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THE FEDERAL CIRCUIT AS AN INSTITUTION: ON UNCERTAINTY AND POLICY LEVERS

S. Jay Plager *

In this essay I address a central concern that runs through a number of the papers presented at this symposium, and is attributed, at least in some measure, to the Federal Circuit in its institutional role: the endemic problem of uncertainty in law and the judicial decisional process, and particularly in patent law. Though thought by some to be present in various aspects of Federal Circuit jurisprudence,[1] the exemplar of the uncertainty problem is the court's handling of patent claim construction—a jurisprudential conundrum created by the pervasiveness of ambiguous patent claims. Part II of this essay discusses this uncertainty problem.

A second concern, the subject of several recent books about the Federal Circuit's performance as a patent law institution, is how the Federal Circuit has used, or failed to use, the "policy levers" available to it to deal with various patent law problems, including the uncertainty problem. In Part III of this essay, I reprise that portion of my keynote address at the symposium in which I presented a hypothetical litigation brought by the authors of these works against the key government actors in the patent system. I examine what a judicial response in terms of policy levers might look like.

I. INTRODUCTION

I begin with a brief overview of the institutional role of the Federal Circuit as compared to her sister circuits in the courts of the

* Circuit Judge, U.S. Court of Appeals for the Federal Circuit. This is a revised and expanded version of the keynote address given by Judge Plager at *Loyola of Los Angeles Law Review*'s symposium, *The Federal Circuit as an Institution*, on October 30, 2009. Judge Plager expresses his appreciation to his law clerk, Lynne Pettigrew, for her invaluable assistance in the preparation of this essay.

1. *See* Ted Sichelman, *Myths of (Un)Certainty at the Federal Circuit*, 43 LOY. L.A. L. REV. 1161, 1163 (2010) ("'[T]he Federal Circuit does a coin flip and reverses district court decisions left and right. You might as well just roll the dice.'" (quoting *Patent Troubles: Does the Patent System Need Fixing?*, CORP. LEGAL TIMES, June 2005, at 61)).

United States. Following this overview are some comments about the articles that appear in this symposium issue.

The United States Court of Appeals for the Federal Circuit shares the same place in the three-level hierarchy of the Article III American judicial system as the twelve other courts of appeals. The court is governed in its membership, structure, and activities by the same body of constitutional law, statutory law, and rules of procedure as are the other circuits.

Yet the Federal Circuit differs from the other circuits in two significant respects. First, the Federal Circuit does not have the general jurisdiction that the other circuits share over the panoply of federal criminal and civil causes, but instead has a variety of specific subject-matter areas assigned to it. Within these specific subject-matter areas, the Federal Circuit has exclusive appellate jurisdiction. Second, the jurisdiction of the Federal Circuit is not geographically limited, as are the jurisdictions of the other circuits, but instead is nationwide with regard to the areas over which its jurisdiction extends.[2]

One subject-matter area Congress has assigned to the Federal Circuit is patent law. Indeed, the history of the Federal Circuit—created by Congress in 1982[3]—is intimately tied to a perceived need (perceived especially by the then-practitioners of patent law and the innovation and entrepreneurial community most affected by patents) for change in the way the circuit courts had previously approached that body of law.[4] The increasing role in the economy that patents have filled in the past twenty-five or so years has vindicated the views of those who perceived a need for change.

It is not surprising, then, that when the conversation turns to the Federal Circuit, it turns to patent law, at least within this subset of the legal and academic community. And when it turns to patent law, it turns to the question of why, given its exclusive jurisdiction and virtually free hand over patent doctrine, the changes the Federal

2. The U.S. Court of Appeals for the District of Columbia Circuit is considered a regional circuit for general jurisdiction purposes, but also has specific subject matter areas with national reach, particularly in the area of administrative law.

3. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

4. *See* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 6–7 (1989); S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 854–55 (1990).

Circuit has brought about in patent law and doctrine have not done more to solve some of the issues that bedevil the patent system.

The articles submitted for this symposium speak, in thoughtful ways and often with valuable empirical data, to a number of these issues.[5] In the interest of time and the reader's patience, I will not discuss in detail each of the symposium articles. However, the reader will benefit from reading them all as each author has something important to say about the patent system and the role of the Federal Circuit as an institution.

Several of the papers address particular aspects of the court's jurisprudence. For example, Professor David McGowan explores the doctrine of inequitable conduct in patent law and how the court has moved in recent years to cabin the doctrine, with consequences for predictability and certainty that he believes can be improved upon.[6] Professor Jeffrey Lefstin reassesses the early patent jurisprudence of the Court of Customs and Patent Appeals (CCPA), one of the Federal Circuit's predecessor courts. Professor Lefstin argues that when the CCPA's precedents were incorporated wholesale into the law of the Federal Circuit, so were the jurisprudential outlook and methodology the CCPA had developed.[7] He suggests that the outlook and methodology may have served the CCPA well as overseer of the U.S. Patent and Trademark Office (USPTO), but may not serve so well the very different needs of the Federal Circuit.[8]

Other articles take a global look at the Federal Circuit. Professor Christopher Cotropia explores the occasionally heard accusation that the Federal Circuit's exclusive jurisdiction over patent cases causes the court's decision making to become stagnant and entrenched, and negatively affects the pace of doctrinal development. Based on the empirical data he has compiled regarding the several circuit courts of appeals, he concludes to the contrary: "[T]he data suggest that the

5. On the uses and values of empirical data, see S. Jay Plager, Keynote Address at the North Carolina Law Review Symposium: Frontiers in Empirical Patent Law Scholarship (Oct. 23, 2008), *in* 87 N.C. L. REV. 1323 (2009).

6. David McGowan, *Inequitable Conduct*, 43 LOY. L.A. L. REV. 945, 946 (2010). At this writing, the announced en banc review of our inequitable conduct jurisprudence remains pending. *See* Therasense, Inc. v. Becton, Dickinson & Co., No. 2008-1511, 2010 WL 1655391, at *1 (Fed. Cir. Apr. 26, 2010) (order granting petition for rehearing en banc).

