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Thinking About Law and Creativity: On the 100 Most Creative Moments in American Law

Robert F. Blomquist

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THINKING ABOUT LAW AND CREATIVITY: ON THE 100 MOST CREATIVE MOMENTS IN AMERICAN LAW

Robert F. Blomquist*

Abstract

In most cultural contexts creativity is viewed as an unalloyed virtue. Law is different: given the inherently conservative and slow-moving pace of legal evolution, innovation in the law is viewed by many observers as problematic. Yet American revolutionaries, constitutionalists, legislators, chief executives, judges, administrators, scholars and activists have creatively changed the law for over two centuries in mostly positive ways with some admittedly questionable innovations. This article makes a bold new proposal—the articulation and ranking of America’s most creative legal moments—designed to energize and clarify our synoptic thinking about the nature of legal creativity.

Starting with the opinions of numerous eminent legal historians on the most creative moments in Anglo-American law, we will explore the meaning of creative moments in law, and advance to analytically compare legal creativity with other kinds of creativity (corporate, artistic, military and rhetorical). Then we will heuristically entertain a ranking of the top hundred moments in American law and a justification for the ranking.

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THINKING ABOUT LAW AND CREATIVITY: ON THE 100 MOST CREATIVE MOMENTS IN AMERICAN LAW

I. INTRODUCTION

In most cultural contexts, to be creative is an unalloyed virtue—a really good quality. To be creative is to be “inventive and imaginative”; to be “originative, artistic, original, ingenious, resourceful.” But what of creativity or innovation in the context of the law? We may usefully open a window on this fascinating subject by briefly considering a concurring opinion of United States Circuit Judge Richard A. Posner to a 1990 panel opinion in a review of a federal magistrate’s conclusion that probable cause existed to issue a warrant that led to the arrest and conviction of Benny McKinney on federal drug trafficking and firearm charges.2 Like many other things that Posner has written—as a jurist3 and a public intellectual4—what he wrote in his concurrence in United States v. McKinney was frank and astute. For our purposes, let us focus on his thoughts about law and creativity; he said “only in law

4 See id. at 161, n.1 (discussing some of his intellectual books and articles).
is ‘innovation’ a pejorative” and “[w]e should not fear to reject [sterile verbalisms and outmoded distinctions] for fear of being called innovative.”

Judge Posner’s McKinney concurrence was in reaction to the majority opinion written by his colleague on the Seventh Circuit, Judge Flaum. The majority opinion disparaged Posner’s proposal to “change ... the formulation of the standard of review of probable cause determinations,” labeling the notion as involving “bold initiatives” which flew in the face of Supreme Court precedent and admonished Posner that the proper role of circuit judges, in the realm of Fourth Amendment jurisprudence, is to “await an explicit order from our superiors before scuttling” existing doctrine. Moreover, Flaum’s majority opinion in McKinney went further to call Posner (and another Seventh Circuit judge, Frank Easterbrook) “overly innovative jurists displeased with the state of the law” on probable cause standards of appellate review.

The exchange between the appellate judges in McKinney is interesting for several reasons. First, the judges use a synonym for “creative”—the word “innovate.” “Innovate” enriches the meaning of the idea of creativity; to innovate means to “break new ground, pioneer, blaze a trail” and to “make changes, make alterations, modernize, remodel, revamp.” Thus, innovation can be considered in the same company as “originality, inventiveness, creativity, imagination, imaginativeness, novelty, invention, modernization, alteration, [and] change.” Second, the warring judicial rhetoric uncovers a fundamental tension about creativity and the law expressed by Roscoe Pound years ago: “the law must

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5 U.S. v. McKinney, 919 F.2d 405, 421 (7th Cir. 1990) (Posner, J., concurring) (parentheses omitted).
6 Id. at 423.
7 U.S. v. McKinney, 919 F.2d 405, 409 (7th Cir. 1990) (internal quotation marks omitted).
8 Id.
9 Id.
10 Id. at 411, n.4 (citation omitted) (emphasis added).
11 See supra notes 5-10 and accompanying text.
12 OXFORD DICTIONARY & THESAURUS, supra note 1, at 770.
13 Id.
be stable; and yet it can not stand still.”

When is it appropriate to innovate in the law? Is legal creativity cabined by the unique role of the purported law innovator (i.e., a trial judge, an appellate judge, a justice of a supreme court, a legislator, an executive official)? And, related to the preceding question, should legal innovation have different constraints depending on federal considerations (i.e., whether or not a state appellate judge is thinking of being creative versus a federal appellate judge)? And, related to the two preceding questions, should the substantive area of potential legal creativity be factored into the calculus of whether legal innovation is appropriate or not (i.e., a federal judge considering innovating, as Judge Posner was, in the area of criminal constitutional law appellate standards of review versus a hypothetical idea of a federal appellate judge to innovate by bending the words of a state health maintenance organization statute to allow more covered treatment options for HMO enrollees?) Third, the exchange between the circuit judges in McKinney suggests a fascinating cultural issue: in America—the land of the “pioneer spirit,” the cradle of inventive scientific and technological breakthroughs, the capitalistic culture always in search of the better mouse trap, and the place where creative artists are welcomed and lionized—should legal creativity be considered of the same cloth as other forms of creativity? And if legal innovation is to be differentiated from other forms of creative change, on what grounds should it be distinguished?

Alas, my purpose in the present Article is more limited than the range of questions posed in the previous paragraph. While a scattering of interesting ideas have been written on law and creativity, much remains to be written about how American legal

14 THE QUOTABLE LAWYER 38 (David S. Shrager & Elizabeth Frost, eds. 1986).
15 See infra notes 119-29 and accompanying text. One of the most interesting books on law and creativity—indeed on thought and invention throughout history—is PETER WATSON, IDEAS: A HISTORY OF THOUGHT AND INVENTION FROM FIRE TO FREUD (2005). Watson discusses many creative legal ideas throughout world history. Among the candidates of great legal innovations of ancient history are: (1) the Sumerian laws set down by the ruler Lipit-Ishtar (1934-1924 B.C.) in southern Mesopotamia which covered rules for, among
innovation fits and should fit within the larger overarching cultural milieu of American innovation and global innovation, in general.\textsuperscript{16}

other subjects, ownership of land, inheritance, marriage, and remarkably, something akin to a private nuisance law which created liability for an adjoining real estate owner who, through lack of due care, allows his neighbor’s property to be broken into by an intruder, \textit{id.} at 15; (2) the code of Babylonian King Hammurabi (1792-1750 B.C.) who arranged for the first systematic set of laws arranged in a comprehensive and coherent fashion, covering such subjects as “offences against property (twenty sections), trade and commercial transactions (nearly forty sections), the family (sixty-eight sections covering adultery, concubinage, desertion, divorce, incest, adoption, inheritance), wages and rates of hire (ten sections)” and, alas, “ownership of slaves (five sections),” \textit{id.} at 93-94 and whose laws exhibited the sophistication of two different forms— “[a]podictic laws [which were] absolute prohibitions, such as “Thou shalt not kill” and [c]ausistic laws such as “if a man delivers to his neighbor money or goods to keep and it is stolen out of the man’s house, then, if the thief is found, he shall pay double”, \textit{id.} at 94 (internal quotation marks omitted); (3) the ancient Roman republic’s innovation of applying the previously aristocratic legal concept of \textit{imperium} (“the ... right to give orders to those of lower status and expect them to be obeyed”) to rule by elected officials, after 509 B.C., including two consuls with a tenure of one year “with equal \textit{imperium},” \textit{id.} at 200 (internal quotation marks omitted) (endnote omitted); and (4) the incomparable code of Byzantium emperor Justinian (A.D. 527-565),

[which was the culmination of a thousand years of Roman law and] which in turn largely shaped European law as it exists today, both in Europe itself and in many of those countries colonized by later European powers. This code consists of the following entities: the Institutes, elementary principles; the Digest, a collection of juristic writings; the Code, a collection of imperial Enactments and the Novels, Justinian’s own legislative innovations. The layout of Justinian’s work identified the evolution of ideas and names those responsible, so it is especially useful in showing the way legal thought developed and matured in Rome. Its most well-known and influential element is the \textit{Corpus iuris civilis}, effectively statute law affecting civil administration and the reach of ecclesiastical power and privilege. During the Middle Ages, the code of Justinian was more influential in the eastern part of the empire (Byzantium) but it was one of those classical elements that was rediscovered in western Europe in the twelfth century.

\textit{Id.} at 203-04.

Such projects are beyond my present, rather modest, heuristic exercise. Like the famous joke of an economist stranded on a desert island (along with other folks) with a sealed can of food who (lacking any available opening tool) “solved” his hunger problem by assuming a can opener,¹⁷ I will, for present purposes, follow in the same spirit. Assume that creativity is a good thing in American law. I am interested in performing the following thought experiment: What are (in ranked order) the most creative moments in American law?

What follows comes in three parts. In Part II, I will describe my informal survey of American law professors who have taught legal history asking for their input on the most creative moments in Anglo-American law. Since American law was born of English law, this is a good place to begin. But since my expertise lies with American law and my interest focuses on American law, I have chosen to focus, in the final analysis, on creative elements in American law. Part III of this Article is my own tentative take on a ranking and listing of the 100 most creative moments in American law; the discussion which precedes this ranking entails much meandering and perambulations. Part IV offers a brief explanation of my tentative ranking in the previous part.

II. THOUGHTS FROM LEGAL HISTORY LAW PROFESSORS ON ANGLO-AMERICAN LEGAL INNOVATIONS

In September of 2005—relying upon the AALS Directory of Law Teachers¹⁸ I sent letters to approximately 426 American law professors listed as having taught the subject of legal history.¹⁹ I asked each professor, rather naively, but straightforwardly: “Given your background as a teacher and scholar of legal history .... What do you think are the most creative moments in Anglo-American
law?"20 I also alerted each recipient of my epistle that I was contemplating writing an article (and eventually a book) on the topic and would, if I used their response, give academic credit for the thoughts.21 Much to my surprise, I received numerous assorted responses to my query of the most creative moments in Anglo-American legal history—some by letter, some by e-mail and some by handwritten note.


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20 *Id.* One of the reasons why I chose the snail-mail approach, rather than the e-mail approach, is that since my audience had a historical bent I thought the law professors might appreciate receiving an old fashioned letter. Candidly, though, another reason is my personal opinion that if you really want to be noticed, in this age of spam inflation on the internet, the best way is to send a letter.

21 *Id.*

22 In this part of the Article I do not provide legal citation to professorial suggestions of specific regulations cases, statutes or other material which they considered to be the most creative moments of Anglo-American law; I do so to try to preserve the informality of the responses which I received to my query.

23 E-mail from Calvin Massey, Professor of Law, University of California, Hastings, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 20, 2005, 08:24:32 CDT) (on file with author) (italics added).
unanimity and his writing approach, especially in Brown I.”

Professor Alfred L. Brophy waxed imaginative on his seven suggestions, opining that the following items should be on a list of most creative Anglo-American legal moments:

(1) Francis Daniel Patorius’ Young Country Clerk’s Collection, the first legal treatise written in British North America. It’s a combination of English, German, and American sources on law; hence it draws on the past but represents an attempt to remake the law and make it more useful in settling disputes. It’s an important moment in the making of American law.


(3) Ralph Ellison’s Invisible Man (published in 1952), signaled and helped create the cultural consensus that segregation based on race was immoral. Few people speak about the importance of Invisible Man to the culture of civil rights ....

(4) Jones v. Alfred Mayer—sees the wisdom of the Reconstruction civil rights statutes and constitutional amendments and applies them to contemporary problems. (Along those lines, 13th-15th Amendments obviously rank highly.)

(5) Charles Darwin’s Origin of Species—popularized the idea of evolution, which led to much change in jurisprudence. (Obviously, Holmes’ Common Law fits here ... Cardozo’s Nature of the Judicial Process fits here, too).

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24 E-mail from John Q. Barrett, Professor of Law, St. John’s University School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 20, 2005, 09:39:04 CDT) (on file with author) (italics added).
(6) Thomas Paine’s *Common Sense* and the *Rights of Man*—both helped indict English law and prepare the way for positivism and a more humane common law.

(7) Harriet Beecher Stowe’s *Uncle Tom’s Cabin*—indicted slave law (as well as slavery itself) and undermined support for [the] Fugitive Slave Act of 1850.

In short, one of the most important law books ever written. And all the more creative because it took the form of a novel.  

