

I believe this guidance reflects a ruling in *Myriad* that is inconsistent with patent law precedent and should not be repeated in the USPTO's guidance on patent eligible subject matter. It was at the Federal Circuit that characterized DNA to a mere "use" or "function." With very little analysis of Myriad's cDNA claim, the Supreme Court seems to follow the Federal Circuit without question or comment and offered that the structural changes made to Myriad's cDNA was sufficient to render it not a product of nature. But, the Court's single paragraph on the patent eligibility of Myriad's cDNA did not address the genetic information found on the cDNA, which happens to be identical to that of its naturally occurring counterpart. Regarding the Court's holding on Myriad's isolated DNA claim, states, "We merely hold that genes and the information they encode are not patent eligible under § 101 simply because they have been isolated from the surrounding genetic material." In *Alice*, the Court held that a claim that "adds nothing of substance to the underlying abstract idea" is not patent eligible. If the genetic information found on Myriad's cDNA and that of its naturally occurring counterpart are identical, it seems to reason that it adds nothing to the underlying judicial exception, and should therefore be found patent ineligible under *Alice*.

Chakrabarty repeats prior Supreme Court decisions that found "Laws of nature, natural phenomena, and abstract ideas are not patentable." The Court has provided examples of subject matter that is not patent eligible: new minerals discovered in the earth, a new plant found in the wild, Einstein's $E=mc^2$, Newton's law of gravity. Myriad may have "created" something structurally unique in its cDNA but they did not create anything new in the genetic information found on their cDNA, i.e., there was no "inventive concept."

Promulgating the *Myriad* decision will "tie up" the "basic tools" of research into genetic disorders and "inhibit future innovation premised upon them." Is a product of nature that is found

in *all* of us something that should be held to the exclusion of all others? No, it should be “free to all men and reserved exclusively to none.”