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Introduction

Dear readers,

Thank you for taking the time to visit the first formal edition of the Clemson Law Review (CLR)! As Clemson's leading undergraduate legal publication, we are excited to provide a forum for high–quality legal scholarship. Our goal is to educate both undergraduate students and the general public about America's legal heritage. We also seek to provide students with an opportunity to refine their legal writing skills and to serve as a resource for legal practitioners looking for the latest updates in federal case law.

Our journal has been off to an impressive start, with over sixty top students at Clemson joining the CLR as staff writers this semester. We have published ten carefully edited summaries (with more articles due to be released in January) of recent court rulings as a resource for practicing attorneys. The CLR is now a recognized student organization at Clemson and our website has received visits from over two hundred readers in the past month alone. We are grateful for this initial success and look forward to continuing it in the future.

This volume is the first edition of full-length articles to be published in the CLR, and we are very excited to share its contents—including interviews with three top legal minds and two full-length law review notes authored by members of the CLR—with our readers.

First, this volume includes an interview with Professor Gomez-Arostegui of Lewis and Clark Law School—one of America's foremost experts on English legal history—on the Supreme Court's recent ruling regarding national injunctions in *Trump v. CASA*. Professor Gomez-Arostegui takes readers on a scholarly but accessible journey through the history of equitable remedies from the Middle Ages to the present day. His interview will serve as both a helpful resource for legal historians and attorneys hoping to gain a better understanding of *CASA*'s historical context, as well as an enjoyable introduction for laymen who desire to learn more about America's rich legal inheritance from England.

Next, we are delighted to share an interview with Professor Seth Barrett Tillman, an American law professor and legal historian currently teaching at Maynooth University in Ireland. Professor Tillman is a widely acclaimed legal historian whose writings on the Fourteenth Amendment with Professor Josh Blackman played a key role in the scholarly debate over the original meaning of the Insurrection Clause. This fall, he joined us to discuss the complex legal issues at stake in President Trump's appeal of his New York state criminal conviction.

Third, we were kindly joined this past August by Troy Shelton, one of North Carolina's top appellate attorneys, on his own legal journey and his advice for students who are interested in pursuing a career in appellate law.

Our student notes also explore fascinating topics, including an in-depth discussion of intellectual property law and its economic impact as well as an article on the constitutional problems that might arise from classifying traffic violations as civil offenses.

I would like to thank the many individuals whose diligent efforts and very generous sacrifices made this publication possible, including Professors Gomez-Arostegui and Tillman and Mr. Troy Shelton for kindly agreeing to complete interviews with the CLR and go through our editing process; our Case Summaries Editor, Madeline Leonard, for her countless hours spent editing and refining the CLR's articles during this past semester to ensure they were of the highest quality; our Notes Editor, Jacob Citron, for his diligent efforts; our staff writers, for their devotion to legal scholarship and excellent work; our Treasurer, Sidney Truluck, for her help and research; and, last but not least, our Faculty Advisor, Dr. Eric Daniels, for his advice and support throughout the CLR's first semester.

Thank you again for taking the time to read the CLR's first scholarly edition, and we hope you have a Merry Christmas!

Sincerely,

Maclain Conlin

Founder & Editor-in-Chief, Clemson Law Review

An Introduction to English Legal History: *A Conversation with Professor Gomez–Arostegui**

Interview Conducted and Transcribed by Maclain Conlin (All errors are my own).[1]

(All views expressed in this interview are those of the guest and do not necessarily represent the position of the Clemson Law Review *or its leadership.)*

Maclain Conlin: Good afternoon and welcome to the Clemson Law Review's interview series. My name is Maclain Conlin, and today I am joined by a very special guest, Professor Tomas Gomez-Arostegui. Professor Gomez-Arostegui joined the faculty of Lewis and Clark Law School in Fall 2006. He regularly teaches courses on the history of the common law, civil procedure, torts, and remedies. His research interests lie primarily in English legal history before the year 1800—which is very relevant to our discussion today—as well as civil procedure and remedies. In 2015, the American Society for Legal History awarded him the Sutherland Prize for the best article or book chapter on English legal history published in the prior year. After graduating from law school, he clerked for Judge Edward Rafeedie of the U.S. District Court for the Central District of California in Los Angeles, and Judge John C. Porfilio of the U.S. Court of Appeals for the Tenth Circuit in Denver. He then practiced as a litigator for several years at O'Melveny & Myers in Century City and Hogan & Hartson in Denver. Most recently, he authored an essay entitled *Universal Injunctions and Attorney General v. Vernon,* which addresses how a seventeenth-century case in the English Court of Chancery might impact the universal injunction question today.[2] Today, he joins us to discuss that case, as well as the Supreme Court's recent decision regarding universal injunctions in *Trump v. CASA, Inc.*[3] and the role that English legal history should play in cases concerning equitable remedies. Professor, thank you very much for joining us.

Tomas Gomez–Arostegui: Thank you for having me.

MC: Of course. Before we get to *Attorney General v. Vernon*, which I'm very excited to do, I'd like to lay out a little bit of background. In the Supreme Court's *CASA* decision, Justice Barrett wrote that federal courts must "ask whether universal injunctions are sufficiently analogous to the relief issued by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act."[4] Let's start there. Could you please explain

* Professor of Law, Lewis and Clark Law School.

[1] Edited for length and clarity. This interview was conducted on August 12, 2025.

[2] H. Tomas Gomez-Arostegui, *Universal Injunctions and* Attorney General v. Vernon *(Ch. 1684–1685/6)*, available at https://ssrn.com/abstract=5244183 (May 14, 2025).

[3] *Trump v. CASA, Inc.*, 606 U.S. 831 (2025).

[4] *Id.* at 841–42 (internal quotation marks omitted).

what the High Court of Chancery in England was, and why its practices were relevant to the Supreme Court's *CASA* decision?

TG: Sure. I think some context will help. Today, when you file a civil lawsuit in federal district court, the district court has the ability to hear all sorts of different types of claims and grant all sorts of different types of remedies. And that's because those powers have all been consolidated into the district court. True, there are numerous district courts throughout the country—you might sue someone in the Central District of California, for example, or the District of Colorado—but those are all district courts, and each district court has the same power as other district courts.

Historically, that was not the case. It used to be—and I'm talking about before the year 1800 here—that you had to go to different courts to achieve different things. Sometimes where you filed depended on the type of *claim* you had. Other times you went to a certain court because it had *remedies* you couldn't get in the other courts.

So how did that come about? This requires even more background. Let's go back to the beginning of the royal justice system in England, to the twelfth century. The King came to be seen as the fountain of all justice. And so anyone who had a dispute with someone would go to the King. Eventually the King, of course, grew tired of receiving all these petitions. And so he delegated disputes to other people. These were people who served on his Council. And eventually, that delegation of authority to hear claims ended up resulting in spinoff courts. So we had something that became known as the Court of King's Bench. That spun off the King's Council, and that court heard certain types of claims. We had another court spin off the Council called the Court of Common Pleas, which heard certain types of claims. And then we had another one that spun off called the Court of Exchequer, which also heard certain types of claims. Those three courts, the ones I've just listed, the King's Bench, Common Pleas, and Exchequer, all became known as the "law courts," or the common-law courts.

Additionally, the law courts offered only certain types of remedies, namely damages. I'm oversimplifying things, just so we're clear, but on the whole, for most claims, damages—to cover a plaintiff's losses—was the only remedy one could receive.

Now imagine we're in the 1200s, we're in the 1300s, and these different law courts are adjudicating claims. Sometimes litigants found those courts to be inadequate forums to adjudicate their claims. They could be inadequate in one of three ways.

The first would be substantively: "I have a claim that I want to bring that cannot be brought in any of those three law courts." The courts just don't recognize the claim, and courts back then were unlikely to allow a new claim. So that's a substantive inadequacy.

The second type of inadequacy would be a procedural one, like, "Those courts will recognize my claim, but there's something about their court rules of procedure that's going to make it difficult or impossible for me to bring my claim in those courts."

The third is remedial. Maybe the law courts did recognize my claim, and there were no procedural hurdles to me bringing my claim in those courts, but they wouldn't give me the type of remedy that I want. I don't want damages. I want an injunction ordering the defendant to stop doing what they're doing. Damages are backward looking—they compensate the plaintiff for wrongs that have already occurred. But maybe I'm worried about a defendant committing additional wrongs in the future, so I want an injunction. And it just so happens that these courts, these three law courts we've talked about, at least in the period that we're most interested in, didn't grant you injunctions as a remedy. They didn't have the power to do it.

Importantly, any time litigants felt they would suffer one of those inadequacies with the law courts—substantive, procedural, or remedial—where do you think they went for relief? The King, again.

They went to the King in his Council and said, "Listen, I'm not doing so well in your law courts here. Can you help me out? Because you're the King." And the King would say, "Okay, sure, maybe I can do that." And eventually the King got so many of these petitions that he started delegating the work to someone else, and that was the Lord Chancellor for England. He was the King's trusted advisor, with many functions.

The Chancellor kept receiving these petitions, always on behalf of the King and as part of the King's Council, but he received so many that the mechanism for dealing with them morphed into another court: the Court of Chancery. That transition started in about the year 1380, and the Chancery became what's known as a court of equity.

So to recap, we had law courts first, in the 1200s and 1300s, and then in about 1380, we start to see the Court of Chancery becoming its own court. All operated alongside each other. Importantly, the Chancery was the first and the principal court of equity. This is why today, when we speak of equitable powers and equitable remedies, like injunctions, we think back to the Court of Chancery, as the original equity court.

Let's focus now on 1789, the year in which the U.S. Congress created the lower federal courts in the Judiciary Act of 1789. Congress used the English legal system as its model. Keep in mind, in England, in 1789, they still had the law courts—the King's Bench, Common Pleas, and Exchequer—and an equity court in the Chancery. (The Court of Exchequer also had an equity side, but I will skip that for now.)

The Judiciary Act of 1789 recognized a split system of law and equity like England, albeit without creating physically separate law and equity courts with different judges. Federal trial courts instead kept separate law and equity dockets. This is why when you read the Judiciary Act of 1789, you can see that it gave lower federal courts the powers of a law court and the powers of an equity court.

Importantly, the Supreme Court has interpreted the Judiciary Act of 1789—both in earlier cases[5] and most recently in *CASA*—to mean that in 1789, Congress adopted and gave to federal courts the equitable remedies the Court of Chancery was using in equity at that time, and only those remedies. If there are to be any other equitable

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[5] *See, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.,* 527 U.S. 308 (1999).

remedies outside of the ones that were available in Chancery in 1789, Congress has to provide for those remedies in new legislation.

So that's why *CASA* says: when we need to figure out whether the remedy of universal injunction is available today, we need to assess whether a universal injunction or something analogous to it existed in 1789 in the High Court of Chancery. The remedy doesn't have to be an exact historical match, but if the Chancery employed a sufficiently close remedy in 1789, then we can employ that remedy today.

And ultimately, as you know, *CASA* said that they couldn't find a historical analogue for a modern-day universal injunction.

MC: On this point in your essay on universal injunctions, you argued that, "No one to my knowledge has dived deeply into the Chancery cases before 1789." I thought that was very interesting because if, as you just explained, this entire inquiry is centered around English legal history, why, in your view, have relatively few scholars explored that English legal history?

TG: Great question. I think the first reason is that researching English legal history can be very difficult to do correctly, and most scholars and lawyers do not have the time, the resources, or the expertise to research this field in the way I believe is necessary to describe accurately the laws and practices of the courts of England.

I have two principal concerns.

First, lawyers cite too few sources from before the year 1800. They most often cite treatises from the nineteenth century. There are some well-known ones that deal with principles of equity, and those treatises will sometimes, though not always, cite English cases from before 1789. But if you really want to know what was happening circa 1789, you need to cite material from that period. Now, for example, in *CASA*, I think the numerous briefs cited only three sources from before 1800. And one of them wasn't on point at all. And the other sources, were more relevant but not dispositive.

Second, the material lawyers and scholars tend to cite is unofficial. Here's what I mean by that. When litigants and *amici* cite Chancery cases, they often cite what are known as the nominate reports. "Nominate reports" are books that are named after their purported authors or compilers. So you might have something like "Jones's Reports," for example. But none of those are official reports of the court. They merely record what someone, like Jones, sitting in court on a particular day, wrote down. It's not the official record of what the court said or did. It's just what someone thought the court said at the time, because someone was sitting there—literally, physically sitting there—listening to the argument and to what the judges were saying.

