cial decisions for over a century,[1419] "novelty and utility" has been the primary statutory test since the Patent Act of 1793.[1420] Section 103 of the Patent Act of 1952, however, required that an innovation be of a "nonobvious" nature; that is, it must not be an improvement that would be obvious to a person having ordinary skill in the pertinent art.[1421] This alteration of the standard of patentability was perceived by some as overruling previous Supreme Court cases requiring perhaps a higher standard for obtaining a patent,[1422] but, in *Graham v. John Deere Co.*,[1423] the Court interpreted the provision as having codified its earlier holding in *Hotchkiss v. Greenwood*.[1424] The Court in *Graham* said: "Innovation, *advancement*, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored." [1425] Congressional requirements on patentability, then, are conditions and tests that must fall within the constitutional standard. Underlying the constitutional tests and congressional conditions for patentability is the balancing of two interests—the interest of the public in being protected against monopolies and in having ready access to and use of new items versus the interest of the country, as a whole, in encouraging invention by rewarding creative persons for their innovations. By declaring a constitutional standard of patentability, however, the Court, rather than Congress, will be doing the ultimate weighing. As for the clarity of the patentability standard, the three-fold test of utility, novelty and advancement seems

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have had no place in the constitutional scheme of advancing scientific knowledge. A few that have reached this Court show the pressure to extend monopoly to the simplest of devices: [listing instances]." Id. at 156–58.

[1419] "Inventive genius"—Justice Hunt in Reckendorfer v. Faber, 92 U.S. 347, 357 (1875); "Genius or invention"—Chief Justice Fuller in Smith v. Whitman Saddle Co., 148 U.S. 674, 681 (1893); "Intuitive genius"—Justice Brown in Potts v. Creager, 155 U.S. 597, 607 (1895); "Inventive genius"—Justice Stone in Concrete Appliances Co. v. Gomery, 269 U.S. 177, 185 (1925); "Inventive genius"—Justice Roberts in Mantle Lamp Co. v. Aluminum Co., 301 U.S. 544, 546 (1937); "the flash of creative genius, not merely the skill of the calling"—Justice Douglas in Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 91 (1941).

[1420] Act of February 21, 1793, ch. 11, 1 Stat. 318. *See* Graham v. John Deere Co., 383 U.S. 1, 3–4, 10 (1966).

[1421] 35 U.S.C. § 103.

[1422] *E.g.*, A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950); Jungerson v. Ostby & Barton Co., 335 U.S. 560 (1949); and Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84 (1941).

[1423] 383 U.S. 1 (1966).

[1424] 52 U.S. (11 How.) 248 (1850).

[1425] 383 U.S. at 6 (first emphasis added, second emphasis by Court). For a thorough discussion, *see* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146–52 (1989).