7. Jeffrey Lefstin, *The Constitution of Patent Law: The Court of Customs and Patent Appeals and the Shape of the Federal Circuit's Jurisprudence*, 43 LOY. L.A. L. REV. 843, 847 (2010).

8. *Id.*

Federal Circuit is no more lacking in jurisprudential diversity than other circuits and, considering dissents, is significantly more internally diverse in viewpoints regarding the outcomes of individual cases."[9] Donald Dunner, a long-time practitioner and leading advocate before the court, shares that positive outlook on the court's place in the patent system and its institutional performance.[10]

Professor Polk Wagner's *The Two Federal Circuits* takes a somewhat different tack. He argues that the problem the Federal Circuit confronts is choosing between its role as "decider" of cases, and its role as "manager" of the jurisprudence. Though that duality of roles exists in all appellate courts, he sees it as a particularly acute issue for the Federal Circuit.[11]

Professor Rochelle Dreyfuss, whose earlier work provided some of the basis for the Wagner thesis, disagrees with both Cotropia and Wagner. She contends that Cotropia's approach is denial (the empirical data do not rule out quality concerns), while the Wagner approach is apologetic (the concerns regarding the court are not excused by the court's conflicting goals).[12]

Professor Lee Petherbridge's article addresses the development of patent law and posits a theoretical framework for the operational aspects of patent law. Although not focused on the uncertainty issues which I address in Part II below, his article illuminates nicely those issues, as well as the issues he addresses—doctrines of patentability and patent scope.[13] He first posits a fairly conventional view of patent law as a system for creating certain property rights that provide a number of discrete incentives for innovation.[14] Regarding the issues with which I am concerned, he usefully emphasizes the importance of clarity and that "more predictable rights can make innovation more efficient."[15]

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9. Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 804 (2010).

10. Donald R. Dunner, *The U.S. Court of Appeals for the Federal Circuit: Its Critical Role in the Revitalization of U.S. Patent Jurisprudence, Past, Present, and Future*, 43 LOY. L.A. L. REV. 775, 783 (2010).

11. R. Polk Wagner, *The Two Federal Circuits*, 43 LOY. L.A. L. REV. 785, 787 (2010).

12. Rochelle Cooper Dreyfuss, *The Federal Circuit as an Institution: What Ought We to Expect?*, 43 LOY. L.A. L. REV. 827, 830–31 (2010).

13. Lee Petherbridge, *On the Development of Patent Law*, 43 LOY. L.A. L. REV. 893, 896 (2010).

14. *Id.* at 906.

15. *Id.* at 899.

His second theoretical construct is especially illuminating, though possibly more arguable. He calls it a theory of the patent granting process.[16] Under this theory, the USPTO's role in the examination of a patent application is viewed as "nothing more than 'a rough "first cut" at determining [patent] validity.'"[17] Professor Petherbridge seems to suggest that this is the way it was intended to be, but the important question is whether this is an accurate description of the actual operational effect of the process.

Under Professor Petherbridge's theory, it would follow that the USPTO would allow a nontrivial number of claims directed to inventions that are unpatentable and would reject a nontrivial number of claims that are (or should be) patentable.[18] It also follows that it is the courts that "are tasked with determining the legal scope of the rights conferred by patent claims and with determining whether accused products and processes infringe those rights."[19] That may indeed be an accurate description of what courts now do. What may be different from the usual normative description of the USPTO/court interaction is the expectation that what the USPTO does is only a first pass at the basic questions posed by the statutory requirements for a patent, and that the real gatekeepers are the courts.

Professor Petherbridge suggests that such a view of the system implies important consequences in terms of the economics of the system and its social costs, and of the incentives to draft patent applications that obscure the scope of the invention at issue.[20] He also suggests why the USPTO has strong incentives to cooperate with this patenting strategy. His thesis provides an interesting perspective on the two questions I mentioned earlier and will explore next: legal uncertainty in patent law generally, and ambiguity in patent claiming and the problems that poses for patent claim construction. Other articles included in this symposium issue will be discussed in the context of these two questions.

16. *Id.* at 900.

17. *Id.* at 901 (quoting ROBERT P. MERGES & JOHN F. DUFFY, PATENT LAW AND POLICY 1046–47 (4th ed. 2007)).

18. *Id.* at 901.

19. *Id.* at 900.

20. *Id.* at 902.

II. THE UNCERTAINTY CONUNDRUM

A. Uncertainty in Patent Law In General

I have had long-standing concerns with the problem of indeterminacy in legal doctrine, especially in patent law.[21] Professor Kelly Casey Mullally has written an insightful article on this issue.[22] Rather than the oft-repeated generalities recited about doctrinal indeterminacy in patent law,[23] she focuses attention on the specific causes of that uncertainty and some of the solutions. She begins with the unarguable proposition that indeterminacy can undermine fundamental goals of the patent system by reducing incentives for creators to invent and to publicly disclose their inventions—a point that has not escaped our court.[24] She notes that the Federal Circuit is one of the accused sources of this uncertainty, allegedly by being unable to render patent law decisions that are certain and predictable.[25]

She explores two aspects of the uncertainty problem: (1) the uncertainty that results from the structure and institutional behaviors of the public entities involved; and (2) the uncertainty that results from private actors in the system. Her article contains insights into why uncertainty is inherent in all judicial processes—in any given circumstance a court may find that there is no legal rule to apply, or the legal rule may be unclear, or there may be competing legal rules. Then there is the process of reconciling conflicting precedents, the application of stare decisis and balancing tests, and equitable considerations. Mullally takes note of an underlying tendency among judges: "Courts often reject precision in, and categorization of, legal concepts in resolving disputes of all kinds."[26]

In a seminal work in the field of judicial decision making, Karl Llewellyn, in his book *The Common Law Tradition—Deciding Appeals*, showed that for many so-called controlling judicial canons

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21. *See* S. Jay Plager, *Challenges for Intellectual Property Law in the Twenty-First Century: Indeterminacy and Other Problems*, 2001 U. ILL. L. REV. 69.