Professor Drew L. Kershen had a different take on some suggestions for the most creative moments in Anglo-American law: [1] “The Progress of Science and Arts clause of the Constitution—the clause gave rise to incredible creativity among Americans and others around the world through the legal protections given to intellectual property”; [2] “President Harry Truman’s Executive Decree integrating the U.S. military forces in [the post World War II era]—I think of this as the beginning of the modern civil rights era and leading the way for the civil rights movement that followed [in the 1960s]”; [3] “the Prior Appropriation Doctrine of Water Rights in the American West—clear, secure property rights in water that allowed the settlement and development of the West. While these may be ‘problematic’ today, these prior appropriative rights were essential in earlier times”; [4] “the creation of the USDA [United States Department of Agriculture] and [I]CC [Interstate Commerce Commission] as the first major FEDERAL administrative agencies—the beginning of the administrative and bureaucratic era of government” and [5] “the Immigration [and Nationality] Act of [1965] which opened the doors of liberty to millions who had previously been denied entrance to the United States. This created our modern multi-

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25 E-mail from Alfred L. Brophy, Professor of Law, University of Alabama Law School, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 19, 2005, 14:13:02 CDT) (on file with author) (italics added).
Professor Stephen B. Presser sent the following short suggestion on American legal creativity:

The only event that I can think of that might not be obvious to you ... is the acquittal of [U.S. Justice] Samuel Chase in 1805. It established ... the notion that [C]ongress shouldn’t impeach for mere political differences, although it also established that judges had better avoid political pronouncements if they don’t want trouble.27

Professor Judith E. Koons wrote: “I trust you will be including Seneca Falls [Convention on Womens’ Voting Rights].”28 An intriguing English nomination came in response to my query from Professor Michael H. Hoffheimer: “Bushel’s case ... (1670) (holding that jurors could not be compelled to return [a] conviction against their conscience), a case that arose from jurors’ refusal to convict Quakers for celebrating their religion in violation of conformity laws.”29 From Professor Stephan Landsman came two interesting ideas to include in my law and creative moments project: “the Warren [and] Brandeis article on the right to privacy published in the Harvard Law Review in 1890” and [t]he adoption of the Federal Rules of Civil Procedure”—among other vital suggestions.30 From Professor Charles D. Kelso came the obvious

26 E-mail from Drew L. Kershen, Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 19, 2005, 12:29:16 CDT) (on file with author) (italics added).
27 E-mail from Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 17, 2005, 15:39:31 CDT) (on file with author) (italics added).
28 E-mail from Judith E. Koons, Associate Professor of Law, Barry University, Dwayne O. Andreas School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 16, 2005, 17:17:38 CDT) (on file with author).
29 E-mail from Michael H. Hoffheimer, Professor of Law, University of Mississippi School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 15, 2005, 13:39:08 CDT) (on file with author) (italics added).
30 Letter from Stephan Landsman, Professor of Law, DePaul University College of Law, to Robert F. Blomquist, Professor of Law, Valparaiso
suggestion of “the Declaration of Independence”—a work of creative law interpretation, law-breaking and law-making—juxtapositioned with two further not so obvious creative American legal moments: “Alexander Hamilton’s plans for economic policy” and “Thomas Jefferson’s Louisiana [P]urchase.”

Given by Professor Daniel R. Ernst were the following thoughts for inclusion on the top creative moments of Anglo-American law list: “the Securities Act of 1933” and “the invention of the log labor lien in the Wisconsin lumber industry.”

Professor Stephen Sheppard provided me with the following synoptical scholarly list of creative moments in “English and colonial history” and “American events”:

Collection of the Domes-Day census
Writings of the Bracton
Consolidation of common law under Coke [1602-1616]
Dr. Bonham’s Case [1610]
Courtney v. Glanville [1614]
Five Knight’s Case and the Parliament of 1628
Publication of Coke’s Reports and Institutes
Glorious Revolution
Bill of Rights [1689]
Lawes and Liberties of Massachusetts [1647]
Samuel Sewell’s Apology for Salem [1697]
Writs of Assistance Case [1761]
Somerset Ruling [1772]
Viner’s creation of a chair of law [at Oxford University] and appointment of Blackstone to it [1756]
Publication of Blackstone’s Commentaries [1760-65]
Publication of Bentham’s Introduction to the Principles of Morals, 1789 ....

University School of Law (undated) (received Sept. 2005), (on file with author) (italics added).

31 Letter from Charles D. Kelso, Professor of Law, The University of the Pacific, McGeorge School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 19, 2005) (on file with author).
32 Letter from Daniel R. Ernst, Professor of Law, Georgetown University Law Center, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (undated) (received Sept. 2005) (on file with author).
Appointment of George Wythe as Professor of Law and Police, College of William and Mary [1779]
Opening of Litchfield Law School [1784]
Publication of Story’s Commentaries and Treatises
Publication of Kent’s Commentaries
Issuance of General Order 100 [1863].

One American event I think is of paramount importance: Abraham Lincoln becomes the first modern head of state to stand for popular re-election during a civil war, a triumph of the U.S. Constitution, 1864.\(^{33}\)

Professor of Law and Director of Law Library Edwin C. Surrency provided the following contrarian nomination for a prime creative moment in American legal history:

I am an admirer of the Articles of Confederation and I am enclosing a reprint [where] I tried to point out its significance. I think that the mere fact that thirteen colonies, which were governed separately, could get together and form this confederation and fight a war at the same time is remarkable. It certainly gave the colonists some experience in governing which they did not have.\(^{34}\)

Other interesting suggestions from American legal historians on the most creative moments in Anglo-American law include the following assortment:

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\(^{33}\) Letter from Steve Sheppard, Professor of Law, University of Arkansas School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 26, 2005) (on file with author) (some italics added).

\(^{34}\) Letter from Erwin C. Surrency, Professor of Law and Director of Law Library, Emeritus, University of Georgia School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 27, 2005) (on file with author). Professor Surrency enclosed Erwin C. Surrency, *The Transition From Colonialism to Independence*, 46 AM. J. LEG. HIST. 55 (2004).
— the “[c]reation of the American Law Institute and the Restatements” and “Christopher Columbus Langdell and the case method study” at Harvard;\(^{35}\)

— “Public Law 600 of 1950, and 447 of 1952, on the establishment of the Commonwealth of Puerto Rico” and “the Northwest Ordinance” and the “1st Amendment” to the U.S. Constitution;\(^{36}\)

— “\textit{Rylands v. Fletcher},” the 19th century English case providing the “introduction of strict liability in tort”;\(^{37}\)

— “David Dudley Field’s 1846/1848 merger of law and equity in New York”;\(^{38}\)

— “[t]he transformation of the corporate charter into a routine business device at the end of the 18th century” which “culmin[ated] in the routine drafting of articles through the general incorporation state laws”;\(^{39}\)

— “\textit{The Federalist Papers}” and “The Massachusetts Constitution crafted by John Adams” and “[t]he protection of the American debtor in tension with market capitalism” stemming from “the rebellion led by Daniel Shays after the

\(^{35}\) Letter from Ronald W. Eades, Professor of Law, University of Louisville, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Oct. 3, 2005) (on file with author).

\(^{36}\) Letter from Antonio Fernós, Inter American University of Puerto Rico, School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 30, 2005) (on file with author).

\(^{37}\) Letter from Harold J. Berman, Woodruff Professor of Law, Emory University School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Nov. 30, 2005) (on file with author) (italics provided).

\(^{38}\) Letter from James W. Paulsen, Professor of Law, South Texas College of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Oct. 23, 2005) (on file with author).

\(^{39}\) Letter from Richard J. Aaron, Professor of Law, University of Utah, S.J. Quinney College of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Oct. 7, 2005) (on file with author).
American Revolution or the Texas homestead and the sanctuary of debtors,”40

— “The Norman Conquest” in 1066 and “[t]he beginnings of the practice of writing out reports of cases .... [a]bout 1290” and the “spread of [English] common law abroad—rise of empire and this export of law” and the “[i]nvention of judicial review”;41

— “the movement starting in the mid-late 19th century for the election of state court judges ....”42

Interestingly, I also received three separate comments from legal history professors who spoke in terms of negative creativity in the law. First, Professor H. Jefferson Powell urged the Supreme Court’s decision in “Allgeyer v. Louisiana [to be treated] as a creative moment” in “[the Court’s] final acceptance of substantive due process after decades of hesitation,” even though Powell “think[s] the decision wrong.”43 Second, Professor Lynn D. Wardle noted:

I think a couple of negative creative moments should also be included. The Supreme Court decision in Dred Scott v. Sanford effectively striking down the Missouri Compromise and frustrating the fragile political equilibrium led the southern states to believe that they could be more brazen in their efforts to consolidate and strengthen the institution of slavery and to go their separate way. In short, the decision provoked the Civil War. That

40 Id.
41 Letter from A.W. Brian Simpson, Charles F. and Edith J. Clyne Professor of Law, University of Michigan Law School, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 29, 2005) (on file with author).
42 E-mail from Richard E. Coulson, Professor of Law, Oklahoma City University School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Oct. 21, 2005, 12:01 CDT) (on file with author).
43 Letter from H. Jefferson Powell, Professor of Law, Duke University School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Oct. 26, 2005) (on file with author).
was an unfortunate creative moment. Likewise, the decision in *Plessy v. Ferguson* which included a process of emasculating the Fourteenth Amendment and frustrating its implementation for decades, bears mention. It, too, was creative (using creative interpretative approaches to frustrate the intent of the amendment language) in ways that set back the progress of rights for black Americans by decades.\(^{44}\)

A third comment on negative creativity and the law in Anglo-American history came from Professor Richard Stith. He asserted in response to my query: “Basically, courts are not supposed to be ‘creative.’ So such moments are generally negative [regarding] courts.”\(^{45}\) Stith adds: “Well, if creating something out of nothing counts, how about *Roe v. Wade*? Many think it created a right to abortion without any basis in the Constitution.”\(^{46}\)

### III. Rambles, Meanders and Perambulations: Toward a Ranking of the 100 Most Creative Moments in American Law

**A. Born on the Fourth of July.**

Although I was not literally born on the Fourth of July (I’m an October Libra, I’m afraid, forever worried about balancing the scales) I have an American-centric view of the law because I have been educated in American universities, practiced here for over thirty years, and taught in an American law school for over two

\(^{44}\) Letter from Lynn D. Wardle, Professor of Law, Brigham Young University, J. Reuben Clark Law School, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 26, 2005) (on file with author).

\(^{45}\) Letter from Richard Stith, Professor of Law, Valparaiso University School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (undated) (received in Sept. 2005) (on file with author).

\(^{46}\) Id. Cf. Neal Kumar Katyal, Comment: *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65, 70, nn. 20-21, 98 (2006) (arguing that “the real significance of *Hamdan* lies in its repudiation of the Administration’s radical theory that the President has the ability to interpret creatively, and even set aside, statutes that he claims interfere with his war powers”).
decades. I’m also an Anglophile—but I lack the deep historical
connection with British political history and legal history to fully
understand the nature of British legal innovations. Therefore,
while I appreciate the input that I received on British law and
creativity, discussed in the previous Part,47 I feel more comfortable
with pursuing the most creative moments in American law.48

B. What Is a Creative Moment in Law?

Why focus on creative moments in American law? A
“moment” is “a very brief portion of time,” “an instant,” “a short
period of time”—in one sense of the word.49 As legal scholars can
appreciate, however, legal change often takes years (if not decades
or even centuries) to play itself out. Thus, by way of illustration,
we have become accustomed to think about the Marshall Court or
the Warren Court; of the Age of Jackson, The New Deal or the
Great Society; of the Legal Process School or the Critical Legal
Studies movement.50 But, legal scholars and American historians
have also focused on some pivotal events of legal development.
Thus, *Marbury v. Madison*,51 *Brown v. Board of Education*52 and
*Roe v. Wade*53 are known as landmark opinions of the United
States Supreme Court, just as the “first 100 days” of FDR’s
administration during early 1933 is known as a discrete period of
legal ferment led by the president,54 and the Sherman Anti-trust

47 See supra notes 18–46 and accompanying text.
48 Still, I can’t resist listing my own “top three” favorites of British legal
creativity. First, the *Magna Charta*. Second, Blackstone’s treatise on
*Commentaries on the Laws of England*, published in the late 1700s. Third,
the Norman Conquest of 1066.
49 Oxford Dictionary & Thesaurus, supra note 1, at 963.
50 Cf. Andrew Stark, *What Was Old Is Young Again*, WALL ST. J., July 26,
2007, at D7 (reviewing Penelope J. Corfield, *Time and the Shape of
History* (2007)) (“But even in the world of the here and now ... time plays
seductive tricks with our judgment, guiding our sense of cultural wisdom,
civilizational triumphs and spiritual mystery, and causing us to disagree about
such things, seemingly forever.”)
51 Cranch (5 U.S.) 137 (1803).
54 See generally Jonathan Alter, *The Defining Moment: FDR’s
Act,\textsuperscript{55} the Federal Reserve Act,\textsuperscript{56} the Civil Rights Act of 1964\textsuperscript{57} and the USA PATRIOT Act\textsuperscript{58} are key legislative achievements of the Congress that fundamentally altered key substantive areas of American law.