Nominate reports are often very good evidence, of course, of what the law was. I don't mean to suggest that they are irrelevant. They are relevant, and often they are very good evidence of what the court said. But they are never the best evidence of what the Court of Chancery actually ordered. If you're really looking for proof of what the Court of Chancery could order or decree, what you need to find are the actual orders and decrees from the Chancery. And the vast majority of those orders and decrees are not published. They're not in print. You can't pick up a printed book at a library and find those orders or decrees. The records do survive, but they are in manuscript and stored at the National Archives outside of London. Somebody has to physically go there, find the cases they're interested in, which can be very difficult because there are no subject-matter indices to the cases, and then pull up the orders and decrees.

MC: I'm surprised that a university never went through and created like a massive publishing project and tried to publish as many as possible. Or have they done that and there's still a great deal left?

TG: Correct, yes. The late Robert Palmer of the University of Houston started a project many years ago called the Anglo-American Legal Tradition project.[6] And what Bob did (and what his colleagues continue to do, such as Susanne Brand and Elspeth Rosbrook) was photograph manuscript court records and make them available online. It is an invaluable resource. But they have not (yet) included a lot of later Chancery records. If I had to guess, I'd say 60% of the Chancery's pre-1800 order-and-decree books are not digitized, and none are digitized after 1650.

Anyhow, to recap, when it came to *CASA*, the litigants in the case cited very few unofficial records from before 1800, most treating bills of peace, and no one cited any official orders or decrees from the Chancery from the period, showing the court allegedly granting or refusing to grant something analogous to a universal injunction.

And so for me, I wonder, how can one be talking about what the Court of Chancery could or could not do in 1789 when one literally has not looked at the records, the actual records of the Chancery, from the relevant period?

MC: Thank you for that background, Professor Gomez-Arostegui. I would like to move now to the substance of your essay.

First of all, you mention that one part of the reason for your essay is that you're responding to another article—and later an *amicus* brief—which was co-authored by Professor James Pfander of Northwestern, a leading expert on the law of the federal courts.[7] Would you mind providing an overview of that article?

TG: Absolutely. Jim's article was written in anticipation of a case like *CASA,* because everyone knew that, at some point, the power to issue universal injunctions was going to be an issue at the Supreme Court.

His draft paper first argues that federal courts should not limit their default powers to what the Court of Chancery was able to do in 1789. *CASA*, having since been decided, did not take that approach and instead once again fixed the default equitable powers of a federal court today to the powers possessed by the Chancery in 1789. So Jim was not successful in that argument. But if he had been, what he was saying was, if we can look at sources later than 1789 and look at American sources as well,

[6] http://aalt.law.uh.edu.

[7] James Pfander & Mary Zakowski, *Non-Party Protective Relief in the Early Republic: Judicial Power to Annul Letters Patent*, 120 NW. U. L. REV. __ (forthcoming 2026).

then one of the things that the Supreme Court should consider is the American practice of cancelling patents in the nineteenth century.

And when I say "patents" here, I mean invention patents. If you invent something, it doesn't mean it's automatically protected; you have to apply for a patent at the Patent Office. That has always been the case in the United States, including at the Founding.

Now, sometimes patents are improperly granted and they need to be revoked. In the United States we had a procedure for cancelling a patent, which required someone to petition in court to cancel the patent. Importantly, Jim noted in his article and *amicus* brief that, in the United States, patent cancellation came to be seen as an equitable remedy in the nineteenth century. He noted that our Supreme Court had cited an English case called *Attorney General v. Vernon* for the proposition that the Court of Chancery sitting in equity could cancel a patent. And because the Chancery in equity could cancel a patent, the Court believed and ultimately held that federal courts in the United States could cancel invention patents in equity as well. The Supreme Court recognized that *Vernon* did not actually involve an invention patent. It was a patent to transfer land. But the Court said the distinction did not matter.

Ultimately, then, Jim argued in his article and brief that the equitable remedy of patent cancellation was sufficiently analogous to a universal injunction, and thus could and should be taken as a precedent in *CASA*. That's because the cancellation proceeding offered relief that protected non-parties, much like universal injunctions do, because once a court cancelled a patent, the cancellation protected everyone who hoped to use the discredited invention, not just those that had petitioned to cancel it.

This is what piqued my interest because *Vernon* does not actually support the proposition that the Chancery in equity could revoke an invention patent.

MC: Let's start right there, then. With *Attorney General v. Vernon*, what were the basic facts that led up to this case? You mentioned it involved land and it involved property, so it wasn't an invention patent.

TG: Correct. The case is from the 1680s. The King owned—in his private capacity—a lot of land throughout England. That land was consolidated into a portfolio of property in about 1399, and fell under the control of the Duchy of Lancaster, a hereditary title and estate also held by the monarch. This portfolio of land got passed from King to King (and occasionally to Queen) over hundreds of years.

Duchy property differed from Crown property. Other property throughout England constitutes what we would think of more as part of the Crown estate, "official government-type property," if you will, that was essentially owned by the Crown and thus owned by the government. That's not what this was. This was land held by the King's family, almost in a personal capacity.

The Duchy would buy and sell property, and especially rent it to people and thereby draw income from the property. Every so often property would be purchased and moved into the Duchy portfolio, and other times the Duchy would sell property from the portfolio to somebody.

Attorney General v. Vernon involved a dispute over transfers of property both ways. The King through the Duchy sold property to three men. And in exchange for selling that property, one of the men paid the Duchy 7,000 pounds, and two of the men gave the Duchy land that was worth about 3,000 pounds, or so they claimed. So in short the Duchy sold some land and received money and other land in exchange.

The King effected and memorialized this transaction by issuing a patent. Not an invention patent, of course. By way of background, the word "patent" can be used for many types of documents that have receive a seal by or on behalf of the King. And there are different types of seals, and different types of patents. Patents for invention, for example, would be sealed with the Great Seal of England.

Note, that when I say sealed, I don't literally mean sealed, as in closed up. Imagine that *this* [Ed: holding up a piece of paper] is an agreement that says, "I, King, so and so, grant you this, et cetera." What one will find at the end of the document is a wax seal. Sometimes it's a little red seal stuck right on the document. Other times it's a big seal and it's literally hanging off the document. There's a piece of animal skin attaching the seal to the document. And what these seals did was authenticate the document.

Here, because this land transfer was happening from the King's private Duchy estate, it was known as a Duchy patent. So it was supposed to receive a seal, but it would have been sealed with the seal of the Duchy of Lancaster, not the Great Seal of England. Stated another way, when the King transferred land that was part of his Duchy portfolio, he did it in his capacity as a part of the Duchy, so it only had the Duchy's seal on it. That's important, as we will see in a moment.

Anyhow, it turns out the King sold the land too cheaply. Someone convinced the King of this, which triggered a lawsuit that sought to undo the land deal. The Attorney General for all of England brought a lawsuit on behalf of the King. Even though the case involved the King's private Duchy estate, the Attorney General still appeared as the plaintiff in the case for the King, which was a bit unusual.

Ordinarily, when you want to revoke a patent, at least a patent sealed with the Great Seal of England, you had to go to a *law* court to obtain a writ of *scire facias*, and have the patent canceled. But the Attorney General did not do that here. Instead, the Attorney General filed the lawsuit in the Court of Chancery on its *equity* side and tried to cancel it there.

The defendants responded with a plea, although today we might call it a motion to dismiss for lack of jurisdiction. And they said that this type of claim and request could not be heard in equity, and had to instead be heard in a law court.

And so the first thing the judge did is he said, "No. Actually, I think this lawsuit is proper here. And the reason is because of a jurisdictional quirk."

This requires some background. Remember how I told you that in England you had law courts and you had equity courts? And they were physically separate courts with different judges? Well, they established a jurisdictional principle going back very far in time, essentially all the way back to the beginning of the Court of Chancery, which said, "Equity courts cannot hear claims if someone has an adequate remedy at law. If you can have your case adjudicated and basically get what you want in one of the law courts, you have to take the case there. I won't hear it in Chancery." This is known as the inadequate-remedy-at-law requirement.

Does that make sense?

MC: That does make sense. You wouldn't want the Chancery encroaching if it doesn't have to on another court's prerogatives.

TG: Correct. Absolutely right. And so that is the objection that the defendants raised. They said, "Hey, wait a minute, we think the King has an adequate remedy at law in one of those other courts. There's no reason for the Court of Chancery in equity to take this case."

And the judge, who was known as a Lord Keeper in this instance, disagreed and said essentially, "I don't think the King has a remedy in the law courts, because the only remedy he could get in the law courts is a writ of *scire facias*. And that writ has two requirements, not satisfied here."

First, for *scire facias*, the disputed grant has to be enrolled in the Chancery. That always happened when a grant is sealed with the Great Seal of England. But this grant was not. The land grant in this case was something sealed by the Chancellor of the Duchy and enrolled in the Duchy court, another court entirely.

Problem number two was, when you are alleging there has been fraud, you can only use *scire facias* if the fraudulent misrepresentations appear *in the text of the grant itself*. And the court said, "Well, I've looked at the grant and it never undervalues the King's lands. It doesn't say the King's lands are only worth 7,000 pounds. There is no valuation of the King's land. So how can you say that the defendants misrepresented the value of the King's lands when they never represent the value at all?"

The case continued in Chancery, and eventually it got to what was known as a "hearing," which means a trial. Because there were no juries in Chancery, you would try the case in front of the judge. Today we call this a bench trial.

At the hearing, the defendants raised the jurisdictional argument again. Even though they had already lost the point at the pleading stage, they raised it again. And I think the reason they probably did is because there was a new judge sitting in the Court of Chancery. A new King had come into power and appointed a new judge. This was now a Lord Chancellor, and I think the defendants probably thought, "We'll take another crack at this argument. Maybe this judge will be convinced by it."

But the judges—and there was actually more than one judge hearing the case—rejected the defendants' argument again. Basically, they rejected it for the same reasons that the Lord Keeper had: the King does not have a remedy in the law courts.

MC: And I'm sorry, was this Judge Jeffreys?

TG: Yes, Lord Chancellor Jeffreys. The infamous Chancellor Jeffreys! Yes, he ended up with a not great reputation.

Ultimately the Lord Chancellor issued a decree, *i.e.*, the final decision in the case. The decree canceled the Duchy patent. He canceled the grant of land. He also ordered the defendants to reconvey the land to the King. The cancellation itself wasn't enough. And then the Chancellor entered some other orders trying to account for the fact that money changed hands.

Importantly, in my essay, I explain specifically why, even assuming *Vernon* was good law on the point that the Chancery could cancel a Duchy patent for land in equity, *Vernon* did not support the notion that the Chancery could revoke an *invention* patent on its equity side.

MC: What was the reaction to the *Vernon* decision at the time from Parliament and other legal actors?

TG: Not good. Vernon [Ed: one of the defendants], who was on his deathbed after the decision came out, apparently said something to the effect of, "This decree from the Lord Chancellor is very unfair." And so he told the two other defendants to not reconvey the land to the King and to not hand over the Duchy patent. So Vernon basically told his co-defendants to defy the decree of the Lord Chancellor. And they did. The defendants did not do what they were ordered to do.

Not long after, Vernon died, and one of the other defendants appealed the decree via a bill of review. We don't know exactly what happened, but the appeal was not ruled upon. But the defendants had made enough noise arguing the decree was unlawful that the new King, William III, became worried that the decree was unenforceable.

So the King through various back channels asked Parliament to enact a statute that retroactively ratified the Chancery's decree. And eventually Parliament did. They enacted a statute that ratified the decree.

It's interesting because the decree *was* actually seen as problematic. It was thought that there were some things which the decree got wrong, although we unfortunately do not know precisely what the reasoning of King William and Parliament was.

But this explains, I think, why *Attorney General v. Vernon* was rarely cited. I've looked at all the reported cases in the nominate reports, and as many manuscript reports as I could in a short time. At least in the published nominate reports, almost nobody cited *Vernon*. It was mostly a dead letter, and didn't do much. Jim Pfander in his article describes *Vernon* as a "leading case," but it certainly was not in England.

However, some American courts didn't know about this history that came after, or at least they didn't discuss it. It's interesting because the earliest American judges to look at *Vernon*, with a view to assessing whether it could even apply to invention cases, said that it could not. There were two judges. These are not Supreme Court justices. One of them was a district judge, if I remember correctly. This is in the mid-to-late nineteenth century. He looked at *Vernon* and essentially said, "I don't think *Vernon* meant that the Court of Chancery could cancel an invention patent in equity."