22. Kelly Casey Mullally, *Legal (Un)Certainty, Legal Process, and Patent Law*, 43 LOY. L.A. L. REV. 1109, 1109 (2010).

23. *Id.* at 1120 ("[M]any of the demands for certainty in patent law have been vague, conclusory, and fatalistic.").

24. *Id.* at 1135.

25. *Id.* at 1114.

26. *Id.* at 1116.

of interpretation upon which decisions can be based, there often are canons of equal stature that call for an opposite conclusion.[27] Llewellyn, an early legal realist, posited that "the ideal is not 'certainty' at all, in any of the senses in which that term is commonly applied to matters legal. The true ideal is *reasonable regularity* of decision."[28] In essence, Professors Llewellyn and Mullally acknowledge why what judges do is called "judging."

With regard specifically to uncertainty in patent law, Professor Mullally notes the pressure from the USPTO and the district courts for greater formalism—more bright-line rules—and the opposite pressure from the U.S. Supreme Court for more flexible standards and less formalism.[29] In addition, she notes various factors in the patent system that affect certainty, including—echoing Professor Petherbridge's observation—strong incentives for patentees to deliberately introduce uncertainties into their patents.[30]

Her article provides detailed support for her call for more focused analysis: "Systematic analysis of the sources of legal uncertainty and their specific impact, along with targeted solutions, have the potential to impart important lessons for private and public actors in patent law."[31] She offers what she calls a "general framework" for addressing uncertainty: identify the primary source of uncertainty that we wish to redress; then, the desired type of certainty should inform the direction of proposed changes; and finally, in striving for greater certainty, consider the importance of other countervailing values.[32] She illustrates her analysis with several specific proposals for reform. These include recognizing the value in some circumstances of bright-line rules; addressing district courts' lack of technical expertise; and adjusting the claim definiteness requirement, perhaps by shifting the burden to the patentee to prove

27. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521–35 (1960) (describing "thrust but parry" and "thrust and counterthrust" canons of construction).

28. *Id.* at 216.

29. Mullally, *supra* note 22, at 1130 ("Indeed, recent Supreme Court opinions on issues that do not relate solely to patents demonstrate a marked preference for flexible standards in patent law."). The Supreme Court has recently confirmed Mullally's observation. *See* Bilski v. Kappos, 130 S. Ct. 3218, 3226–27 (2010) (rejecting the "machine-or-transformation" test as the exclusive test for patent eligibility of a process under 35 U.S.C. § 101 (2006)).

30. Mullally, *supra* note 22, at 1135–36 ("[C]ommentators have observed that patents are becoming more unclear and their meanings more uncertain.").

31. *Id.* at 1159.

32. *Id.*

that the claim is definite or by simply construing the claim against the patentee.[33]

B. Uncertainty in Patent Claim Construction

Professor Mullally's last example speaks to what is probably the most talked about area of legal uncertainty in patent law today: claim construction—the process of judicially determining exactly what the inventor invented, or more accurately, exactly what the issued patent states as the invention. Several articles addressing that process were presented at the symposium. Professor David Schwartz reports new data on the Federal Circuit's reversal rate in claim construction cases—that is, the rate at which trial court claim constructions are reversed by the Federal Circuit on appeal.[34] The new data are from just before the decision in *Markman v. Westview Instruments, Inc.*[35] through the end of 2008. Professor Schwartz is among the leading researchers in empirical studies of patent law claim construction reversal rates.[36]

Much has been made in recent years of the Federal Circuit's reversal rate in patent claim construction cases. Though views vary widely concerning exactly what that rate is and what causes it, the consensus is that it is too high, and therefore troubling.[37] As to what the rate actually is, some of the confusion is inherent in the actual data. For example, Professor Schwartz, in trying to compare *de novo* review cases (i.e., no deference given to the trial court's view) with cases acknowledging some level of deference, notes that there are over thirty pre-*Cybor Corp. v. FAS Technologies, Inc.*[38] cases that omit any mention of whether review was de novo or with some

33. *Id.* at 1128, 1147; *see also* JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 239 (2008) (suggesting that a claim that has more than one plausible interpretation is invalid for indefiniteness).

34. David L. Schwartz, *Pre-*Markman *Reversal Rates*, 43 LOY. L.A. L. REV. 1073, 1091 (2010).

35. 52 F.3d 967 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996).

36. *See* David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699 (2009); David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223 (2008).

37. *See* Richard S. Gruner, *How High Is Too High?: Reflections on the Sources and Meaning of Claim Construction Reversal Rates at the Federal Circuit*, 43 LOY. L.A. L. REV. 981, 984 & nn.1–2 (2010).

38. 138 F.3d 1448 (Fed. Cir. 1998) (en banc).

deference (i.e., it was impossible to ascertain from the opinions which standard applied).[39]

With regard to the cause of the troubling reversal rate, the blame is most often laid directly at the door of the Federal Circuit. The court is accused, basically, of not having claim construction standards that are clear and understandable, and of not applying the standards, such as they are, consistently. The court's much-anticipated decision in *Phillips v. AWH Corp.*,[40] which was expected to state definitively the interpretive standards to be applied in claim construction cases, and thus reverse the need for reversals, does not seem to have turned the tide. If anything, the reversal rate has not decreased.[41] Professor Schwartz repeats the generally held view that the "claim construction reversal rate is unduly high."[42]

Do the claim construction reversal rates—the frequency with which district court judges' claim constructions are "corrected" on appeal—really indicate that there is a serious problem in the system, and particularly with the standards mandated by the Federal Circuit for claim interpretation? Professor Richard S. Gruner challenges that conclusion. In a lengthy and thought-provoking study titled *How High Is Too High?: Reflections on the Sources and Meaning of Claim Construction Reversal Rates at the Federal Circuit*, Professor Gruner concludes that "the correct answer to the question posed by this Article about whether present claim construction reversal rates of the Federal Circuit are too high, is that these rates are substantial, but of little meaning regarding patent system quality . . . ."[43] He opines that "[e]xcessive attention to these rates distracts us from greater attention to the impact of Federal Circuit standards on extra-judicial case resolutions . . . ."[44] Professor Gruner concludes that "current claim construction standards are doing just fine."[45]

In the face of the drumbeat of accusations surrounding the institutional failure of the Federal Circuit to bring certainty to the claim construction process, Professor Gruner's analysis and

39. Schwartz, *supra* note 34, at 1097.

40. 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

41. Schwartz, *supra* note 34, at 1080–81.

42. *Id.* at 1107.

