

**Public Norms and Private Ordering:
The Contractual Construction of a Biomedical Research Commons**

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The potential for patents on biomedical research tools to inhibit valuable research has generated considerable concern. Various “public law” approaches to address this challenge, such as invoking a common law experimental use exception or curtailing patentable subject matter, face significant limitations and uncertainties. In the wake of these shortcomings, various “public” institutions—by which I include federal and state funding agencies, universities, non-profit organizations, and disease advocacy groups—are engaging in private ordering to address patent holdup. This Article argues that public institutions are increasingly conditioning their contributions of money, patent rights, and materials to biomedical research on assurances that grantees and licensees will not assert patents to impede further scientific inquiry. In essence, these institutions are contractually constructing a biomedical research commons. These efforts represent one example of the broader phenomenon of “consideration-based patent regulation” whereby “upstream” institutions are imposing access conditions on patented inventions as a condition of granting valuable research support.

Substantively, the contractual creation of a biomedical research commons reflects the significance of institutional norms in the patent system. This development reflects and exploits the unique upstream-downstream normative structure of the biomedical research sector, in which institutions critical to funding and conducting basic research are generally committed to open sharing of research technologies. Procedurally, this development reflects a significant shift from property to contract as a mechanism for implementing patent policy. By acting in a contracting rather than legislative capacity, these institutions enjoy a significant degree of freedom to impose access conditions on patented inventions. This Article greets this development with cautious optimism, critically assessing the promise and perils of a contractually-constructed biomedical research commons.