And one of them, indeed, said that *Vernon* was never followed in England. That judge got it right. He didn't cite all the historical manuscript sources that I do in my essay. But the judge understood *Vernon* well enough to know that it actually was not a good precedent for invention cases. A second lower court judge agreed with that assessment. So you had a couple of the judges in the United States that had said *Vernon* was not a good precedent for revoking invention patents in equity.

But, as we have already discussed, the U.S. Supreme Court read *Vernon* differently in a handful of decisions in the late nineteenth century. I have no idea why. The Supreme Court didn't cite all of the reports of *Vernon,* and so the Court didn't get the full picture of the case. But this could also just be one of those instances where judges wanted to reach a particular result and they end up interpreting authority in a way that helped them while ignoring the parts of the authority that didn't help them.

MC: And to tie this back to *CASA* for a moment, if the Court of Chancery couldn't revoke invention patents, at least in the way that has been described recently by Professor Pfander, then, in your view, does that that take away one argument that the Court of Chancery could issue universal injunctions or remedies analogous to universal injunctions before 1789? Is that correct?

TG: Correct. Thank you for that. That was an excellent summary. I know it's a very complex case.

MC: Thank you for that overview. I really enjoyed it. The reason why I love legal history is because it contains very interesting stories, including *Vernon*.

At the end of your essay, you asked the U.S. Supreme Court to clarify a number of things in *CASA* and more broadly in equity cases going forward. Specifically, you asked the Court to (1) clarify the reach and force of *Grupo Mexicano*[8] and the cases it was based on, (2) clarify the scope of the historical inquiry, and (3) clarify who had the burden of proving the historical record. Do you believe that the Court answered those questions in *CASA*? And if so, do you agree with their answers?

TG: Yes and no. They did answer question 1. They wholeheartedly endorsed *Grupo Mexicano* 6–3. That now signals to lawyers, judges, and academics that they meant it in 1999 when they said that a federal court's default equitable powers depend on what the Court of Chancery was doing in England in 1789. People need to take the historical inquiry much more seriously than they have. So the Court definitely did answer that question.

[8] *Grupo Mexicano*, 527 U.S. at 327.

The second thing I asked was that I hoped that they would clarify what the scope of the historical inquiry was. Here's what I mean by that. *CASA* has reaffirmed that Congress in 1789 limited the default equitable remedies of a federal court to those used by the Court of Chancery in 1789. So, what were those remedies? How do lawyers figure out what those remedies were? If, for example, Congress meant to include only remedies that Congress knew about in 1789, then that means we should probably limit our research to sources that members of the First Congress could have realistically gotten their hands on. And that would suggest that manuscript records, like the ones surviving in the archives, don't matter as much, except perhaps insofar as they corroborate other sources that were readily available to the First Congress.

On the other hand, maybe the First Congress thought, "Well, look, we're not going to limit people's research resources to what is available to us today. We don't know what all the remedies are in the Court of Chancery. We know what a bunch of them are, but we certainly don't know what all of them are, because we haven't done the research. Other people can research that later and figure it out." Maybe they meant that the entire universe of research resources are relevant because we care more about *what the law was* in England and less about *what the Founders thought the law was* in England. The Supreme Court in *CASA* did not tell us which one of those is the proper inquiry. Eventually, they'll find a case where it matters. It might take decades. But it will come up when you have a situation where published sources and other sources readily accessible to the Founders say one thing, and unpublished sources say another. And then you will have a dispute, and the Court will have to resolve it.

The third question is, who has the burden of proving the historical record? They didn't say anything about that in *CASA*. And this comes up because when it comes to issues of fact, there are burdens of proof. And ordinarily, if you're a plaintiff and you're suing someone and you're trying to make out a claim, the plaintiff has the burden of convincing the jury that it's more likely than not that a fact exists to support a claim.

Now, what's interesting about this historical inquiry is that obviously we're arguing about what the law was, but it's also factual in the sense that we're looking at historical records. It's kind of a bizarre hybrid. Who has the burden of proving historical fact that happens to be law? I don't know, and *CASA* did not tell us.

And let's say, for example, that the rule is as follows: whoever states a proposition of historical fact has the burden to prove it. Because that could be the rule. For example, if I argue that there were universal injunctions in 1789, that would mean I'm the one who has the burden of actually producing an example of a universal injunction in England in 1789. The other side can do nothing, because they don't have a burden. And if I fail to produce an example of a universal injunction, then I lose, right?

Notably, in *CASA*, the folks who favored universal injunctions presented *some* historical evidence of eighteenth-century practices on bills of peace, but they cited only a handful of cases from the nominate reports. Yes, they also cited some treatises, but those treatises also only looked at those nominate reports. The litigants supporting *CASA never* cited an official record from the Chancery in a case involving a bill of peace where the Chancery enjoined a defendant in a way that protected persons who were not named as plaintiffs in the case—no orders, no decrees.

MC: Can I ask one question on this point?

TG: Absolutely.

MC: If you're an originalist and you want to learn what the English common law said about something, you would probably flip open Blackstone's *Commentaries,* and you might look at Sir Edward Coke's *Reports*. Those are probably your two best sources.

TG: You're right. Those are both very good sources for the law courts, yes.

MC: Thank you. If that's so, then what is the Chancery equivalent of Blackstone and Coke? Are there any high-quality historical sources that are publicly available?

TG: Yes, there are. Let's limit ourselves to sources before the year 1800.

The first place that you would look—and again, we're not looking at unpublished works, we're just talking about works in print—is you would look at Chancery practice manuals and treatises. There are a number of them and they are in print, and most if not all would have been available to the Framers. Not many books were printed in the United States to be sure, but there was an active book trade. Booksellers in the Colonies would buy books from England and they'd bring them over. And so lots of law books printed in England made it over to the Colonies. So the first thing I would say is there are treatises from before the year 1800 that talk about Chancery practice. That's probably the first place you would look. But those treatises often won't answer the questions that courts today care about.

The second place you have to look are the actual published decisions of the Court of Chancery. And what I mean by that are the nominate reports I mentioned previously. There are many, particularly starting around the 1730s. There were a lot more cases being reported from the Court of Chancery after that time. And those nominate reports are even on Westlaw, believe it or not. Essentially all of the nominate reports were reprinted in something known as the English Reports, and that is on Westlaw.

However, it is important to keep in mind that if you're just looking at the published sources, it's only the tip of the iceberg. If you are looking at the published treatises and the nominate reports, it's only a small fraction of the available material.

And even if a lawyer or scholar today has discovered many seemingly relevant sources, that doesn't mean the lawyer or scholar will understand them. Just because you're a lawyer of thirty years doesn't mean that you'll be able to pick up an English case or other authority from the 1700s or 1600s and immediately understand it. There is a great quote from the English legal historian, Professor Toby Milsom, who passed away in 2016. He said the "largest difficulty in legal history is precisely that we look at past evidence in light of later assumptions, including our own assumptions about the nature and working of law itself."[9] Basically what that means is that a lawyer

[9] S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW xvi (2003).

who's reading a decision or an opinion from 1685 is going to look at the language of the case and say, "Well, I know what a demur is," or, "I know what a motion to dismiss is," or, "I know what plea is," because we have those things today. Well, they didn't necessarily mean the same thing in 1685. And so people often make mistakes when they read these early cases because they often don't understand what's in them.

MC: Professor, thank you very much for joining us today, and for offering these insights!

TG: It was my pleasure.

Due Process and New York v. Trump*:* *A Conversation with Professor Seth Barrett Tillman**

Interview Conducted and Transcribed by Maclain Conlin (All errors are my own).[1]

(All views expressed in this interview are those of the guest and do not necessarily represent the position of the Clemson Law Review *or its leadership.)*

Maclain Conlin: Good afternoon, and welcome to the *Clemson Law Review*'s interview series.

Today, in a particularly timely installment, we are joined by a very special guest, Professor Seth Barrett Tillman. Professor Tillman is an Associate Professor at the Maynooth University School of Law and Criminology in County Kildare, Ireland. He is a widely recognized expert on American constitutional law and legal history and the author or co-author of numerous essays and articles, including *The Right to a Unanimous Verdict and the Jury Instructions in* People v. Trump*,* which was published in *Just Security* last summer.[2] Today, he joins us to discuss the latest developments in President Trump's appeal of his New York state criminal conviction, as well as the constitutional arguments made by President Trump's legal team. Professor Tillman, thank you for joining us.

Seth Barrett Tillman: Thank you for having me.

MC: To begin, would you mind providing an overview of the legal provisions at issue in this case?

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[1] This interview was conducted on October 28, 2025 and published on October 30, 2025.

[2] *See* Seth Barrett Tillman, *The Right to a Unanimous Verdict and the Jury Instructions in* People v. Trump*,* JUST SECURITY (June 10, 2024), https://www.justsecurity.org/96654/trump-unanimous-verdict/, accessed October 28, 2025; *see also* Brief of Professor Seth Barrett Tillman and Landmark Legal Foundation as *Amici Curiae* in Support of Defendant-Appellant Donald J. Trump, People of the State of New York v. President Donald J. Trump, App. No. 2025-00648 (N.Y. App. Div. 1st Dept. Oct. 29, 2025) (filed by Robert W. Ray, Esq., of Sterlington PLLC, and J. Andrew Salemme, Esq., of Tucker Arensberg, P.C.), Doc. No. 72, https://ssrn.com/abstract=5652010.

SBT: Of course. This case is a little bit more complex than it first appears. The allegation was a *conspiracy* to violate the election law.[3] The outermost crime is the conspiracy. The object of the conspiracy was to violate the election law and the election law requires that the violation occur "by unlawful means." We have this contraption of three levels of wrongdoing engineered by the prosecutor's office.

The question then became what is meant by "unlawful means"—used to effectuate the object of the conspiracy. The issue here is what the jury has to agree on—that is, can each juror have a different view as to what the "unlawful means" was, or do they have to agree on the "unlawful means"? The prosecution alleged three different unlawful means but the trial court didn't require that the jury agree on any one of them. So we don't know if there was jury unanimity as to any one of three specific unlawful means alleged, and the question is: *Was that a unanimous verdict if different jurors had different views from one another in regard to the unlawful means alleged?*

I'm of the view, and I was of the view when these jury instructions were issued, that the trial court's jury instructions were plainly wrong. This is a violation of the defendant's Sixth Amendment jury-unanimity rights. There's a lot of case law in this area, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000). To me, there is both a technical legal issue here and what you might also call a wider cultural issue, which is: *Where is the defense bar in the United States?* Usually, when there is a defendant who's alleging a violation of a serious constitutional right, the defense bar is there, talking about it. Here, there is just utter silence. If the defense bar thinks that this Trump's jury-unanimity argument is weak, they are certainly not saying it. If the defense bar thinks Trump's position is strong, again, they are certainly not saying it. They are not shouting from the rooftops.

These are the same litigators who have to go into court when litigating other New York crimes prosecuted against their clients. Trump's position, if upheld by the courts, would be a very valuable argument with regard to analyzing New York state law. Keep in mind that New York City's defense bar includes some of the most elite lawyers in the United States, both practicing in the federal courts and the New York state courts.

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[3] N.Y. Election Law § 17-152 "makes it a misdemeanor for 'two or more persons to conspire to promote or prevent the election of any person to a public office by unlawful means.'" Brief for Defendant-Appellant President Donald J. Trump, People of the State of New York v. Donald J. Trump at 67, App No. 2025-00648 (N.Y. App. Div. 1st Dep't Oct. 27, 2025), Doc. No. 66, https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=gXzO2QOX8fren%2FCyAGIzRA%3D%3D&narrow=true, accessed October 28, 2025 (citing N.Y. Election Law § 17-152).

I'm an academic, and other academics have published on the issue of *Apprendi* and jury unanimity. I'm in Ireland—I ask: *Where are all the American and U.S.-based academics?* Every law faculty has professors who teach procedural criminal law and substantive criminal law. Every law faculty has constitutional scholars, and this is a constitutional issue. I can guess as to why there is silence. Is this issue of little moment to them? Is it that they all support Trump and don't want to say something that might hurt him, or that they oppose him and don't want to say something that might inadvertently help him? Could either of these be the case?

You don't even see vanilla analyses of these issues appearing in the major journals or even the professional journals, like the legal newspapers that report news and events of the day with short, neutral analyses. It's a stone wall of silence on the jury-unanimity issue and that is really telling. I happen to think—and I don't know this to be the case, as it is more of a sociological or anthropological question—one reason you have this silence is that many know Trump is right on this particular issue, but they are afraid of becoming unpopular by saying it out loud. It is Orwellian, or, perhaps, better described as characteristic of the behavior of primary school students.