43. Gruner, *supra* note 37, at 1071.

44. *Id.* at 1072.

45. *Id.*

conclusion is noteworthy. He supports his conclusion by arguing that the cases reviewed and frequently reversed by the Federal Circuit are "outliers, selectively filtered by the case settlement processes that dominate patent litigation to ensure that only the most uncertain claim construction cases reach the Federal Circuit."[46] Gruner explains that "[a]s they review cases with high claim construction uncertainty, it is hardly surprising that district courts and Federal Circuit judges see the intensely factual and highly technical issues surrounding the meaning and construction of patent claims differently."[47]

As an initial point, it is worth remembering why there are patents with such highly uncertain claims in them, a point noted earlier. There is general agreement, as noted in a number of the articles in this symposium issue, that at the claim drafting stage a patent applicant's goal is often to draw claims that are as ambiguous, and therefore as uncertain, as possible. This is done in hopes of having the claims cover any possibly implicated known or unknown commercial activity that may exist now or may develop in the future, or at least to have the claim language be broad enough to provide a credible litigation threat to potential competitors. An additional contributor to claim ambiguity, not necessarily intended, is that the nature of inventions in some highly technical fields today may make it difficult, if not virtually impossible, for anyone adequately to put the particular invention into words, in a one-sentence claim, in a way that makes the boundaries discernable.

One hindrance to the success of an intentional ambiguity by the claim drafter is the USPTO's review of the proposed claim language prior to approval of the patent application. However, for many of the reasons noted by Professor Petherbridge, the current process has shown itself all too often to be a non-obstacle. Whether recent undertakings by the USPTO leadership will lead to significant changes in the USPTO's review process and the outcomes of that process remain to be seen.[48]

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46. *Id.* at 985.

47. *Id.*

48. *See, e.g.*, Request for Comments on Enhancement in the Quality of Patents, 74 Fed. Reg. 65,093, 65,093–65,100 (Dec. 9, 2009); David Kappos, Under Sec'y of Commerce for Intellectual Prop. and Dir., USPTO, Remarks to AIPLA Annual Meeting (Oct. 15, 2009), *available at* http://www.uspto.gov/news/speeches/2009/2009oct16.jsp.

Another potential hindrance is the risk of a court subsequently finding a too-loosely drawn claim invalid for indefiniteness. The Patent Act requires that a patent specification conclude with one or more claims "particularly pointing out and distinctly claiming subject matter which the applicant regards as his invention."[49] This is known as the "definiteness" requirement. In determining whether that standard has been met, the Federal Circuit does not usually consider an ambiguous claim, whether deliberately drafted that way or not, to be a violation of the standard. "[W]e have not held that a claim is indefinite merely because it poses a difficult issue of claim construction."[50] The claim must be, literally, "'not amenable to construction' or 'insolubly ambiguous.'"[51] One consequence of this particular reading of the statute is that it removes a significant impetus for clearer claim drafting, thus reinforcing the system's tolerance for uncertainty in claims. In addition, and importantly for the court, it opens the way for claim interpretation cases to come to the court in which the claims at issue are so ambiguous that there are a variety of possible understandings; yet, because some conclusion about meaning is possible, the claim falls short of being "not amenable to construction."[52]

Professor Gruner posits that much of this built-in ambiguity is managed in the real world through economic behavior—competitors negotiate for licenses when they think it worthwhile, engage in mergers and acquisitions, or take into account the real costs of litigation and potential recoveries and then engage in settlements based on their likelihood of success in the face of uncertainties about the scope and reach of the patents.[53] While the doctrines explicated by the court play a role here—negotiation occurs "in the shadow of the law"—the ultimate resolutions of the disputes are not law-governed.[54]

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49. 35 U.S.C. § 112 (2006).

50. Exxon Research & Eng'g Co. v. United States, 265 F.3d 1371, 1375 (Fed. Cir. 2001).

51. Datamize, LLC v. Plumtree Software, Inc., 417 F.3d 1342, 1347 (Fed. Cir. 2005).

52. For a recent critique of the Federal Circuit's indefiniteness jurisprudence, see *Enzo Biochem, Inc. v. Applera Corp.*, 605 F.3d 1347, 1347–49 (Fed. Cir. 2010) (Plager, J., dissenting from denial of petition for rehearing).

53. Gruner, *supra* note 37, at 1028.

54. This is not a new idea. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

As a consequence, only a small percentage of patent disputes ever actually get tried, and only a fraction of those survive to the appeal stage. The result, as Professor Gruner sees it, is that when it comes to the enforcement of a patent through actual litigation,

> [u]nder these conditions the uncertainty and materially different findings deemed plausible by the respective parties, coupled with the ability of litigants to take clear (or at least similarly perceived) cases out of the adjudicatory system through settlements, the surprising question is not why are Federal Circuit claim construction reversal rates so high, but rather why these rates are not even higher.[55]

This is a strikingly different thesis from that ordinarily heard, and it challenges many of the standard explanations for why claim construction cases are so difficult. Admittedly, not all claim construction cases on appeal are all that difficult, or even all that unclear. Sometimes the trial court judge arrives at a construction of the disputed claim term that is as sensible under the circumstances as can be found, and the case is a relatively easy affirmance. Sometimes a trial court judge is overly impressed with a party's argument but the resulting claim construction does not withstand close examination, so that a reversal is unavoidable.

But there remains some number of cases that are—as Professor Gruner describes—the outliers that involve claims that are so ambiguously drafted that nothing in the patent clearly favors one party over the other. In such circumstances, the decisional outcome cannot be dictated pro forma. The notion that standard canons of construction can be framed that would solve such cases is unrealistic: Llewellyn rules. Simply put, these cases present interpretation problems for which there are no "right" answers.

