

The Bargain Theory of Patents

By Robin Feldman¹

It is axiomatic in patent law that the patent defines the rights that have been granted. Patents are frequently described as setting out the “metes and bounds” of the inventor’s rights, analogous to the way in which boundary lines delineate the extent of a piece of land. This image of patents infuses patent law and drives patent doctrine, as well as theoretical debates. The notion that a patent defines the rights is so deeply ingrained in patent law that it would be unthinkable to suggest anything different. That, however, is exactly what I intend to do.

This chapter suggests that the entire conceptualization of patents as establishing the boundaries of the rights granted is simply wrong. Rather than delineating a patent holder’s rights, a patent creates no more than an opportunity to bargain. It is an invitation to enter into the process of negotiating a definition of rights. One can think of this conceptualization as the Bargain Theory of Patents.

In my view, the Bargain Theory is correct both as a matter of how patents actually work in the modern world and as a matter of necessity. In other words, not only does the modern American patent system operate this way, it would be quite difficult for the system to operate in any other way.² Among other reasons, patents cannot possibly

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² In this, I will echo the approach taken by Edmund Kitch in presenting his prospect theory, although I will disagree with just about everything else related to prospect

delineate the boundary of an inventor's rights because those rights will be established in relation to products that have yet to be created at the time of the patent grant. One cannot create definitive measurements at a time when the tools of measurement do not yet exist.³

With ordinary property, we may wrangle over the value of it, and we may wrangle over rights in relation to it. Nevertheless, we do have some sense of what the "it" is. With patents, the contours are established individually, each time, for each patent. Moreover, they are established in the face of rapidly changing knowledge and meaning. Words, which by nature are subject to great swings of interpretation, are chosen to describe an invention that by definition did not exist before and that will be compared against things that may not exist when the words are chosen. Taken together, this set of circumstances ensures that a patent could never grant a definitive and clearly bounded set of rights. Rather, a patent grants some form of an opportunity - a seat at the bargaining table with certain rules in place. The contours of what the patent holder ultimately receives will be determined by factors including the nature of those against whom the bargaining proceeds and the serendipitous element of what products emerge during the term of the patent.

Thus, from a theoretical perspective, it is unlikely that patents could define the

theory. See Edmund Kitch, *The Nature & Function of the Patent System*, 20 J. OF LAW ECON. 265, 267 (1977) (arguing that all patent systems will have some prospect elements, the rules of a patent system can be adjusted to highlight the prospect system, and the prospect system is a significant function of how the American system has operated in fact).

³ See text accompanying notes x-y, *infra* (noting that although courts profess to define the reach of the claims first, without considering the supposedly infringing product, human nature suggests that courts will be unable to operate with such blinders on and that, in fact, they do not).

extent of the rights granted. From a practical perspective as well, the modern American patent system does not operate as if the patent defines the rights. For example, those who draft patents try to place a series of tools within the language that they can choose among, long after the patent has been issued. At the time of application, and even when the patent issues, there is no way to know what technologies will develop, what markets will develop, and how a particular patent will be useful. In addition, patent language is malleable, particularly in the face of evolving technology. There is no way to know how a patent will be interpreted by the courts. Patent holders must have a library of possible terms that they can choose among as markets, licensing negotiations, and court cases advance.

In addition, the practical footprint of a patent holder's rights generally develops during licensing interactions, and these involve much more than simply presenting one's patent and pointing to the language of the claim. The reach of a particular patent's language may depend on factors related to the size of the company, its position relative to others with whom it must negotiate, and the company's other assets. For example, the ideal way to assert one's patent is against someone who holds no counter weapons. If you make telephones but also hold a patent on coffee machines, you can approach coffee manufacturers without worrying about what patents they will throw back at you. The same is true if you have a small amount of revenue. Low revenue can make you a less appealing target for a patent counter charge, given that infringement damages would be minimal.