MC: Could this silence make the unanimity issue more difficult to resolve?

SBT: I don't think it will make it more difficult for the New York courts to decide or for the Manhattan District Attorney's Office to argue or for Trump's lawyers to argue. I think it's catastrophic, though, in terms of American legal culture that practitioners and others are afraid to talk about what they believe in academic settings and elsewhere beyond academic settings.

It should be that the loudest and most vigorous speech comes from the defense bar. They're the guys who are constantly saying, "We will defend every single criminal to make sure that every right is protected. Don't hold it against us that we defend wrongdoers. You could be the next target of a malicious prosecutor." Here, if they were willing to go out and say, "Trump is guilty, and the jury instructions were correct, and here's why"—all that would be very interesting. But we don't even get that. We get nothing. Is it that they simply don't care—or, even worse, that they are deeply afraid of being unpopular. I don't know how a defense bar could be successful if popularity is governing their willingness to talk about these issues, irrespective of whether they think Trump's jury-unanimity rights were violated.

Looking at this from the outside—and I certainly have views about the jury-unanimity issue—there is a larger cultural problem here which is, arguably, more important than the concrete legal issue. At the end of the day, it doesn't matter whether Trump's convictions are upheld. If he loses this case, it doesn't affect whether he is president. He's in office. The only way to remove him is via a House impeachment and a Senate trial ending in conviction, and I don't see that happening. For that reason alone, we should be able to have these discussions without being afraid of political consequences because nothing that happens in the court will affect whether Trump is or is not president at this point. And yet, the stone wall of silence is still there. And like I said, it is difficult to explain why it is there.

There is a deep irony here. I am an American academic writing from Ireland, and you can count on one hand the number of American or U.S.-based academics who have explored this issue and written about it. It is very unfortunate.

Having gotten all that out of the way, we can now turn to the legal issues themselves. The legal issue is the following: Here, we have a charge of conspiracy, and the object of the conspiracy was to violate the election law, and the election law is only violated if "unlawful means" were used. The prosecutor basically alleged three different potential unlawful means: first, violations of the Federal Election Campaign Act (FECA); second, tax violations; and third, falsifying business records. The prosecutor presented evidence for each of these three means. The judge instructed the jury that so long as they agreed that unlawful means were used, that is enough for unanimity. There doesn't have to be agreement on which particular unlawful means effectuated the object of the conspiracy, which was allegedly to wrongfully promote or prevent the election of a person to some public office.

Different evidence came in for each one of these three predicate wrongs. Conceptually, they are different from one another. One really must ask what is left of unanimity if people could have a different view of what the unlawful means were. Is the jury, in any meaningful sense, agreed as to what crime was committed?

This is certainly the view that the defense team put forward, and that I am hopefully going to put forward very soon in my own *amicus* brief (after this interview ends). But another way of looking at it—and this is the way that the prosecutor's office looked at it—is that it's not very uncommon that where there's an element for a crime, the level of specificity for that element does not require unique agreement on that element. For example, if a statute required that a weapon was used, one juror could believe it was one model gun and another juror could believe that it was a different model gun. They don't have to agree on the exact model so long as, based on the statute, they agree that a weapon was used. That's one way of looking at it.

I think that the law on this argument is not as clear as it could be. I don't want to suggest that there is an absolute slam-dunk case here for either side. I think the side for jury unanimity, as Trump has argued, is the better view, as I've argued myself. This is how I would put it: where a statute defines a crime, and one of the elements of the crime is an act or a thing, then different jurors can have different views as to whether that act or thing is fulfilled. But where an element of a crime is, in fact, another crime that itself could be charged—and that's what we have here with a conspiracy to violate an election law where the election law has a predicate offense of using "unlawful means"—the jury must agree on what the specific predicate crime is because the crime itself has elements. When you allege that someone committed a crime, that crime itself has elements that must be unanimously agreed to.

I think that's the distinction that many state courts have adopted with some clarity. New York's courts, including its appellate courts, have not spoken to this issue—especially in regards to the election statute—with any degree of clarity. In fact, Trump remains the only person ever charged, as far as I know, under this election statute. So it's not like there are jury instructions or a statutory history for us to look to. But when you look at other states, with regard to other similarly structured crimes, or to federal crimes, such as RICO, the statutory systems and the case law do make reasonably clear that where there is an element of a crime that is itself a (predicate) crime, the jury must be unanimous with regard to that specific predicate crime. And where different predicates are alleged, that's insufficient, because we don't know if there was unanimity with regard to any specific alleged predicate crime. That's the key issue here.

And that's also the mistake that I think Judge Merchan made when he looked at the various precedents under New York law, which did not look to predicate statutory violations. Instead, they involved predicate acts—allegations that a thing happened or a thing was done or used. But that thing that happened or mechanism that was used was not itself a crime. So the specificity of each juror's agreeing was not strictly necessary. By contrast, if more than one crime is alleged as a predicate, I think that a judge must give a specific unanimity instruction. That might be where this case ends up.

I'm not saying that the New York intermediate appellate court will reverse Judge Merchan. We simply don't know. And we're probably not going to see a decision from this court until just about the next election—the 2026 midterm congressional elections. That's the amazing thing about this, because that's the way that the parties have timed this. It almost looks like both sides want the decision to come just around the time of the congressional midterms because both sides have asked for multiple extensions. Trump's people didn't file their appeal the next day after Judge Merchan announced his sentence. They waited almost until the time period for seeking an appeal had elapsed. And then Trump's attorneys asked for an extension to file his opening brief. And afterwards, both parties asked for a second extension to file the opening brief, which the court granted. So, now, we're many months, nearly a year, since Judge Merchan announced his sentence.

By the time briefing is done, and oral argument, and squarely before the judges of the First Department of the New York Supreme Court's Appellate Division, and they get around to writing a decision and issuing it, it's probably going to be around the time of the congressional election. This is the worst time for it to be announced, because this is the sort of thing that shouldn't feed into an election cycle. The decision on the appeal should be the natural working out of the judicial process rather than a whole new election issue.

Another thing that one has to ask is: *What is the interest of justice here that Alvin Bragg, the Manhattan District Attorney, is really serving at this point?* No matter what happens at this point, Trump remains president. And the Appellate Division can't increase the sentence Merchan imposed. So at best, the only thing that Bragg is defending is that Trump retains the title of felon. But at worst, he's wasting the state judiciary's resources and spending his own office's resources to defend this decision by Judge Merchan.

What legitimate purpose is served by District Attorney ("DA") Bragg in defending the sentence and conviction below? The traditional purposes served by the criminal law include: deterrence—general and specific, retribution, restitution, and rehabilitation. I find it difficult to see how any of these traditional purposes are meaningfully served by the DA's defending Merchan's decision below. I suppose that the DA's real purpose *might* be fairly described as some sort of institutional expressivism—which is easy to do when spending other people's (that is, the taxpayers') money. But if that is Bragg's purpose, then that simply feeds into the narrative that violations of the criminal law are not now (and never were) the core of the prosecution against Trump; rather, it was always just politics.

This largely covers the jury-unanimity issue at stake in this case. The defense brief, the one that the President's lawyers filed yesterday, had several other arguments for overturning Judge Merchan's decision, but I don't really feel qualified to comment on them. I've read them. I was familiar with them when they were talked about during the trial court proceedings, and I certainly read them in the appellate brief, which was very strong. The arguments in this brief aren't entirely new. They were made by Trump's lawyers from the trial court proceedings, or at least something very close to them, but of course, there was much less briefing at the trial court level. And some of those lawyers that had worked for Trump in the prior proceeding are now in the Justice Department, and one of them has since become a judge of the United States Court of Appeals for the Third Circuit, so there is that.

One of the other complexities in this case is that there are now collateral proceedings outside of the New York state system in the federal courts, including the U.S. Court of Appeals for the Second Circuit, which is the federal appellate court that includes New York. In that litigation, Trump is looking to have the litigation moved out of the state court system and into the federal court system, where I think he believes he'll have greater procedural protections. And perhaps he'll have access to a better body of precedent in a certain sense, because federal courts are (believed by many to be) more likely to see their own federal precedents as controlling (or, at least, persuasive) than state courts would be. That might be one of the reasons that both sides have sort of sought a delay until now, because if the Second Circuit were to rule before the

Appellate Division, it might be that the Appellate Division would look for guidance from the Second Circuit.

However, the Appellate Division's judges do not have to defer to the Second Circuit. The New York Appellate Division's ability to decide a case, particularly under New York state law, is not controlled by anything that happens in the federal courts, with the exception of the U.S. Supreme Court. Still, a decision of the Second Circuit would be very persuasive, I think, to New York state court judges.

MC: How did the Founding generation think about jury unanimity, and how might their understanding apply to this case as a matter of original meaning?

SBT: Jury instructions in the eighteenth century were not as complex as they are today, in large part because state crimes were still common law crimes. They often didn't have well-defined elements. The judges would give oral instructions, and the jurors would simply sequester themselves and vote on it. There wasn't a lot of written guidance. Sometimes there was no written guidance. The idea of written jury instructions, as a matter of course, came much later.

And what makes it even more complex is the idea of predicate crimes, which I believe is a twentieth century novelty, with the exception of inchoate crimes such as attempt and conspiracy, which did have predicates. But even then, when a conspiracy was alleged, it was a conspiracy to violate some known law. So there was a predicate crime, but there was only one such predicate.

Today we have much more complex crimes that are part of the positive law system. There's a statute, and there's a code provision, and you have crimes like RICO, which say there have to be two predicate crimes, and there has to be unanimity with regard to those two. It's right there in the statute.

In the eighteenth century, people talked about jury unanimity. That meant there were twelve jurors, and they all had to agree. As to the scope of that unanimity, I don't know that they gave a lot of thought to that, because the crimes were so much simpler, and they were common law crimes. They often weren't part of vast statutory codes.

So I don't know that we could go back to history and tradition and get a meaningfully precise answer. That doesn't mean the State could do anything it wants. There's a concept of unanimity. The question is: *What do we do with that concept when we have crimes that are vastly more complicated than the ones where the original tradition of unanimity evolved from?*

And that's a very hard question, and it's not one that I've sought to answer. As a matter of fact, I think a different paper ought to be written first. The paper that ought to be written, I think, and I wish I had time to write it myself, is one that goes to the

Australian courts, the New Zealand courts, the South African courts, the English (and Welsh) courts, the Scottish courts, the Irish courts, the courts of India, and the Canadian courts—all the other courts in the primary political jurisdictions of the common law world. They have complex statutory systems. What have *they* done with this issue? If all the courts have come out consistently, one way, that's probably indicative of the answer to our historical question. That would be a really interesting paper to write.

Of course, you need access to the rich case histories of all those other legal systems, which do exist to some extent, on the various electronic platforms, e.g., Westlaw International and LexisNexis. But doing that research is going to be difficult. Probably the best way to do that research would be to try to reach out to scholars (and recently retired judges!) in each of those countries and ask them about how predicate crimes are treated in their legal code. And it might be that the answer to that is there's a statutory solution. That is, the legislature has announced this is the way we want this issue treated. And unless there's a strong common law tradition to define unanimity, the legislature gets to define the issue. That might be part of the answer.

I wish I could say that there is a concrete originalist answer. Perhaps there is, and I think that paper is yet to be written. I haven't written that paper. I discuss our understanding of jury unanimity within the context of case law from the Supreme Court, particularly case law from the last fifty years. I discuss the Supreme Court's jury-unanimity decisions *because* that's what other courts will look to, as well as the Supreme Court itself. Courts, particularly lower courts, tend to only look at originalist answers when there is no announced case law on the subject from or through which they can navigate.

But where there is rich case law, or even some case law, that's going to be the best evidence of what they ought to be doing. Now, whether that's right or wrong as an original matter is a different question, but that's certainly the way American courts, state and federal, tend to function. Another way to think about it is that the largest role for originalism is, as my frequent co-author, Professor Blackman, put it once, when you're in an open field, as opposed to a thicket of precedent.[4] That is, where the case law hasn't addressed a question, but you could go back in history and find out what the practice was apart from the case law, and then that becomes a way of addressing the question, and that has become a (if not the only) widely accepted role for originalism. But that requires the lawyer and the scholar to be something of a historian. And that itself is a very controversial role.

MC: Thank you for joining us today, Professor Tillman, and for offering your time.

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[4] *See* Josh Blackman, *Back to the Future of Originalism,* 16 CHAP. L. REV. 325, 343 (2013).

SBT: It was my pleasure.

