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A Politics of Patent Law

Crafting the Participatory Patent Bargain

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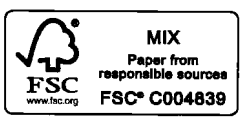

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Preface

This book arose out a footnote in my first article, in which I promised (threatened?) to figure out exactly why the public-notice function played an important role in patent law. It has been a long project since that initial footnotes; many thanks are in order.

I first want to thank my colleagues at the Marquette University Law School. I would like to thank Dean Joseph Kearney for his ongoing support for this project. Colleagues such as Andrea Schneider, Vada Lindsay, Phoebe Williams, Irene Calboli, Gregory O'Meara, Edward Fallone, Paul Secunda, Associate Dean of Research Michael O'Hear, Alison Julien and Megan O'Brien have been a source of support throughout this project. Nadelle Grossman, Bruce Boyden, and Sharon Hill have provided patient support in many forms; thanks for their patience through many, many manuscripts. I want to thank my research assistants, Ashanti Cook, Andrew Spillane, Elizabeth Brown, Benjamin Chesney and Mitchell Stock for their hard work on this project. A special thanks is reserved for Sarah McNutt, whose meticulousness on this project was welcome. Finally, I would be remiss if I did not emphasize that Elana Olson has been a real partner in the very difficult research associated with this project.

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Lucy Murray Franklin. My sister, Alana D. Murray, a wonderful scholar in her own right, has been with me in every single way for their entirety of this project. A final thanks to Ernest Tolly Igoni, Jr., and Zeike, who made all the difference.

Contents

Introduction

The Introduction proceeds to outline the course of the book, with a particular emphasis on the usefulness of recognizing the participatory bargain as central to the re-legitimation of the national, regional and domestic patent regime.

It is increasingly understood in patent law that a politics of patent law is necessary and it is increasingly understood that a broad public can participate in that politics. The premise of this book differs though in its descriptive and normative claims that patent law already reflects a politics that is constructed within the "participatory patent bargain." This participatory patent bargain is based in the assumption that patent law's purpose is not simply to protect the property rights of an owner but rather to provide access to informational resources that are necessary to create an informed set of publics. These publics are imagined and embodied in the central doctrines of patent law. The participatory patent bargain, thus, is grounded in the core normative values of the patent regime. More work needs to be done to recognize these values as relevant to the doctrinal structure and institutional design of patent law.

1 Troubled publics in patent law

Any Introduction rehearses the core set of claims that the text will be preoccupied with in its entirety; the central preoccupation of this text will be how patent law can be reconciled to its troubled publics. My reference to troubled publics is deliberate as it both conveys that multiple publics are interested in patent law and it further suggests that these publics are disturbed—perhaps, for different reasons—by the doctrinal and institutional commitments of patent law. My reference to patent law is equally deliberate. Unlike others who have grappled with this emergence of these troubled publics (and their consequent politics), I contend that patent law itself contains a rich vocabulary for the reconciliation of these troubled publics to its aims and goals.

To describe the current landscape of patent law is to describe an institutional and political landscape constituted of many publics. Esther van

Zimmeren and I have proposed elsewhere[1] that we should understand patent governance in its national, domestic and international elements[2] to be a dynamic undertaking insofar as the creation of patent law is fluid—even, unstable—because the range of actors now involved is broader than is typically understood. Patent publics are quite diverse. They are a powerful epistemic community, composed of corporations, universities, lawyers, and judges that continue to play a dominant role in the current patent system. Patent law, however, has come to include a "patent civil society" that broadly defined consists of what John Clark has termed "policy-influencing civil society organizations," such as development and human rights NGOs, environmental and other pressure groups, trade unions, consumer organizations, faith-based and inter-faith groups, and certain professor organizations.[3]

This patent civil society has played a key role in an emerging politics of patent law. While this insight by itself is not a unique one, Esther and I further identify two key consequences of these multiple publics. First, a politics reflects that continual conflict will exist between the "patent civil society" and the "epistemic" patent community over the conceptual commitments associated with patent law.[4] Whether or not one regards this as a positive outcome, this conflict is likely to undermine the stability of the overall system of patent law. This competitive instability is amplified by the emergence of fissures within the epistemic community itself. Nominal members may ally themselves with the patent civil society on any given set of issues (take for instance, IBM's ongoing relationship with the community peer review system within the United States), or even adopt the critical stance of the patent civil society in conflicts with other members of the epistemic community.