How then are such cases to be decided? Professor Llewellyn's insights may again be useful: the court must make a judgment based on the sense of the situation.[56] Llewellyn explains "situation-sense" as the complex of law-situation-facts, coupled with "the felt duty to justice which twins with the duty to the law."[57] Though Llewellyn's insights are derived from his study of common law courts—and

55. Gruner, *supra* note 37, at 985.

56. LLEWELLYN, *supra* note 27, at 121–57.

57. *Id.* at 121.

federal courts are not common law courts in the traditional sense—the process of patent claim construction has many parallels: the specifics at issue in any two cases are never the same, the doctrinal rules invoked for decision are at best only guides, and the issues are inevitably a blend of facts and law as well as context and technology.

Given all that, the question of why the reversal rate is what it is may be considered by asking, whose situational sense should prevail? Should it be the trial court judge who heard the witnesses and spent days or even weeks with the case? How much does it matter that, at least for some trial court judges, a patent case with a difficult claim construction problem is seldom seen?[58] Or should the sense of the situation be decided by the appellate court judges who, working from a cold record with limited time, try their best to understand what the parties and the trial court judge think about the matter? The appellate court judges do have the advantage of seeing a number of such patent claim construction cases on a regular basis, but does their experience help them when addressing a particular case?

To address the conundrum of who should have the final say in claim construction there is no easy generalization that provides the answer. It depends. It depends on the grasp of the problem conveyed by the trial court judge, and the care taken in conveying that grasp. It depends on how self-assured the appellate court judges who heard the case are regarding the particular technology, especially in highly complex, technical matters. And perhaps most importantly, it depends on the appellate court judges, who, if nothing else, will have the last word about the matter as between themselves and the trial court judge. They may prefer their versions of good sense, or they may feel some obligation to defer to the trial court judge when the outcome is a matter of essential "judgment." However the judgments may be articulated, however rationalized they may be in terms of the carefully selected canons of claim construction, the outcomes on appeal in these difficult claim construction cases ultimately depend on the Federal Circuit's judgment about the sense of the situation. Understood in this way, the surprising thing indeed is that the

58. For an earlier average estimate of how often trial judges hear patent cases, see Plager, *supra* note 21, at 77.

appellate court judges think that the trial court judges get these claim construction cases "right" nearly two-thirds of the time.[59]

Finally, I note the views expressed in Professor Ted Sichelman's article regarding both the general topic of (un)certainty[60] as discussed by Professor Mullally and the specifics of claim construction addressed by the Gruner thesis. Concerning the question of legal uncertainty as it reflects on reversal rates, Professor Sichelman notes that the average Federal Circuit reversal rates in patent cases across all issues is essentially the same as the average reversal rates for private civil litigation across the other circuit courts.[61] It is the claim construction cases that skew the data, and which he considers to be "a special animal deserving of reform."[62] He agrees with Professor Gruner that the bulk of claim construction disputes settle,[63] and that some of the increase in claim construction reversal rates relative to average rates for civil cases and other patent issues is likely attributable to selection effects. However, he finds that this explanation does not fully account for the increase; he also attributes the increase to a complex of other factors, especially the high costs of litigation.[64]

Interestingly, Professor Sichelman recognizes, in the context of patent law, Llewellyn's concept of conflicting canons: "[I]n its quest for predictability, the Federal Circuit has adopted a number of 'canons' of claim construction, which—while seemingly instantiating a formal regime of transparent rules—are internally contradictory and rest on flawed premises."[65] And he captures the idea of situation sense as the decisional model in these outlier cases: "[I]t appears that typically unstated judicial ideologies influence judges, whether conspicuous or not, to choose one of the competing canons in the cases in which they conflict."[66] He notes that by "ideologies" he does not mean political ideologies, but rather a

59. *See* Kimberly A. Moore, Markman *Eight Years Later: Is Claim Construction More Predictable?*, 9 LEWIS & CLARK L. REV. 231, 241 tbl.1 (2005).

60. *See* Sichelman, *supra* note 1, at 1163 n.3 (adopting the Mullally "mongrel term").

61. *Id.* at 1175 fig.1.

62. *Id.* at 1189.

63. He places the cases that effectively settle at 84 to 89 percent. *Id.* at 1180.

64. *Id.* at 1180–81.

65. *Id.* at 1191.

66. *Id.* at 1192.

judge's view of the role of the patent system.[67] He concludes this discussion with a statement that resonates with the next part of this essay: "[S]ince the differing 'rules' often lead to irreconcilable results that can only be resolved by policy choices, the Federal Circuit would provide more guidance—and, hence, more stability—by explicitly considering such policies in its opinions, rather than promulgating a façade of formalism."[68]

III. POLICY LEVERS

The recent books I mentioned at the beginning of this essay are familiar to patent lawyers and academics—James Bessen and Michael Meurer's *Patent Failure*,[69] and Dan Burk and Mark Lemley's *Patent Crisis*.[70] There is another recent book by Michael Heller worth noting, *The Gridlock Economy*,[71] that points to the problems caused by too many overlapping claims to ownership and rights, including multiple patents dividing up interests in singular innovations.[72]

Having spent (or misspent) some twenty-five years of my professional life as a law professor, I am not unsympathetic to the efforts reflected in much of this literature. At the same time, in the almost-equal number of years that I have been on the bench, I have come to understand that the vision of what judges do, and even more importantly do not do, as seen by the academic community differs in significant ways from the basic judicial perspective. To illustrate this difference in expectations, let me hypothesize a highly improbable situation.

Let us suppose that I have been designated by the Chief Justice to sit as a U.S. district court judge for the purpose of hearing an emergency petition for relief. The petition is brought against three U.S. government defendants: the legislative branch, meaning

67. *Id.* at 1192 n.137.

68. *Id.* at 1193.

69. BESSEN & MEURER, *supra* note 33.

70. DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT (2009).

71. MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES (2008).

72. *Id.* at 49–78; *see also* Mark A. Lemley & Carl Shapiro, *Patent Hold Up and Royalty Stacking*, 85 TEX. L. REV. 1991, 1992 (2006) (discussing the fact that products in some industries can be covered by many different patents).

