Supreme Court Patent Decision on Human Genes Has Constitutional Roots

By Donald Scarinci

While it might seem strange to discuss the patentability of DNA on a constitutional law blog, the U.S. Supreme Court's decision in *Association for Molecular Pathology v. Myriad Genetics, Inc*. can be traced back to the founding fathers. While they likely could not have anticipated the advances inventors would make in mapping our genetic makeup, they did believe in promoting American innovation.

Article 1, Section 8, Clause 8, referred to as the Patent and Copyright Clause, authorized Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Under this mandate, Congress created the U.S. patent system for "new and useful" inventions.

While the Supreme Court's *Myriad* decision largely focused on the language of 35 U. S C. § 101 regarding patent eligibility, several amicus briefs arguing against the gene patents referenced the constitutional foundation of the patent system. As highlighted by the American Bar Association:

The drafters of the Constitution sought to give Congress the power to promote the widespread distribution of knowledge in the most effective way possible. The U.S. Constitution, Article I, Section 8, Clause 8, grants Congress the power to provide inventors time-limited exclusive rights over their inventions in order 'to promote the progress of Science and the useful Arts.' However, patents for human genetic material directly threaten that idea, essentially blocking future research and development and stopping science in its tracks.

Ultimately, the Supreme Court largely agreed. It found that a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated. Conversely, cDNA is patent eligible because it is not naturally occurring. As further explained by the Court, "Myriad did not create or alter either the genetic information encoded in the BCRA1 and BCRA2 genes or the genetic structure of the DNA. It found an important and useful gene, but groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry."