution.
>
> Specifically, Georgia election officials allowed unqualified individuals to register and vote in violation of O.C.G.A. § 21-2-216; allowed convicted felons still serving their sentence to vote in violation of O.C.G.A. § 21-2-216(b);

[235] Upheld as constitutional, provided probable cause existed for the alleged vehicle code violation, in *Whren v. United States*, 517 U.S. 806 (1996).

[236] It is argued that pretextual stops, intentionally or otherwise, affect minority persons out of proportion either to their fraction of the population or to the incidence of criminal behavior. That such policies have been adopted in cities where policing is controlled by the subordinated group does not alter the fact. *E.g.* James Forman Jr., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017). I suspect that a similar correlation might be found with respect to at least some vote challenges, but I am not inclined to mark the challenges down to racism. If, for example, Hispanic voters in some jurisdiction tended to vote Republican, one would not see Republican challenges to procedures in that jurisdiction. These people are professionals, a fact that raises rather than lowers the level of concern.

[237] Complaint, Trump v. Kemp, 511 F. Supp. 3d 1325 (2021) (No. 1:20-cv-05310-MHC).

> allowed underage individuals to register and then vote, in violation of O.C.G.A. § 21-2-216(c); allowed unregistered or late-registered individuals to vote in violation of O.C.G.A. § 21-2-224(a); allowed votes by individuals who had registered to vote (and in some cases did vote) in another state, in violation of O.C.G.A. § 21-2-217; allowed individuals to vote who had moved across county lines, in violation of O.C.G.A. § 21-2-218(b); allowed individuals to vote who had registered at a P.O. Box, church, or courthouse rather than their residence, in violation of O.C.G.A. § 21-2-217(a)(l); and accepted votes cast by deceased individuals, in violation of O.C.G.A. § 21-2-23 l(a)-(b) and (d). The violations above (and others) have resulted in more than 11,779 "illegal" votes to be counted in the State of Georgia which is sufficient to change the outcome of the election or place the outcome in doubt as determined by the Legislature and set forth in the Election Code.[238]

Some of these allegations might taint the results of an election as an expression of popular will, depending on how many votes were involved. Dead voters, persons who voted in Georgia and in another state, and (for some people) convicted felons might fall into this category. But other allegations bear no logical relationship to the validity of a result as an expression of popular will. Persons registering at a church, courthouse, or PO Box, persons who registered late, and persons who moved from one county to another within a state, would likely fall into this category. They are at worst the electoral equivalent of unlit tail lights.

But the ISL theory need not, and in the hands of the Supreme Court may not, distinguish between the two types of cases. As President Trump's election lawyers alleged, votes from persons who registered late, or at a church, could be considered "illegal" votes, even though they were not "fraudulent" in the common understanding of the term.[239] And some such challenges may put a lot of votes in play. For example, in at least two Georgia cases the Trump campaign submitted an expert report contending that in Georgia over 40,000 voters — many more than President Biden's margin of victory — had indicated an intention to move across a county line (by filing a change of address form with the U.S. Postal service) more than 30 days before the November 3 election but who were then recorded as voting in their old county of residence.[240] The expert plausibly opined that it was unlikely that all these voters were relocating only temporarily (in which case they could vote in their old county), and that some number of such votes were therefore contrary to Georgia law.[241]

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[238] *Id*. at ¶¶ 8-9

[239] Ordinary people could be forgiven for treating "illegal" votes and "fraudulent" votes interchangeably, which is no doubt part of the strategy of ISL claims.

[240] Expert Report of Mark Alan Davis, Trump. v. Kemp, 511 F. Supp. 3d 1325 (2021) (No.1:20-cv-05310-MHC).

[241] *Id*. at ¶¶ 28-32. O.C.G.A. § 21-2-216(a) provided that "No person shall vote in any primary or election held in this state unless such person shall be . . . . (4) "A resident of this state and of the county or municipality in which he or she seeks to vote." Paragraph nine of the complaint in *Trump v. Kemp* cited O.C.G.A. § 21-2-218(b), which for the 2020 election provided that any person "who is registered to vote in another county or municipality in this state and who moves such person's residence from that county or municipality to another county or municipality in this state, shall, at the time of making application to register to vote in that county or municipality" so the voter could be registered in the new county and the old county could cancel the voter's registration. O.C.G.A. § 21-2-217(a)(6) provided that "[i]f a person removes to another county or municipality within this state with the intention of remaining there an indefinite time and making such other county or municipality such person's place of residence, such person shall be considered to have lost such person's residence in the former county or municipality . . . ."

From a purposivist point of view, even accepting as true the suggestion that tens of thousands of Georgians qualified to vote did so in the wrong county, so what? In Georgia, Presidential elections are conducted on a statewide basis. A Georgian who moved from Gwinnett County to Cherokee County more than thirty days before November 3, but who voted in Gwinnett, is nevertheless a Georgian entitled to vote for president. The county these people voted in would not affect the statewide total unless their votes were thrown out. To a purposivist, it would be perverse to throw a person's vote out for what would probably be an innocent mistake.[242]

But to count such votes rather than throwing them out would effectively nullify the county-voting rule by disregarding violations of it. Professor Simon presumably would be fine with that, as I am, but Professor Paulsen would not be wrong to say that there is a formal sense in which counting such votes would be "lawless." And though Electors Clause challenges to date have raised only overt deviations from state laws, there is no logical reason such a challenge could not be based on a state executive's failure to enforce a law when presented with evidence of its violation. The legislative Manner of election would be thwarted in either case. Wrong-county voting by eligible voters has nothing to do with "fraud" as commonly conceived and does not diminish the moral force of an election as an expression of popular will. Nevertheless, strategic use of the ISL theory might, depending on judicial tolerance for it, thwart that will in the name of (a highly formal conception of) the law.

An ability to distinguish real fraud from mistakes or technical violations of the law is a good test of a practical mind concerned with the purpose of elections. But to certify votes in such a case may entail the sort of practical nullification Simon rightly identified as common for lawyers, and to reject a kind of strict formalism that some, such as Paulsen (and, when it suits him, Eastman)[243] view as the very essence of law. One lesson of 2020, therefore, is that nullification of procedural laws that do not impeach what most people think of as the integrity of voting may be necessary to preserve voters' faith in elections and, paradoxically and by extension, may be vital to the rule of law.

As this example illustrates, there are a lot of reasons to reject the ISL theory. It presumes a formal, strictly textualist reading of Article II, a reading that does not identify a federal interest that would justify precluding a state legislature from delegating some election functions to non-legislative officials. At a minimum, one would think the textualism that purportedly justifies the ISL theory would allow legislatures expressly to delegate to state executives the job of certifying electors–it is hard to read "such Manner as the Legislature thereof *may direct*" to exclude a direction that the executive do that job.[244] Even in the absence of an express textual delegation,

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[242] The same might not be true of county-based races, such as for sheriff or tax assessor.