Congress; the executive branch, in particular, the USPTO; and the judicial branch, in particular, the Court of Appeals for the Federal Circuit (collectively, the "Government"). The plaintiffs in this hypothetical action are Professors Bessen, Burk, Lemley, and Meurer, supported by a large number of amicus briefs, including ones from Professors Craig Nard and John Duffy,[73] the latter group all members of the professoriate in support of the plaintiffs' case.

As I understand the pleadings, plaintiffs seek an injunction and unspecified, but substantial, damages. The injunction, if granted, would order the defendants to fix the variety of problems that plaintiffs allege pervades the American patent system. The plaintiffs also ask that the injunction invalidate all decisions of the courts that are inconsistent with the views expressed by plaintiffs in their pleadings and papers, including their extensive academic writings, which are incorporated by reference. The damages awarded are to be sequestered to pay for research and publication of more books and papers by the plaintiffs. (The plaintiffs leave open whether the sweep of the injunction should cover their future writings as well.)

The plaintiffs move for summary judgment on the grounds that their case is so obviously correct that they should be granted judgment as a matter of law. The Government has moved to dismiss on the grounds that this action raises only political questions assigned by the Constitution to the other branches of government, and therefore is beyond the jurisdiction of the courts. And in any event, says the Government, the suit does not state a claim for which relief can be granted.

I will first take up the Government's motion to dismiss. For purposes of deciding the Government's motion to dismiss, I must take the well-pleaded allegations in the plaintiffs' complaint, including the extensive materials incorporated by reference, as true. For the record, and to avoid any recusal motions, I hereby disavow any of my previous views on the subjects before us, expressed by me in anything I may have said or written.

What are the allegations made by the plaintiffs and their amici? These are contained in a number of sources, and are many, but if we focus just on the recent books, we are dealing with hundreds of pages

73. *See* Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619 (2007). *But see* S. Jay Plager & Lynne E. Pettigrew, *Rethinking Patent Law's Uniformity Principle: A Response to Nard and Duffy*, 101 NW. U. L. REV. 1735 (2007).

of, dare I say, densely written material. I will summarize what I understand to be the essence of the complaints:

- There are too many patents.
- There is a continuing decline in patent quality.
- There are too many issued patents containing claims that are poorly drafted, overly broad, and difficult to understand. Whether this result is inadvertent or intentional, such claims fail to provide clear and efficient notice of the boundaries of the rights granted.
- The USPTO has an unmanageable backlog of applications and the patent-continuations practice is abused.
- There should (or should not) be post-grant review of patents.
- Litigation is too expensive and takes too long.
- Patent trolls are ensnaring real innovators who might inadvertently cross the boundaries of a troll's patent.
- Patents may be called "property," but they fall far short of any idealized notion of property rights.
- The problems with the patent notice function are widespread and deep.
- A "unitary" patent law does not work in this day when our major industries are as diverse as pharmaceuticals and information technology. Patent law must be tailored to the new technologies if it is to effectively promote innovation.
- There is a perceived lack of determinacy in patent law.

And with regard, specifically, to the Federal Circuit, the complaint makes the following allegations:

- The court is unable to render certain and predictable decisions.
- The court does not follow its own precedents, and thus its decisions are panel-dependent.
- The court's excessively high reversal rates create uncertainty about the value of trial court decisions, and trial court resources are wasted on a court that does not give proper deference to the trial judge.
- Although the court professes to seek bright-line rules, the results are confusion and uncertainty.

- In short, the court has failed to deal with these fundamental problems in the system by failing to exercise its policy levers, and the result is a patent system that is broken or in crisis.

Though the Government in its defense to these allegations does not quite say so, it seems safe to say that the parties basically agree on this much: Congress has fallen short in its duties to the patent system and to the innovators and industries affected by the system. Admittedly, there have been congressional patches and fixes added from time to time, but despite tremendous economic and technological changes since enactment of the 1952 Patent Act, Congress has failed to significantly update the Act to reflect these changes.

In the past several years, Congress has had before it proposals to bring the Patent Act more into accord with what some see as modern needs, and it has failed to do so.[74] I do not think I run the risk of summary reversal by the Court of Appeals if I hold that it is time for Congress to stop dithering and face up to its responsibilities under the Constitution "to promote the Progress of Science and useful Arts."[75] But how much further can I go?

Could I, in my capacity as designated district court judge in this suit, issue the sought-after injunction, ordering Congress to pass appropriate legislation or else find itself in contempt of court? Perhaps I should have the U.S. Marshals take the congressional leadership into custody until they comply?

Most legal authorities would say that the enactment of new laws, no matter how badly needed, is basically a matter for Congress and the U.S. President because it is a political act delegated by the Constitution to the elected branches and thus not one within the purview of the courts. That proposition is largely undisputed. Perhaps less well accepted, at least among some critics, is the extension of that thought beyond formal legislation. The extension would say that the conscious exercise of so-called judicial "policy levers," intended to change the basic operation of the system, is also

74. For the status of the currently pending patent reform legislation, see Press Release, Leahy, Sessions, Hatch, Schumer, Kyl, Kaufman Unveil Details of Patent Reform Legislation (Mar. 4, 2010), *available at* http://leahy.senate.gov/press/press_releases/ (announcing proposed agreement on changes to S. 515, 111th Cong. (2009)).

75. U.S. CONST. art. I, § 8.

a political act; to the extent discernable policies already are contained in legislation, modification of those policies is exclusively the province of the elected branches.

Since I see some validity in both the accepted narrow purview of the court, as well as the extension of that view to policy levers, I am persuaded that I must grant the Government's motion to dismiss the complaint as it applies to Congress.

The same problem exists with judicial intrusion into the policy choices and administration of the system as they are found in the executive branch, acting through the USPTO. That, of course, does not preclude courts from correcting actions of the USPTO that are challenged in a properly brought law suit, assuming, of course, that the USPTO's decision under review is in violation of some legal standard and not simply a lack of political will to do what is necessary to make the system work better. Of course, the ability of the USPTO to do what is necessary is hindered by the agency's lack of any substantive rulemaking authority; but there again, the decision to leave the USPTO as one of the few major executive agencies to be so impaired is for Congress to make. Thus, and for the same reasons, I should either also dismiss the USPTO from this action, or at a minimum, find that the complaint fails to state a claim for which relief can be granted.