Yet, even if we acknowledge the advantage, at times, of charting and assessing longer periods of time in considering legal change, use of the word “moment” has another meaning—“importance” and synonyms such as “weight,” “consequence,” “significance,” “import,” “gravity,” “seriousness,” “prominence,” “interest” and “note.”\textsuperscript{59} So, on balance, I think use of the word “moment” affords a useful ambiguity about both short-term and long-range developments of great significance; it is, in my judgment, a suitable lens to take a look at American legal creativity (but, by no means, the only way).

\textbf{C. Of Creativity and Intellectual History in General.}

Law is really a set of human ideas that has proven practical and helpful in advancing civilization. Peter Watson has described a range of “core” ideas through history; his description helps in discerning the way legal ideas relate to other kinds of ideas.\textsuperscript{60} According to Watson core intellectual ideas consist of: “ideas about the external order of nature; ideas about human nature, literature and aesthetics; ideas about history; economic, legal and political ideas and institutions; religion and philosophy; formal logical mathematical and linguistic ideas.”\textsuperscript{61} Narrowly construed, legal ideas are intertwined with economic and political ideas and

\begin{footnotesize}
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\item \textsuperscript{55} 26 Stat. 209-210 (1890).
\item \textsuperscript{56} 38 Stat. 251-275 (1913).
\item \textsuperscript{59} OXFORD DICTIONARY & THESAURUS, \textit{supra} note 1, at 963-64.
\item \textsuperscript{60} WATSON, \textit{supra} note 15, at 10.
\end{enumerate}
\end{footnotesize}
institutions. But, broadly interpreted, ideas about law can be viewed as being based on presuppositions about the external order of nature, as reflective of human nature, as a type of literary production with aesthetic characteristics, as premised on historical evolution, as a philosophical statement, or, even as an exercise in formal logic.

Creativity—and its cognate concepts—\(^62\)—is enormously important in the general history of ideas. Indeed, Watson has identified the “failure of both historians and scientists to get” a grip “with imagination as a dimension in life generally and in particular so far as the production of ideas is concerned” as one of the principal failures in modern intellectual analysis and understanding.\(^63\) So, trying to gain some insights on law and creativity—however limited—would appear to be a worthy intellectual endeavor that has potential payoffs not only for improving law but also for refining and enriching intellectual history.\(^64\)

D. Of Legal Creativity and Corporate Creativity—Comparisons and Contrasts.

As the New York Times recently put it, corporate creativity and “[i]nnovation is all the rage.”\(^65\) Indeed, “chief executives implore their troops to be more creative, the editors of Business Week are

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\(^62\) See supra notes 1, 12-13 and accompanying text.

\(^63\) Watson, supra note 15, at 10. The other two key failures of modern intellectual history, according to Watson, are (1) a failure to explain the meaning and significance of “secularisation” and (2) the disappointing results of psychohistorical studies. Id.

\(^64\) See, e.g., Josiah Bunting III, The Anxiety of Influence, WALL ST. J., July 3, 2006, at A10 for a recent intellectual historical take on the American Founders, which brought to life the founding legal concepts and institutions of the American Republic:

[T]hey wrote with a grace and lucidity we cannot match. Their minds seemed clearer than ours. And they had also what was imputed to a great general of a later generation: the imagination of engineers. They knew how to transform ideas into action, into policies and institutions. Id. (emphasis added).

starting a new magazine devoted to the subject, and Wall Street awards premiums to companies (like Apple Computer) that come up with innovative products (like iPod). As explained, by way of example, a 2006 book on corporate creativity entitled (creatively enough) *Juicing the Orange*, argues that business creativity can be both harnessed and leveraged by pursuing seven crucial steps:

1. Always start from scratch.
2. Demand a ruthlessly simple definition of the business problem.
3. Find a proprietary emotion you can appeal to. Marketers who favor reason over emotion ... will find themselves quite literally forgotten.
4. Think big. Don’t be limited by the budget or the initial challenge.
5. Take calculated risks.
6. Collaborate with others both inside and outside your company to solve the problem.
7. Listen hard to your customers. (Then listen some more).

By way of another example, derived from another recent book entitled *How Invention Begins*, hugely important creations like the printing press, the steam engine and the airplane were the products of “group intelligence” with inventors building on past ideas. Thus: “the fabric of causality becomes terribly complex in the case of invention .... That is why we do better if we begin with a seemingly illogical acceptance that invention is the emergence of a

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66 Id. And, more recently, I-Phone.
67 Id. (quoting from Pat Fallon & Fred Senn, *Juicing the Orange* (2006)) (internal quotation marks omitted).
68 Id. (citing John H. Lienhard, *How Invention Begins* (2006)).
collective idea at the same time it is an expression of one person’s genius.”

Based on the aforementioned principles of corporate creativity, we can appreciate some similarities to legal creativity. First, legal creativity (whether judicial, legislative, executive or administrative) usually involves risk-taking by legal officials; at its best, this risk-taking is calculated and based on an astute and transparent weighing of costs and benefits. Second, legal creativity may be similar to effective corporate creativity in assorted instances of collaboration within and without a legal institution. Thus, creative legislation may rely on principles articulated in the first instance by an administrative agency; creative judicial opinions may rely upon law review articles or the spirit of particular statutory enactments; or creative executive orders may rely upon legislation and constitutional provisions. Third, like corporate creativity—and even individual invention—legal creativity is often the result of group intelligence—whether it be members of a legislative committee and its staff or members of the majority opinion of an appellate court or agency officials and their subordinates).

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69  Id. (quoting JOHN H. LIENHARD, HOW INVENTION BEGINS (2006) (internal quotation marks omitted).


73  See, e.g., Executive Order No. 10, 340, Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies, 17 Fed. Reg. 3139 (April 8, 1952).

Looking at contrasts between corporate creativity and legal creativity, however, yields some important differences. First, unlike corporate creativity in the promotion of a particular product brand, for instance, it is unlikely that legal actors can “start from scratch.” Thus, appellate judges, for example, must approach a case with specific procedural history in the lower courts or administrative agencies, with a background set of constitutional, statutory, judicial and administrative principles and with findings of fact and conclusions of law which are usually due some degree of deference. In a similar respect, when a legislature decides to address a particular public policy problem by considering a public enactment, the potential creativity of the legislative work product is typically cabined by constitutional constraints, other statutory enactments, pertinent caselaw, and pre-existing administrative schemes. Second, unlike corporate creativity which may take place with a charge of “[d]emanding a ruthlessly simple definition of the business problem” at hand, ruthless simplicity in defining a particular legal problem is usually a luxury; this is the case because of competing power centers in the legal system (executive, legislative, judicial, administrative), competing political alliances (Democratic, Republican, Farm-Labor, Green, Libertarian), competing philosophies (conservative, liberal) and the like. A third contrast between corporate creativity and legal creativity relates to the corporate admonition to “think big.” Government budgetary restraints, political limitations and separation of powers concerns usually limit the scope and cost of various proposals for creative legal innovation (although there are such exceptions such as the Marshall Plan and the Manhattan Project).

E. Of Legal Creativity and Artistic Creativity—Comparisons and Contrasts.

When we speak of artistic creativity, this commonly “carries with it a positive value-judgment.” A prominent, but not exclusive, characteristic of artistic creativity held by some is

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75 See supra note 67 and accompanying text.
76 See supra note 67 and accompanying text.
77 See supra note 67 and accompanying text.
78 A COMPANION TO AESTHETICS 88 (David Cooper ed., 1992).
“success in integrating complex elements within a unified whole” of a particular artwork. In recent times, another characteristic of artistic creativity has been valorized: that of “originality—in the sense of breaking with current traditions—has come to be seen in many quarters as an important constituent of [creative] artistic excellence.” Yet, a countervailing view within the art community has arisen to dispute originality as a criterion of creative artistic excellence. Thus:

Some feel things have gone too far in this direction and would challenge the value often accorded in our age to the merely unusual. They would put more stress on the role that working within traditions plays in the artistic life: Joyce is not necessarily a greater novelist than Pasternak, even though the former broke with traditional forms while the latter worked within them.

A third characteristic of artistic creativity is objective: “Persons are called creative ... in so far as they make things, generate novel thoughts, produce works of merit, express aesthetic ideas.” Objective artistic creativity is not a unanimous perspective; opposed to this “objective perspective” is a fourth potential characteristic of artistic creativity, which is known as “the subjective view.” The subjective view of artistic creativity “locates creativity in the creative processes taking place in artists, scientists and other thinkers. This has been influential in ... educational circles ... as well as among psychologists of different persuasions.”

79 Id.
80 Id. at 89.
81 Id. (emphasis added).
82 Id.
83 Id. (internal quotation marks omitted).
84 Id. (internal quotation marks omitted). One could also choose to take a nihilistic view of artistic creativity as propounded by “those philosophers who see creativeness as in its essence inexplicable.” Id. at 90. Indeed:

Kant claims that one cannot describe scientifically how genius brings about its products. A genius does not know how he has come by his ideas and cannot formulate precepts which will enable others to
A fifth dimension of artistic creativity is that “consumers of arts can have a role in co-creating the work” such that “works of art have areas of indeterminateness which are filled out by those who appreciate them.”\textsuperscript{85} Thus, “[i]n this way a work of art is the common product of artist and observer.”\textsuperscript{86} Yet, others have questioned this: “Whether it is helpful to speak of observers creating—rather than, say, interpreting, or seeing aesthetically interesting features in a work—is doubtful.”\textsuperscript{87}

Based on five arguable aesthetic characteristics of artistic creativity discussed above,\textsuperscript{88} it is possible for us to draw some parallels with legal creativity. Like the view that posits coherence in integration of complex elements within a unified artistic whole,\textsuperscript{89} there are some legal theorists, like Ronald Dworkin, who see legal coherence and integrity as a vital feature of legal creativity.\textsuperscript{90} Similarly, some have spoken of originality in breaking with traditional legal concepts as a desirable focus of legal creativity.\textsuperscript{91} Third, legal thinkers like Richard A. Posner who rate the influence of intellectual and legal creativity as well as other substantive influence on the basis of quantitative enumeration of citations to one’s work, would tend to agree with produce similar works. Plato sees poets as composing their work under the influence of divine inspiration ... it is not they who speak, but the god who speaks to us through them .... In one way one can interpret Plato here as saying that creativeness is, after all, explicable: its origins lie in the desires of the gods. To that extent he can be classified with those who locate these desires in natural processes at the level of the unconscious mind or the physiology of the brain. In another way he can be read as saying, along with Kant, that artistic creation is a mystery that no amount of explanatory investigation will dispel.

\textit{Id.} (internal quotation marks omitted) (citations omitted).
\textsuperscript{85} \textit{Id.} (internal quotation marks omitted) (citation omitted).
\textsuperscript{86} \textit{Id.} (internal quotation marks omitted) (citation omitted).
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} See supra notes 80-87 and accompanying text.
\textsuperscript{89} See supra note 79 and accompanying text.
\textsuperscript{90} RONALD DWORKIN, LAW’S EMPIRE 95-6, 225-27, 259-66 (1986).
theorists of objective artistic creativity.\(^{92}\) Fourth, a creative legal idea (say, in a statute or a judicial opinion or a law review article) is easily replicable and, therefore, it is helpful to think of consumers of creative legal ideas as co-creators of these ideas (when, say, they are copied, in whole or in part, in legislation of a sister state or adopted as precedent in a foreign jurisdiction).\(^{93}\)

Turning to a contrast between artistic creativity and legal creativity, we see that the subjective view of creativity does not fit well with legal creativity. Imagine, in this regard, a lawyer or judge or legislator who is a legend in his or her own mind—thinking that what he generates is subjectively creative and worthwhile; also, imagine that no one else in the legal community finds the legal work product to be interesting or edifying. Since the essence of a good legal idea is its persuasiveness, so-called subjective legal creativity which others view as unhelpful is nihilistic.\(^{94}\)

\(F.\) Of Legal Creativity and Military Creativity—Comparisons and Contrasts.

