A fundamental goal of patent law is to balance rewards given to pioneers with those given to improvers. Broad patent rights can incentivize pioneers but stifle follow-on innovators. Conversely, narrow patent rights may not sufficiently encourage initial investments in innovation. There are two doctrinal mechanisms to effect this balance. The first focuses on placing ex ante restrictions on the types of inventions that can be patented and on the scope given to pioneer patents. The second focuses on enacting ex post safeguards to allow access to those inventions that are found to have a chilling effect on follow-on innovation.

Recent Federal Circuit and Supreme Court decisions in patent law in the area of patentable subject matter, obviousness, the doctrine of equivalents, and the experimental use exception, can be interpreted as a move to strengthen ex ante restrictions to patentability and weaken ex post safeguards. This Article will argue that this emphasis on ex ante restrictions is misplaced. In many cases, in particular when technology is advancing rapidly, ex post safeguards can more efficiently achieve a balance between pioneer and follow on innovation. Instead, the goals of balancing incentives for pioneers and innovators can best be achieved by expanding the experimental use exception doctrine, reviving the doctrine of equivalents, and adjusting remedies jurisprudence.