An Introduction to Appellate Law*: *A Conversation with Troy Shelton*

Interview Conducted and Transcribed by Maclain Conlin (All errors are my own).[1]

(All views expressed in this interview are those of the guest and do not necessarily represent the position of the Clemson Law Review *or its leadership.)*

Maclain Conlin: Welcome to the Clemson Law Review's interview series. I am here with a very special guest, Mr. Troy Shelton. Mr. Shelton is a partner at the Dowling Firm and a graduate of Duke University and the UNC School of Law, where he served in the North Carolina Law Review and graduated as part of the Order of the Coif. Prior to joining the Dowling Firm, he served as a partner at one of the nation's 100 largest law firms and clerked for a federal district judge. Today, he is widely recognized as one of North Carolina's top appellate attorneys and frequently represents clients in high profile cases. He also participates in a wide variety of pro bono activities and serves as president of the Triangle chapter of the Federalist Society in Raleigh, North Carolina. Today, he joins us to discuss his career in appellate law and to offer advice to students interested in pursuing a similar path. Mr. Shelton, thank you for joining us.

Troy Shelton: Thank you for having me.

MC: Some of the students who might read the *Clemson Law Review* are undergraduate pre–law students who aren't yet sure what legal career they might want to pursue, and they might not be fully clear on what an appellate career looks like. What does your day job look like as an appellate lawyer? What matters do you typically handle?

TS: Sure. So, there are a few different types of appellate lawyers. I think the most common type is an appellate lawyer that does everything. We're really generalists. We are specific when it comes to the courts that we practice in. We just normally practice in appellate courts. But within the appellate courts, most of us handle a bit of everything. You might say there are some things that we don't handle. I don't normally handle criminal work, though I have and can. There are some appellate attorneys that only specialize in a certain field within appeals. So there are several attorneys in the state that do just family law appeals, which is a very niche subject matter. There are other kinds of subspecialties within appellate law, but for the most part, people either dabble in appeals or they do appeals in general.

From day to day, appellate work involves not being in the courtroom a lot. There are not tons of hearings. There are not tons of oral arguments, necessarily, though there

* Partner, The Dowling Firm.
[1] This interview was conducted on August 7, 2025.

are plenty of those, enough, at least. If you like being in the courtroom all the time, you probably won't like an appeal.

I have a very full plate of appeals. I do sometimes show up in trial court and help, not as a lead trial counsel, but I help trial attorneys get their cases set up so that either there won't need to be an appeal or if we do lose and there is an appeal, it's in the best shape possible. So, for example, earlier this year, I sat in on a two-week jury trial here in Raleigh.

I do sort of behind the scenes work sometimes in trials, especially with juries. The jury will usually never hear my voice. I don't examine the witnesses or anything like that. But I'll argue legal motions outside the presence of the jury. Sometimes we have to write and prepare briefs on the fly during the trial, so those are things I'll be worried about during the trial in the evenings between trial days, while also preparing the jury instructions. Anything that's sort of law intensive instead of fact intensive are things that I help with at trial.

MC: Interesting. So, just out of curiosity, you mentioned that there aren't many oral arguments in an appellate lawyer's career. How many oral arguments do you think you do per year or per month?

TS: Per year, it really does vary. I mean, it can be as few as one or two. This year, I have a lot coming up. I have three coming up at the North Carolina Supreme Court in the next two months. I would have had four, but one of my partners in a case that we're working on together is doing that one, which I was thankful for. Two of them had gotten set for the same day. They were fifteen minutes apart from each other, but thankfully, the Court was kind enough to reschedule them, so they are now about twenty hours apart.

But, if you were doing four or five oral arguments per year, that's a lot for an appellate lawyer, though that can vary by state. In some states, everything is set for oral argument at their appellate courts. In North Carolina, we have two appellate courts, the Court of Appeals, which is the lower appellate court, and then we have the Supreme Court, which sits above that. So most appeals die at the Court of Appeals. That's the end of their journey. The Court of Appeals currently sets only about five percent of cases for oral argument. Historically, it was more like ten or fifteen percent. I like to think that I make the cases I handle interesting enough such that we have a better than five percent shot, but even then, I have plenty of cases that don't get oral argument at the Court of Appeals.

This is in contrast to the Supreme Court, where every case is set for oral argument. So depending on which court you're in, you know that you will definitely get oral argument, or you probably won't.

MC: Moving from the argument side to the brief writing side a little bit, I've read a number of your briefs and some of your articles over the past two years, and I always found your writings to be very clear, very concise, and very enjoyable. When did you start to develop those writing skills, and do you have any advice for students who want to hone their own writing skills?

TS: That's a great question. It's not something that happens overnight. I think it’s something that happens over the course of years. So when I think of my writing style, I think of it as having different phases.

First, there is before you go to law school. I was a history major and did lots of writing in college. For your audience, I always recommend any kind of major that involves a lot of writing. If you know you want to go to law school, it's great preparation. Doing lots of reading, lots of writing, that's what I do everyday. That’s history as much as anything else. So I felt like I had a pretty strong voice by the time I finished my undergraduate degree at Duke.

Then, I went to law school. Law school is great at teaching you how to think like a lawyer, but not great at teaching you how to write. I mean, maybe it teaches you to write in a very bland way, which has its own value. Hopefully, if nothing else, you can have clear thoughts, which results in clear writing by the end of law school. But you will sort of have lost whatever voice you probably came into law school with. I then clerked for a year for a federal judge, and most of the judges aren't doing the first drafts of their opinions. The clerk is doing the first draft of their opinions in federal court. So you sort of create your own style to mimic the style of the judge, who you’re writing for, who's going to be editing. You adopt their style throughout that year.

I then went to work at a midsized firm in North Carolina. I worked for one of the top appellate lawyers in the state then and now, Matt Sawchak. He had his own voice and his own style, and whatever I wrote was going to be edited heavily to become that style. So you just end up adopting that style, which was a new style that you adopt, right? You're just a young associate. You don't have any clients. You're going to do whatever. You're going to write however you're told to write. And that was good in the sense that Matt had, and still does, a very, not showy, not overly formal style, but very professional. It's a good style. It's one that I still use today, depending on the situation.

I would say I have multiple styles. I have multiple voices now and it depends on the case and it depends on the time to deploy each one. And sometimes I pull out what I think of as the Matt Sawchak style and voice when I need it. I then ended up leaving that firm, joined another firm, and I worked for another Matt this time. His name was Matt Learberg, and he had a more relaxed, more conversational tone and style. And we worked very closely together, and he told me at least that by the end of our time working together, his voice had become a bit like mine, and my voice had become a bit like his. So it was the next sort of phase in my own writing development.

And I just had a longer leash to write how I wanted to. So I think that was probably the first time I really had the opportunity to experiment in what my own legal voice was going to sound like. And that was really helpful. Then, I ended up leaving that firm and now I'm on my own at the Dowling Firm, though it's just me in charge of appeals. It's me, and to the extent I'm working with some other attorneys who might make suggestions, but they rarely have major suggestions on tone or style or voice.

I think I have a pretty distinctive style, at least for our appellate courts. I'm usually told that it’s pretty direct, and I always like to be direct and clear. You don't want to be insultingly direct, but direct enough to be understood. But at the same time, I do think I have a pretty conversational style. I freely use contractions, for example. You can overdo those. Usually I have many contractions in there and I take many of them out, but I'll leave the ones that I think just sound good. I think legal writing should be clear. It's not going to be a pleasure to read. No one is picking up a legal brief to read it because they want to. They're picking it up because that's what they’re required to do. Either it’s the judge or the justice or his clerks, or her clerks, and they’re all reading it, but that doesn't mean that any of them really want to be reading it.

So I like to imagine that I can at least make my writing understandable and not painful to read. You'd be surprised how poor most legal writing is. It's very difficult to understand what someone is saying. I think that oftentimes the problem is you have a lack of clear thinking, and that leads to a lack of clarity in the writing. Those to me go hand to hand. When you see bad writing and you can't understand what they’re saying, it could be that they're poor writers. It could be that the idea is pretty underdeveloped or the argument is wrong.

It certainly shows confidence in your position to the court, I would think, if you’re very clear. You're not trying to obscure the matter or trying to be confusing. And to be fair, there are times in writing where you might have ambiguity in the writing and it’s intentional. I think that a lot of writing is ambiguous, but not intentionally. It’s just unclear writing.

But there is a time to shade through some facts or some issues that you might not want to focus on or that you don't think the court needs to focus on. So you might leave those a little less developed. There's a time and a place for that. But by the time you get to oral argument, even for those facts you need to be very well–versed in them, as you might be asked about them by the court. It might not be something you really want to talk about, but you have to.

MC: A moment ago, you mentioned that you clerked for a federal judge at the beginning of your career. I have a couple of questions on that point. First, how does that experience clerking for a federal trial judge play into your appellate career? And second, do you have any broader advice on young people who are thinking about clerking one day?

TS: If you know you want to be an appellate attorney, you should do an appellate clerkship to the extent that you can. But if that's not an option or, it's not the appellate clerkship you'd like to have, you shouldn't say, "Well, I'm not going to clerk at all." My year clerking in the federal district court, which is the federal trial court, was an absolutely wonderful year. I learned a lot about how judges think and how to write. It was a wonderful experience.

To be fair, appellate clerkships can be a little boring. This is what I'm told. In an appellate clerkship, you're usually just in chambers. In federal district court, there are plenty of hearings and trials. During my clerkship, it was a very busy year of trials, which was a lot of fun. So you have a lot more fun in federal district court than you might in a state appellate clerkship or a federal appellate court clerkship. You only have oral arguments a few times per year if you're in a federal appellate clerkship. I don't know about all the circuits, but the Fourth Circuit sits only six weeks per year because most cases don't get set for argument. By contrast, there are other circuits where almost every case is orally argued. It really depends on what court you're in.

MC: You mentioned that you primarily practice appellate law. So you don't practice appellate law, and then three other different disciplines as well.

TS: That's right.

MC: You specialized in this field, and you became a board-certified appellate practice practitioner. What are the benefits of specializing in appellate law? And also, in case any students are curious about what the certification process is to become a certified practitioner, if you could walk us through that, I would appreciate it.

TS: Some states have developed specialization programs. They have sort of two purposes. One is internally in the bar to reward and recognize practitioners who have a true expertise in some subfield of the law. It's also important from a marketing perspective to be able to advertise to potential clients or people that hire you.

I sometimes distinguish between those things because I'm often hired by law firms, not necessarily by the clients, though I have plenty of direct clients as well.

Sometimes from a business perspective, the law firm is really the business client, and the underlying client is the client where the professional obligations run to. Not every state has an appellate specialization. North Carolina has for several years. I think it may have been one of the first in the nation to have an appellate specialization. It definitely has specializations in other fields going back for decades. So we're a bit of a forerunner in that respect.

The specialization requirements vary by the field. To be specialized in appellate law in North Carolina, you first have to be qualified to even apply for specialization, which is, I would say, three quarters of the battle. You need five oral arguments. You have to devote about a quarter of your practice to appellate practice for four or five years, and you must have ten briefs that you have primarily authored. In North Carolina, usually the hardest part is the oral argument requirement, because, like I said, the Court of Appeals doesn't set a lot of things for oral argument. As a result, it can be very challenging for young lawyers to get the opportunities to do oral arguments, since usually the clients want the more senior attorney to do the argument.

Assuming you meet all those requirements, then you can apply to sit for the specialization exam. Our exam in North Carolina has two parts. There's a multiple choice part and an essay part, and then there is a take–home part that lasts for a week after that, where you take home a brief that is horribly formatted. It violates all the rules and you have to edit it very heavily and then you have to actually draft part of the argument section. All of that is then graded. And this is not a perfunctory exam. The year I took the exam, there were five of us that sat for the appellate specialization and only two of the five passed. So it's a real exam, to be sure, but people certainly pass every year and if you fail one year, you can take it the next.

MC: You mentioned the oral argument time as one of the most challenging parts of the process. I was speaking to a federal judge in Arkansas a couple of years ago, and he mentioned a new program he was starting where even though he's a district court judge, he would allow young attorneys who wanted more oral argument experience to file *amicus* briefs in cases that he was hearing and then come present for ten minutes in his courtroom. If federal judges adopted that policy here in North Carolina, could that potentially also qualify for oral argument time or does it have to be before an appellate panel?

TS: It does have to be before an appellate panel, but, I mean, young attorneys should look for any opportunity to be in the courtroom. If you get ten minutes to be in front of a federal district court judge, you should take that. It's great practice for being in front of an appellate court. It might have more questions for you than an appellate court. You never really know in an appellate court whether it is, as we call them, hot benches or cold benches. Sometimes cold benches where they don't really have hardly any questions and they're hot benches where, I mean, whatever you came to talk about doesn't matter, but you're here to answer the questions. Generally, my preference is a very hot bench. Otherwise, what was the point? You already knew what I was going to say. You read the briefs and I don't have anything new.