Creativity in warfare is a much-studied field. For our present purposes let us consider three examples. First, the battles fought by Napoleon and his general strategic thoughts and actions have been considered boldly creative by military historians for the last two hundred years.\(^{95}\) Second, the exploits of the World War II era American General George S. Patton, Jr. have, likewise, been described in language of creativity. Thus, Carlo D’Este wrote a book entitled *Patton: A Genius for War*.\(^{96}\) D’Este wrote of Patton’s military creativity in several portions of his book. The following paragraph is representative:


\(^{93}\) See supra notes 85-87 and accompanying text.

\(^{94}\) See supra note 84 and accompanying text.


Patton was an authentic and flamboyant military genius whose entire life was spent in preparation for a fleeting opportunity to become one of the great captains of history. No soldier in the annals of the U.S. Army ever worked more diligently to prepare himself for high command than did Patton. However, it was not only his astonishing breadth of professional reading and writing that separated Patton from his peers, but that intangible, instinctive sense of what must be done in the heat and chaos of battle, in short, that special genius for war that has been granted to only a select few, such as Robert E. Lee and German Field Marshal Erwin Rommel. Who but Patton would have tramped the back roads of Normandy in 1913 with a Michelin map to study the terrain because he believed he would someday fight a major battle there?97

Perhaps the epitome of Patton’s military creativity was his imaginative belief (or vision as the case may be) that “he had lived in earlier times as, among others, a Viking warrior and a Roman legionnaire.”98 Patton asserted that he had “been a pirate and fought with both Alexander the Great and Napoleon as a cavalryman.”99 Moreover, he “declared that he had once hunted for fresh mammoth, and then in other ages had died on the plains of Troy ..., fought with the Scottish Highlanders for the rights and hopes of the House of Stuart, fallen ... in the Hundred Year’s War, and taken part in all the great campaigns since then.”100 A third

97 Id. at 3-4. Moreover, Patton’s creativity on the battlefield was the natural result of his extraordinary reading:
Patton’s great success on the battlefield did not come about by chance but rather from a lifetime of study and preparation. He was an authentic intellectual whose study of war, history, and the profession of arms was extraordinary. His memory was prodigious, as was his intellect. Patton not only believed in the Scriptures but could quote them at length. For hours on end, he could recite not only verses from the Bible, but from his great love, poetry. His favorites were Homer’s Iliad and Kipling’s verse.
Id. at 4.
98 Id. at 3-4.
99 Id. at 3-4 (endnote omitted).
100 Id. (endnote omitted) (brackets omitted).
example of military creativity is the description of “counterinsurgency lessons” in John A. Nagl’s book Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam.¹⁰¹ The heart of Nagl’s thesis is “that tactical leaders in the field can spur innovation that, when accepted by higher commanders, dramatically reshapes an army in combat.”¹⁰² Nagl offers an explanation of military creativity as the essential element of long term geopolitical success when a nation decides to deploy warriors in arms. As he explains, “preparing for the future will require new ways of thinking, and the development of forces and abilities that can adapt quickly to new challenges and unexpected circumstances. [My] book explains how to build military organizations that can adapt more quickly and effectively to future changes in warfare.”¹⁰³

Since litigation is often characterized as combat,¹⁰⁴ the style of military creativity—developing a strategy, adjusting the strategy based on tactical developments, attacking where unexpected and using concentrated force¹⁰⁵—fits well with the deployment of legal creativity by trial lawyers in legal combat. Indeed, theorists of legal creativity in litigation have often described the good trial advocate as a lawyer who knows how to deploy creative technique.¹⁰⁶ Even creative appellate advocacy (and creative rhetorical advocacy by appellate judges who seek to change their judicial colleagues’ mind or to plant a seed of a legal idea for the future in the course of a separate judicial opinion) parallels, in a rough sense, the thrust and parry of creative generalship in the face of armed combat.¹⁰⁷ In this regard, it is interesting to consider how

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¹⁰¹ NAGL, supra note 1.
¹⁰² Id. at xv.
¹⁰³ Id. at xxi (endnotes omitted).
¹⁰⁵ See supra notes 95-103 and accompanying text.
military doctrine (the accepted principles and concepts of engaging and vanquishing the enemy) is akin to appellate judicial opinions: both sets of doctrine respond over time to actions in the field of conflict and organized reflection on the meaning and efficacy of those actions.

Still, military creativity is different from legal creativity in a number of respects. First, military creativity is cruder and less refined than legal creativity; after all the basic idea of military strategy and tactics is to maneuver the enemy into a field position where maximum firepower can be applied to kill or capture the maximum number of troops. Legal creativity, by way of contrast, entails mastering a kind of meta-discourse which encompasses every form of human conduct with just the right type of legal intervention. Second, military creativity is more entrepreneurial than legal creativity; the commander on the battlefield, while connected to superiors by communications technologies, must often make command decisions that, for better or worse, are not subject to second-guessing by superiors whereas every American trial proceeding is subject to review and correction by superior judges. Third, military doctrine tends to be slower to adapt and change in the face of creative military thinking than

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108 Even the intellectual warrior, General George S. Patton, Jr. boiled down the “Qualities of a Great General” to essentially virtues of physical courage, writing as a West Point cadet of six basic virtues:
   1. Tactically aggressive (loves a fight)
   2. Strength of character
   3. Steadiness of purpose
   4. Acceptance of responsibility
   5. Energy
   6. Good health and strength

D’Este, supra note 96, at 105-06.

legal doctrine tends to adapt and change when challenged by legal creativity.110

G. Of Legal Creativity and Rhetorical Creativity—Comparisons and Contrasts.

“Invention is one of the most prominent terms in the” study of rhetoric.111 “The rhetorical creative process ... [is] theoretically viewed as comprised of five phenomena (variably called arts, offices, or canons): invention, arrangement, style, delivery, and memory.”112 The rhetorical art of invention was first discussed by Aristotle113 and might be translated in modern parlance to be the

110 See, e.g., NAGL, supra note 1, at 115-212 (describing the failure of the U.S. military to adapt and change its war-fighting doctrine throughout America’s military intervention in Vietnam up through the end of the the twentieth century). Yet, Nagl points out the importance of quicker adaptation to change and, by implication, more nimble incorporation of creative military ideas into evolving American military doctrine in the final paragraph of his book:
In these dirty little wars [within states in the twenty-first century], political and military tasks intertwine and the objective is more often “nation building” than the destruction of an enemy army. The ability to learn quickly during such operations in order to create an organizational consensus on new ways of waging war—or of waging peace—may be more important for modern military institutions than ever before. Armies will have to make the ability to learn to deal with messy, uncomfortable situations an integral part of their organizational culture. In T.E. Lawrence’s metaphor, they must learn to eat soup with a knife. The process will not be comfortable, but it could not be more important.

Id. at 223 (emphasis added) (endnote omitted). Yet, this is not to suggest that the nimbleness of the American legal system in responding and adapting to creative proposals for change is ideal. There are many areas of current American law which cry out for adaptation and creative change including, health care, old age pensions, immigration law, and environmental law. See, e.g., Robert F. Blomquist, Pragmatically Managing Global Labor Migration?, 37 U. MEM. L. REV. 1 (2006) (offering some imaginative ideas for immigration law reform).


112 Id. at 800.

113 Id.
most important factor in rhetorical creativity.\textsuperscript{114} Rhetorical invention “includes the entire process of initial inquiry into uncertain questions, [and] the reflection upon alternative possibilities of position, proofs, and perspectives.”\textsuperscript{115} Modern topics of rhetorical invention are numerous and include: (1) ideograph, (2) imitation, (3) occasion, (4) perspective, (5) problematology, (6) questioning, (7) rhetorical situation, (8) rhetorical vision, (9) social knowledge, and (10) the tacit dimension.\textsuperscript{116}

Rhetorical creativity through invention by the speaker is analogous to legal creativity by an advocate and, indeed, is premised on three classic sources of persuasion first identified by Aristotle: the character of the speaker, the emotion of the audience, and the character of speech.\textsuperscript{117} “The rhètôr must ... be able to invent the motivation that will lead to the decision he is advocating. The three sources of persuasion, speaker, audience, and speech, all provide possibilities for the invention of motivation.”\textsuperscript{118} But, unlike rhetoric, law is not always a matter of argumentation; as explained by Professor Carrie Menkel-Meadow, legal creativity is frequently a matter of “using the law or legal concepts to solve problems, make transactions or change certain end states.”\textsuperscript{119} And while there are so-called “Constitutional

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\item[114] \textit{Id.} at 403. For scholars of “the new rhetoric,” a field launched in the second half of the twentieth century, “creativity” has become “most conspicuously” addressed. \textit{Id.} “Creativity has become an academic specialty with its conferences, journals and burgeoning literature.” \textit{Id.} See, e.g., \textsc{The Creative Process: A Symposium} (Brewster Ghiselin, ed. 1952) (a collection of essays by thirty-eight, well-known creative individuals from assorted fields, all describing their own creative processes); \textsc{William J. J. Gordon, Synectics: The Development of Creative Capacity} (1968) (an account of creative problem-solving in small groups); \textsc{The Nature of Creativity: Contemporary Psychological Perspectives} (Robert J. Sternberg, ed. 1988).
\item[115] \textit{Encyclopedia of Rhetoric, supra note 111, at 800.}
\item[116] \textit{Id.}
\item[117] \textit{Id.} at 393-94.
\item[118] \textit{Id.} at 393.
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moments” of legal creativity, there are, also, “smaller domains of everyday legal” problem-solving. Creativity has been described by Menkel-Meadow as involving the following three components:

(1) relevant domain skills required for any performance of creativity in a particular domain, including factual knowledge, technical skills and special talents required by the domain; (2) creativity relevant skills, including cognitive skills, working styles or heuristics for exploration of new pathways within a domain and (3) task motivation that determines how an individual approaches a particular task (with intrinsic, self-directed motivation being more effective than extrinsically oriented motivations).

According to Menkel-Meadow: “Scholars of creativity distinguish between big ‘C’ breakthrough creativity, such as Einstein’s relativity theory, and more incremental creativity such as the patterns of social research and the development of legal doctrine.” Some prominent legal theorists like Edward H. Levi and Karl N. Llewellyn have argued that “there is no big ‘C’ creativity in the law, precisely because Anglo-American law ... is based on adherence to precedent and incrementalism.” “On the other hand, overruling major doctrines, such as changes in liability rules (non-privity) and recognition of new rights (privacy) may have the effects of big ‘C’ creativity on those governed by laws and rules.” Moreover, “[u]nlike scientists working in secret labs

120 Id. (citing Bruce Ackerman, We the People: Foundations (1991); Bruce Ackerman, We the People: Transformations 4-5 (1998); Jack Rakove, The Great Compromise: Ideas, Interests and the Politics of Constitution Making, 44 WM. & MARY L. REV. 424 (1987), among other sources).
121 Id.
122 Id. at 114 (citing Teresa M. Amabile, Creativity in Context 83-127 (1996)).
123 Id.
124 Id. (citing Edward H. Levi, An Introduction to Legal Reasoning (1949); Karl N. Llewellyn, Bramble Bush (1930)).
125 Id. “It is also possible to see law as having benefited from the communal big ‘C’ creativity that produced the Constitution—a template for stability and
until they are ready to share their findings for peer review, lawyers and legal scholars must share their ideas rather quickly, if not in print, then in negotiated proposals, offers, paper presentations, motions, briefs and arguments. 126 Lawyers, however, can profit by generic ways of boosting creative solutions to problems in other walks of life—in other words, by learning to “think outside the box”; “exercises are used to question assumptions, unpack stereotypic thinking (aggregation and disaggregation of problem elements), develop new frames, analogies or metaphors, and to avoid pre-judging or prematurely settling on particular solutions.” 127 And yet, the “constituent element of all law” involves the “creatin[g] [of] new concepts or ideas by interpreting or characterizing words”: by “expanding, aggregating, disaggregating, rearranging and altering existing ideas and concepts, borrowing or translating ideas from one area of law to another or from other disciplines, and finally, by use of re-design or architecture of words and concepts to build both new legal theories ... and new institutions ....” 128 Some “[e]xamples of new legal and real entities” that have been fashioned by creative lawyers include the following: “corporations, trusts, regulatory agencies, condominiums, unions and tax shelters. In addition our words have created new legal rights and constructs like leases, sexual harassment, probation ...[,] new claims like civil rights, privacy, free speech and emotional distress.” 129

H. A Rough Ranking.

So, with the aforementioned considerations, suggestions, comparisons and contrasts firmly in mind, 130 what follows is my no frills, tentative list and ranking of the 100 most creative
moments in American law. My citations and brief justification for the list and ranking follows in Part IV.131

1. The Constitution of the United States (1787) and the ratification debates (1787-1788).
2. The Declaration of Independence (1776).
3. The Bill of Rights (1791-1792).
4. The Articles of Confederation (1777).
5. The Ordinance of 1787: the Northwest Territorial Government.
7. President Lincoln’s Emancipation Proclamation (1863).
8. The Judiciary Act of 1789.
9. President Lincoln’s suspension of the Writ of Habeas Corpus during the Civil War (1861-1865).
12. Secretary Alexander Hamilton’s plans for American economic policy (1789-1796).
13. President Thomas Jefferson’s Louisiana Purchase (1803).
14. The Laws and Liberties of Massachusetts (1648).