Second, this competitive instability is complicated even further since the patent civil society, and to a lesser extent, the epistemic community, is demonstrably impatient with the conceptual map of the modern patent regime. This conceptual map, as identified by Thomas Meshbesher, has been built around two basic underlying concerns: an attempt to "stimulat[e] competition in innovation" by permitting a limited monopoly in otherwise available information, coupled with a "partially reconcilable" attempt to "encourage innovation" by promoting a property claim on the part of an individual patent owner.[5] While the patent civil society might find that first underlying conceptual claim minimally satisfying (insofar as it suggests the

1 *See* Kali Murray and Ester van Zimmeren, "Dynamic Patent Governance in Europe and The United States: The Myriad Example," 19 Cardozo J. Int'l & Comp. L. 287, 308–313 (2011).

2 *Id.* at 313.

3 *Id.* at 308.

4 *Id.*

5 Thomas Meshbesher, "The Role of History in Comparative Patent Law," 78 J. Pat. & Trademark Off. Soc'y 594, 613 (1996).

impaired competition imposed by a patent in the first place), the "conceptual map" of the modern era of patent law has supported the construction of a legal regime—despite intermittent challenges by developing nations in the late 1960s—[6]that has focused on protecting the individual property rights of a patent owner as its primary institutional and ideological strategy. Giles Rich, a noted patent jurist in the United States and one of the primary authors of the Patent Act of 1952,[7] best articulated this core conception of patent law, suggesting that "[p]rogress is most effectively promoted by protecting those who enrich the art as well as those who improve it."[8]

This expression of conceptual commitment to the centrality of ownership as the predominant norm in intellectual property received, perhaps, its fullest expression in the preamble of TRIPS, which holds as one of its primary claims, that intellectual property rights are private rights.[9] The institutions of the modern patent era reflect this norm of innovation through individualized ownership. For instance, the World Intellectual Property Organization ("WIPO") has played an important role, in its administration of the Patent Cooperation Treaty ("PCT"), a treaty that facilitates the acquisition of a patent in multiple countries. The PCT should be seen as an equally important accomplishment of the modern public international intellectual property law system in reinforcing the idea that the primary aim of the modern intellectual property system is focused on acquisition and ownership of the patent.

While the epistemic community's relationship has soured in large part because of the perceived functional failures of patent institutions, the patent civil society has moved towards a far more radical re-evaluation of the conceptual map. Indeed, it can be said that a remarkable achievement of the patent civil society in the last ten years is that the primary normative conception of the intellectual property regime, including patent law, has been "re-framed"

6 *See generally* Peter K. Yu, "A Tale of Two Development Agendas," 34 Ohio N.U. L. Rev. 465 (2009) (analyzing the initial development agenda of developing nations within the context of the Stockholm Protocol, the development of WIPO as a potential institutional counterpoint to the World Trade Organization, and other international institutional frameworks).

7 Patent Act of 1952, ch. 950, 66 Stat. 792 (1952) (codified as amended at 35 U.S.C. § 1).

8 *Id.* Giles Rich, "Principles of Patentability," 42 J. Pat. & Trademark Off. Soc'y 75, 85 (1960). This conceptual map was by no means the dominant norm of the intellectual property system, from the 1890s until 1940s, as reflected in key provisions of the Berne and Paris Conventions, related to issues such as working requirements. *See, e.g.*, Royal E. Montgomery, "The International Aspects of Patent Legislation," 31 J. Pol. Econ. 90, 93 (1923) ("Perhaps the working clause—a requirement that the monopoly grant be worked within a specified numbers of years—is of first importance.").

9 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Preamble, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips_02_e.htm [hereinafter TRIPS].

(to use a term originally introduced by Amy Kapczynski[10]) in the predominant norms that underlie the ideological and institutional culture of patent law.