Interactions like these are anticipated and planned for from the first moment of a patent application. Consider Astro Zenica, the company that developed Prilosec and its

second-generation version, Nexxium. In drafting a patent, there is always a tension between choosing broad claims that will reach farther and narrower claims that can be more easily defended. The claims in the Nexxium patent are drawn quite narrowly. Why would the company do this? Because the company already has a market presence, and it can use that power in combination with narrower claims to obtain its objectives. In other words, it is the combination of assets that will create the reach of the Nexxium patent, something that the inventors are aware of from the beginning. This is not a story of property rights; it is a story of bargaining.

Patent holders can also use contracts to try to construe claims in different fashions. Contract drafters can choose to draft a license that either 1) permits a particular set of uses or 2) grants rights to anything under the patent. If you choose to license for particular uses, you are in essence, contractually construing the claims. To offer an analogy from copyright, think about some of the outrage over the Google books deal. Part of the concern is that the contract, once in place, establishes rules that will govern the market interaction and may prove difficult to dislodge, regardless of what alternative legal interpretations might have been available.

All of this must be understood in the context that the extent of the claims cannot truly be known until the last day that the patent expires. Only then are we likely to know how the various broader and narrower claims stood up when tested and how the market that might provide licensing targets developed.

One could argue that the image of the patent system presented in this chapter reflects nothing more than flaws in the system. Perhaps the bargaining flows from our legal system's inability to develop clear rules, particularly those related to interpretation

of patent claims. Perhaps there are structural elements in our review system that are less than optimal⁴ or there are flaws in the way we grant and prosecute patents.

All of these concerns may be accurate, and they would certainly affect the level of bargaining. In fact, if Bargain Theory is correct, we may want to reign in those elements that fail to cabin the bargaining in an optimal fashion. Nevertheless, the fundamental nature of the patent system is such that no matter how brilliantly we design and apply the rules, the patent cannot definitively identify the rights granted. There simply is not enough information at the time of the patent grant.

Bargain Theory has the potential to alter more than just our theoretic conception of the patent system. If the nature of the patent system is substantially different from that which was previously assumed, one should consider whether that difference is a good thing and how government can structure its response to these new perspectives. Imagine that the government is selling property but the boundaries are not set from the start. We cannot walk the property or know what we are handing over. Under those circumstances, we have a greater responsibility and a much more difficult task than if we are simply transferring a piece of land. When the game is far more complicated, it places a greater burden on the system to ensure that the game operates fairly and efficiently.

This is not to suggest that patents are entirely unbounded or that the grant of a patent sets off a complete free-for-all. There must be some structure, and that structure exists in relation to the invention. Words may be flexible, but they are not infinitely

⁴ See ROBIN FELDMAN, *THE ROLE OF SCIENCE IN LAW*, 187-193 (Oxford 2009) (arguing that problems at the Federal Circuit are structurally predictable).

malleable, at least not in a system that applies some semblance of consistency in its rules of interpretation.

Properly construed, patent rules do and should set boundaries to restrain the reach of an individual patent holder and to identify the level of contribution an inventor must make before acquiring any rights at all. Disclosure rules in their proper application should prevent an inventor from giving us the alphabet and assuring us that we can compose Shakespeare.⁵ Nor should we allow an inventor to stretch his or her grasp to things that are only somewhat similar to the invention. As one scientist wonderfully explained, you should not allow an inventor say, “Sure, I gave you the Constitution. I just had a few words mixed around, but I got essentially what America is about.”⁶

No patent is infinitely expandable. Nevertheless, the range of possible rights that could result from any individual patent is quite broad, and the players in the patent world seem to operate with an innate understanding of that. Although no one has yet articulated it as such, the organic beast that is the patent world operates with an instinctive understanding of the game.

The fact that the patent world operates with this innate understanding should provide some comfort and reassurance to those concerned about the reliance interests that might be inherent in a system in which the articulated message presupposes that the patent defines the rights granted. Although Bargain theory clashes strongly with the

⁵ See Robin Feldman, *The Inventor's Contribution*, 2005 UCLA J. LAW & TECH 6 (using the Shakespeare analogy to describe improper disclosure caused by insufficient narrowing).