131 *See infra* Part IV.


22. The Homestead Act (1862).

23. The GI Bill (1944).


28. David Dudley Field’s code in New York State merging law and equity (1846-1848).

29. The transformation of the corporate charter to general state incorporation laws (late eighteenth to early nineteenth centuries).

30. The post-Civil War Constitutional Amendments (13th, 14th and 15th) (late 1860s to early 1870s).

32. The Federal Reserve Act (1913).

33. The Voting Rights Act (1965).

34. The Civil Rights Act (1964).

35. Justice Jackson’s involvement in creating the London Agreement and International Military Tribunal and prosecution of Nazi war criminals (1945-46).

36. The Missouri Compromise (1820).

37. The U.S. Senate acquittal of Justice Samuel Chase (1805).

38. The Administrative Procedure Act (1946).


40. Wisconsin’s Personal Liberty law in defiance of the Fugitive Slave Act (1850s).


42. The Clean Air Act Amendments (1990).


50. CERCLA (1980).


56. Section 520 of the *Restatement (Second) of Torts* (1965).

57. The Interstate Highway Act (1956).

58. President Eisenhower’s Atoms for Peace Program and the creation of the International Atomic Energy Agency (1950s).


60. President Woodrow Wilson’s proposal for the League of Nations (1919).


65. President Eisenhower’s Goals for Americans project (1960s).

66. EPA Notice of Rulemaking to Abolish Lead and follow-up actions (early 1970s).
67. Emergency Planning and Community Right to Know Act (Title III of SARA) (1986).


70. NAFTA and environmental side agreements (1993).

71. Sherman Anti-Trust Act (1890).

72. Justice Jackson’s concurrence in *The Steel Seizure Case* (1952).

73. Promulgation of the Uniform Commercial Code (1940s).

74. President Lincoln standing for re-election during the Civil War (1864).


76. Formation of the American Law Institute (1922).

77. Opening of Litchfield Law School (1784).

78. Appointment of George Wythe as Professor of Law and Police, College of William and Mary (1779).


80. John Adams’ drafting of the Massachusetts state constitution (1779).


87. McCulloch v. Maryland (1819).

IV. EXPLAINING AND JUSTIFYING THE TENTATIVE RANKING

A. The Top Tier: Rankings #1 Through #10:

It’s significant that my top six most creative moments in American law are loosely associated with the articulation of basic governmental foundational principles for the new American nation during its first decades of emergence as a democratic-republic. I suspect that this is the case because the creative legal enterprise is most difficult when legal innovators are blazing broad, new trails.
The 1787 drafted (1788 ratified) Constitution of the United States is the most creative moment in American law because it entailed the need for delegates from different regions of the country: to propose new ideas for governance based on an amalgamation of historical experience, to deliberate on the wisdom of these ideas while offering spur of the moment improvements, and to “wrap” these ideas into a single, workable instrument that could be debated at state ratifying conventions. The durability of the Constitution for well over two centuries of American experience is further testament to its supreme creative nature. I lump all of the *Federalist Papers* by John Jay, Alexander Hamilton and James Madison as well as the state ratification debates into the extended creative moment of crafting and adopting the United States Constitution because of the incisiveness of the commentary, the energy and civility of the discussion and the relative speed (about two years) in which the new Constitution was made up out of whole cloth and made the governing charter of a new nation.

The Declaration of Independence is #2 on my list of the most creative moments in American law for four reasons — first, as historian Pauline Maier has pointed out, between April and July 1776 there were approximately ninety “other declarations of Independence that Americans in colonies ... and localities” drafted and adopted. Second, these “other” declarations built on the English practice of drafting written communications (“addresses, petitions and declaration”) to government officials. Third, the

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132 U.S. CONST., art. I-VII.
135 See generally CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA (1966).
136 THE DECLARATION OF INDEPENDENCE (1776).
138 *Id.* at 50.
Second Continental Congress in adopting a revised draft by Thomas Jefferson of the national Declaration of Independence rose to the occasion by “do[ing] more than demonstrat[ing] that the British Crown had forced them to the measure” and by “overcoming fear and the sense of loss, to link their cause with a purpose beyond survival alone, to raise the vision of a better future so compelling that in its name men would sacrifice even life itself.”

Fourth, the relatively abstract ideas of the Declaration of Independence fostered a creative tension with the more down to earth, brokered, and compromised, concrete terms of the U.S. Constitution. President Abraham Lincoln recognized this tension, nearly nine decades after the Declaration: “[i]n Lincoln’s hands, the Declaration of Independence became first and foremost a [creative], living document for an established society, a set of goals to be realized over time, and so an explanation less [of separation from Britain] than of their victory in the War for Independence.”

The Bill of Rights—“those first ten amendments to the Constitution that the states chose to ratify from twelve that Congress had proposed in September 1789”—fills out the trifecta of top creative moments in American law. I have chosen the Bill of Rights—textual limitations on governmental power over speech, religion, the bearing of arms, criminal procedure, punishment and the like—as a prime American creative legal moment for two reasons. First, the “Anti-federalist critics of the Constitution and several state ratifying conventions had [originally] insisted upon a bill of rights,” the legal process by which James Madison’s original proposal to add a “prefix” to the existing U.S. Constitution setting forth a “watered-down version of the more extensive bills of rights demanded by state ratifying conventions” was, in turn, reduced by Congress to “twelve amendments that were listed at the end of the Constitution” and, in turn, reduced to ten amendments by the states by December 15,

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139 Id. at 95-96.
140 Id. at 207.
141 Id. at xv.
142 U.S. CONST., amends. I-X.
143 MAIER, supra note 137, at 196.
1791, was a breathtaking creative institutional process of drafting, deliberation and refinement between the First Congress of the United States and the new states. Second, given the creatively ambiguous language in the Bill of Rights, American lawyers were given the opportunity to make arguments which the United States Supreme Court used to help them develop an expansive gloss on these liberties. Thus, over time:

Those ten amendments became the federal Bill of Rights. And in time that abbreviation of an abbreviation—that is, the states’ partial ratification of Congress’s reduction of Madison’s watered-down version of the more extensive bills of rights demanded by state ratifying conventions—became another of the nation’s “vital documents.”

As Professor Surrency has pointed out the Articles of Confederation is a remarkably—and under-rated—creative moment in American law. The separate colonies which had previous to the Declaration of Independence been tied directly to Great Britain by different legal umbilical cords, realized that after July 1776 “they must cooperate”; but the rub was “to what extent?” While the delegates to the Second Continental Congress were prescient in adopting Richard Henry Lee’s June 7,

\[\text{id. at 195 (internal quotation marks omitted), to contain the following language:}\]

That all power is originally vested in, and consequently derived from the people.
That Government is instituted, and ought to be exercised for the benefit of the people; which consists in enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.
That the people have an indubitable, unalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.

\[\text{id. at 213.}\]
\[\text{id. at 196.}\]
\[\text{Surrency, supra note 34, at 63-65 (2004).}\]
\[\text{id. at 63.}\]
1776 Resolution, which combined a declaration of independence with the legal process for the Continental Congress to prepare a plan of confederation to be “transmitted to the respective Colonies,” the seminal idea for a plan of colonial confederation had been floated years earlier by Benjamin Franklin of Pennsylvania. John Dickinson of Pennsylvania drafted the proposed Articles of Confederation in July of 1776; but because of the stumbling block of conflicting colonial claims to Western lands coupled with the self-imposed requirement of unanimity, there was a delay in congressional adoption of the Articles until November 15, 1777, and a further delay until May 1, 1781, when Maryland (fearing “that those states which had Western lands would become so large, the smaller states would have no influence”) finally voted for adoption. Yet, Congress acted creatively during the delay by governing “as if the plan was in effect.” Furthermore, Congress innovated in this first American indigenous experiment in national self-government by inventing the institutions of the President of Congress, the Committee of States (accorded power to legally act for Congress when that body was in recess), the Superintendent of Finance, Secretary of War, Secretary of Marine, and Secretary of Foreign Affairs; Congress also experimented by employing different techniques for gathering supplies needed to fight the Revolutionary War—from “appropriating the financial needs of the Confederation among the several states in relation to the value of property” to “requisitioning supplies rather than money” to seeking “loans” from foreign governments to “a liberal use of paper money”—to ingeniously circumvent the lack of a congressional power to tax. As explained by the late great historian Samuel Eliot Morison: “It is no wonder that the Articles were imperfect; even so, they were the best instrument of federal government adopted anywhere up to that time.”

149 Id. (internal quotation marks omitted) (footnote omitted).
150 Id.
151 Id. at 64.
152 Id.
153 Id.
The Northwest Ordinance—approved by the Congress under the Articles of Confederation in July of 1787—was a remarkable piece of legislative innovation which had a profound impact on the state governments that would ultimately come into being in the Northwest Territory. First, the Northwest Ordinance created an initial interim government for the federal territory consisting of a governor, secretary and three judges appointed by Congress. Second, the Northwest Ordinance provided for an election of a bicameral territorial legislature and a nonvoting member of Congress when the territory reached a population of five thousand free male adults. Third, when the Territory reached a population of sixty thousand free inhabitants, the Northwest Ordinance established a legal mechanism for statehood (requiring that the Territory ultimately be divided into at least three but no more than five states). Last, but most importantly and creatively, Congress declared the following civil and economic rights to apply within the Northwest Territory: “[p]rohibition [of] slavery ..., no law could be enacted that would impair a good-faith contract, religious freedom, right of trial by jury, and support of public education.” Indeed, “no more important enactment was ever made by the Confederation” since it “laid fundamental principles of the American colonial system which have been followed, even through the admission of Alaska and Hawaii” while triumphantly banning slavery in this large expanse of American soil.

And, although the authority of Congress to legislate for the West was doubtful, both state and federal courts have held that the Northwest Ordinance is still superior to all constitutions and laws subsequently adopted by the five

156 Id.
157 Id.
158 Id.
159 Id.
160 MORISON, supra note 154, at 300-01.
Marbury v. Madison is the preeminently creative judicial decision on our list of the most creative moments in American law. The essence of Chief Justice John Marshall’s innovation was to issue a judicial decision with a twist: while holding that Marbury was entitled to his commission as a justice of the peace for the District of Columbia (appointed as a “midnight” judge by the previous president, John Adams), Marshall nevertheless held that the Constitution’s Article III provisions on original jurisdiction conflicted with Section 13 of the Judiciary Act of 1789, by which Congress authorized the mandamus writ. Marshall found an innovative way to declare the paramount power of the Supreme Court (through the doctrine of judicial review of all government action) to say what the Constitution requires—with all laws subject to its supreme authority—while avoiding a direct political conflict with President Thomas Jefferson and the ascendant Democratic-Republican Party. Jefferson’s biographer, Dumas Malone explained Marshall’s superb act of judicial creativity as follows:

It is uncertain whether the Chief Justice was or was not in danger, but by consenting to consider the case of Marbury he unquestionably confronted himself with a dilemma. If he were to issue a mandamus he would have no way to enforce it, and it would be ignored by the executive branch.

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161 Id. at 301. A contemporary poem of the late 18th century waxed optimistic about the creative impact of the Northwest Ordinance. The poem, by Philip Freneau, was entitled On the Emigration to America and Peopling the Western Country:

Far brighter scenes a future age,
The muse predicts, these States will hail,
Whose genius may the world engage,
Whose deeds may over death prevail,
And happier systems bring to view,
Then all the eastern sages knew.

Id.

162 1 Cranch, 5 U.S. 137 (1803).