[243] Which is not meant as a criticism. He acted as counsel, not as a disinterested academic, and therefore was committed to favor approaches that favored his client.

[244] U.S. CONST. art. II, § 1, cl. 1 (emphasis added). This was Judge Boasberg's reasoning in rejecting the anti-delegation version of ISL theory in *Trump v. Pence.* Case 1:20-cv-03791-JEB Document 10 at 5 ("Plaintiffs somehow interpret this straightforward passage to mean that state legislatures alone must certify Presidential votes and Presidential electors after each election, and that Governors or other entities have no constitutionally permitted role. . . . That, however, is not at all what Article II says. The above-quoted language makes manifest that a state appoints electors in "such Manner as the Legislature thereof may direct." So if the legislature directs that the

which did not exist with respect to the three Pennsylvania challenges discussed above, state legislatures are constituted by and operate within state constitutions, and state supreme courts interpret state constitutions. If a state chooses to give its Supreme Court final say over the meaning of a constitution such that, for example, a state constitutional right to vote trumps the text of a statute, which is by hypothesis subordinate to the state constitution, what federal interest is harmed? What bad federal thing has happened? The judgment of Professor Vikram and Akhil Amar on this point seems sound: the theory is "seemingly plausible but ultimately preposterous."[245]

Malleability of language in the face of varying interpretive techniques worsens the threat ISL theory poses to orderly elections in which the public has confidence. It is easy enough to see when a state administrator deviates from a legislatively specified date for counting ballots — one needs only a calendar. But, as in the example of drop boxes in Pennsylvania, in most cases interpretation likely will be needed to determine what Manner the Legislature has specified, and administrative rulings may themselves require interpretation, leading to a thicket of competing interpretive inference that will read as uncertainty to those not paid to be clever with words. That uncertainty creates rhetorical space in which charges of "fraud" may thrive.

None of this means, however, that Eastman or any other lawyer could be sanctioned for challenging state voting procedures on ISL grounds. Wrongness is a necessary but far from a sufficient condition for sanctioning or disciplining a lawyer, and academic criticism is in any event not the measure of wrongness from a professional point of view. Given the apparent willingness of four justices to endorse ISL theory in some form, there is no point in saying a lawyer who brings an ISL challenge to wrong-county voting should be disciplined.[246] Not only are such challenges not obviously wrong or sanctionable but, depending on where the Court is headed, they may turn out to be legally *right* in a formal sense, one that, from a purposivist perspective, does not impugn the integrity of a vote count. Whether that turns out to be the case depends on whether the ISL theory achieves acceptance by the Supreme Court and, if so, how the Court fills out the contours of the doctrine.

There is enough support for Eastman's first premise on the Supreme Court that, regardless whether Trump's election lawyers are disciplined, such Manner challenges are not going away. We will see them again, and in a form where discipline is not a plausible response,[247] and we should expect to see them in droves in 2024. Step two of the endgame theory is drawing lots of fire, but step one is a more persistent threat, the severity of which is not yet clear.

Governor, Secretary of State, or other executive-branch entity shall make the certification, that is entirely constitutional."

[245] *Supra* note 20 at 1.

[246] This is true regardless of the verbal formulation of a standard for assessing the merit of theories for purposes of discipline. As discussed below, Luban posits that "the legal mainstream defines the concept of plausibility." Luban, The Torture Lawyers of Washington, *supra* note 158 at 194. That is reasonable, subject to two qualifications—first, as he recognizes, "nobody is actually out there surveying lawyers," so the parameters of the mainstream will have normative elements and be subject to the standard biases often said to plague judgment. Second, arguments may change the direction of the stream, as has been the case with originalism and textualism.

[247] *E.g.*, Richard Pildes, *Election Law in an Age of Distrust,* 74 STAN. L. REV. Online 100 (May 2022).

3. Step Two: The Twelfth Amendment.

The shift from a literal reading of the Electors' Clause to a non-literal interpretation of the 12th Amendment highlights the difficulty in mapping interpretive method onto professional ethics. There is a textualist argument against reading the 12th Amendment as President Trump's lawyers did, but to attack the ISL theory of step one as mindless formalism is to weaken a textualist attack on step two. No rule requires consistency of method at each step of an argument, and the Court does use history to interpret constitutional text. If one is a strong purposivist, one must choose a purpose, and nothing in the text of the 12th Amendment rules out the idea that its purpose is to give effect to Article II's requirement that, literally read, Legislatures specify the Manner of election.

How far history should govern constitutional interpretation is its own question, particularly when the history offered does not correspond to any of the flavors of originalism in vogue in 2020. Still, analysis of the Second Amendment, and thus modern gun policy, is dominated by historical inquiry, as was the Court's recent decision to overturn *Roe*. Reliance on history to distill a tincture of constitutional meaning is within professional bounds. But even from a historical point of view step two is weak. The conduct of Adams, Jefferson, and Nixon was not drafting or ratification history. It relied on post-enactment history that corresponded more to a type of contractual course of performance argument than to original public meaning.[248]

The opacity of the 12th Amendment's text and the paucity of authority construing it favor neither side in debates over discipline. These facts are as much a problem for a claim that step two is well out of bounds as they are for President Trump's election lawyers. For example, a draft paper by Matthew Seligman — *The Vice President's Non-Existent Unilateral Power to Reject Electoral Votes*,[249] argues that the Twelfth Amendment could have been written differently, in a way that would unambiguously give the Vice President the power to count.[250] That is true but, as with many "could have been written" arguments, it cuts both ways. The text could have been written to unambiguously deny the Vice President that power, but it wasn't. Seligman argues that Eastman misread Jefferson's actions because (as Ackerman wrote in a later book) Jefferson's actions avoided rather than resolved a conflict. That is a functional argument, and a practical one, but the use of power to avoid conflict is still the use of power.[251]

Seligman chides step two for ignoring a "critical nuance" in the example.[252] He is persuasive on that point, but ignoring nuance is not much of a basis for discipline. Seligman documents Congress's use of tellers to count votes, which is probative of a then-current understanding that the Constitution did not require the Vice President to do the counting.[253] Step two essentially ignores the point, substituting the Jefferson example instead. Fontana and Ackerman are clear that tellers could not resolve disputes, however, and the use of tellers to count does not imply that tellers decide whether a dispute exists.

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[248] The Adams and Jefferson examples pre-dated the Twelfth Amendment, which was ratified in 1804. Seligman, *supra* note 138 at 3.
[249] *See supra* note 57.
[250] Seligman, *supra* note 57, at 13.
[251] *Id*. at 15-16.
[252] *Id*.
[253] *Id*. at 18.

Before turning to some troubling aspects of the calls for discipline based on the endgame theory, it is useful to note Seligman's conclusion regarding history:

> The only reasonable interpretation of the history is that there simply was no dispute to resolve. Whatever the technical deficiencies of Georgia's certificate might have been, there were no allegations that Georgia's electoral votes had not actually been cast for Jefferson . . . . Jefferson himself had acquiesced to Adams's election in 1796, saying that "substance and not form should prevail."[254]

Seligman quite sensibly posits a distinction between "technical deficiencies" and the validity of a vote actually cast. Jefferson is portrayed as embracing the distinction. As shown above, however, the ISL theory is being wielded to deny just that distinction. To the extent the Court endorses the ISL theory, the practical resolution to the election of 1800—substance over form—may not be available in future elections. We have no real precedent for dealing with such a case.[255]

In three letters,[256] the United States Democracy Center asked the California Bar to investigate Eastman. Citing extensively to Seligman's analysis, the Center argues that the Constitution itself refutes the endgame theory, which on its own terms violates the principle that no person should judge their own case, that the endgame theory misreads history — including the continuous use of "tellers" to count votes, and that Eastman's memoranda elaborating the endgame theory did not take objections into account.[257] The latter point is unquestionably true, and those preceding it appear (to a non-specialist eye) sound as well.

The Center originally charged violations of two litigation rules,[258] a rule relating to misstatements,[259] a catch-all rule relating to dishonest conduct,[260] and a provision forbidding advising or assisting in unlawful conduct.[261] Subsequent letters added the allegation that Eastman's advice was not independent or candid,[262] and that he acted incompetently.[263] I address the litigation rules and Eastman's public statements in a separate work relating to the factual narrative President Trump's lawyers deployed in the election cases. Below I examine the arguments Eastman made in offices.

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[254] *Id*. at 25.

[255] My point, again, is not to agree with step two, but to test whether and to what extent standard lawyering arguments may be wielded in its defense. To the extent that is the case, the case for discipline is weakened. The significance of this point, elaborated in Part III, is that with respect to theory discipline cannot erect a reliable boundary on permissible argument. No boundary set within the law can protect it from interpretive forces.

[256] Memorandum from U.S. Democracy Center to George S. Cardona, Chief Trial Counsel (Oct. 4, 2021) (on file with author); Letter from U.S. Democracy Center to William Todd, Assistant Chief Trial Counsel (Nov. 16, 2021) (on file with author).

[257] Memorandum from U.S. Democracy Center to William Todd (Nov. 16, 2021) (on file with author).

[258] Cal. Rules. Pro. Conduct, r. 3.1 regarding frivolous filings), and 3.3, (regarding misstatements to tribunals).

[259] Cal. Rules. Pro. Conduct, r. 4.1.

[260] Cal. Rules. Pro. Conduct, r. 8.4(c).

[261] Cal. Rules. Pro. Conduct, r. 1.2.1.

[262] Cal. Rules. Pro. Conduct, r. 2.1.

[263] Cal. Rules. Pro. Conduct, r. 1.1

a. Falsity, Advice, and Argument.

The gist of the Democracy Center complaints regarding Eastman's advice (as opposed to his litigation work) was that the advice was false: "Mr. Eastman's advice was false or misleading, claiming to be based on a constitutional `fact' that had little or no basis in actual fact or law."[264] The Center argues that the "advice was materially false and misleading, and that Mr. Eastman knew of—or was recklessly indifferent to—its false and misleading character."[265] The second complaint treats as a "fact" the assertion that the Vice President had exclusive, unreviewable power to reject certified slates of electors even if no competing slate had been appointed. That is a strong construction of portions of the memo's text,[266] but the more interesting question is whether these assertions in the Eastman memo are "facts" within the meaning of the rules of conduct, and what standards of discipline should apply.[267]

From a pragmatic point of view, a statement of "fact" is an assertion that: (i) refers to something outside the statement itself, and (ii) as to which there is a degree of consensus on standards for evaluation sufficient to warrant a belief that a large fraction of persons investigating the assertion would employ the same tools to reach the same conclusion. Implicit invocation of such standards within a linguistic community will cause the statement to be understood as an assertion of fact.[268] "The temperature is 98 degrees" is a statement of fact because of agreement on means for measurement. "It's nice outside" is not.

Invocation of such implicit standards is common, including in statements about legal texts. Thus, it is both a statement of law and, in this Article, of "fact" that, "absent tolling, the limitation period in California for a breach of duty claim against a lawyer is one year from accrual."[269] That is because everyone in the relevant community will know what a limitation period is, because one year is a discrete period as to which consensus would be expected on how to measure (counting days), and because all other issues are buried by using generic terms—"tolling" and "accrual." Whatever those terms might mean, and whenever accrual happens, after that there is just one year to file, absent whatever might count as tolling. "Accrual" itself is a less precise term, and the statement "accrual has occurred because with reasonable diligence the plaintiff would have discovered the alleged breach by date *X*" would be less likely to be

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[264] Email from U.S. Democracy Center to William Todd, supra note 250 at 15.
[265] *Id*. at 12.
[266] The memo treats conclusions of law as facts for purposes of these rules: "Mr. Eastman's advice was false or misleading, claiming to be based on a constitutional "fact" that had little or no basis in actual fact or law. Mr. Eastman's advice that the Vice President could unilaterally disregard provisions of the Electoral Count Act to exclude certified presidential electors—and necessarily disenfranchise tens of millions of voters—had no basis in any plausible interpretation of the law." *Id*. at 15. The memo says: "There is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes (as Adams and Jefferson did while Vice President, regarding their own election as President), and all the Members of Congress can do is watch."
[267] The analysis in Delahunty & Yoo, *supra* note 60, tends to support the view that claims about Vice Presidential power are better treated as argument than fact.
[268] Charles Peirce, Philosophical Writings of Peirce 38 (Justus Buchler ed., 1955); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 60 (1990).
[269] Cal. Code. Civ. P. 340.6.

perceived as a statement of fact because it employs less precise terms and pertains to specific facts, which may conflict. A decrease in precision lessens confidence that the statement invokes the sort of objective standards that cause it to be treated as a statement of fact. That statement would more likely be construed as advice, if made to a client, or argument, if made to a judge, opposing party, or mediator.

"Advice" typically refers to statements made to a client and invokes the legal rules and conventions of fiduciary relationships.[270] Within these rules and conventions clients are presumptively dependent on the lawyer's superior knowledge and judgment with respect to legal matters, though the strength of the presumption may as a practical matter vary among clients. The relative stringency of the liability and disciplinary rules pertaining to advice give effect to this relationship. A lawyer may be subject to discipline for providing incompetent advice,[271] regardless whether incompetence takes the form of a misstatement of fact or is merely an unsound judgment. A negligent statement is not typically considered deceit under the Rules,[272] but may be sanctioned as incompetent, and be the basis for tort liability, just the same.

