

***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 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

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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).

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 cases⁵ 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

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

in equity at that time, and only those remedies. If there are to be any other equitable 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

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).

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, 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 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

⁸ *Grupo Mexicano*, 527 U.S. at 327.

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.

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 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.

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