This re-framing of intellectual property norms has come from the mobilization of the patent civil society (among others) against the perceived excesses of the current patent regime. This reframing is told through a series of stark morality tales. A victim of HIV-AIDS in South Africa cannot receive medical treatment because that treatment is the subject of multiple patents.[11] A farmer in India cannot plant a seed because of the ownership of the patent by large multinational corporations.[12] A breast cancer victim in the United States cannot gain access to relevant diagnostic testing for her illness.[13] These stark morality tales provided activists with what Kapczynski has termed a "rhetoric of resistance" that consisted of negative characterizations of the intellectual property regime ("monopoly", "privilege", "anticompetitive", "piracy of the commons") as well as positive characterizations of their proposed normative values ("access", "freedom", "sharing", "innovation" and "new business models").[14] This re-framing sought to expose the equitable costs and benefits attendant on the modern intellectual property movement.

The patent civil society has sought to advance its "re-framing" agenda in both tactical and conceptual ways. The patent civil society has engaged in tactical strategies to enact their "re-framing" agenda. The patent civil society has engaged in tactical "regime-shifting" that brings their claims before administrative bodies, at the national, regional, and international levels, that are perceived to be more responsive to their needs.[15] The patent civil society

10 Amy Kapczynski, "The Access to Knowledge Mobilization and the New Politics of Intellectual Property," 117 Yale L.J. 804, 809 (2008) (where the author discusses how the framing theory explains the "recent flux in IP law [that] has been filtered and organized by conceptual frames in a way that is non-trivial.").

11 *See* The Honorable Dr. Aaron Motsaledi, Address at the Kaiser/CSIS Forum with South African Forum with South African Minister of Health (March 29, 2011) (discussing the HIV crisis within the country of South Africa).

12 Vandana Shiva, "Food Rights, Free Trade and Fascism," contained in *Globalizing Rights: Oxford Amnesty International* (Matthew Gibney, ed. 2003). *See* The Honorable Dr. Aaron Motsaledi, Address at the Kaiser/CSIS Forum with South African Forum with South African Minister of Health (March 29, 2011) (discussing the HIV crisis within the country of South Africa).

13 Press Release, ACLU Challenges Patents On Breast Cancer Genes: BRCA (May 9, 2009), *available at* http://www.aclu.org/free-speech-womens-rights/aclu-challenges-patents-breast-cancer-genes–0.

14 *See* Kapczynski, *supra* fn 10.

15 *See, e.g.*, Lawrence Helfer, "Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Law-Making," 29 Yale J. Int'l L. 1, 5 (2004) (contending that the movement of the expansion of intellectual property governance into different disciplinary regimes is the result of deliberate "regime-shifting" on the state and non-state actor dissatisfied with the narrow interpretative framework of TRIPS).

has engaged in activist tactics such as media campaigns, and public interest organizational tactics, like the solicitation of amicus briefs that have sought to refashion the contours of patent law.[16]

Alternatively—although not often in tandem, but reflecting the concerns of the broader patent civil society—scholars are engaged in "reframing" the core values of patent law. This scholarly "reframing" is deliberately interdisciplinary in nature in its methodological and substantive content. As a methodological matter, such "reframing" scholarship undertakes small-scale individualized studies that focus on the conflict between actors in a single-scalar context (i.e. at a domestic, regional, or national level),[17] and furthermore, draws on a variety of different disciplines, such as public health,[18] human rights,[19] and political economics.[20] As a substantive matter, the

16 Michael Parkinson, "Protecting Drug Patents in Africa," in *International and Intercultural Public Relations: A Campaign Case Approach* 160–170 (Michael Parkinson and Daradirek G. Ekachai, eds., Allyn & Bacon, 2006) (outlining the intercultural communications strategies related to the media campaign contesting the allocation of rights within South Africa).

17 *See, e.g.*, Gaelle Krikorian, "The Politics of Patent: Conditions of Implementation of Public Health Policy in Thailand," in *Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information* 29–55 (Sebastian Haunss & Kenneth C. Shadlen eds., 2009) (analyzing the conflict over Thailand's invocation of the use of compulsory licensing within the context of the TRIPS agreement); Sabil Francis, "Who Speaks for the Tribe? The Arogyacha Case in Kerala," in *Politics of Intellectual Property: Contestation over the Ownership, Use, and Control of Knowledge and Information* 80–106 (Sebastian Haunss & Kenneth C. Shadlen eds., 2009) (examining how the benefit-sharing agreement between the Tropical Botanic Garden and Research Institute and the indigenous Kani tribe exposed internal governance issues within the respective indigenous community, and their relationship to the broader domestic and regional political institutions).