In this context, "arguments" are sets of propositions asserted to third parties, such as opposing parties or courts, in an effort to persuade the third party to believe or do something. Arguments are aspirational. Within the rhetorical community they are made, arguments seek to create a state of affairs corresponding to the content of the argument. Arguments may incorporate facts, and the rules preclude knowing misstatements of facts or law within an argument,[273] but the inclusion of a factual statement in an argument does not render the argument itself a statement of fact. A statement of fact is descriptive, not aspirational; it refers to something external to the statement, subject to the standards of assessment mentioned above. The propositions comprising an argument seek to establish, not to describe.[274]

For example, made to a Court, the assertions "the Constitution entitles a felony defendant to counsel provided by the government" or "the Constitution forbids states from banning the sale of contraceptives to married persons" are aspirational, not descriptive. They are attempts to create the situation they describe. If successful, they can then support descriptive statements referring to the achievement of their goals. Within the practices and conventions of argument, however, they are not understood as describing an existing reality but as an invitation to establish a reality corresponding to the argument's content. They are treated as being successful or unsuccessful, sound or frivolous, but not true or false, even if the literal content of an argument –

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[270] *See Model Rules of Pro. Conduct r. 1.2(d)(*Am. Bar Ass'n 2021)(lawyer may not "counsel" a client to break the law); 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."). Lawyers can in fact create client relationships by offering advice under circumstances that justify the putative client in believing the lawyer has undertaken to look out for their interests and is doing so with the advice.

[271] Model Rules of Pro. Conduct r. 1.1(Am. Bar Ass'n 2021). .

[272] For example, Rule 4.1 forbids "knowing" misstatements to third parties, Rule 3.3 forbids knowing misstatements to a tribunal, and Rule 8.4(c) forbids "conduct involving dishonesty, fraud, deceit or misrepresentation," with "fraud being defined to mean conduct that is "fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." The purpose element in the definition likely excludes most cases of negligent misrepresentation, which is a species of fraud.

[273]Model Rules of Pro. Conduct r. 3.1(a)(1)(Am. Bar Ass'n 2021).

[274] Professor Luban makes essentially this point: "there are no truths about what law means or requires outside the range of views that the interpretive community finds plausible." Luban, The Torture Lawyers of Washington, *supra* note 158 at 195 n.109.

”the Constitution entitles felony defendants to counsel provided by the State” – might in another context be a statement of fact.[275] When Solicitor General Elizabeth Prelogar stated, in her magnificent argument in *Dobbs*, that “grounded in the liberty component of the 14th Amendment” there is a “right to abortion,”[276] she neither stated nor misstated a fact; the statement did not become a lie because she lost.

Semantic content helps draw these distinctions, but is not itself sufficient to distinguish among them. The social significance of such propositions, and thus their legal treatment, is determined by the relationship of speaker and audience not by literal content. The same sentence “absent tolling, the limitation period in California for a breach of duty claim against a lawyer is one year from accrual,” may be a factual statement in commentary (in this article), advice (spoken to a client) or argument (spoken to an adversary or court). As commentary it is subject to discipline, if at all, only under free speech standards. As advice it is subject to discipline for incompetence and is subject to civil liability for unreasonability.[277] As an argument it is subject to discipline to the extent it includes a knowing misstatement or is frivolous.

The same issues arise regarding Eastman’s statements. The Democracy Center argues that “Mr. Eastman predicated his legal advice on factual allegations concerning pending disputes and `dual slates of electors’ that were demonstrably untrue. The reality was that each state had sent only one slate of electors to the Joint Session.”[278] This argument seeks to apply the standards of falsity to Eastman’s memo.[279] Implicitly the argument seeks to use discipline to depict the validity of the election as a reality external to any argument about it.

This effort to shoehorn the argument of the endgame theory into the status of fact relies implicitly on a formal definition of what makes an elector an elector — they are the persons who emerge from procedures specifying how one achieves that status. According to this view, just gathering a group together and proclaiming the members electors is meaningless and it is a lie to pretend otherwise. In the abstract it is true that no group can bind others to the group’s self-description, just as no document – including the Constitution — can create its own authority.[280] But the procedures specifying how one achieves the status of an elector include the Electors Clause and the 12th Amendment. It is unconvincing to characterize Eastman’s memo as lying about the status of electors because the point of the memo was to assert that those procedures were tainted. The status of “elector” is a rhetorical achievement, not something external to disputes over whether it has been achieved. Eastman’s memorandum advances grounds to deny that achievement to formally certified electors and to confer it on the Trump electors. Made to

[275]Model Rules of Pro. Conduct r. 3.1(Am. Bar Ass’n).
[276] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf at 86.
[277] Of course, incompetence or negligence may include knowing misstatements, so the categories can overlap. But it would be odd for a lawyer to make a knowing misstatement absent some self-interested reason that would qualify as a duty of loyalty problem.
[278] Letter from U.S. Democracy Center to William Todd, supra note 250 at 15.
[279] Specifically Cal. Rules. Pro. Conduct, r. 4.1 and 8.4(c).
[280]*E.g.*, Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. Rev. 204, 225 (1980) (“a document cannot achieve the status of law, let alone supreme law, merely by its own assertion.”).

Vice President Pence, his assertion that in view of a long list of supposed illegal actions "[t]here are thus dual slates of electors from 7 states," is an argument, and should be judged as such.[281]

Finally, these categories can bleed into each other, most notably when advice rests not on some abstract interpretive exercise conducted with "independence" but on a Realist prediction of what a tribunal would do in a certain matter. The advice in that case would not be whether a text "means" *x* or *y*, but what a tribunal in a specific matter would do with the text. The advice may be nothing more than a prediction that a judge would want to reach result *X* and that, given the facts, interpretation *Y* would provide enough cover for the judge to reach that result.[282]

b. Fraud and Illegality.

The endgame theory fits awkwardly with the three most relevant disciplinary rules, which forbid lawyers from making knowing misstatements of fact or law to third parties,[283] furthering a client's unlawful conduct,[284] or engaging in conduct involving deceit.[285] Those prohibitions fit most comfortably with situations of information asymmetry, in the case of misstatements, and secret conduct, or at least conduct that is hard to discover, in the case of illegality. A lawyer who knowingly helps a client consummate a merger by providing fake financial statements violates all these rules. The misstatement works because the counterparty does not have access to the true financials and relies on the misstatement, which allows fraud to occur.

