THE GRAND EXPERIMENT, AFTER THREE DECADES

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Every three decades or so, the technology-industrial complex in the United States undertakes an upheaval of the United States patent system, adjusting the procedural law and the substantive law, in tandem with advances in science and technology and their accommodation in industrial development. A major shake-up occurred in 1982 with the formation of the Federal Circuit Court of Appeals, three decades after the 1952 Patent Act put the nation on the path to harvest the extraordinary blossoming of technology after World War II. The 1982 adjustments also introduced patent reexamination and, through the Bayh-Dole Act, facilitated movement of basic science into industrial development. The purpose of the Federal Circuit Court of Appeals was to support industrial incentive by providing a stable and reliable patent law and dispute-resolution mechanism.

The America Invents Act of 2011 fits this chronology. Technology-based industry has become the dominant force in the nation's economy, and the patent law was again lagging the needs of innovative industry. I outline the evolution of judge-made patent law during these three decades, with an eye to evaluating the continuing needs and purposes of the law governing industry and innovation. I focus on policy-oriented rulings of the Federal Circuit and the Supreme Court. It is timely to consider whether the Federal Circuit is continuing to fulfill its mission as designed in 1982, and whether further adjustment in judicial structure may be appropriate in light of today's pace and nature of technological change. The powerful promise of further advances of science and technology deserves no less. I conclude that it is time for a fresh look at the judicial role and structure designed to support industrial innovation.