⁶ I am indebted to Dr. Garry Nolan, Stanford University Department of Microbiology & Immunology for this wonderful imagery.

accepted scholarly narrative, it corresponds closely to a vision that would ring true to those in the patent world.

The Image of Patents

“It is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled. . . . Because the patentee is required to define precisely what the invention is, the [Supreme] Court explained it is unjust to the public, as well as an invasion of law, to construe it in a manner different from the plain import of its terms.”⁷

These words, uttered en banc by the Federal Circuit in 2005, would not seem the least bit surprising to anyone versed in patent law and commentary. It is almost a throwaway line, a way of starting at basic principles with which we can at least all agree. The implication is not just that the words of the patent provide some form of limitation in a boundless universe of possibilities but rather that the patent is definitive, and that the boundaries are specific and definite. The court’s job is to figure out precisely what was granted.

Patent commentary is rich with imagery analogizing a patent to a piece of land. In fact, the imagery is so commonplace that examples are almost endless. The claims are commonly described as setting the metes and bounds of the invention, similar to the way that property lines delineate a piece of land. For example, the seminal article on patent scope describes the claims portion of the patent in the following manner: “Analogous to the metes and bounds of a real property deed, they distinguish the inventor’s intellectual

⁷ Philipps v. AWH Corp, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (citing *White v. Dunbar*, 119 U.S. 47, 52 (1886)) (internal quotations marks omitted); *see also* *Afro Mfg. Co. v. V. Convertible Top Replacement Co.*, 365 U.S. 336, 339 (1961) (the claims made in the patent are the sole measure of the grant); *McCarty v. Lehigh Valley R.R. Co.*, 160 U.S. 110, 116 (1895) (if we once begin to include elements not mentioned in the claim in order to limit such claim we should never know where to stop).

property from the surrounding terrain.”⁸ Similarly, a basic background text on patent law sketches out the analogy in great detail, including drawings of land boundaries to help explain how patent law works.⁹

As a side note, the analogy to land that I am discussing here is distinct from other comparisons made between patent law and property law. For example, many authorities describe patents as a form of property, which would make them subject to property rules rather than liability rules.¹⁰ Modern debates in this arena relate to how absolute the patent holder’s right to exclude should be and whether compulsory licensing might be appropriate. For my purposes here, I am describing the legal imagery that imagines patents as having formal and definitive boundaries, analogous to property lines for a piece of land.

Modern scholarship is awash with complaints about our inability to know how a patent will be interpreted and whether a patent or a particular claim will be upheld. Our struggles generally are attributed to weaknesses in the current state of the doctrines, such as insufficient or excessive powers of review, inadequate approaches to disclosure, or insufficient interpretation rules. The Patent and Trademark Office receives its own

⁸ Robert P. Merges & Richard R. Nelson, *On The Complex Economies of Patent Scope*, 90 COLUM. L. REV. 839, 844 (1990).

⁹ See Charles E. Lipsey & Amy L. Tsui Collins, *Patent Infringement in the Field of Biotechnology*, in UNDERSTANDING BIOTECHNOLOGY LAW: PROTECTION, LICENSING, AND INTELLECTUAL PROPERTY POLICIES 240-242 (Gale R. Peterson ed., 1993).

¹⁰ See, e.g., 35 U.S.C. §261 (2000) (describing patents as property); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999); *Cammeyer v. Newton*, 94 U.S. 225, 226 (1876); *Seymour v. Osborne*, 78 U.S. 516, 533 (1871); *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 599 (Fed. Cir. 1985); *Blum v. Comm’r*, 183 F.2d 281, 287 (3rd Cir. 1950); *Heywood-Wakefield Co. v. Small*, 96 F.2d 496, 500 (1st Cir. 1938).

generous share of the criticism. It is either portrayed as incompetent at screening out improper claims or, more sympathetically, as simply understaffed.