MC: Did you participate in Moot Court in law school, out of curiosity?

TS: I actually didn't. Let me take a moment to explain this to your listeners. In law school, they have many sorts of extracurricular programs. One is called the Law Review, where you are editing and preparing a legal journal. It's usually professors that are publishing their articles and you are assisting them. It's a student–run organization. You choose the articles that you're going to publish and then you have to edit and prepare those articles for publication.

I was on the Law Review. There's also Moot Court. Moot Court is a competition where you write briefs–sort of fake briefs for a fake appellate court–and then you go present a fake oral argument to a fake panel of appellate judges. At Carolina [UNC Chapel Hill], if you're on the Law Review, you're not allowed to do Moot Court.

Because of the publication schedule for the Law Review, frankly, I wouldn't have had any time to do Moot Court. That's not true at most or maybe any other law school that I'm aware of, as you can usually do both. It certainly would have been helpful to do Moot Court, but I was unable to.

Thankfully, it all worked out in the end anyways. You know, you wouldn't look at the path I took and say, "Oh yes, he's clearly going to be an appellate attorney." But I always had an interest in appellate work. But for personal circumstances, I probably would have done a second clerkship at an appellate court. I certainly had the opportunity to do so. I was engaged. I was married at that point while I was clerking. My wife is a veterinarian and if I was going to go do an appellate clerkship, I was going to have to go live somewhere else for a year and move around. Usually when you're applying for clerkships, people apply to all sorts of places. But I limited myself just to North Carolina and to be frank, I was ready to just go into private practice.

I had worked one summer at the firm that I ended up going to, and I was looking forward to going there and I had some student loans to pay off too.

MC: That sounds like a wonderful journey. My family and I live on a horse farm here and we love North Carolina. I certainly intend to practice here myself.

TS: It's a nice place. I've only ever practiced in North Carolina. I very nearly left the state when I was in law school. I had offers up in Washington, D.C. So I was mostly trying to decide, do I want to be in Raleigh or do I want to be in Washington, D.C? I was very lucky to have gotten those offers, but I ended up turning them down, which some people thought I was crazy for doing.

But I'm not really a big city kind of guy and didn't think I would want to be up there for very long. It's not really conducive to having a family. So I ended up staying here in Raleigh. I had several friends who all went up to D.C. They've all moved back to

Raleigh now. And when they were ready to move back to Raleigh, they called me. I helped them find jobs here in Raleigh. There are many paths.

MC: It sounds like you had a wonderful experience at UNC Law School. Do you have any advice for students who are trying to decide which law school to go to? Are there different factors that they should consider or anything else in that regard?

TS: Yes. Some of the things that I think guided my decision might be helpful to other students.

First of all, it might be surprising to some of my friends who know me, but I wasn't sure I wanted to be in private practice. I was sure I didn't want to be in private practice before I went to law school. I thought that I might want to be a federal prosecutor. And so I did not want to go to a law school where I knew I was going to come out with a ton of debt. I graduated mostly debt free. I was very interested in Carolina because I could get in–state tuition. There are scholarships available on top of that. I knew any debt I graduated with would be pretty manageable and it would not determine where I had to work.

Now, of course, I ended up going into private practice, but had I gone to a school where I graduated with hundreds of thousands of dollars in debt, I probably wouldn't have stayed in Raleigh. I probably would have taken those Big Law jobs up in D.C because they pay much more. I would have needed that to pay off the debt more quickly. Because that is something to think about. It's the debt and what job you might like to have.

Another consideration is, where do you want to live and practice when you finish law school? Many of the best lawyers in the state graduated from UNC. It's a very natural place to live and to work after you graduate from the school. But UNC also has great name recognition all the way up to New York if you want to be on the East Coast. I knew that UNC was a good school, and I wasn't sure at the time that I wanted to be in North Carolina. Like I said, I thought there was a good chance I wanted to be in D.C. And so UNC didn't shut the doors for me to be in any of those places.

But that's another thing to think about: by going to a particular school, what doors am I opening and closing for myself? Of course, if you go to school like Harvard, that can open more doors. But actually, that can be a little bit tricky, for example, in North Carolina. I had friends who went to Duke Law and they had trouble getting jobs in North Carolina because most employers didn't think that they were very serious about staying in North Carolina. Very few Duke Law graduates end up staying in the state. Most are not from here and never intended to practice here, which makes sense.

As they say, it's the Ivy League of the South. If you go to Harvard Law, you're probably not intending to practice in Cambridge. That said, both of my partners at our three–man firm went to Duke Law School. So you can clearly stay here and practice.

But it is not just, “Oh, I didn't go to a very good school and it was in Idaho, and now I want to practice in North Carolina,” which could be tricky. Employers ask, when you are applying for jobs, “Why do you want to be in North Carolina?” If your resume shows some other connections to North Carolina, you might be fine–if you’re from here, for example. But keep in mind what story your resume is telling future employers.

There were some things that I considered but didn't ultimately sway me. For example, Wake Forest University was really close to where I grew up, and they had an appellate law clinic, which was really cool. A clinic is like a non-profit law firm that operates out of a law school. But ultimately I just didn't want to be that close to where I grew up.

So I didn't end up going to Wake. I've now become friends with the clinic director over there, Professor John Korzen. So if any of your listeners are considering Wake Forest, it is a wonderful school, with a wonderful appellate clinic. Duke also has an appellate clinic. UNC, as far as I know, still doesn't have an appellate clinic. It would have been nice. Some students absolutely should consider the clinic opportunities. Like I said, I didn’t do one. I had friends who did. They had great experiences.

If you know that you have a strong interest in a particular type of law, law schools have these clinics. And so that's something else that you should consider.

It shouldn't be a determinative factor. I think it's less important than the other factors, but it’s something to think about.

MC: You also participate as an appellate attorney in a wide variety of pro bono activities. For example, you co–founded North Carolina's state appellate pro bono program, along with then–Judge Dietz on the Court of Appeals, who now serves on the North Carolina Supreme Court. Would you mind telling us a little bit more about that program and why you believe that it is valuable for an appellate lawyer to engage in pro bono work?

TS: When I was maybe two or three years out, I wanted to do more appellate work. And of course, then you want to do oral arguments and you realize there’s not a lot of opportunities. So I started researching all the opportunities for arguments and found there were very few.

And then out of the blue, I got a call from Sylvia Novinsky, who runs the Pro Bono Resource Center here in North Carolina, and she used to head a pro bono program at UNC Law, so we already had a good relationship. And she said, “Judge Dietz has contacted me and we’re thinking about putting together an appellate pro bono program in the state. Would you be interested in helping with that?” And I said, “Absolutely.”

That took us a few years to get off the ground, but it's been great. When I was there, my focus was on making the program work as well as possible for young attorneys who want to get appellate experience, because to me, that's a critical part of the program. I consider the program to have three purposes. One, help young, blossoming appellate attorneys get appellate experience; two, help unrepresented litigants get good representation; and three, help the courts, because when they have an unrepresented person in front of them, the briefing is generally not helpful.

We created an arrangement with the Court that said, “If you take one of these cases in the program, you will set it for oral argument.” And so it helps everyone. I got at least one or two cases through the program myself after I founded it. I ended up doing at least a few other pro bono appeals outside of the program as well. I had one somewhat prominent case I took from our state Court of Appeals to the state Supreme Court which involved a state constitutional claim. We ended up prevailing and set an important precedent in the state.

A lot of law firms are very supportive of their young attorneys doing pro bono work. Your listeners might not know, but there's usually a certain number of billable hours that are required of attorneys. Often large law firms will count a certain amount of pro bono hours toward that billable hour requirement. So you have no one to blame but yourself if you're not out there doing some of that pro bono work. It's good work to do for people. It's a good experience for the attorney. I mean, my pro bono work ended up leading to several paying jobs because it was a very prominent case. I’ve worked on several matters that spun off from the recognition that came from just that pro bono case.

MC: Some people might not think of pro bono work when they think of appellate attorneys because they usually imagine it at the trial level. Why do you think it’s also very valuable to have pro bono work at the appellate level as well in addition to the reasons that you just mentioned?

TS: When you are a young attorney, at the trial level, you know, even at a small or large firm, there might be small matters where they just have the young attorney run with it, which is fine. That almost never happens for an appeal at a law firm. They’re not going to hand it off to some young attorney normally and say, “Run with it.” But if you have an appellate pro bono matter, you can really be in charge of yourself. It’s yours. And hopefully you have some mentors either within the firm or outside the firm that you can and should consult as you’re working on it because there are a lot of rules and you're not going to know them all.

But it's a great opportunity to have your own client, your own case and make your own decisions and that's a very different feeling than when you're really working for a senior attorney who's making all of the decisions. Here, it's up to you. Go make the decisions because that's what will be your own life eventually. When you become an older attorney, you will be that person. It's just up to you. It turns out there's really no one else to ask that makes the decisions. The buck stops with you.

MC: In addition to your pro bono work, you are also the president of the Federalist Society Chapter here in the Triangle area. When did you first become involved in the Federalist Society and what value do you see in becoming a part of that organization as an appellate lawyer and a lawyer more generally?

TS: Almost every law school today has a chapter of the Federalist Society. Ours at UNC was mostly inactive when I was there. To the extent that I was a member, I didn't fully know what membership meant. I went to some lunch events, and that made me a member, I suppose.

We didn't have a particularly active chapter when I graduated here in Raleigh. It started becoming active, and I started going to more events, and got to know the former president. We ended up actually working together at my prior firm, and then she became busy and she had to hand over the reins to someone else. And I was a natural person to pick those up and run with it, in part because appellate work and the Federalist Society really go hand in hand. Appellate attorneys are the nerds of the bar. We are the people sitting, reading, writing, and researching all day long.

The Federalist Society is not as nerdy as being an appellate litigator, but it is on the nerdier edge, because it consists of people who love the law and have an interest in a lot of different legal fields. When I plan events, they often focus on administrative law and constitutional issues. But even within that, there's a ton of variety—criminal, civil, and everything in between. It's a fun organization to be a part of. The Federalist Society is a group of conservative lawyers, but our panels are always well balanced. Our membership expects a very free exchange of ideas. And that's what we want.

The Federalist Society doesn't take positions on legal issues, but we do, I'd say, foster discussion on legal issues that we think are important. If it's as easy as just going to a few meetings once you're a lawyer, why wouldn't you become involved? As a lawyer, you also need what we call continuing legal education credit. And you get those by going to our meetings. You have to have a certain number of those hours every year and you usually get a free lunch by going to ours!

It's a fun group. You make good friends that way, so I think some people get into it for networking. I get into it for the camaraderie and because I'm a nerd. I don't know that there's a lot of true business networking that goes on, though there can be. If you're especially looking at government jobs, not so much here in North Carolina, but in states where, for example, you might have a Republican Governor, it can be very valuable. For example, in Florida, there's a very tight relationship between the Governor and the Federalist Society.

At the federal level, there’s certainly a strong relationship, though a complicated one, between the President and the White House—depending on who's in the White House—and the Federalist Society. If you're a conservative attorney, it’s an important organization to be a part of, but not just for your career advancement. No matter what, I think you'll find it to be a fun, enjoyable organization.

MC: We will include a link to your appellate newsletter,[2] which I strongly recommend, in this interview, but are there any sources on appellate law that you think students should start reading if they want to learn more about this field?

TS: It's a good question. An excellent thing to read is high–quality appellate writing. Sometimes that's judicial opinions, though not usually (not because judicial writing is bad per se, but you're not a judge and it's a different style of writing). If you're working in a state court system, find out who the top appellate lawyers are in your state. Pull their briefs, look at them. I was really blessed to have mentors who were some of the top appellate lawyers in the state, and I owe my career to them and what I learned from them, both in terms of writing and strategy.

But you can also look at the federal level. For example, you can look up some of the best briefs filed at the U.S. Supreme Court. You can look at, for example, a Paul Clement brief or listen to a Paul Clement oral argument. Now, most people are not Paul Clement. You’re not going to match his skill–but you can improve from following his argument style.

I'm a complete nerd and while I don’t listen to all of the oral arguments in the U.S. Supreme Court, I listen to a lot of them. You can download them like a podcast and I do that. When I am working on something else at home, I throw it on. Those are all helpful. It can be fun, of course, to listen to some of the various podcasts that follow the Supreme Court. There’s several good legal podcasts out there now. That wasn’t really that true when I graduated law school; now there are a bunch. People enjoy different ones for different reasons.