On the other hand, a rejection of Marbury’s petition would have been regarded as a vindication of the executive to whom Marshall was implacably hostile. The Chief Justice must have regretted at times that he ever picked up this hot potato. The means he adopted to escape his predicament, to do a maximum of damage to the President and at the same time enhance the authority of his Court vis-à-vis both the legislature and executive were indeed amazing. He could not have accomplished this tour de force had he not taken up the several questions in the precise order that he did. At a number of points he closely followed the argument of Charles Lee, the former Attorney General of the United States who represented Marbury. But the question that Lee sought to answer first was the one Marshall put off to the last—that of the authority of the Supreme Court to issue a writ of mandamus. Starting the other way round, Marshall asked three questions in the following order: Did the applicant have a right to the commission? If he had the right and this had been violated, did the laws afford him a remedy? If they did, was the remedy a mandamus issuing from that court? Had he answered the crucial question of jurisdiction negatively in the first place, as he did finally, he would not have needed to raise the others .... Marshall denied Marbury’s petition after having elaborately argued for its rightfulness, thus managing both to have his cake and eat it.\footnote{Dumas Malone, Jefferson the President: First Term, 1801-1805 148-49 (1970) (footnotes omitted).}

Having considered brilliant, nascent creative moments at the constitutional level by American constitution-makers and political revolutionaries,\footnote{See supra notes 132-54 and accompanying text.} paused to examine a lustrous occasion of early legislative innovation,\footnote{See supra notes 155-61 and accompanying text.} and focused on a dazzling instance of judicial creativity in the first decade and a half of the fledgling American Republic,\footnote{See supra notes 162-64 and accompanying text.} it is salutary to turn to a radiant moment of
ingenious law-making and law interpretation by the Chief Executive. For a number of reasons, President Abraham Lincoln’s drafting and issuance of the Emancipation Proclamation certainly belongs in the top ten creative moments in American legal history. First, Lincoln artfully responded to the exigencies of the deteriorating military situation for the Union that had developed throughout 1861 and up to the summer of 1862 “rais[ing] the ante” of his failed efforts to pass gradual compensated emancipation legislation for the Border States and the passage of tepid legislation to confiscate slaves of southern slaveholders who had taken up arms against the Union. Second, with characteristic prudence, Lincoln prepared multiple drafts of his proposed proclamation and, while determined to issue the decree at the appropriate time, heeded the sage advice of his Secretary of State, William Seward, to hold off until the North had achieved a military victory; accordingly, Lincoln waited from the time he shared his first draft of the Emancipation Proclamation with his cabinet on July 21, 1862 until after the Union’s technical victory at the battle of Antietam in early September of that year to present a second draft to a special cabinet meeting in mid-September of 1862. The final Emancipation Proclamation was signed into effect by President Lincoln on January 1, 1863. Third, Lincoln was pragmatic in limiting the scope of his final Emancipation Proclamation; it was the best he could do given the exigencies of the war and the potential hostility of the southern sympathies of the Taney Supreme Court. As explained by Professor Allen C. Guelzo in his book Abraham Lincoln: Redeemer President, it is unrealistic to look at Lincoln’s Proclamation “as a half-hearted effort, partly because it was ... not a declaration of national abolition, and partly because the authority the proclamation was predicated upon was only the military necessity of war,” leaving out of its scope the border states since, not being in the rebellion, had “not legally put

169 Id. at 340.
170 Id. at 341.
171 Id. at 342-43.
themselves in the way of Lincoln’s military necessity” rationale.\footnote{Id. at 343-44.}
Indeed,

[I]t is hard to see how Lincoln could have done otherwise. Every jurist, in the country knew that any proclamation, any congressional statute, any military gesture that crossed slavery, would be appealed to the federal courts, either after the war or while it was still being waged. And though it might be expected that the federal judiciary would be reluctant to hamstring Congress, the president, and the armed forces in the middle of a war, that was exactly what Chief Justice Taney had shown he was willing to do in\textit{ex parte Merryman}. Any proclamation that failed to pay attention to the niceties of law, or indulged freely in flights of “moral grandeur,” was liable to perish on Taney’s legal spike, as would any emancipation measure that based itself on anything beside military necessity and the presidential war powers.\footnote{Id. at 344.}

Had President Lincoln overplayed his hand, moreover, southern opposition could have intensified the war and led to widespread chaos.\footnote{Id. at 344-45.}

A fourth justification for rating Lincoln’s Emancipation Proclamation—and its antecedent drafts—as a landmark creative moment in American legal history is the inventive process used by Lincoln in drawing upon the intellectual roots of emancipating the slaves and testing his own evolving thoughts on the subject. “The idea of emancipation by presidential decree was, of course, not a new one.”\footnote{DAVID DONALD, LINCOLN 363 (1995).} Senator Charles Sumner had raised the idea with Lincoln back in April 1861 on “the day that the news of the firing on Fort Sumter reached Washington”;\footnote{Id. at 344-45.} General John C. Frémont in August 1861 had issued a military proclamation (rescinded by Lincoln) freeing the slaves of Missouri Rebels; Secretary of War
Simon Cameron had proposed emancipation by decree in December 1861; General David Hunter by military order had declared slaves in Florida, Georgia and South Carolina “forever free” (also rescinded by Lincoln). “No commanding general shall do such a thing, upon my responsibility, without consulting me,” he had informed Secretary of the Treasury Salmon P. Chase. \(^{177}\)

Professor David Donald, though, described the creative process that was sparked in Lincoln’s mind after setting aside Hunter’s order:

After overruling Hunter’s proclamation, Lincoln began to think of emancipation as a question to be decided on grounds of policy rather than of principle, and he started to formulate his ideas for a proclamation of freedom. He probably talked over the idea with [Secretary of War] Stanton in May [of 1862], and he may have discussed a very preliminary draft of such a proclamation with Vice President Hamlin as early as June 18. Later that month, in the cipher room of the War Department telegraph office ... he asked Major Thomas T. Eckert for some foolscrap, because he said, “he wanted to write something special.” At the telegraph office, he remarked, he was able to work “more quietly and command his thoughts better than at the White House, where he was frequently interrupted.” He then sat down at Eckert’s desk, which faced onto Pennsylvania Avenue, and began to write. “He would look out of the window a while and then put his pen to paper,” Eckert remembered, “but he did not write much at once. He would study between times and when he had made up his mind he would put down a line or two, and then sit quiet for a few minutes.” That first day he filled less than a page, and as he left he asked Eckert to take charge of what he had written and not allow anyone to see it. Almost every day during the following weeks he asked for his papers and revised what he had written, adding only a few sentences at a time. Not until he had finished did he tell

\(^{177}\) Id. (internal quotation marks omitted) (citation omitted).
Eckert that he had been drafting a proclamation “giving freedom to the slaves in the South.”

During June and July [of 1862] when Lincoln was drafting an emancipation order, he often played a kind of game with the numerous visitors who descended on him to urge him to free the slaves. The measures they advocated were precisely those that he was attempting to formulate in his document at the War Department. If he challenged their arguments, he was, in effect, testing his own. No doubt he enjoyed his little game, relishing the use of his lawyer’s skills to make the worst case sound the best. No doubt, too, he was pleased to retain total flexibility, since these discussions committed him to nothing.178

Fifth, Lincoln continued to clarify his own thinking on the ways and means of emancipation during the weeks of late summer 1863 by summoning Swett—an old Illinois friend and fellow lawyer who had traveled the Eighth Judicial Circuit with Lincoln in previous decades. Lincoln used Swett as a final sounding board.179 At the same time, Lincoln skillfully “began preparing public opinion for a proclamation of freedom if one was to be issued”180 by proposing black colonialization (knowing that it would be likely rejected) and responding to an “intemperate editorial by Horace Greeley” in the New York Tribune with carefully chosen words to provide “assurance to the large majority of the Northern people who did not want to see the war transformed into a crusade for abolition” while “at the same time ... alerting antislavery men that he was contemplating further moves against the peculiar institution.”181 Lincoln’s classic, lawyerly letter to the editor in response to Greely stated:

My paramount object in this struggle is to save the Union, and it is not either to save or destroy slavery. If I could save the Union without freeing any slave I would do it; and

178 Id. at 363-64 (internal quotation marks omitted) (citations omitted).
179 Id. at 366-67.
180 Id. at 367.
181 Id. at 368.
if I could save it by freeing some and leaving others alone I
would also do that. What I could do about slavery, and the
colored race, I do because I believe it helps to save the
Union; and what I forbear, I forbear because I do not
believe it would help to save the Union.182

A sixth aspect of Lincoln’s admirable creativity in making the
Emancipation Proclamation was his act of personal conscience in
calling on God in the summer of 1862, vowing in prayer “that he
would interpret [a Union battle] victory [which came with
Antietam in September 1862] as an indication of Divine will, and
that it was his duty to move forward in the cause of emancipation”
and that “not he but God had decided this question in favor of the
slaves.”183

The Judiciary Act of 1789184—an enactment of the First
Congress during its first year of existence after the formation of the
new Republic following the Philadelphia Constitutional
Convention—ranks among the top ten creative moments of
American legal history for two basic reasons. First, Congress
acted in one bold stroke to implement Article III, Section 1 of the
Constitution by organizing the federal judiciary in a logical and
practical way, given both the limited resources of the infant
National Government and the reality of preexisting state
geographical boundaries. In this respect, the Judiciary Act of 1789
“[p]rovided for a Supreme Court consisting of a chief justice and
five associate justices, three circuit courts composed of two
Supreme Court justices and a district court judge, and thirteen
district courts, corresponding roughly to state boundaries, with a
judge for each.”185 This seminal federal statute formed the
foundation for the subsequent growth and evolution of the federal
judicial system over the ensuing centuries.186 Second, Congress in

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182 Id. at (internal quotation marks omitted) (citation omitted).
183 R ICHARD CARWARDINE, LINCOLN: A LIFE OF PURPOSE AND POWER 228
(2006) (internal quotation marks omitted) (endnote omitted).
184 1 Stat. 73-93 (1789).
185 STATHIS, supra note 155, at 12.
186 See generally DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE
FEDERALIST PERIOD, 1789-1801 (1997).
the Judiciary Act of 1789 wisely established the vital office of attorney general of the United States—the nation’s chief law enforcement officer under the president.\textsuperscript{187}

We return to President Abraham Lincoln and his executive orders suspending the Writ of Habeas Corpus during the Civil War to highlight his second top ten creative moment in American legal history. A variety of rationales support Lincoln’s actions regarding suspension of the Great Writ during the national emergency of the War Between the States as constituting a first-order creative legal moment. One, Lincoln was the first American president to explicitly exercise the Lockean doctrine of prerogative which claimed that, as explained by historian Arthur M. Schlesinger, Jr., “[w]hile in normal times ... responsible rulers must observe the rule of law, in dire emergencies they could initiate extralegal or even illegal action.”\textsuperscript{188} The doctrine of prerogative was reflected in the text of the Constitution (Article I, Section 9), permitting the suspension of the writ of habeas corpus “when in Cases of Rebellion or Invasion the public safety may require it.”\textsuperscript{189} Two,

\begin{itemize}
  \item \textsuperscript{187} STATHIS, supra note 155, at 12.
  \item \textsuperscript{189} U.S. CONST. art. I, § 9. President Thomas Jefferson was the first president to directly apply for suspension of the writ of habeas corpus to protect the nation against the perceived insurrection of Aaron Burr. Schlesinger, supra note 188, at 153-54. “Burr’s acquittal by the courts helped limit subsequent resort to emergency prerogative” by presidents during the first half of the nineteenth century. \textit{Id.} at 154. Yet Jefferson took aggressive executive actions on a unilateral basis which arguably involved his own vision of the Lockean doctrine of prerogative.

  Thus he sent a naval squadron to the Mediterranean under secret orders to fight the Barbary pirates, applied for congressional sanction six months later, and then misled Congress as to the nature of the orders. He unilaterally authorized the seizure of armed vessels in the waters extending to the Gulf Stream, engaged in rearmament without congressional appropriations, and not infrequently withheld information from Congress. \textit{Id.}

  After Jefferson left office, “[e]mergencies considerably more authentic than the Burr conspiracy took place in the next thirty years. But Presidents as
President Lincoln was innovative in making the suspension of the writ of habeas corpus himself, without prior congressional approval. On April 27, 1861 he authorized the top Union general to suspend the writ of habeas corpus, “this despite the fact that the power of suspension, while not assigned explicitly to Congress, lay in that article of the Constitution devoted to the powers of Congress and was regarded by commentators before Lincoln as a congressional prerogative.”

