

*From de novo Review to Informal Deference:  
An Empirical Examination of Patent Claim Construction*

**J. Jonas Anderson**

Assistant Professor of Law, American University, Washington College of Law  
janderson@wcl.american.edu | [Bio](#) | [SSRN](#)

**Peter S. Menell**

Herman Phleger Visiting Professor of Law (2011-12), Stanford Law School  
Robert L. Bridges Professor of Law and Director, Berkeley Center for Law &  
Technology, University of California at Berkeley School of Law  
pmenell@law.berkeley.edu | [Bio](#) | [SSRN](#)

Claim construction plays a central role in nearly every patent litigation. It is also critical to patent prosecution, patent licensing, and cumulative innovation by delineating the scope of patent protection and the opportunity to work around patent boundaries. Yet since the Supreme Court's 1996 *Markman* decision, the Federal Circuit has struggled to articulate a consistently reproducible methodology for construing the scope of patent claims, resulting in high reversal rates and consternation among the federal judiciary, litigants, and patent prosecutors. Using a comprehensive, granular, hand-coded database of all Federal Circuit decisions between 2000 and 2011, we examine the evolution and current status of claim construction jurisprudence. We find that immediately after the Federal Circuit's 2005 *en banc* decision in *Phillips v. AWH Corp.*, the claim construction reversal rate dropped precipitously and has remained substantially below the pre-*Phillips* levels. We explore several competing hypotheses to explain this drop and conclude that the most plausible explanation was a shift away from *de novo* review and towards a more deferential review of claim construction decisions. The paper also reports several other patterns in claim construction jurisprudence.