In most states, you have the State Bar, which regulates lawyers. Then you usually have the Bar Association, which is a separate nonprofit entity. Most State Bar Associations are broken up into sections based on different types of the law. North Carolina has its own appellate section. I would advise any young attorney to get involved with the appellate section. Just reach out to the leadership, and ask, “What

[2] https://us18.campaign-archive.com/home/?u=bf5486fb9faae6b2dd3db4ebd&id=7fed22d8bd.

can I do?" They're always desperate for volunteers. They'd usually be happy to give you something to do, would be my guess.

I'm now on the Appellate Rules Committee, which is a different organization, but it helps write and revise the rules of procedure for our state appellate courts. So that is definitely an important thing for a young attorney who's looking to do more. You should definitely reach out to your State Bar Association.

MC: Thank you very much for your time!

TS: Of course. Thank you for having me.

Patent Invalidity Risks for IP-Centered Transactions Post-AIA

By Maxwell Breton*

Abstract: *In this article, we analyze the Intellectual Property transactional risks stemming from the America Invents Act, demonstrate the ways in which traditional Mergers and Acquisitions provisions are insufficient to manage this risk, and highlight the strategies practicing attorneys use to mitigate invalidity risk.*

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I. Introduction

Intangible assets have constituted a fast-growing proportion of business' values, with some estimates suggesting they account for ninety percent or more. This is a dramatic increase from only fifty years ago when such assets contributed less than twenty percent.[1] Among the intangible asset class, intellectual property (IP) makes up a significant portion. This, together with more recent changes in the patent system, has altered the risk profile of corporate transactions involving IP. With the America Invents Act (AIA) of 2011,[2] patent proceedings following issuance were established, including inter partes review (IRP) and post-grant review (PGR). As such, patent validity challenges—once a costly and lengthy process—became less burdensome.[3] AIA resulted in granted patents becoming more challengeable and thus less certain. Coinciding with the increasing proportional value of intangible assets, AIA has necessitated new IP risk and valuation methods in the context of transaction due diligence.

[1] Ocean Tomo, *Intangible Asset Market Value Study*, https://oceantomo.com/intangible-asset-market-value-study/, accessed Nov. 10, 2025.
[2] Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).
[3] Kevin J. Hickey & Christopher T. Zirpoli, *The Patent Trial and Appeal Board and Inter Partes Review*, Cong. Rsch. Serv., R48016 (2023), https://www.congress.gov/crs-product/R48016, accessed Nov. 10, 2025.

II. Quantifying Transactional Risk Post-AIA

As a third-party petition, IPR replaced inter partes reexamination (IPX), a mechanism by which a challenger could request that the United States Patent and Trademark Office (PTO) reexamine an issued patent. In 2011, about a decade after IPX's introduction in 1999, Congress found IPX to be ineffective due to length and limited ability for third-party participation,[4] eventually giving way to IPR. Unlike IPX, IPR provides a streamlined procedure for petitions.[5] Couple this with the lower evidentiary burden it requires, and you have a much higher probability of success.[6] This has resulted in a marked increase in validity challenges, and, as such, IPR has radically altered the risk profile of patent portfolios which are now subject to a higher probability of claim cancellation. This poses a significant challenge to M&A frameworks which now need to consider discounting IP valuations to account for invalidity risk.

IPR also presents a means for validity challenges that requires a lower standard of proof than that required in district court litigation. In district court litigation, "each claim of a patent shall be presumed valid… The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity."[7] In

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[4] H.R. Rep. No. 112-98, at 45–48 (2011).

[5] Alison J. Baldwin, *Inter Partes Review and Inter Partes Reexamination: More Than Just a Name Change*, McDonnell Boehnen Hulbert & Berghoff LLP, https://www.mbhb.com/intelligence/snippets/inter-partes-review-and-inter-partes-reexamination-more-than-just-a-name-change/, accessed Nov. 10, 2025.

[6] Stephan T. Schreiner, *Perspectives on the PTAB's 70% All Claims Invalidation Rate*, IPWatchdog (July 2, 2025), https://ipwatchdog.com/2025/07/02/perspectives-ptabs-70-claims-invalidation-rate/, accessed Nov. 10, 2025.

[7] 35 U.S.C. § 282(a).

Microsoft v. i4i, The Supreme Court held that "a defendant raising an invalidity defense bore 'a heavy burden of persuasion,' requiring proof of the defense by clear and convincing evidence."[8] Such factors make successful invalidity challenges far less likely than through IPR, where the "petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence."[9] When pursuing an invalidity challenge through IPR, a challenger only must prove that it is more likely that the patent claims are invalid rather than valid. AIA has thus put into place structures that introduced new sources of invalidity risk—ones which are far more likely to succeed than previously existing alternatives.

In determining the amount of risk posed by post-grant proceeding potential, due diligence becomes an increasingly arduous task. A buyer must consider the likelihood a patent will face post-grant proceeding and the merits of a challenge should such a proceeding arise. Because traditional due diligence primarily concerns past or pending infringement claims, attorneys, to better assess validity and enforcement, can include techniques likely to be employed by the Patent Trial and Appeal Board (PTAB) in IPR to develop a more complete understanding of a patent's susceptibility to post-grant invalidity. These techniques can include those which would often be seen in a PTAB trial: invalidity challenges based on prior art and claim construction, the process of interpreting claim language to determine the scope of a patent. The

[8] *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 102 (2011).
[9] 35 U.S.C. § 316(e).

incorporation of such practices into due diligence happenings gives an attorney a better grasp of a patent's ability to withstand an IPR challenge.

Further, with post-grant proceedings being accessible as ever, due diligence must necessarily include competitor analysis to determine the propensity of or the incentive for a competitor to bring about invalidity challenges. Establishing motive to file an IPR can shed light on increased invalidity risk or lack thereof. An acquiring company—especially a well-resourced one—can be seen by a competitor as an infringement litigation threat, thus prompting the competitor to file an IPR. Moreso, a competitor may pursue a post-grant proceeding following a transaction to devalue a company's newly acquired market share or to disrupt the transaction itself. Motivation to file an IPR is thus a major factor of risk in any transaction involving IP. In properly evaluating this risk, due diligence must also consider whether a competitor has a winnable IPR case, as the statutory grounds for IPR and procedural restrictions—such as the one-year 35 U.S.C. § 315(b) time bar—can make some petitions nonviable even though any party may file an IPR petition under 35 U.S.C. § 311(a).

The cumulation of an expanded due diligence process can give a buyer a greater sense of invalidity risk. However, considering this risk within a given valuation methodology presents an additional layer of complexity. One common valuation methodology is the income approach, which utilizes financial tools and cash flow modeling to estimate future income streams from a given patent.[10] While discounted cash flow models (DCFs) can incorporate certain risk profiles concentrating on litigation or infringement likelihoods, they can fail to capture the totality of risk posed by other factors, including post-grant proceeding invalidity. Through proper due diligence, invalidity probability models can be used to discount future cash flows from a DCF, achieving a far more accurate value assessment for a corporate transaction. By incorporating the risk-adjusted DCF into the patent valuation, the buyer becomes far more protected from invalidity risk in a post-AIA transaction. This mechanism can succeed in accurately valuing the risk associated with invalidity potential, but it does not solve the problem of assigning risk in the context of a transaction. Thus, additional structures are required for deals involving high-value IP.

III. Insufficiency of Traditional M&A Mechanisms

M&A contracts include representations and warranties, which, in their standard form, fail to sufficiently share invalidity risk among involved parties in a corporate transaction, especially post-AIA and with the growing proportional value of IP. Typical representations seldom cover future assurances, such as that of future patent validity, and rather focus on the accuracy of facts as they exist at the time of a transaction.[11] Representations and warranties also often involve an indemnity cap

[10] CONSOR IP Experts, *IP Valuation: The Income Approach*, https://consor.com/ip-valuation-the-income-approach, accessed Nov. 11, 2025.
[11] Jacob Orosz, *M&A Reps & Warranties: A Complete Guide*, Morgan & Westfield, https://morganandwestfield.com/knowledge/reps-and-warranties/, accessed Nov. 11, 2025.

accounting for only a minority proportion of a deal's value. These elements produce an evident imbalance between standard M&A provisions and IPR risk.

The scope of standard IP representations commonly assert ownership, non-infringement, lack of pending litigation, and sufficiency.[12] Importantly, standard warranties often exclude unqualified assurance of a patent's ability to withstand IPR challenges. This places the entirety of the invalidity risk on the buyer, who, with high proportional value of IP assets, faces potential catastrophic loss following an IP transaction. While risk-adjusted valuations economically allocate some invalidity risk to the seller, it too fails to provide a legal safety net for the buyer in case of total loss. Since the scope of standard representations and warranties is fundamentally insufficient, special provisions are required for IP transactions following AIA.

Typical indemnity caps are likewise ill-suited for the risk posed by IPR. With median indemnity caps in M&A around 10% of the deal value,[13] and intangible assets often accounting for upwards of 90% of a business's value, catastrophic loss from invalidity far exceeds the median indemnity cap. As such, standard indemnity caps are largely inadequate to cover potential patent invalidity. There is also an issue of the survival period of indemnity, which is typically intact for no longer than eighteen

[12] Nina L. Flax, *Key Representations and Warranties in Tech M&A: Critical Safeguards for Deal Success*, Mayer Brown LLP, https://www.mayerbrown.com/en/insights/publications/2025/10/key-representations-and-warranties-in-tech-m-and-a-critical-safeguards-for-deal-success, accessed Nov. 11, 2025.

[13] David P. Creekman, *Indemnification Caps and Baskets in Private Company M&A Transactions: What's Market?*, Wyrick Robbins, https://www.wyrick.com/news-insights/indemnification-caps-and-baskets-in-private-company-ma-transactions-whats-market, accessed Nov. 11, 2025.

months in standard representations and warranties.[14] However, with a much longer exposure to an IPR filing, the indemnity survival period does not provide recourse to the buyer for future invalidity. The buyer bears the full burden of the potential devaluation of the intangible asset, the exact result that both representations and warranties are designed to prevent.

Another buyer protection mechanism exists in representations and warranties insurance. Such a policy shifts transactional risk from the parties involved in the transaction to a non-involved third party. The issue of applying these terms to high-value IP transactions lies in the fact that this type of insurance typically covers breaches in deals rather than forward-looking risks such as IPR invalidity.

IV. Improved Risk-Sharing Methods

Shortcomings of standard representations and warranties have led to specialized provisions for IP-centered transactions. These reworked M&A structures are a necessary component of corporate transactions. However, these special representations and warranties can face significant resistance from sellers, undermining their efficacy. This pushback often sees sellers seeking no-recourse deals and rejecting overly broad patent warranties. In such cases, buyers may be forced to accept the full weight of the invalidity risk in a corporate transaction until improved standards for IP risk allocation become more commonplace.

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[14] Candace Groth, *Indemnification in M&A Contracts Part III: Time Period for Indemnification*, Vela Wood, https://velawood.com/indemnification-in-ma-contracts-part-iii-time-period-for-indemnification-aka-the-survival-periods/, accessed Nov. 12, 2025.

Of the viable options for specialized provisions, earn-outs already have significant adoption in general M&A practices and should be applied to IP. Such provisions stipulate contingent payments on patents surviving a challenge period. This certainly benefits the buyer by protecting their acquired IP against invalidity risk, but it also serves to allow the seller to realize the full value of the IP by avoiding risk-adjusted valuations. Buyers may also seek higher indemnity caps with longer survival periods. These provisions can be specifically tailored to the transacted IP to include patents deemed exceptionally essential to the transaction. This allocates some invalidity risk back to the seller without exposing the party to other general liabilities unrelated to crucial IP. These changes also necessitate altered escrow practices. To account for expensive earn-outs and high indemnity caps, escrows must be significantly larger than is standard. Longer term escrows are also necessary if earn-outs cover the enforceable term of the patent and if indemnity survival periods are extended.