Three, later on in the Civil War Lincoln “claimed the habeas corpus clause as a precedent for wider suspension of constitutional rights in time of rebellion or invasion—an undoubted stretching of original intent.” Four, on July 4, 1861—after Lincoln had authorized the writ’s suspension and at a delayed special session of Congress which Lincoln had deliberately postponed for several months—Lincoln offered a compellingly fresh justification for his actions. As Schlesinger explains:

The issue, he said embraced more than the fate of the United States. The rebellion forced the whole family of man to ask questions going to the roots of self-government: Is there in all republics, this inherent and fatal weakness? Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence? So viewing the issue, Lincoln continued, no choice was left but to call out the war power of the Government; and so to resist force employed for its destruction by force for its preservation.

Five, Lincoln pointed to the foundational “war power,” on which his suspension of habeas corpus depended, as “flow[ing] into the presidency” by the creative combination of three forceful as Jackson and Polk refrained from invoking emergency prerogative—even in the face of the nullification crisis and the war with Mexico.”

Schlesinger, supra note 188, at 156. Technically, this suspension of habeas corpus was limited to “the corridor between Washington and Philadelphia, to allow the summary military arrest, without trial, of those who threatened the passage of troops to the nation’s capital.” Carwardine, supra note 183, at 164.

Schlesinger, supra note 188 at 156.

Id. (internal quotation marks omitted) (endnote omitted).
constitutional provisions: “through the presidential oath to preserve, protect and defend the Constitution,” by virtue of “the constitutional commitment to take care that the laws be faithfully executed, and through the constitutional delegation of the President as commander in chief.” Six, Lincoln’s Attorney General, Edward Bates, added to this creative moment in American legal history by writing an “exculpatory opinion” which asserted “that the national emergency justified Lincoln in suspending habeas corpus and disregarding subsequent judicial objection,” even from the Supreme Court, since, according to Bates, “[t]he President ... was the judge of the gravity of the emergency and was accountable only through procedures of impeachment.” Seven, Lincoln deepened and elaborated on his presidential decision to suspend habeas corpus in eloquent and new prose toward the end of the Civil War:

It was necessary to suspend habeas corpus, Lincoln added, in order to assure the enforcement of the rest of the law and thereby the protection of the state. Are all laws but one to go unexecuted, and the Government itself go to pieces, lest that one be violated? ... In such a case, would not the official oath be violated if the government should be overthrown? Would the very principles of freedom prevent free government from defending itself? As Lincoln explained his case toward the end of the war, his oath to preserve the Constitution imposed the duty of preserving, by every indispensable means, that government—that nation—of which the Constitution was the organic law. Was it possible to lose the nation, and yet preserve the Constitution?

Eight, Lincoln leavened the rationale for suspension of writ of habeas corpus with a “homely analogy to defend his course.”

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193 Id. at 157 (internal quotation marks omitted) (endnote omitted). See also Robert F. Blomquist, The Presidential Oath, the American National Interest and A Call for Prisiprudence, 73 UMKC L. REV. 1 (2004).
194 Schlesinger, supra note 188, at 157-58.
195 Id. at 158 (internal quotation marks omitted) (endnote omitted).
196 Id. at 160.
According to Lincoln’s logic, the fundamental purposes of human beings are to “protect life and limb.” And, “[y]et often a limb must be amputated to save a life; but a life is never wisely given to save a limb.” He went on to assert: “I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”

To top off the ten most creative moments in American legal history we return to the Supreme Court and consider the original contribution of *Brown v. Board of Education*—both the 1954 unanimous decision on the merits (*Brown I*) and the 1955 decision on the question of relief (*Brown II*) as a combined watershed; indeed, it is really appropriate to frame the legal “moment” as the twenty-five year period which started with the litigation campaign of the National Association for the Advancement of Colored People (NAACP) which began in the mid-1930s with lawsuits brought “first at the state and then at the federal level challenging, on constitutional grounds, the legal regime of ‘Jim Crow’—state-imposed racial segregation in public accommodations and in education.” The moment is bracketed by the 1958 decision on the merits in *Cooper v. Aaron*. Another important part of this legal moment was “when the United States attorney general, for the first time, signed an amicus curiae brief” in the real estate racial restrictive covenant case of *Shelley v. Kraemer* in 1948, “which signaled the federal government’s symbolic support for the NAACP strategy.” *Shelley*, in turn was followed by two more key Supreme Court opinions: the 1950 cases of *McLaurin v. Oklahoma State Board of Regents* (invalidating racial discrimination in state graduate schools) and *Sweatt v. Painter* (invalidating racial discrimination in state law

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197 Id. at 160, 162 (internal quotation marks omitted) (endnote omitted).
200 OXFORD SUPREME COURT GUIDE, supra note 163, at 34.
202 334 U.S. 1 (1948).
203 OXFORD SUPREME COURT GUIDE, supra note 163, at 34.
Chief Justice Earl Warren—who replaced the previous Chief Justice Fred Vinson in 1953 after Vinson’s sudden death—deserves creative kudos for his persuasive ability in Brown I and Brown II to convince his colleagues on the Court to procedurally handle the backlog of pending school cases affecting more than a dozen states and the District of Columbia along with their millions of school children, by addressing the merits in one opinion and the matter of remedy in a follow up opinion after reargument. Moreover, Warren merits additional creative acclaim for his ability to nudge Justices Robert H. Jackson and Stanley F. Reed “to suppress [separate] opinions that they were then preparing” and to sign on to a unanimous per curiam Court opinion on both the merits and the remedy. Furthermore, Warren’s crafting of the Brown I opinion in a brisk, nontechnical, nonaccusatory ten page opinion brilliantly allowed laypersons as well as lawyers to understand the thrust of the Court’s rationale striking down the “separate but equal” doctrine of race relations; his Brown II opinion of “all deliberate speed” as the remedial touchstone for desegregating racially divided school systems in the affected states was artfully ambiguous and politic in light of the strong opposition in many southern states to Brown I. Arguments exist, however, for viewing Brown I and Brown II and its progeny as a negative creative moment in American law. First, the curt opinion in Brown I avoided all the difficult questions: “the evidence of the historical understanding of the Equal Protection Clause—upon which the parties had been directed to focus their reargument” was labeled “inconclusive”; the Court relied upon questionable social science data that racial segregation in public education caused harm to black school children; and did not squarely overrule Plessy v. Ferguson’s “separate but equal doctrine.”


OXFORD SUPREME COURT GUIDE, supra note 163, at 34-35.

Id. at 35.

Id.

Id.

See supra notes 43-46 and accompanying text.

Id.

OXFORD SUPREME COURT GUIDE, supra note 163, at 35.

Id.

163 U.S. 537 (1896).
Second, Brown II’s “all deliberate speed” remedial rationale was one extended equivocation on what to do and “essentially returned the problem to the courts where the cases began for appropriate desegregative relief.”215 This empty remedy “imposed substantial costs on all concerned” with “[t]he burden of producing multi-million-student desegregation plans” foisted “on the plaintiffs and the NAACP, who were undermanned, thinly financed, and targets of hostility.”216 Third, “[a]s organized resistance, especially in Congress, and less organized resistance at the grass roots, mounted, the Court retreated and did not hear another case [on the merits] involving segregation for more than three years after Brown II”217 when, in Cooper v. Aaron,218 involving the Little Rock, Arkansas school crisis of 1957-58, the Court “spoke more to the importance of the Court’s own power than to the substantive issue of equal protection of the laws.”219 Finally, and perhaps most destructive, the Court’s Brown I and Brown II opinions and its subsequent series of reasonless per curiam orders “based solely on requests for review of lower court decisions” which effectively invalidated racially segregated public transportation, beaches, parks, golf courses and bath houses “prompted many legal scholars to warn that the Court was acting more out of” willfulness and policy preferences than legal text or principle.220

B. The Second Tier: Rankings #11 Through #30.

We begin our second tier of most creative moments in American law by briefly considering the spate of innovative economic and recovery legislation proposed by President Franklin D. Roosevelt and enacted by Congress from 1933 through 1936. Indeed, “[b]y the end of Roosevelt’s first hundred days as

214 Oxford Supreme Court Guide, supra note 163, at 35.
215 Id.
216 Id.
217 Id.
219 Oxford Supreme Court Guide, supra note 163, at 35.
president,” in early 1933, “Congress had approved fourteen major laws and helped him successfully launch the ‘New Deal for the American People’ he promised in his campaign” of 1932 against Herbert Hoover.\footnote{STATHIS, supra note 155, at 199. President Roosevelt acted to address a dire national economic emergency. By inauguration day 1933, 25 percent of the nation’s labor force was out of work, lengthy bread lines were common, and farm prices had fallen by more than 50 percent since the start of the Great Depression. During the previous three years, more than five thousand banks had failed, and currency hoarding was widespread. Millions of Americans gathered around their radios to listen to newly elected president Franklin D. Roosevelt’s message of hope. “Let me assert my belief,” Roosevelt reassured his anxious audience, “that the only thing we have to fear is fear itself.” His promise of immediate action rallied the nation.\textit{Id.}} Important legislation initiated by Roosevelt and enacted by Congress in 1933 to help the nation recover from economic depression included the following:


\addtocounter{footnote}{1}
\footnotetext[221]{STATHIS, supra note 155, at 199. President Roosevelt acted to address a dire national economic emergency. By inauguration day 1933, 25 percent of the nation's labor force was out of work, lengthy bread lines were common, and farm prices had fallen by more than 50 percent since the start of the Great Depression. During the previous three years, more than five thousand banks had failed, and currency hoarding was widespread. Millions of Americans gathered around their radios to listen to newly elected president Franklin D. Roosevelt's message of hope. “Let me assert my belief,” Roosevelt reassured his anxious audience, “that the only thing we have to fear is fear itself.” His promise of immediate action rallied the nation.\textit{Id.}}
(10) Emergency Railroad Transportation Act\textsuperscript{231} and (11) Farm Credit Act of 1933.\textsuperscript{232}

Key legislation supported by FDR and enacted by Congress in 1934 to continue the national economic recovery included the following: (1) Gold Reserve Act of 1934;\textsuperscript{233} (2) Federal Farm Mortgage Corporation Act;\textsuperscript{234} (3) Crime Control Act;\textsuperscript{235} (4) Securities Exchange Act of 1934;\textsuperscript{236} (5) National Housing Act;\textsuperscript{237} (6) Communications Act of 1934;\textsuperscript{238} (7) Silver Purchase Act of 1934;\textsuperscript{239} and (8) Federal Credit Union Act.\textsuperscript{240}

FDR continued to press the Seventy-Fourth Congress, during 1935 and 1936, for further creative legislation to continue to shore up the fragile American economy and provide relief for the destitute. Vital national recovery and economic stabilization legislation suggested by FDR and approved by Congress in 1935 included the following: (1) Soil Conservation Act;\textsuperscript{241} (2) Wagner-Connery National Labor Relations Act;\textsuperscript{242} (3) Motor Carrier Act of 1935;\textsuperscript{243} (4) Social Security Act;\textsuperscript{244} (5) Banking Act of 1935;\textsuperscript{245} (6) Public Utility Holding Company Act of 1935;\textsuperscript{246} (7) Frazier-Lemke Farm Mortgage Moratorium Act;\textsuperscript{247} and (8) Railroad Retirement Act.\textsuperscript{248} During 1936 this most legislatively productive and innovative four-year interaction between the president and the

\textsuperscript{231} Pub. L. No. 73-68, 48 Stat. 211-221 (1933).
\textsuperscript{233} Pub. L. No. 73-87, 48 Stat. 337-344 (1934).
\textsuperscript{234} Pub. L. No. 73-88, 48 Stat. 344-349 (1934).
\textsuperscript{239} Pub. L. No. 73-438, 48 Stat. 1178-1181 (1934).
\textsuperscript{240} Pub. L. No. 73-467, 48 Stat. 1216-1222 (1934).
Congress saw the following economic stabilization and recovery national enactments signed into law: (1) Soil Conservation and Domestic Allotment Act; (2) Rural Electrification Act of 1936; (3) Federal Antiprice Discrimination Act (Robinson-Patman Act); (4) Flood Control Act of 1936; (5) Merchant Marine Act of 1936 and (6) Walsh-Healey Government Contracts Act.