That leaves only the complaint against the courts, specifically the Federal Circuit. Before we delve into the policy levers the court has available to it, and the consequences of the court's failure to employ them creatively, there is an important distinction to be made. We must remember that we are dealing here with a court of appeals, not with the Supreme Court. Just because most patent appeals end at the circuit court level does not mean that the court of appeals is just like a junior supreme court. Let me explain.

As much as some academics and media folk love to extol or condemn the Supreme Court and its decisions and its pervasive role in society, the rest of the judicial branch—the "inferior courts," as the Constitution refers to us,[76] the courts that carry the vast bulk of the federal judicial workload—have a much different perspective on judicial life. The Supreme Court reports only to the Constitution and

76. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

God, not necessarily in that order. And they get to pick and choose the issues about which they want to opine, and how many cases in a year with which they want to deal.

The "inferior courts," including the thirteen courts of appeals, operate in a very different judicial world. In addition to the Constitution and the constraints imposed by Supreme Court precedent, most cases that come to us are cabined by the elaborate statutory framework Congress provides on just about every subject that gets litigated in federal courts, including, of course, the entirety of Title 35 of the U.S. Code dealing with patents. Common law courts in the great English tradition we are not. Furthermore, the cases come to these lower courts in a random, undifferentiated manner, in sometimes overwhelming numbers over which the courts have little, if any, say.

But that does not detract from the plaintiffs' well-pleaded allegations to the effect that we need significant improvement in the functioning of the American patent system. Let us further accept that neither Congress nor the executive branch seem to have the will or the way to bring about that change. Why then will the courts not do it?

Let us take as an example an issue that we might all agree is worthy of examination: the question of whether patent law should be tailored to the needs of specific industries. For example, can there be a robust and well-defined body of patent law supporting innovation in the pharmaceutical industry over the long periods of time it takes to bring new products to the market, while at the same time a somewhat different body of patent law providing rules with sufficient flexibility and adaptability so as not to interfere with the constantly changing dynamics of invention in the software and computer industry?[77]

How would or could a court go about addressing that question?

The first step would be to have the issue brought before the court in a focused and cohesive way. The Constitution could be a problem here, because it states that "[t]he judicial Power shall extend to . . . Cases . . . [and] . . . Controversies."[78] Admittedly, how to tailor

77. *See* Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 BERKELEY TECH. L.J. 1155 (2002). *But see* R. Polk Wagner, *Of Patents and Path Dependency: A Comment on Burk and Lemley*, 18 BERKELEY TECH. L.J. 1341 (2003).

78. U.S. CONST. art. III § 2.

patent law to specific industries would certainly be a controversy, but that may not be exactly what the Constitution means.

We would need to find parties to a lawsuit willing to focus their attention on the larger policy issues and not necessarily just on winning their case. The case would have to be one that clearly raised the issue and on which the outcome turned, so that the court's decision would not simply be dicta and thus nonbinding. And we would have to be sure that we could muster enough judges willing to manipulate those policy levers and not just decide the case.

A second step would be to ensure that the court obtains adequate information about the issues, how different industries would be affected, and what specific alternatives there are to changes in doctrine and practice that would achieve the desired results. Perhaps the court could announce a series of public hearings on the case and invite experts from industry and academia to give testimony. Amicus briefs could be invited, though that raises the question of whether, in the interest of fairness, we would have to allow the amici to file reply briefs in response to each other. Presumably the case would have to be decided by the full court sitting en banc, but those who have observed the court en banc might have qualms about that.

In addition to these constitutional, statutory, and practical obstacles to the flexing of the court's policy levers, culture is also a key question. Having spent much of my professional life in the academy while teaching at several different law schools, I am familiar with the culture and traditions of that life—the importance of scholarly publication and the dedication to teaching; the need to be creative in one's research and writing; and the value of peer recognition and the usefulness of intellectual interchange at conferences and symposia held at the many law schools. The freedom to intellectually innovate, to choose what one wants to think about, and to reach beyond the customary and the accepted is central to the role of the academic.

Having now spent almost as much time on the court as I did in academia, I have come to understand that the culture of the courts—of judges—is quite different.[79] The courts take seriously their role in the peaceful resolution of specific disputes. At the appellate level, the

79. *See generally* RICHARD A. POSNER, HOW JUDGES THINK (2008) (offering an inside perspective on the judicial branch).

cases come to us in defined form and substance, defined in great detail by another forum, and our opinions are expected to respond and be confined to the arguments and issues presented by the parties' advocates. When a court strays into territory of its own choosing, it opens itself to justified criticism.

The purpose of publishing an opinion usually is not to challenge one's peers to think more broadly or to break new and unexplored ground.[80] Rather, it is a response to the received materials in the briefs and records; to the extent new rules and doctrinal explications emerge as a consequence of decision, so be it. Even then, the scope of doctrinal explication today is largely constrained by statute and precedent. The days of the Cardozos and Learned Hands, the great common law judges who looked across an empty landscape and filled it with creative imagination, are hard to replicate in a world of seemingly unlimited legislative volubility; the occasional judge who tries usually gets overruled.

This is not to say that, even today, judges—including judges below the Supreme Court—do not make law. Yes, there are notable occasions on which a court such as ours has undertaken to engage in significant doctrinal modification. But it is important to appreciate the kinds of issues the court has felt free to address in that manner. A court of appeals is quite willing to decide questions about who in the judicial system should decide what and by what standards. Examples of such decisions are *Markman*[81] and *In re Seagate Technology, LLC.*[82] And courts are familiar with the practice of applying established rules to different factual circumstances to reach different results. But that is not the same as crafting different rules to be applied differently to different cases, nor does it speak to the broader question of how and in what ways innovation and invention should be promoted and protected in the society.