18 *See, e.g.*, Cynthia Ho, *Access to Medicine in Global Economy: International Agreements on Patents and Related Rights* (Loyola Univ. of Chi. Sch. of Law, Research Paper No. 2011–011, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776606## (assessing patent law as an element of global health policy).

19 *See generally* Rosemary Coombe, "Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by Recognition of Indigenous Knowledge and the Conservation of Biodiversity," 6 Ind. J. Global Legal Stud. 59 (1998–1999) (recognizing the importance of human rights to emerging global international intellectual property regime); *see also* Erika George, "The Human Right to Health and HIV/AIDS: South Africa and South-South Cooperation to Reframe Global Intellectual Property Principles and Promote Access to Essential Medicines," 18(1) Ind. J. Global Legal Stud. 167 (2011) (assessing the incorporation of human rights principles as a result of the conflict over compulsory licensing in South Africa).

20 *See, e.g.*, Andrew P. Morriss & Craig Allen Nard, "Institutional Choice and the Interest Groups in the Development of American Patent Law, 1790–1870," 19 Sup. Ct. Econ. Rev. 143, 145 (2011) (emphasizing a public choice approach, that focuses on the impact of an organized patent bar in relationship to the doctrinal development of patent law in the nineteenth century); Christopher May, *The Global Economy of Intellectual Property Rights: The New Enclosures* (2nd ed. 2010) (exploring a "political economy" of intellectual property law, that is based on an assessment of "the ownership and control of particular innovations and technologies, established through the institutions of intellectual property

inter-disciplinary nature of such "reframing" scholarship has usefully identified the "access" content of third-party interests in patent rights including speech, assembly and expressive rights.

The troubled publics of patent law suggests that "patent law" as a set of doctrinal commitments and as a set of "institutions" has failed to serve its two stated values, promoting competition and promoting innovation. Equally important, however, is the claim that patent law has failed to serve broader societal concerns. While scholars have argued that patents can be used to create more equal access to social goods[21] and, indeed, that patents lead to the flourishing of human development and capabilities,[22] it is far more common to suggest that patent law has failed to effectively serve its publics, and therefore, the goals of patent law could be served more effectively by alternative strategies of legal organization.[23]

This book contends, though, that a crucial perspective has been overlooked in this debate: patent law in its doctrinal commitments, as well as its institutional structure, has a vocabulary of participation that is far richer than is claimed by its critics. Members of the patent civil society may do themselves a disservice by failing to recognize and claim this vocabulary of participation, since speaking within the tradition achieves strategic fluidities that may be vital for the reconstruction of patent law in its doctrinal and institutional

law"); Shubha Ghosh, "Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor after Eldred," 19 Berk. Tech. L. J. 1315, 1315–38 (2005) (examining the primary theoretical bases for regulatory patent bargain).

21 Margaret Chon, "Intellectual Property Equality," 9 Seattle J. Soc. Just. 259, 261 (2010) ("However, the kind of freedom represented by equality—the freedom of human flourishing through access to education, for example—has been underexplored in intellectual property literature when compared to the freedoms of expression and speech. And it goes without saying that the converse is true as well—intellectual property and its normative commitment towards knowledge diffusion has been underrepresented in the equality literature.").

22 Madhavi Sunder, "IP3," 59 Stan. L. Rev. 257, 312–319 (2006) (applying the theories of Amartya Sen and Martha Nussbaum, to contending that intellectual property law should be designed to promote the development of individuals' ability to flourish within the context of a democratic society); *see also* Margaret Chon, "Intellectual Property and the Development Divide," 27 Cardozo L. Rev. 2812, 2814–2815 (2006) (contending that the normative basis of intellectual property needs to be recalibrated to include a substantive equality principle, based on the theories of development economists such as Amartya Sen).