Bargain Theory suggests that such problems do not merely reflect flaws in the system, they are the system. We can certainly exacerbate the effects of how the system works in the rules that we choose. Nevertheless, by necessity, a patent does not grant a definitive set of rights but rather an invitation to bargain over the definition of those rights.

II.

Theoretic Analysis: The Nature of Patents

As described above, common wisdom holds that a patent grants a bounded set of rights. Given the nature of patents, however, it is simply not possible for a patent grant to create anything more than a starting place. The result flows from a confluence of three problems that can be described in terms of the lack of a shared conception, the limitations of language, and the effects of time. All of these problems can be traced to the paradox of newness. By definition, patents should be granted only on those things that have never existed before. A device or a method must be novel, and even those inventions consisting of a combination of existing elements must be able to demonstrate that the combination is new and nonobvious.

Stated briefly, with the creation of new things, the relevant society lacks a shared understanding of what those things are and how they might be differentiated from other things. This uncertainty is exacerbated by the limitations of language, particularly language that is being used to describe things that did not exist when the language

developed and that also will be used as a measure against future inventions that do not exist at the moment that even the limited language is chosen.

Finally, although the patenting process begins with an invention, the full dimensions of that invention will not be understood until later developments in the relevant arts. Those developments are likely to occur long after the patent has been granted. The following sections describe each of these three problems in detail.

A. The Lack of a Shared Conception

There is an extensive philosophical literature devoted to the problem of trying to define the world around us. As human beings, we struggle with attempts to identify and create categories for the content of our experiences, whether those experiences involve a concrete item like a rock or an abstract concept like the truth. In trying to understand what “gold” is, for example, a philosopher might try to assign a categorization based on what could be discovered about its natural properties. From that perspective, “gold” would be a yellow metal, for example, but not a deity.

Within these attempts at understanding the world around us, we must have certain concepts to which we are committed. Do we believe that water exists? Do we believe that G-d exists? Without a shared commitment to the existence of at least some concepts, members of a society are unlikely to be able to engage in much of a meaningful dialogue or to analyze those things around them in any useful fashion.

This does not mean that our commitment to the existence of something and our shared concept of that thing can answer all questions about its identity or about the many implications that flow from its identity. Nevertheless, theoretical discussions about those things to which we are committed will be quite different from discussions related to

things that are new or even things that have yet to be discovered. To put it simply, a discussion about the implications of medium-sized dry goods will be quite different from a discussion about the implications of neutrinos, something for which we have seen no evidence other than in mathematical equations. Patents are likely to fall between the two. Reduction to practice in the patent application provides some evidence to work with beyond mathematical equations. Nevertheless, patented inventions fall closer to the neutrino end of the spectrum. Their newness deprives us of the opportunity to have developed a shared conception to which we are committed as a society. That definitional commitment can only develop over time as the contours of the boundaries are fully explored

Compare the grant of a patent to the grant of a license for hunting bears. As a society, we may not have an exhaustive and exclusive definition of the features that define a bear. Nevertheless, we have some conception of the notion of a bear, to which we are committed. Our attempts to define bears for the purposes of the license grant will be fundamentally different from an attempt to define for example, dark matter, something that may or may exist but about which we have some clues. We may argue about the definition of bears at the margin, and those arguments may even lead to a redefinition of the nature of a bear. Nevertheless, we have some commitment to the core concept of what a bear is. That level of commitment to a core concept is unlikely to be true for cases in which we are attempting to define what is new and unfamiliar to us.

Of course, with patents, the shared conception need not exist for society at large. Patents are designed to speak to those skilled in the relevant art, and it is persons of ordinary skill in the art who would need to have the shared concept. Nevertheless, for an

invention to be patentable, it must nonobvious to this all-important group. Thus, even looking from the perspective of narrow and dedicated experts, a patent must teach something that is unfamiliar and for which new constructs and understandings will develop across time.