There was no information asymmetry with the endgame theory. No information presented in the Eastman memorandum was confidential. The allegations of illegality had been made and litigated publicly. The Twelfth Amendment theory was being touted in *Gohmert* and in the media. Vice President Pence was separately represented by able counsel who could read the law just as well as Eastman and who was, presumably, familiar with President Trump's litigation

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[281] One way to assess whether Eastman was lying about facts is to ask whether he would be subject to discipline if Vice President Pence had played along. The question highlights the difference between fact and argument. In the case of financials falsified to close a deal, the success of the deal strengthens the case for discipline by showing harm. If the Vice President had been persuaded, would the alleged "facts" about the Electors Clause or the 12th Amendment be deemed true? Would they be true if the Court chose not to intervene, deeming the dispute fundamentally political? Or would they be false unless and until the Court accepted them, at which point they would become true for all relevant purposes?

[282] It is possible that Eastman's advice to Trump could have presented the endgame theory as fact, but the presence of other lawyers for the president, their countervailing positions, and the structure of the memorandum itself all suggest that it may have been presented as a position the president could take — i.e., as an argument. A contrary finding might not be clearly erroneous, but the allegation that Eastman lied about established legal facts is an aggressive position.

[283] Cal. Rules. Pro. Conduct, r. 4.1(a) ("In the course of representing a client a lawyer shall not knowingly" "make a false statement of material fact or law to a third person" or "fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client); The equivalent ABA rule is not materially different for purposes of analyzing the endgame theory.

[284] Cal. Rules. Pro. Conduct, r.1.2.1(a)("A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal");(b)(a lawyer may "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal"). California's subsection (a) is broader than the equivalent ABA rule, which is limited to criminal or fraudulent conduct.

[285] Cal. Rules. Pro. Conduct, r.8.4(c)(misconduct for a lawyer to "engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;"). The equivalent ABA rule is not materially different.

losses.[286] The same was true of President Trump, who had plenty of lawyers besides Eastman. Those lawyers presumably knew the facts and the law, and (to their credit) they seem to have done their best to shoot down the endgame theory.[287] Eastman's memo is more of a collection of bullet points than a formal memo usually would be,[288] and it is true that the memo does not discuss competing views or potential holes in the theory, but there is no reason to believe that, from either Vice President Pence's or President Trump's points of view, omission of opposing views from the memo meant that opposing views were omitted from their deliberations.[289]

As noted above with respect to the statement that there were competing slates of electors, at least with respect to efforts directed to the Vice President much of the Eastman memo is better classified as argument than as either advice or assertions of fact. The entire point of the endgame theory was to persuade Vice President Pence to engage in an action that would be visible to all the world, and which without question would have resulted in litigation. Eastman was explicit on this point:

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[286] The Democracy Center's second letter asserts that Eastman falsely implied "that there continued to be active, meritorious, and timely disputes implicating the legality of the relevant state's elections that could provide Mr. Pence with a basis for rejecting those ballots as "disputed" and that Eastman "had to conceal" the fact that "essentially every significant legal challenge to the election that could have conceivably altered the award of presidential electors had been resolved." Letter from U.S. Democracy Center to William Todd, supra note 250, at 24. This allegation is unconvincing. Trump's election losses were public and it is highly improbable that they were unknown to the President's other lawyers and to Vice President Pence's counsel. For example, Eric Herschmann, New York lawyer and advisor to President Trump, testified to a tense meeting in the Oval Office where Sidney Powell tried to persuade President Trump that the election was tainted by fraud:

> Derek [Lyons] and I both challenged what she was saying. And she says, "Well, the judges are corrupt." And I was like, "Every one? Every single case that you've done in the country you guys lost, every one of them is corrupt? Even the ones we appointed?" I'm being nice. I was much more harsh to her.

Jan. 6 Committee Hearing - Day 7 Transcript, Cond. Rev. (July 13, 2022) https://www.rev.com/blog/transcripts/jan-6-committee-hearing-day-7-transcript. White House Counsel Pat Cipollone testified to the same effect:

> There was a real question in my mind and a real concern, particularly after the attorney general had reached the conclusion that there wasn't sufficient election fraud to change the outcome of the election. When other people kept suggesting that there was, the answer is, what is it? And at some point you'd have to put up or shut up. That was my view.

[287] *See supra* note 216.

[288] The chaotic situation created by President Trump's insistence on challenging the election — the number of cases, the increasing pressures of time — are relevant to an assessment of what lawyers did during those days. Chaos is not a defense to unlawful conduct, but the combination of little sleep, massive amounts of information to process, and extreme time, client, and public pressure are relevant. The Democracy Center's November 16, 2021, complaint uses scare quotation marks to describe a "war room" set up to pursue election challenges and the endgame theory. Letter from U.S. Democracy Center to William Todd, supra note 250, at 5. The phrase is inapt for any academic setting, but it is what such centers are called in practice, for trials and mergers, among other things.

[289] It may well be that other lawyers who advised the Vice President and the President were not as focused on what Seligman calls historical nuance as on the astonishing disproportion between the remedy advocated by the endgame theory and the paucity of facts -– including the absence of proof of anything any ordinary person would consider fraud– supposedly required a remedy. The point is more that White House and Vice President Pence's counsel assessed the situation as real lawyers -– they focused on whether proof could be adduced commensurate to the remedies sought -– than that every analytic weakness necessarily would have been pointed out.

> Let the other side challenge his actions in court, where Tribe (who in 2001 conceded the President of the Senate might be in charge of counting the votes) and others who would press a lawsuit would have their past position -- that these are nonjusticiable political questions – thrown back at them, to get the lawsuit dismissed.[290]

Whatever else one might say of the endgame theory, it relied on brazen assertion, not on secrecy and deception.

There is a bit of formalist irony here, however. Although the American Bar Association's model rules of conduct forbid only assisting a client "in conduct that the lawyer knows is criminal or fraudulent,"[291] California, Eastman's licensing jurisdiction, has a non-standard rule of conduct that forbids assisting a client in conduct a lawyer knows is "criminal, fraudulent, *or a violation of any law*, rule, or ruling of a tribunal."[292] The Electoral Count Act is a law, not yet held unconstitutional. The California Bar is unlikely to declare it so. Set against the text of California's rule, Eastman's e-mail to Jacob –"I implore you to consider one more relatively minor violation [of the ECA]"[293]— might raise an issue.

California's rule does allow lawyers to "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law . . . ."[294] As noted above, Eastman recognized that if Pence went along with the endgame theory litigation would have been inevitable, and perhaps the endgame theory can be shoehorned into this category, though typically one would think the rule favored asking permission rather than forgiveness. Still, this Rule is not typically associated with making arguments to third parties. "Counsel" in the rule corresponds to advice, and "assist" would typically mean surreptitious conduct – things like laundering money, hiding evidence, signing fake legal documents, or the like.[295]

Judge Carter's crime-fraud ruling is textually defensible, but so much of the conduct was advocacy to represented third parties, such as Vice President Pence, or public advocacy, as with the media statements identified by the Democracy Center, that the theory of illegality resembles attempted incitement more than deceit. To the extent Eastman's work is conceived of as argument rather than factual assertion, and to the extent one favors contextual or purposive interpretation over literalism, this rule is an awkward fit as a standard of discipline.