To summarize, then, regarding the institutional role of the Federal Circuit in addressing the array of problems in the American

80. *But see* Enzo Biochem, Inc. v. Applera Corp., 605 F.3d 1347, 1347–49 (Fed. Cir. 2010) (Plager, J., dissenting from denial of petition for rehearing) (urging the court to reexamine its indefiniteness jurisprudence).

81. Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc), (holding that claim construction is a question for the court, not the jury), *aff'd*, 517 U.S. 370 (1996).

82. 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc) (overruling prior precedent to hold that proof of willful infringement requires at least a showing of objective recklessness).

patent system, one must ask: Does appellate litigation lend itself to addressing, and solving, the basic problems in the patent system? Not without substantial modification in the way cases are brought, how they are developed at the trial level, and how they are presented and argued. This would require a conscious decision by all involved—the litigants, the trial lawyers, the trial court judge, the jury (if there is one), the appellate lawyers, and the appellate court judges—to cooperate in framing an agreed policy issue and to preserve it all the way through the appeal. This is certainly a challenging prospect.

Could the Federal Circuit act more like the Supreme Court, seeking and finding the cases that present the big policy questions? The court could identify the questions it is interested in and solicit cases raising these questions. As cases come up, whether the parties adequately understood or raised the right issues, the court could call for further briefing by the parties and invite amici.

Like the Supreme Court, the court's opinions would have to be free of the usual constraints. The facts would be the starting point, but not necessarily a restriction on the scope of the decision; dicta would be good law; multiple opinions in any one case would be the rule (something we already seem to be doing on occasion). It would be expected that the judges would line up squarely by understood policy preferences; perhaps the media and the press would become interested; and the judges might author something other than compilations of cases—they could even write books about their judicial philosophy.

All of this is possible, but it would take some doing. For one thing, we would have to re-educate the judges away from deciding cases to deciding instead how the patent system should work and why. Admittedly, some judges might like that, but it would subject the others to possible criticism from their peers in the other courts. It might even require a whole different panel of judges, possibly all made up of former academics, and preferably also former law clerks.[83] And on a positive note, perhaps Congress or the President might take more interest in their responsibilities to the patent system if we really showed them what could be done.

83. This may not be entirely farfetched. *See* Scott A. Herbst & Antigone G. Peyton, 19 FED. CIR. B.J. 509, 511–12 (2010) (remarking on the number of potential vacancies the court will have in the ensuing years).

However, if I had to decide this case now, as my hypothetical proposes, for all the many reasons suggested I would have to grant the Government's motion; the suit against the Federal Circuit is dismissed. The plaintiffs have sixty days to file their appeal—with the Federal Circuit.

CONCLUSION

In this essay, I have addressed two separate aspects of the Federal Circuit in its institutional role in the federal court system—the role of the Federal Circuit in dealing with the problem of uncertainty in patent law, and more specifically, the court's handling of the patent claiming and claim construction processes; and the role of the Federal Circuit with regard to its so-called "policy levers" and its ostensible failure to effectively exercise them.

With regard to the problem of uncertainty in patent law doctrine, there can be found in the several articles submitted in this symposium a number of suggestions for improvement, some within and some beyond the court's reach. Much more could, and probably should, be said about this. Perhaps a later symposium devoted primarily to this topic is warranted.

With regard to the "policy levers" debate and whether the exceptional aspects of the Federal Circuit's structural position (which I described at the beginning of the essay) have caused the court to fall notably short in its performance, as its critics claim it has, there seems to me to be a thread that ties together the "policy levers" debate and the disagreements over the court's success as an institution. Deciding cases is clearly the central role of a court at every level; the Federal Circuit is no exception. However, as the commentators emphasize, for an appellate court, there is also the need to deal with the synthesis of doctrine and, especially in the federal system, the complexities of statutory interpretation both for the case at issue and for later cases that may arise under the statutory framework.

Analytically, these two functional roles of an appellate court—deciding the case and "managing the jurisprudence," to use Professor Wagner's expression—can be separately described; operationally, they merge and blend. In some cases, the applicable law and the right result may require no more explanation than a few sentences; in

other cases, the explanation for the agreed result can be the more difficult task.

A court's explanatory style may be primarily formalistic: the appropriate legal rules are parsed and their application to the facts described, the precedents are shown as controlling or distinguishable, and the conclusion is presented as a matter of virtually unavoidable logic. Policy is invoked, if at all, by demonstrating consistency with established law.

An alternative explanation might be based on identifying what are taken to be the underlying policies (economic, social, and political, to name a few) raised by the issues in the case, and explicating how the decision contributes to the realization of the posited policy goals. Rules of law and precedents are extolled or rejected depending on their contribution to the analysis.

As I explained with reference to the situation-sense concept, when a single "right" outcome in a patent case is precluded by ambiguity, either inherent or constructed, neither of these styles accurately reflects the interior process of judging. Perhaps some of the criticism regarding the court's "failure" to use its policy levers is a reflection of the critics' desire to have the court openly address the policy questions rather than have them kept out of sight. It is worth noting that readers who turn to the minority views found in some of the Federal Circuit's opinions—a form of judicial expression currently in vogue—may sometimes get a sense for the underlying policy disputes, even if such disputes are not visible in the majority's version.

Should the judges of the Federal Circuit, in addition to reciting the law, also explicitly articulate the underlying policies that present themselves in any particular case? Assuming such policies are both visible and describable, such explicit articulation presumably would illuminate the extent to which such considerations are at work, rather than leave the focus on the doctrinal explanation for the outcome. Whether that would improve the decisional process or only change the nature of the debate about it is not all that clear. And for the reasons I discussed above, to make a wholesale shift to this form of opinion writing might require a departure from tradition that would challenge this and any circuit court's ability or desire, even assuming advocates before the court could be trained accordingly.

That, however, may not be a sufficient reason to ignore the question. As is often the case, there may be room for a middle ground between these extremes, and one would not be surprised to find variability on the treatment of this question in the opinions that have been, and are currently being issued, by the court. This symposium and the articles included in this issue make a significant contribution to patent law literature by bringing into focus the interesting questions that surround the institutional roles of the several players in the patent game.