The same is true for a comparison of patent rights to rights in relation to land. With land, new types of rights may emerge – water rights, air rights, subsistence rights – and these rights again have the potential to redefine the nature of property. Once those rights emerge, however, the contours are identified for a class of rights. With patents, the contours of each individual patent must be determined anew, because there must be something new in each patent.

With real property, at least we have some shared concept of the core of what a piece of land is. We may argue about rights in relation to it. Society, nevertheless, begins with some concept of what “it” is. The circumstances are necessarily different when we engage in creating a definition of what is new.

B The Limitations of Language

The lack of a shared conception is exacerbated by problems related to language. Such is “the paradox of truth enshrined in language.”¹¹ Even if there is an essential truth to any invention, a shared conception upon which we could all agree, that conception must be represented by words in the patent. The nature of language is such that once the truth is enshrined in it, the words chosen are subject to twisting and turning in a myriad of directions.

Indefiniteness of language is not a problem unique to patent law. The

¹¹ TAMAR YELLIN, *THE GENIZAH AT THE HOUSE OF SHEPHER* 211 (St. Martin’s Press 2005).

frustrations of interpreting language are shared by those engaged in the fields of contract law, legislation, and by any lawyer or scholar who has ever tried to glean precedent from any case. Nevertheless, in the realm of patent law, the indefiniteness of language presents particular challenges. As one scholarly article explains:

Even after claim construction, the meaning of the claims remains uncertain, not only because of the very real prospect of reversal on appeal but because lawyers immediately begin fighting about the meaning of the words used to construe the words of the claims.¹²

First, the entire concept of patenting revolves around the idea of granting rights for introducing something that has not existed before and is not obvious based on those things that do exist. Thus, in describing an invention in a patent, one must often use existing language to describe something that by definition has never existed. Whatever language society has chosen to represent those things that exist around us must be pressed into the service of describing something that did not exist when the language and its concepts developed.

It is, of course, possible that language concepts exist when the invention does not. The human mind can conceive of and describe many concepts long before those concepts can be translated into reality. In those circumstances, the language constructs may be in place already and the inventor can turn to them.

In addition, many inventions flow from combining existing elements in a new way to achieve a new result or from translating concepts from one arena to another. In that case, inventors may be able to draw on language libraries developed in other

¹² Dan L. Burk and Mark A. Lemley, *Fence Posts or Sign Posts? Rethinking patent Claim Construction 2* (forthcoming, PENN. L. REV.) (suggesting that claim construction may be inherently indeterminate and advocating a return to the pre-1870 central claiming system).

contexts. For example, society understood the concept of flight in birds long before the Wright brothers invented flying machines. The Wright brothers would have had a wealth of words related to flight to draw upon in describing their invention.

Nevertheless, no matter how creative the human mind and its linguistic developments may be in the abstract, the translation of that abstract into a particular successful practice can easily wander into new and unexpected territory. The new territory can create linguistic challenges, even for those inventions that rely heavily on concepts for which language exists.

In addition, in understanding the challenges of linguistic uncertainty for patent law, one must think not only of the invention that is patented but also of other products and inventions that will be created in the future. When a court engages in an infringement analysis, the process involves comparing an accused product to the words of the patent grant as those words have been interpreted. Thus, even if we have linguistic devices for describing the patented invention, we may be using that language as the basis for a comparison of the invention to something that did not exist at the time the language developed. Once again, the patent system is relying on language to serve as the basis for understanding something that did not exist when the language developed. This additional challenge makes the indefiniteness of language much more problematic in patent law than in contract law, for example.

C. The Weakness of Fixation in Time

The grant of a patent is a one-time event. It occurs at a single, fixed moment in time with the sealing of a document that is presumed to contain the description of the invention and the rights granted. At that moment, however, none of the parties has the

information that would be necessary to know the contours of those rights. In fact, that information is unknowable at the time of the patent grant. The full dimensions of the invention will not be understood until later developments unfold. It is impossible to definitively identify the boundaries of the rights granted at the time of the grant.