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[290] Eastman memo, *supra* note 123, at 5-6. In fairness to the Democracy Center, the next sentence does parade itself as factual: "The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter." *Id*. In context, that assertion was argument.

[291] Model Rules of Pro. Conduct r. 1.2(d)(Am. Bar Ass'n 2021)..

[292] Cal. Rules. Pro. Conduct, r. 1.2.1(a)(emphasis added).

[293] *See supra* note 150.

[294] Cal. Rules. Pro. Conduct, r. 1.2.1(b)(2).

[295] Comment 10 to the ABA version of the rule provides examples of assistance: "drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed." 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer, Ann. Mod. Rules Prof. Cond. § 1.2. *See also In re Feeley,* 581 S.E.2d 487, 488 (S.C. 2003) (disbarment for helping client forge checks); *Att'y Grievance Comm'n of Maryland v. Protokowicz*, 329 Md. 252, 258 (App. Div. 1993) (discipline for attorney who broke into home of opposing party, ransacked it seeking evidence, and killed the family kitten in a microwave oven).

c. Frivolousness and Competence.

To the extent the preceding discussion is sound, even though Eastman's memo was not a brief in a proceeding, the most apt framework for assessing the endgame theory is the standard governing argument: frivolousness.[296] Frivolousness is not a precise term, but it is generally given a fairly narrow meaning to allow for a high degree of creativity in argument,[297] the bounds of which are described as being a claim "supported by a good faith argument for an extension, modification, or reversal of the existing law."[298] That conception acknowledges, in the words of a comment to ABA Rule 3.1, that "the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change."[299]

These generalities are unhelpful, but Professor Luban fairly asks what more could be said. He views frivolousness as a horizontal inquiry relative to some group of lawyers: "the legal mainstream defines the concept of plausibility."[300] Thus, "no bright-line test of frivolity exists beyond whether an interpretive community accepts specific objections showing that the arguments are baseless or absurd. You know it when you see it."[301]

Condemning an argument as frivolous is hard in a static model and even harder when change is taken into account, as the comment to Model Rule 3.1 requires. The bounds of acceptable legal argument may change over time. In 1980, it would have been fine to brief a constitutional provision without excavating a mound of history and arguing about some flavor of original public meaning (and at the time the relevant target would have been the original intention of the framers). Today it would be poor lawyering, not because originalism has intrinsic

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[296] As noted above, in the rules the standard contemplates a proceeding and, apart from *Gohmert*, the important work on the endgame theory took place outside a proceeding. Nevertheless, it is the most apt standard relative to what went wrong.

[297] *E.g.*, Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 Osgoode Hall L.J. 353 (1986). Professor Levinson quoted Judge Frank Easterbrook on this point:

> [S]omething is frivolous only when (a) we've decided the very point, and recently, against the person reasserting it, or (b) 99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it's untenable. Either one is a pretty stiff test.

[298] Rules. Pro. Conduct, r. 3.1(a)(2).

[299] Model Rules of Pro. Conduct r. 3.1 cmt. 1(Am. Bar Ass'n 2021).

[300] Luban, The Torture Lawyers of Washington, *supra* note 158 at 194.

[301] *Id*. at 197. Descriptively this is right. In the context of the OLC Memos, however, Professor Luban added independence and honesty to the mix. He thought Bybee and Yoo could not justify their work on the ground that their interpretive community had a different take from "the interpretive community of liberal cosmopolitan lawyers" because of the "moral certainty that they would have reached the opposite conclusion if the Administration wanted the opposite conclusion." *Id*. That is no doubt true of Eastman, as well. Vice President Pence's counsel tried to push back against the endgame theory by asking Eastman whether Kamala Harris or Al Gore would have the same power. Eastman of course said "no," apparently on factual grounds but one suspects a flat "no" would be given if needed. The OLC Memos were effectively opinion letters that might insulate certain officials from some legal risk, and perhaps these considerations are fair in that case. But in the normal course, even with respect to opinion letters, if a plausible reading would support the result a client wanted then to insist on advice that reflected the lawyer's own, honest view would bring Rule 2.1 into tension, if not conflict, with the duty of care and with Rule 1.1. A lawyer could always refuse to provide advice in such circumstances, but nothing would be wrong with proceeding otherwise.

merit as an analytic technique but because the conservative political movement has made originalism, flawed as it is, an important part of legal discourse.

Textualist formalism presents the same problem. Writing of the OLC Memos in 2004, Posner and Vermeule argued that the memos reflected the influence of "a dynamic generation of younger scholars who emphasize constitutional text, structure and history rather than precedent" and who favored strong executive power over foreign affairs.[302] The rise of textualism, in nominal opposition to more purposivist readings, has not abated. The ISL theory is part of that general intellectual movement. The descriptive plausibility of the ISL theory as one that can garner judicial votes proves the point. No more is needed to domesticate a technique as "ordinary" and thus "acceptable" lawyering, because the concept of competence — the standard of care – is horizontal. It looks to reflect what prudent lawyers do.

Dynamism partly explains the fissure between the endgame theory and the comparative prudence of Vice President Pence and his counsel, Greg Jacob. Jacob's testimony before the House Committee on the January 6 assault on Congress depicted Pence as adopting what, in the 1980s, would have been a form of original intent originalism. Pence thought there was no way the Framers would have intended one person to exercise the power the endgame theory argued for.[303] The point will resonate with anyone who thinks the Framers were wise, or even just sane. But 1980s originalism was a defensive doctrine that aimed to stop courts from making up new rights not found in the text of the Constitution. 2010s "original public meaning" originalism is an offensive doctrine that cares little for Framers' intent. It is a word game played to score wins, not just to avoid losses.[304] It is a more disruptive, less Burkean, doctrine than its predecessor.

No doubt Pence's prudence also reflected the burden of responsibility, which advocates such as Eastman do not shoulder, but aggressive originalism is ascendant, and any candid horizontal theory of ethics or discipline should deal with that fact. Pence rejected Eastman's argument at step two, which is not textualist, so the conflict between the two is an imperfect example of dynamic interpretive technique, but the change in that theory provided at least the context for their confrontation, if not the specific content.

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[302] *Supra* note 214.

[303] Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, Docket 160-16 Exh. F at 95.