While these practices seemingly offer a more distributed risk profile for a transaction, sellers often reject provisions that leave them exposed to invalidity risk long after a deal has concluded. Sellers often seek clean exits where, after closing, they are subject to almost zero liability.[15] This is especially common for private equity firms who enter a transaction with a fixed exit timeline—lingering risk upsets their business model. Further, with many IPR challenges filed in response to infringement

[15] Frank S. Jones, *Private Company M&A – Rep & Warranty Insurance: A "Zero-Liability" Promised Land for Sellers?*, Whiteford Taylor Preston LLP, https://www.whitefordlaw.com/news-events/private-company-ma-rep-warranty-insurance-a-zero-liability-promised-land-for-sellers, accessed Nov. 13, 2025.

litigation, sellers often represent that their IP is not currently being infringed. However, broad non-infringement warranties are difficult to negotiate due to the complexity of the due diligence necessary to determine potential infringement.[16]

V. Conclusion

While improved M&A mechanisms provide solutions to post-AIA IP-centric transactions, their efficacy remains inhibited by seller pushback. Inconsistent approaches, along with inadequate risk-adjusted valuation practices, further contribute to unequal risk sharing and deal volatility. A comprehensive solution therefore necessarily lies in the adoption of standard practices rather than deal-by-deal negotiations. If overcoming inequitable risk allocation is truly an impossible feat, specialized IP insurance proves a potential remedy. While representations and warranties insurance is commonplace in M&A, invalidity protections are often excluded. The inclusion of invalidity protections would provide a clean exit for sellers and invalidity risk aversion for buyers but not without expensive premiums. The complex risk-adjusted valuation practices, insufficient for traditional M&A, would be far more crucial for IP underwriting. By providing both a clean exit for the seller and risk protection for the buyer, specialized IP insurance is an attractive solution for post-AIA transactions but is predicated on widespread adoption among attorneys and rigorous due diligence and valuation.

[16] Flax, *supra* note 13.

Traffic Cameras and the Reclassification of Crimes to Civil Violations

By Jacob Citron*

Abstract: *In this paper, we analyze the increasing efforts by the states to crack down on speed and red-light violations via the use of traffic cameras, how the states seem to have gotten around the Confrontation Clause by reclassifying crimes to "civil violations," and the numerous issues with this approach.*

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I. Introduction

Milton Friedman, in his *Why Government Is the Problem*, notes that "If there is any function of government that all but the most extreme anarchist libertarians will agree is appropriate, it is to protect individuals in society from being coerced by other individuals." He also notes that the more laws there are to break, the harder it is to prevent them from being broken because a "larger and larger fraction of the laws fail to command the allegiance of the people." Friedman continues: "You can rigidly enforce only those laws that most people believe to be good laws, that is, laws that proscribe actions that they would avoid even in the absence of laws.[1] When laws render illegal actions that many or most people regard as moral and proper, they can be enforced only by brute force. Speed laws are an obvious example."[2]

For whatever reason, the many state governments have been cracking down on speed and red-light violations at an increasing rate—the reasons for this are not entirely relevant to our present discussion. Here, we will tackle the increasing efforts by the states to crack down on speed and red-light violations via the use of traffic cameras, how the states seem to have gotten around the Confrontation Clause, and the issues with this approach.

[1] Murder, the unjust taking of a life, would be an example.
[2] MILTON FRIEDMAN, WHY GOVERNMENT IS THE PROBLEM 2 (Hoover Institution Press 1993).

II. Background

The Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth, reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."[3]

In many states,[4] when one is pulled over by a police officer for alleged speeding, he is charged with a criminal misdemeanor. This is acceptable under the above framework. Other states, however, classify these as various types of non-criminal infractions—we will call these "civil violations"—and, by doing so, are able to navigate

[3] U.S. Const. amend. VI.

[4] As of January 24, 2025, the following states classify speeding as a misdemeanor criminal offense: Alabama (*Ala. Code* § 32-5A-8); Arizona (excessive speeding only, *Ariz. Rev. Stat. Ann.* § 28-701.02); Arkansas (*Ark. Code Ann.* §§ 27-50-302, -304); Delaware (*Del. Code Ann. tit.* 21, § 4205); Georgia (*Ga. Code Ann.* § 40-6-1); Illinois (third or subsequent offense, *730 Ill. Comp. Stat.* 5/5-4.5-65; or excessive speeding, *625 Ill. Comp. Stat.* 5/11-601.5); Iowa (*Iowa Code* § 321.482); Louisiana (*La. Stat. Ann.* § 32:57); Maryland (*Md. Code Ann., Transp.* § 27-101); Minnesota (three or more violations within a year, *Minn. Stat.* § 169.89); Mississippi (*Miss. Code Ann.* § 63-9-11); Missouri (20+ mph above limit or violating careful and prudent standard, *Mo. Rev. Stat.* §§ 304.010, .012); Montana (*Mont. Code Ann.* § 61-8-711); Nevada (*Nev. Rev. Stat.* § 484A.900); Ohio (*Ohio Rev. Code Ann.* §§ 4511.21, .99); Oklahoma (*Okla. Stat. Ann. tit.* 47, §§ 11-801, 801e); South Carolina (*S.C. Code Ann.* § 56-5-1520); South Dakota (*S.D. Codified Laws* § 32-25-1.1); Tennessee (*Tenn. Code Ann.* § 55-8-152); Texas (*Tex. Transp. Code Ann.* § 542.301); West Virginia (*W. Va. Code Ann.* § 17C-6-1); and Wyoming (*Wyo. Stat. Ann.* § 31-5-1201). Other states classify speeding differently.

around the procedural safeguards of the Constitution. It is by this exact same method that states are able to avoid the Confrontation Clause and other constitutional protections in citation cases originating from traffic cameras. Using civil violations, states and other levels of government can charge citizens without probable cause, witnesses, or due process—essentially depriving them of all of their Constitutionally protected rights regarding criminal proceedings. This practice is unacceptable. The argument that this reduces strain on criminal courts and increases legal administrative efficiency does not matter under the Sixth Amendment; the Constitution does not permit the government to violate the rights of the people in the name of 'efficiency.' This is a dangerous precedent, and it substantially undermines America's Founding principles.

Let us now examine the history of classifying crimes as civil infractions.

III. History

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, dates back to early common law. Blackstone[5] explained that "private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the

[5] Sir William Blackstone is the most cited source on the English common law, and he was profoundly influential to the American Founders. Hon. Paul Matey, "Indispensably Obligatory": Natural Law and the American Legal Tradition, 46 HARV. J.L. & PUB. POL'Y 967, 973–974 (2023) ("[A]ll the formative documents of the Framing Era were drafted by legal thinkers steeped in Blackstone's theories.").

whole community, considered as a community, in its social aggregate capacity."[6] Civil injuries occur between two men, whereas public wrongs occur between man and community. Public wrongs were divided into two categories: crimes (what we now call "felonies") and misdemeanors, the earlier denoting such offenses as are "of a deeper and more atrocious dye," and the latter denoting "smaller faults."[7]

The common law system of the colonies (and later, the United States) was not just *inspired* by the English common law, but rather, it was, in many ways, a *replication*.[8] In parts of the *Federalist Papers*, the line between civil and criminal cases is also quite clear.[9] It is also worth noting, in a 1952 piece for the South Carolina Law Review examining the consequences of classifying crimes as *either* felonies *or* misdemeanors,[10] there is no mention of what we call a "civil violation." Up until here, our understandings of the classifications of public wrongs and private, felony and misdemeanor and civil injuries had remained roughly the same, but one thing has remained notably absent: civil violations, which came to the picture in the mid-twentieth century.

In the 1960's, the American Law Institute published their *Model Penal Code*, which expressly recognized "violations" as non-crimes for which no imprisonment may be imposed.[11] This marked a crucial move away from the 'old' classification—a

[6] 4 WILLIAM BLACKSTONE, COMMENTARIES *5-6.
[7] *Id.*
[8] Commonwealth v. Knowlton, 2 Mass. 530, 535 (1807).
[9] THE FEDERALIST NO. 83 (Alexander Hamilton).
[10] George A. Thomy, Note, *Classification of Crimes as Felonies or Misdemeanors*, 5 S.C. L. REV. 59 (1952).
[11] MODEL PENAL CODE § 1.04(5) (AM. LAW INST. 1962).

change that many states later mirrored. In 1961, for example, the New York Legislature created the State Commission on Revision of the Penal Law and Criminal Code. The Commission prepared a "comprehensive revision of the *New York Penal Law* for consideration by the 1965 session of the legislature."[12] The proposed New York penal law introduced the subcategory of "violation" to encompass every offence that is not a crime—*id est*, a felony or a misdemeanor. In doing so, "the revisers have succeeded in integrating less serious offenses into the penal law without attaching all the infamy of criminality."[13] Interestingly as well, New York still attaches possible prison sentences to violations,[14] making the topic at hand of even more import to the citizens of New York. Interestingly, New York maintains a separate classification of "traffic infraction,"[15] but the case, here, remains the same; the state of New York maintains the definition of "crime" as a misdemeanor or a felony,[16] leaving the other offenses outside of the criminal classification. New York is just an example—it should by no means be understood as just the exception.[17]

Civil violations, by whatever name, are different from civil injuries in the sense that civil injuries are understood to be between man and man, whereas civil violations are between man and *government*—much in the same way as public wrongs—except with the distinction that public wrongs are between man and *community*. The

[12] Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1469 (1964).
[13] *Id.*
[14] N.Y. Penal Law § 10.00 (Lexis Advance through 2025 released Chapters 1-429).
[15] *Id.*
[16] *Id.*
[17] *See supra* note 4.

difference, essentially, though, is a practical one: in creating a new classification that involves a familiar relationship, government is able to circumvent procedural safeguards to liberty, directly contradicting America's founding principles.

IV. American Principles

In order to ensure the protection of man's inalienable natural rights and legal equality, America's Founding Fathers wrote a constitution that was "designed to allow for action in cases of grave national need, as demanded by broad consensus; gridlock in cases of serious disagreement, to protect minorities from the tyranny of majorities," favoring local control on behalf of local communities, but a national protection of individual rights.[18] The Founders not only feared "tyranny of the majority,"[19] but also tyranny in the more 'traditional' sense. One way to protect against tyranny and preserve liberty is to provide constitutional safeguards regarding criminal procedure.

Let's take the institution of trial by jury, for example. The Founders held this institution in criminal trials to be an inestimable "safeguard to liberty" and an important protection from oppressive government.[20] As a protection *from government*, this necessarily implies that cases in which the government is the plaintiff, a citizen the defendant, and the liberty and/or property of said citizen being at stake, are cases of the criminal type, not of the civil. This is made even more evident through

[18] BENJAMIN A. SHAPIRO, HOW TO DESTROY AMERICA IN THREE EASY STEPS 14 (2020).
[19] GEORGE A. PEEK, JR. ED., THE WRITINGS OF JOHN ADAMS 154 (Hackett Publ'g Co. 2003) (quoted in *id.*).
[20] HAMILTON, *supra* note 9.

Hamilton's discussion in FEDERALIST 83 regarding the decision for the Constitution to remain silent on the institution of trial by jury in civil cases. This discussion on the institution of trial by jury shows, yet again, the divide placed between criminal and civil cases.

Hamilton's continued discussion on other safeguards in criminal trials in FEDERALIST 84 only furthers this point, and, as Hamilton noted, "The observations of the judicious Blackstone … are well worthy of recital…":[21]

> To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation.[22]

The safeguards enshrined in the Constitution exist to protect liberty. Reclassifying crimes to "civil violations" to avoid these safeguards is not only unjust, but in direct opposition to the American experiment.

V. The Main Refutations, Answered

Some argue that reclassifying some offenses such as speeding reduces strain on criminal courts and increases legal administrative efficiency. As was noted above, this does not matter under the context of the Sixth Amendment. This leaves us with a more well-founded refutation: that the existence of "civil violations" addresses the infamy attached to criminal convictions.

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[21] THE FEDERALIST NO. 84 (Alexander Hamilton).

[22] 1 WILLIAM BLACKSTONE, COMMENTARIES *136. (quoted in *id.*).

The main positive of decriminalization is that, if charged with a civil violation, one does not face the same legal disadvantages as he would face if he were to be charged with a criminal offense. However, the same issue remains: under the context of the Sixth Amendment, and what was discussed earlier, this does not matter. A better way to address this issue would be to create another category under the criminal classification and emphasize that minor criminal offenses such as traffic cases are not to create legal disadvantages.

VI. Conclusion

Over the years, states have cracked down on speed and red-light violations at an increasing rate. They utilize the relatively new concept of a "civil violation" to avoid the protections enshrined by the United States Constitution, and in doing so, they unjustly place the liberty of the people in jeopardy. The issue of traffic cameras only exposes the larger issue at hand. While there may be some good that comes out of decriminalization, the same good can be accomplished in other ways that do not violate the rights of the people. If we allow government to reclassify offenses however it pleases, what is stopping it from reclassifying other offenses that place the people's liberties in even more danger? This is one of the many paths to tyranny.