23 *See* Kapczynski, *supra* fn 10. *See also* Joseph E. Stiglitz, "Scrooge and Intellectual property rights: A medical prize fund could improve the financing of drug innovations," 333 BMJ 1279 (Dec. 2006), *available at* http://www.bmj.com/content/333/7582/1279.full.pdf (where the author argues for a "medical reward" rather than intellectual property rights); *see also* Michael J. Madison, "Beyond Invention: Patent as Knowledge Law," 15 Lewis & Clark L. Rev. 71, 106–108 (where the author discusses the idea that law must recognize that intellectual property is "labor of the head" and the law should be more shaped as "knowledge law," rather than separate copyright, patent, and trademark law).

commitments. This vocabulary of participation comes from many places: a historical tradition that reflects a far more contested politics of patent law than otherwise thought, from the basic doctrinal bases of patent law, and from patent law's relationship to other related legal areas such as property, constitutional, administrative, environmental and international law. A vocabulary of participation is helpful to the patent civil society insofar as such an orientation does not require administrative and judicial institutions of the patent regime to radically re-orient their behavior so as to accommodate the demands of a patent civil society.

The vocabulary of participation is necessary to pivot from "outside" the tradition to "within" the tradition. The current institutional and doctrinal structure of patent law is often characterized as private law thus forcing the patent civil society to resort to extra-legal strategies in order to participate in policy decision-making. Recovering and expanding patent law's latent vocabulary of participation permits the patent civil society to engage in a tactical reclamation of the doctrinal content of patent law so as to suggest its considerable "public" law characteristics. Indeed, patent law's considerable doctrinal ambiguities may work to the benefit of those seeking to organize social mobilization through the legal resolution of social conflict.

Reliance on doctrinal ambiguities is the strategy of lawyers, and may move the discourse of the patent civil society from stark resistance to an accommodationist stance within patent law. Mark Tushnet writes of a similar transition in the Civil Rights Movement in the United States in which radical critics such as W.E.B. Dubois sought to clarify standards of constitutional equality, while lawyers such as Charles Hamilton Houston sought to maintain its doctrinal ambiguities. Houston sought to preserve doctrinal ambiguities so as to maintain maximal precedential flexibility in his ultimate approach to challenging the very different elements of legal segregation.[24] The organizational tasks of activists differ then from the strategic tasks of lawyers. Notably this tension in activism remained a crucial tactical debate throughout the history of the Civil Rights Movement in the United States.

I revisit this debate because it bears some resemblance to the concerns of this book. I suggest here that the vocabulary of participation does provide tools which social activists can exploit—in the best sense of the word—in their activism; this is a book that is specifically interested in exploring the doctrinal commitments of patent law in such a way as to signal to legal activists the range of options within patent law that remain relevant.

Moreover, a vocabulary of participation speaks to the institutional culture of patent law in two key respects. First, a vocabulary of participation is values-neutral insofar as it can be deployed by any respective interest groups within

24 Mark Tushnet, "The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston," 74 J. Am. Hist. 884, 893–97 (1987).

a given system. This is important, because the emergence of multiple publics means that a participatory framework will provide a way to manage the fluidity of alliances that can occur within a committed epistemic community, and between the epistemic community and the patent civil society. This has an important social consequence since the vocabulary of participation becomes a vehicle for the patent civil society to acquire the necessary epistemic knowledge that is useful for participating in a broader dialogue over patent law.

Second, a vocabulary of participation exposes that the patent regime is not simply the result of a set of doctrinal choices but also a series of equally important choices about the most appropriate institutional design for the regulation of the patent. B. Zorina Khan's claim that the United States' then innovative institutional design of the patent system, which included the choices to reward of a patent to first and true inventor of a patent, examine applications in a transparent manner, and charge low fees for such examination, served "a critical part of a blueprint for a democratic society"[25] because such features, among other elements, stimulated invention "across a wide spectrum of the population."[26] Thus, Khan's work usefully reveals how the regulatory design of particular patent systems can reflect truly normative values, and makes explicit how features of the patent system such as standardized disclosure requirements, or the publication of the patent, usually ignored as irrelevant, reflect real normative choices as to the appropriate design of a political system. Exploring the latent vocabulary of participation, then, helps us to focus on the fact that the institutional design of patent law can encourage, as much as it can potentially discourage, participation by a range of parties.