Perhaps the simplest way to think of this is the following. Meaning is contextual. One cannot develop a complete understanding of the meaning of something without the full context of all those things that might or might not be included in the meaning.

If, at the time of the patent grant, one could anticipate everything that would be developed during the twenty-year term of the patent, one might have some hope of creating a definition of the invention and identifying the boundaries of that definition. No one, however, will have all of that information until the end of the twenty years. The boundaries of the invention, its definition, will be developed as the new products emerge that will give us the opportunity to shape the definition. These will give us the opportunity to ask, “Is the invention A or is it B?” The nature of the questions, and the resulting definition that emerges, to some extent, will be determined by the serendipity of the products that emerge. Certain developments will lead us to flesh out a particular contour of the definition that otherwise would remain unexplored. It does not matter whether we say the reference point for the definition is the words we have chosen for claims or the nature of the invention itself. At the moment of the patent grant, insufficient information exists to understand the shape of the rights.

Given the extent of the those things that cannot be known, patent holders in combination with future inventors and the courts will develop a definition of the invention across the patent term. This process creates the bargaining of the patent

system, as patent holders and others vie with each other in the development of the definition of the rights.

This problem is distinct from valuation challenges that affect all types of property. At any fixed moment in time, those who hold rights in any type of property cannot necessarily predict what its ultimate valuation will be. An unprepossessing scrap of land may turn out to be the key tract for the development of a shopping mall, making its value much greater than anyone would have predicted. For any asset with a limited life span, the valuation of that asset cannot be calculated with complete precision until the end of its lifetime. This can certainly leave plenty of room for market actors to negotiate over the use of that property and its valuation. Such valuation variations, however, are distinct from the type of bargaining contemplated in Bargain Theory. With the tract of land described above, we may argue over the value of the property, but we have some sense of where one tract of land stops and the neighboring tract begins. With patent rights, it is the definition of land itself that is at issue every time in every case.

For example, consider the invention of a device for biodegradable grocery bags. The patent may contain several claims, including one claim that lists the use of any organic wood residue, and one claim that lists a particular type of wood as a best mode.

Over time, however, it may become clear that certain wood residues will not work without the type of alteration or adaptation that would be considered “undue experimentation.” Thus, the broader claims are less likely to survive a challenge. At the simplest level, the definition of the patent rights is narrower than it appeared at the time of the grant. At a more complex level, the parties will factor that weakness into their navigation of the boundaries of the invention. From either perspective, one’s

understanding of the invention and its limitations developed only across time as further work in the field and in the application of the invention unfolded.

Valuation variations may contribute to the bargaining within patent law. When valuable commercial applications emerge for a particular invention, actors in the drama are more likely to explore the boundaries of that invention, and to explore them in ways that might not have been contemplated at the time of the patent grant. Thus, uncertainty of value does play a role in the patent process. Nevertheless, uncertainty in the definition of the patent boundaries, not uncertainty in the value of the patent creates the unique circumstance in which the contours of the rights themselves are the subject of bargaining.

All legal issues are to some extent unknowable. Courts would have very little to do if the full contours of legal rights were clear from the outset of all interactions. Nevertheless, the types of uncertainties that plague other areas of law operate in addition to those that plague the patent system alone.

With contracts, for example, the parties are presumed to have reached a meeting of the minds. This cannot possibly be true in the case of patents. At the time of the patent grant, the relevant parties could not have known what the minds would have to meet about. Among other things, they could not have known what products would be developed against which the patent would be read.

Of course, parties to a contract will often encounter issues they did not anticipate at the time of contract formation. The inability to predict and resolve all future issues is a challenge that contracts and patents share. Nevertheless, the unexpected in contract law is simply that – unexpected. The norm for most contracts is that they represent an understanding and resolution of the issues that are likely to arise. In contrast, the

unexpected and the unknown are the essence of the patent system.

At this point, I suspect that some patent mavens will object. In determining the meaning of words in the patent, courts are supposed to think only of the invention and not of the product that might be infringing. In other words, before a court gets to the part of the case that asks whether a product is infringing, the court is supposed to decide what the patent terms mean and decide it without considering the accused product.