> So the Vice President mostly asked a series of questions in that meeting of Mr. Eastman. And from my — and, again, I mentioned this before — from my very first conversation with the Vice President on the subject, his immediate instinct was that there is no way that one person could be entrusted by the Framers to exercise that authority. And never once did I see him budge from that view, and the legal advice that I provided him merely reinforced it.

[304] In saying this I do not question the sincerity or good faith of judges who endorse and apply modern originalist technique. The reasons why one technique or another appeals to different judges are complex. It is too easy, unfair, and counterproductive to allow disagreement with an interpretive technique to bleed into condemnation of an interpreter using the technique. I do mean to say that the conservative legal movement has successfully cultivated an environment in which such techniques may prosper by becoming normalized, if not received wisdom, rather than idiosyncratic. The ascendance of originalism and textualism has fundamentally political roots, but it does not follow that those who adhere to either technique are cynical or that their espousal is pretextual. The same points are true of adherents of dynamic constitutional interpretation.

The mainstream inquiry requires a baseline against which an argument can be tested. Because arguments make appeals within communities of persons who share at least some interpretive commitments, different baselines may produce different conclusions. The advice of the OLC memos might fare differently if the relevant community was that of international humanitarian law scholars than if it was the community of federal prosecutors, or members of the Federalist Society. From this perspective, under a frivolousness standard the most telling point against step two of the endgame theory is that two highly accomplished lawyers with impeccable credentials within the conservative movement treated step two as, in Jacob's apt phrase, "bullshit." In other words, if you lose Greg Jacob and Pat Cipollone you can't count on any appreciable segment (interpretive community) within the legal community to bail you out. To put the case in Jacob's words of January 6, 2021:

> [T]he advice provided has, whether intended to or not, functioned as a serpent in the ear of the President of the United States, the most powerful office in the entire world. . . .
>
> it was gravely, gravely irresponsible for you to entice the President with an academic theory that had no legal viability, and that you well know we would lose before any judge who heard and decided the case. And if the courts declined to hear it, I suppose it could only be decided in the streets.
>
> I do not begrudge academics debating the most far-flung theories. I love doing it myself, and I view the ferment of ideas as a good and helpful thing. But advising the President of the United States, in an incredibly constitutionally fraught moment, requires a seriousness of purpose, an understanding of the difference between abstract theory and legal reality, and an appreciation of the power of both the office and the bully pulpit that, in my judgment, was entirely absent here.[305]

This criticism is well judged. It employs a strong form of the language of competence, more specifically of prudence.[306] Jacob's point was that any lawyer advising a president was required to take great care to assess the practical consequences of his advice. To advise use of a claim far enough outside the mainstream to be deemed frivolous is a perfectly cogent duty of care complaint, though not one President Trump has made. It would be unusual, though not contrary to literal text, for discipline to be imposed for incautious advice about which the client did not complain.[307]

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[305]Eastman v. Thompson, No. 8:22-cv-00099-DOC-DFM, Document 160-16.

[306] Which is the province of California Rule of Professional Conduct 1.0: A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence." Cal. Rules. Pro. Conduct, r. 1.0.

[307] Competence was not among the rules raised in the original Democracy Center complaint against Eastman. That complaint leveled bigger guns, which employed morally charged language such as fraud. Competence does not carry similar moral weight, and in cases of a single incident is almost always dealt with through civil litigation rather than through the disciplinary process. Competence and independence were added in a second letter, though with no independent discussion, and repeated in a third letter after Judge Carter's crime-fraud ruling. The analysis in that letter derives from his findings. The Center's April 14, 2022, letter states:

> Mr. Eastman's conduct was an intentional, reckless, or grossly negligent violation of his obligations to provide competent services under Rule 1.1 and to provide independent and candid professional

In fairness to Eastman, Jacob wrote under significant strain in view of the invasion of the Capitol by President Trump's supporters. Perhaps the most remarkable thing about Jacob's assessment is that it is so lucid and temperate, given that a mob spun up in part by public advocacy of the endgame theory was intent on coercing Jacob's client, Vice President Pence.

It is also fair to note that the endgame theory is complex and, in its strongest form, has a lot of moving parts. Professors Yoo and Delahunty argue that the 12th Amendment gives the Vice President power to decide disputes over electors, but only where a state legislature has certified an electoral slate different from the one certified by the state's executive.[308] To make that happen in enough states (at least in 2020) requires a lot of coordination, which takes time, and which presents a chicken-and-egg problem. The time is not worth spending if it will change nothing but, even if the Yoo-Delahunty version of the endgame theory were adopted, whether change is plausible may depend in part on whether the time is spent. Eastman and other Trump election lawyers were trying to get state legislatures to take this step, but that did not happen. At most they had groups of electors meeting to declare themselves a competing slate.[309] Most likely the lack of a legislative endorsement reflected the repeated failures of President Trump's lawyers to come forward with evidence of actual fraud, but unfamiliarity with the endgame theory and what foundation it required may have played a part. One of the risks of attempting to shift legal discourse by introducing a new theory is that one may discover gaps when implementation is tried, so that early attempts are easy to criticize.

4. But What About the Hypo?

In context, Eastman tried to persuade the Vice President to set himself up as a tribunal for disputes over electors. This new 12th Amendment tribunal would have to stake a claim to be at least an alternative to the Supreme Court, and more likely as being in competition with it. At bottom the endgame theory is best understood as representing a bet that the Court would not have the guts to condemn the Vice President's action had he chosen to act. In simple terms, Eastman was urging Vice President Pence to play chicken with the Supreme Court.[310] There is

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> advice under Rule 2.1. The court's findings suggest that Mr. Eastman violated those obligations repeatedly by giving advice that ignored the "obvious" illegality of the course of conduct proposed, and which failed to meet even minimal standards of accuracy, candor, or disinterestedness.

As noted above, *supra* notes 224-225, disinterestedness does not imply independence from client objectives, and the sense in which it is used in this quotation creates tension with the duty of care. The criticism regarding Rule 1.1 is sound, however, for the reasons stated in the text.

[308] *See supra* note 64.

[309] Criticism has been leveled at these meetings and the attempt of such persons to declare themselves electors, but in the broader context of the endgame theory it is possible to view them as engaging in a form of petitioning state legislatures to take action. Whether that description is apt will depend on the facts of particular cases. In general, however, such actions appear to have been taken and proclaimed publicly and used in election-related advocacy. By way of example, persons proclaiming themselves Republican electors were plaintiffs in *Gohmert*. Unless one endorses the premise that no truly new arguments may be made, however– a proposition that does not deserve endorsement--one should be cautious in condemning early efforts that prove to have gaps.

[310] One of the better lessons for lawyers is not to play chicken at the behest of someone who sits out the game. Vice President Pence and his counsel got full marks on that one.

no rule against that —as noted at the outset, it is a plausible way of describing the campaign against the death penalty in the 1960s and early 1970s. But it is a risky game.