Indeed, an admitted tension for me in analyzing the effects of the substantive revision of the international intellectual property order, represented in the enactment of TRIPS, the extent of which is under-examined in the current literature, is the extent to which the provision of tools of participation that I believe accompany the regulation of patents, embeds distinctly participatory

25 *See* B. Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790–1920*, 24 (2005) (contending that the institutional design of the patent system reflects the broader ideological values of a given society, and that broad arguments related to the state structure impact on innovation designs). *Compare* Daniel Drezner, "State Structure, Technological Leadership and the Maintenance of Hegemony," 27 Rev. Int'l Stud. 4, 5 (2001) (contending that the governance structure of nation-states is crucial for determining rates of national innovation) *with* Mark Zachary Taylor, "Political Decentralization and Technological Innovation: Testing the Innovative Advantage of Decentralized States," 27 Rev. Int'l Stud. 231, 232 (2007) (contending that decentralized state structure does not enjoy an advantage within the context of national innovation policies). These studies, which focus primarily on the state's ideological basis (for example, comparing decentralized innovation regimes with centralized innovation regimes), have typically underestimated how state institutions actually regulate the patent.

26 Khan, *id.* at 29.

values within the structure of patent law. A vocabulary of participation, as it is embodied in the regulatory design, then at the very minimum presupposes a set of small (d)emocratic values. This is an important consideration as patent systems are not always expressed in democratic cultures. I respond provisionally, by noting that a range of participatory mechanisms is available, some stronger, some weaker, thus affording political cultures the ability to experiment given their particular concerns.

The aim of this book, then, is to explore the ways in which a politics of patent law needs to reflect an understanding of what I call the participatory patent bargain. In its claim to ideal, the participatory patent bargain focuses on how actual legal mechanisms reflect the claim that patent owner is envisioned within a community that is both imagined, and embodied within patent law. By focusing on the participatory patent bargain, in ideal, we can see the ways in which activists can exploit legal mechanisms to participate in the judicial, administrative and legal decision-making around the grant, issuance and review of patents. In its claim to action, the participatory patent bargain focuses on how the institutional design of patent law is formed by an iterative process, in which the behavior of actors shapes and is shaped by the institutional design of a given national, regional, and international legal regime. Thus, the participatory patent bargain is crucial to providing third-party activists with the basic ability to participate in the conflict resolution over patent law.

This book examines the participatory patent bargain as an ideal insofar as it emphasizes that recognizing the participatory patent bargain is embodied within the core normative premises of patent law. Thus, it plays a crucial role in the politics of patent law since the participatory patent bargain serves as a central element in the re-legitimization of patent law. In my early work I argued, echoing the words of Saul Alinsky, that patent law could adopt as a core principle "citizen participation" as the "animating spirit and force in a society"[27] because to do so would allow for a greater legitimacy in patent law, by allowing for decision-making not to appear to be a result of simple "rule-capture" by powerful economic interests that are often depicted—rightly or wrongly—as the central stakeholders within the context of patent law.[28] The participatory patent bargain provides a way to link patent law more thoroughly with the larger social movements that have formed the primary basis of the legitimizing critique.

27 Saul D. Alinsky, *Rules for Radicals: A Pragmatic Primer for Realistic Radicals* xxv (Vintage Books ed., 1971).

28 *See generally* Jay P. Kesan and Andres Gallos, "The Political Economy of the Patent System," 87 N.C.L.Rev. 1341 (2009) (analyzing the patent law reform of the United States in light of competing group interests).

2 Crafting the participatory patent bargain

This book seeks to provide an analytical framework by which explore the consensual, participatory bargain. Chapter 1 begins by evaluating the three primary models of politics within patent law: politics as state, politics as regulation and politics as governance. I contend a better way to frame politics in patent law is as politics as publics. My construction of politics as publics suggests that two kinds of publics exist, an epistemic public and a citizen public that are subsequently embodied in the doctrinal content of patent law. I next contend that the embodiment of these publics in the doctrinal content of patent law necessarily leads to a reconsideration of the normative bases for politics in patent law, what I referred to as the classical patent bargain. I claim that the classical patent bargain fails to fully legitimize the claims of the patent state because it conflates formalized political authority with the concerns of the broader publics. The crisis of legitimacy within patent law, consequently, suggests another legitimizing construct: the participatory patent bargain, which proceeds from a re-reading of crucial elements of patent law in relationship to imagined publics that are embodied within the doctrinal formation of patent law.