Although such is the procedure in theory, it is a little like asking the court not to think about the elephant in the room. One might imagine that the mental compartmentalization would be difficult for most ordinary mortals, and there are plenty of cases to suggest that courts are unable to manage it. Even if courts were able to accomplish this super-human task, the contours of the accused product would still play a significant role in defining the boundaries of the patent grant. On the most basic level, that product and its characteristics will frame the questions that are asked about the words of the patent in the first place. In addition, regardless of the construction chosen, the words of the claim will eventually be compared to the accused product to determine infringement, and that comparison will determine the boundaries of the rights. Those boundaries are impossible to anticipate without full knowledge of what products will develop to which the patent must be compared.

However one chooses to describe and distinguish the invention, that description will be compared repeatedly to products and inventions that did not exist at the time of the patent grant. It is this question and answer process that will ultimately result in a bounded set of rights. The bounded set of rights, however, cannot be known until the end of the patent term, when all potential products have appeared and all questions have been

asked. Although one can try to predict what type of questions might arise in a comparison to unknown future developments, it is no more than a prediction.

One could certainly compare patents to any form of legal precedent, whether that precedent is a case, a piece of legislation, or a constitutional provision. Law constantly evolves, and no legal framework can ever hope to definitively resolve the issues that will emerge. As I have written in the past, doctrinal structures are not enduring in law.¹³ Those wishing to escape the confines of any doctrinal structure will seek out the interstices, the open spaces within whatever has been decided, rendering that structure insufficient for resolving the question.¹⁴ Our all too human nature, combined with the relentless march of social and technological changes in society, ensures that precedent constantly must be applied to that which did not exist or was un contemplated at the time of the precedent.

This is not to suggest that all legal rights – legislative, constitutional, or otherwise – are merely an invitation to step up to the bargaining table. The challenges of judicial interpretation may be similar for patent law and constitutional law, for example, but the context in which those rights play out are quite different. Patent rights are designed for commercial exploitation, and the realization of those rights involves a process of extensive commercial interaction, as patent holders use their right to exclude to navigate economic opportunities. Regardless of whether a patent holder chooses to manufacture products that embody the invention, license someone else to manufacture them, block the creation of products, or engage in a combination of these activities, patent holders will

¹³ For a more expansive exploration of the view of law described in this paragraph, see FELDMAN, *supra* note 4, Chapter V, *The Nature of Law*, at 79-95.

¹⁴ See FELDMAN, *supra* note 4, at 3.

use their right to exclude to ensure economic returns from the choices made.

Other legal rights are not necessarily subject to this form of economic realization, although it is certainly possible that some commercial rights may operate in a similar fashion. If voting rights, for example, could be sold, traded, or otherwise commodified, the process of developing their boundaries might look quite different from what we are accustomed to seeing in this realm and perhaps more like that of patents.

Other factors also contribute to the operation of patent rights as a system of bargaining. Innovation occurs swiftly, creating a rapid-fire succession of unexplored questions. Moreover, patent rights last only 20 years, which encourages patent holders, or those who hold competing patent rights, to identify and move quickly on questions related to the boundaries of those rights. After all, one has only a limited period of time to capitalize on any potential returns from patent rights. As a result, the hyper-intense and accelerated time frame of patent rights makes them much more susceptible to the type of strategic behavior that creates a bargaining system for the contours of the rights.

In short, the current conceptualization of patents as defining the extent of the rights granted necessarily fails, from a theoretical perspective. Regardless of how brilliantly we craft legal doctrines or how scrupulously we apply them, the definition of an invention cannot be captured in a single, freeze-frame moment at the start of the patent term. The problems of newness ensure the impossibility of such an endeavor. The definition, by necessity will develop across time as information forms, new products emerge, and the relevant parties circle each other in an attempt to find the most advantageous position. Such is the nature of patents, and it can be fully captured only with a Bargain Theory.