Two further points are relevant, though they deserve different weight. First, depending on how one reads the ISL theory, and what one thinks the Court would have done with challenges to, for example, signature requirements or drop-boxes had the Court chosen to wade into the election rather than sit it out, some of the claims of illegality in the Eastman memo may have been right from the perspective of that theory. To the extent that is true, the very specific question posed by the endgame theory is to what extent the executive branch is bound by judicial inaction with respect to arguable state violations of the Electors Clause. In other words, what is to be done when the Supreme Court sees an arguable constitutional violation but chooses not to act?[311] To put the case in the light most favorable to Eastman, what he saw was, to some unknown extent, Simon-esq nullification of the Electors Clause.

Second, and relatedly, what about Eastman's hypothetical, which posited a corrupt Democratic governor certifying a Biden slate of electors in a state Trump clearly won, with the governor refusing to call the legislature into session to act on its own? [312] His question was (and let's assume the courts stay out of it on procedural grounds): Is it really the case that nothing can be done? From the perspective of the disciplinary complaints about the endgame theory, there is an answer: yes, it really is the case. Three grounds support the answer: the hypo will never happen, if it does happen the Republic will have sunk to depths from which no court, much less a state bar disciplinary court, can save it, and in the meantime no good can come from using the hypo as a justification for drilling holes in the boat.

For a pragmatist it is acceptable to answer that the extent of the violations was not great enough to change the result of the election, so any violation was harmless error. Given that the Court will sustain criminal sentences on that ground, it seems like a fair approach. For a positivist, however, the law is the law, and an election tainted by "illegality" is in some sense an illegal election.[313] It may be a paradox that democracy and the rule of law require nullification of the law (absent a showing of prejudice), but the point is no less true for the paradox.

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[311] We have seen that before, in the disgraceful dancing the Court did in the Japanese internment cases, just to avoid handing Franklin Roosevelt a loss during wartime. *Yasui v. United States*, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

[312] Again, the hypo was:

> Suppose a Democrat governor in a state Trump clearly won — North Carolina, perhaps, or Kansas — were to certify the Biden slate of electors and transmit that certificate and the subsequent electoral votes to the president of the Senate (that is, the vice president of the United States). Republican legislators in the state howl about the fraud, but because the governor refuses to call the Legislature into special session, they can do nothing about it except send a letter notifying the vice president of the fraud. Is it really the case that nothing can be done?

[313] To which the pragmatist would respond that no election will ever be free from at least claims of ISL-like illegality, but that is a subject for a different time.

CONCLUSION

In rehearsing the endgame theory and trying to understand its structure, I do not intend to defend its substance. I do intend to try to inject a bit more understanding into calls for discipline. Substantively, looking to see how the ISL theory might appeal to someone from a strictly positivist, formalist orientation provides two cautions. The first is that not even the erudite, well-informed, and sincere arguments made by advocates of discipline are immune from conventional legal rhetorical tools. To get serious traction, the complaints try to find grounds for criticizing the endgame theory that exist outside the sort of rhetorical moves the theory makes; there are no such grounds. [314]

Not even step two of the endgame theory goes beyond the power of the American political system to rearrange itself. Sometimes in conjunction with the other two branches, sometimes on its own, the Court has blessed an administrative state unnamed in the Constitution, created a rights structure channeling what it sees as the harm principle, danced around and ultimately ignored the forced incarceration of tens of thousands of American citizens of Japanese descent, only to turn around years later and proclaim it was all a mistake,[315] and so on. The current, dominant conception of the Vice President's power under the 12th Amendment is not a fact external to legal rhetoric but an achievement within it. Like all such achievements, it is provisional.

Discipline may reinforce that achievement by warning lawyers that they face consequences from failure. It may also erode that achievement by appearing to disregard on partisan grounds the grievances expressed in the ISL theory, which are within the mainstream of legal discourse. If discipline seeks no more than payback, it will be counterproductive to the profession and to the country. There is enough screaming across partisan lines already. Based on what we know now, it is possible to imagine a disciplinary official reasonably making a formal

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[314] A point made well in Fish, *supra* note 172. A similar point may be made about an extensive critique of Eastman's candor in statements one might see as either placing his memoranda in the context of verbal discussions with the Vice President and Mr. Jacob or as trying to walk back the advice contained in the memos. Nov. 16 Letter at 12-16. As part of this critique, the Democracy Center quotes a media article by Professor Scott Cummings of UCLA:

> By asking that the bar judge a lawyer's written legal advice not based on what it explicitly recommends but rather on what the lawyer may (or may not) have orally stated in a client meeting, Mr. Eastman's defense threatens the rule of law, both because it ignores the fact that lawyers have an affirmative obligation to ensure their legal opinions analyze options provided to clients, and because it would provide an all-too-easy end run around professional regulation.

Letter from U.S. Democracy Center to William Todd, supra note 250, at 14 (quoting Scott Cummings, *The Lawyer Behind Trump's Infamous Jan. 6 Memo Has a Galling New Defense*, Slate (Oct. 20, 2021), https://slate.com/news-and-politics/2021/10/eastman-jan-6-trump-memo-defense.html.). It is hard to know how to read this idea. The position entails that a lawyer who advised a client verbally of a material point, but who failed to document the advice, could be disciplined for failing to give the advice on the theory that only the writing counted, even if there was no dispute that the advice had been given verbally. That cannot be right, and I expect the principle stated was not the one intended. The rule of law does not require, much less depend on, ignoring verbal evidence. (Among other reasons, the rule of law extends to the law of evidence.) More likely, the passage is best read as aiming at Eastman's credibility in view of his various statements. That is a factual question, best resolved by weighing rather than disregarding evidence.

[315] Trump v. Hawaii, 201 L. Ed. 2d 775, 138 S. Ct. 2392, 2423 (2018).

case for discipline based on extrajudicial advocacy of the endgame theory. But not every case that can be made, should be made. One might think that is the most important point exemplified by the endgame theory.

At the end of the day, criticism of the endgame theory may fairly be grounded in the premise that it got too far ahead of any legal rhetorical community broad enough to render it plausible. Even obvious forays in judicial creativity have relied on a more incremental approach, and broader popular support, than existed for step two. We cannot know what would have happened if Greg Jacob and Vice President Pence had gone along with step two, but if a constitutional argument drawing on conservative constitutional dogma (the ISL theory) cannot carry even them, then it may fairly be condemned as irresponsible. The theory may become plausible in the future (though I hope not) but invoked as a last resort in 2020 it fell short of that mark. Thus, a lesson for future legal rhetorical entrepreneurs: if you're walking on eggs, don't hop.