Chapter 2 outlines the ways in which the basic participatory mechanisms, which already exist in patent law, can serve as the doctrinal basis of the participatory patent bargain and I offer examples of how current patent systems engage in these participatory mechanisms. Key to this understanding is what I term the "participatory" toolbox: individualized and systematic transparency mechanisms as well as deliberative mechanisms that embody the imagined community within patent law. I initially contend that these individualized mechanisms by reflecting the patentees' ethical responsibilities reflect patent's law imagined communities. I then trace how the systematic transparency mechanisms, associated with publication and examination, ground the patent bargain in a commitment to public transparency. Finally, I examine the emergence of deliberative mechanisms, which actually permit "imagined communities" to become "actual communities" in the examination and issuance of patents. The use of the term "toolbox" is a deliberate one. The current ferment over the "politics" of patent law has demonstrated the significant ways in which a more dynamic civil society wishes to participate in policy determinations related to patent law but has not always considered the actual methods by which such participation is to occur in a sustained fashion. Chapter 2 seeks to ground these mechanisms in a normative account of the patentees' responsibilities to its imagined publics.

My "participatory toolbox" of purposeful legal mechanisms, however, should not be viewed in a void what I term the "participatory context". The participatory context is vital for understanding that the participatory patent bargain is often shaped by external constitutional, statutory, and background legal traditions. The participatory context is useful for exploring the ways in which participation in any patent regimes is shaped by internal ideological

variables, while often not directly speaking to the actual subject matter of patent law, that necessarily reflect the basic political preferences of a given legal regime. In particular, in Chapter 3, I focus on a constitutional variability in the intellectual property regime as indicative of the multiple ways in which communities of consent can be incorporated into patent law on a constitutive and ongoing basis. Thus, the participatory toolbox is central to understanding how actors construct legitimacy of the patent regime for any number of actors, not just the individual patent owner. I conclude by examining the ways in which constitutional and international regimes may conflict in their expression of communities of consent.

Chapter 4, the concluding chapter, makes some tentative conclusions about the crafting of the participatory patent bargain. I use the term "crafting" deliberately, seeing the construction of the patent bargain as the skillful work that will need to draw on an interdisciplinary content to constitute the participatory patent bargain. This work, I contend, will be both conceptual and tactical, and so in my last chapter, I examine how Justice Breyer of the Supreme Court of the United States is seeking to shape a participatory bargain by utilizing specific conceptual and tactical strategies that offer us lessons on how to reform the participatory patent bargain within domestic, international and regional patent law. I conclude that Justice Breyer's craft offers long-term strategies for re-shaping the content of the participatory patent bargain.

One final note: the reader will find that the methodological approach of this text is eclectic. In this, I owe some debt to the scholarship of "reframing" the intellectual property regime. Strategies of scholars such as Madhavi Sunder who, for instance, engage in a "cultural analysis of intellectual property"[29] have been integral in interrogating the normative claims that reconstituted intellectual property can serve to advance individual and social interests. Beyond this, however, I believe my eclectic method is representative of what I think is the process of (re)constituting the patent bargain. Its methodologies may be "incremental and disorderly"[30] for two reasons. First, because its subject, patent law, is both new and old: old in the sense of its actual origins in the Renaissance; new in its ability to reconstitute itself over and over again in national, regional, and international politics. Second, because this book seeks to prompt constructive debate over the goals and ends of patent law as a way not only to protect the investments of owners, but to serve the broader aims and goals of society. Thus this text offers up a series of eclectic techniques as a representative of the act of craft itself in the reconstitution of the patent bargain.

29 Madhavi Sunder, "IP3," 59 Stan. L. Rev. 257, 312 (2006).

30 Patrick Chabal, *Africa: The Politics of Suffering and Smiling*, xi (2009).