The sage historian Samuel Eliot Morison remarked that the essence of the creativity of the New Deal was the energy of its enactment in four short years: “The New Deal seemed newer than it really was, partly because progressive principles had largely been forgotten for the thirteen years [since President Wilson left office], but mostly because the cards were dealt with such bewildering rapidity.” Another aspect of FDR’s legal creativity in crafting the New Deal legislation during 1933-1936 was the courage with which he proceeded and his willingness to experiment. Winston Churchill remarked about the New Deal: “the courage, the power and the scale of his effort ... could not fail to lift the whole world forward .... Roosevelt is an explorer who has embarked on a voyage as uncertain as that of Columbus, and ... which might ... be as important as the discovery of the New World.” James MacGregor Burns wrote, likewise, of the incredible energy of FDR’s law-making: “At the center of the action sat Franklin Roosevelt, presiding, instructing, wheedling, persuading, enticing, pressuring, negotiating, manipulating, conceding, horse-trading, placating, mediating, leading and following, leading and misleading.” Burns also marvels at Roosevelt’s creativity: “The President soon proved himself an artist in government—in his fine sense of timing, his adroit

255 MORISON, supra note 154, at 953.
256 Id. at 959.
application of pressure, his face-to-face persuasiveness, his craft in playing not only foes but friends off against one another." 258

Amazingly,

Like a creative artist, Frances Perkins [his Secretary of Labor] said, he would begin his picture without a clear idea of what he intends to paint or how it shall be laid out upon the canvas, and then, as he paints, his plan evolves out of the material he is painting. He could think and feel his way into political situations with imagination, intuition, insight. 259

Nearly a century-and-a-half before FDR painted creative legal canvases of innovative economic stabilization laws, another brilliant artist of law and government, Alexander Hamilton, as the first United States Secretary of the Treasury, fashioned bold, new American legal plans for American nascent economic policy, between 1789 and 1795. First in early 1790 Hamilton devised ingenious plans for meeting the debts going back to the Revolution: his scheme resisted discriminating between the present holders of Continental government certificates and the original holders; his approach, instead, involved new funding by the constitutional federal government by arranging for the exchange of old certificates for new securities, and assumption by the federal government of the unpaid war debts of the states. 260

Second, Hamilton “proposed the next step in his master financial plan,” 261 which, like his debt refinancing, was bold and brilliant. Hamilton urged the chartering of the Bank of the United States by Congress as “a great engine of state” that “would deal only in large-scale operations” such as “servic[ing] the national debt,”

258 Id. at 27-28.
259 Id. at 28 (internal quotation marks omitted).
260 JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 233-38 (1974). Interestingly, the ultimate political compromise which let Hamilton’s war debt financing proposal proceed was a creative “swap” that was hatched at a meeting between Secretary of State Thomas Jefferson, James Madison and Alexander Hamilton: “in exchange for enough votes to put the capital in the South, enough southern votes would be recruited to pass assumption. On this, the issue was settled.” Id. at 236-37.
261 Id. at 239.
“mak[ing] loans to the government and for major private projects.” Moreover, “[u]sing its powers to create and control credit, the bank would ward off excessive inflation or deflation, would force its policies on local banks.” Hamilton’s bank proposal was a controversial challenge deploying “new economics” to the “old agrarianism” exemplified by Jeffersonianism and opened up a political schism which lasted for several decades. Due to the feverish lobbying efforts of Hamilton that followed-up his bank proposal and its passage by Congress, Hamilton convinced President Washington to sign the bill into law. Third, during the congressional session that lasted from December, 1791, to May, 1792, Hamilton presented his ingenious Report on Manufactures. One biographer has explained Hamilton’s Report on Manufactures as “contain[ing] the embryo of modern America.” Thus:

Treating the subject with all the broadness of his far-ranging financial intellect, Hamilton summarized the existing state of American manufactures; showed that industrialization was the magic wand that would change economic colonialism to world power; argued that the northern processing of southern staples would help unite the nation; demonstrated that the United States could not safely depend on imports in case of war; and deduced that Congress should encourage native manufactures through tariffs, bounties, subsidies, and premiums.

Alas, Hamilton’s creative ideas for American manufacturing policy were ahead of their time; Washington distanced himself from this report and thought it too radical for “the temper of the times.” Taken together, Hamilton’s three plans for American

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262 Id.
263 Id. at 239-40.
264 Id. at 242.
265 Id. at 240-41.
266 Id. at 245-46.
267 Id. at 248 (internal quotation marks omitted).
268 Id.
269 Id. (internal quotation marks omitted).
economic policy were farsighted and innovative in planning for an American national economy that “had no need for slavery” in any region of the country.\textsuperscript{270}

The next most creative moment in American legal history—\#13—also involved inventiveness in the executive branch of the federal government, similar to Secretary Hamilton’s financial plans. But this moment involved the chief magistrate and his breathtaking gamble to purchase the Louisiana Territory from Napoleon Bonaparte to add to the land of the United States.\textsuperscript{271} Despite a host of factual and legal uncertainties about the purchase and executive action which flew in the face of the strict constitutional constructionists of his own political party, President Jefferson demonstrated flexibility and vision in directing American ministers to France—Robert Livingston and James Monroe—to accept Tallyrand’s offer, on behalf of Napoleon, to sell the “whole of Louisiana” to the United States.\textsuperscript{272} Indeed, while “[t]he Louisiana purchase turned out to be the greatest bargain in American history,” from a rational perspective in “1803 it seemed likely that the United States was paying $12 million for a scrap of paper.”\textsuperscript{273} Looking at the downside in 1803, “[t]he province [of Louisiana] was still in the hands of Spain. Bonaparte had promised never to dispose of Louisiana to a third power. The French constitution allowed no alienation of national territory without a vote of the legislature.”\textsuperscript{274} Moreover, “[t]he boundaries were indefinite; how far north Louisiana extended, and whether it

\textsuperscript{270} Id. at 386. Hamilton’s innovative intellectual luminescence in crafting his three major plans for American economic policy as the United States’ first Secretary of the Treasury was, no doubt, a manifestation of his general acumen. Indeed, “he had both a penetrating intelligence and a great fund of energy, together with a passion for seeing a thing done right. He could accomplish huge amounts of work in short spaces of time, and was willing to take responsibility, make arrangements, oversee details, and anticipate contingencies.” STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC 1788-1800 95 (1993).
\textsuperscript{271} See generally CHARLES A. CERAMI, JEFFERSON’S GREAT GAMBLE (2003) (the story of the Louisiana Purchase).
\textsuperscript{272} MORISON, supra note 154, at 366 (internal quotation marks omitted).
\textsuperscript{273} Id.
\textsuperscript{274} Id.
included West Florida or Texas, or neither, was uncertain.\textsuperscript{275} And, as a matter of American constitutional law, “[i]f the federal government, as Jefferson had always claimed, possessed no power not expressly granted, the President had no right to increase the national domain by treaty, much less to promise incorporation in the Union to people outside its original limits.”\textsuperscript{276} President Jefferson’s geopolitical and legal strategy and tactics in “pushing through the Louisiana Purchase”\textsuperscript{277} can be characterized in a number of ways: “defiantly bold behavior”;\textsuperscript{278} “brilliantly successful”;\textsuperscript{279} an “irony of ironies” in establishing “federal jurisdiction over the western territories as a clear [constitutional] precedent”\textsuperscript{280} “alert and skillful”;\textsuperscript{281} “designedly”;\textsuperscript{282} and showing Jefferson “at the peak of his presidential career.”\textsuperscript{283} The Louisiana Purchase moment in American legal history, however, was a team success: in addition to President Jefferson’s vision and willingness to gamble, ministers Robert Livingston and James Monroe as well as Secretary of State James Madison deserve considerable credit.\textsuperscript{284}

Next on our list of superlative creative legal moments in American history is the promulgation of \textit{The Laws and Liberties of Massachusetts} in 1648.\textsuperscript{285} As a communal undertaking (spearheaded by John Winthrop, Sr., the first governor of the Bay Colony and the Rev. John Cotton, one of the leading ministers) this “first printed compilation of the laws of any English colony” and

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\textsuperscript{275} \textit{Id.}
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} \textsc{Joseph J. Ellis, Founding Brothers: The Revolutionary Generation} 74 (2000).
\textsuperscript{278} \textit{Id.}
\textsuperscript{279} \textit{Id.} at 212.
\textsuperscript{280} \textit{Id.} at 241. This was the view of Jefferson’s rival—and later friend—John Adams.
\textsuperscript{281} \textsc{Malone, supra} note 164, at 286.
\textsuperscript{282} \textit{Id.} at 291.
\textsuperscript{283} \textit{Id.} at 302.
\textsuperscript{284} \textit{Id.} at 301.
\textsuperscript{285} \textsc{Laws and Liberties of Massachusetts} (1648).
later model “for similar efforts elsewhere”\textsuperscript{286} was remarkably innovative. First, contrary to the letters patent of March 4, 1629—the charter of the Bay Colony—the \textit{Laws and Liberties} differed in several respects from the conditioning clause of the charter which required that whatever laws and ordinances were promulgated by the Bay Colony could not be “contrarie or repugnant” to the laws of England.\textsuperscript{287} For example, the Massachusetts enactment had fewer capital felonies than English law, but “in particular crimes” were “more severe.”\textsuperscript{288} Second, dowries to widows “in the matter of goods and chattels” was far more generous under the \textit{Laws and Liberties} than under English common law.\textsuperscript{289} A third innovative feature of the 1648 Massachusetts Bay Colony’s statutory enactment was loaded with “far-reaching liberties” thus, for the first time in the English-speaking world, containing \textit{both} laws and liberties.\textsuperscript{290} Finally, the \textit{Laws and Liberties} constituted a pragmatic blend of the English past and the promise of a unique American future.\textsuperscript{291}

Two treatises authored by two great nineteenth century judges are next on our list of most creative moments in American law and will be discussed together. First, at \#15, is James Kent’s \textit{Commentaries on American Law}, a four-volume masterpiece published between 1826 through 1830.\textsuperscript{292} Kent’s treatise was “the first systemization of American law during its formative period.”\textsuperscript{293} Kent’s treatise was a creative endeavor—making a virtue out of the necessity of compulsory retirement for New York state judges at the age of sixty. Kent used his retirement from the New York appellate bench to give a number of lectures as an early American law professor at Columbia; the lectures were published

\textsuperscript{286} Thomas G. Barnes, \textit{Introduction}, \textit{Notes From the Editors, The Laws and Liberties of Massachusetts} 3 (Legal Classics Library 1982).
\textsuperscript{287} \textit{Id.} at 13 (citing March 4, 1629 charter).
\textsuperscript{288} \textit{Id.}
\textsuperscript{289} \textit{Id.} at 14.
\textsuperscript{290} \textit{Id.} at 12.
\textsuperscript{291} \textit{Id.} at 3.
\textsuperscript{292} JAMES KENT, \textit{Commentaries on American Law}, 4 vols. (1826-1830).
\textsuperscript{293} BERNARD SCHWARTZ, \textit{A Book of Legal Lists: The Best and Worst in American Law} 133 (1997).
as his Commentaries, “ear[ning] for its author the sobriquet ‘American Blackstone.”’294 Kent was also creative in the basic thrust of his Commentaries:

Throughout the work ... Kent emphasized that the English system was to be followed only as far as it was suitable for American conditions. The underlying consideration was to present American law in a manner that served the new nation’s economic development. This enabled Kent’s work to authenticate the transition from a system still influenced by its feudal roots to the emerging entrepreneurial society.295

Almost contemporaneously with Kent’s treatise,296 U.S. Supreme Court Justice Joseph Story’s Commentaries on the Constitution of the United States was published in 1833.297 This book was a monumental creative project, #16 on our list, written while he was a Justice and—in his spare time—the first Dane Professor of Law at Harvard. Story provided a specific, clause-by-clause analysis of the Constitution based on the nationalistic and flexible approach to nascent American constitutional interpretation espoused in the jurisprudence of Chief Justice John Marshall. Story’s three-volume treatise on the Constitution was a creative successor to The Federalist and a persuasive rebuttal of the strong state sovereignty view of the Constitution as “a mere contract” between the states.298

Following up on the creative legal books of Story and Kent are two additional creative books comprising the #17 and #18 most creative moments in American law: the 1871 book, A Selection of Cases on the Law of Contracts (the first law casebook) by Harvard

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294 Id. at 193.
295 Id.
296 See supra notes 292-93 and accompanying text.
297 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).
298 SCHWARTZ, supra note 293, at 195.
Law School dean, Christopher Columbus Langdell,\textsuperscript{299} and the 1880 book by Oliver Wendell Holmes entitled \textit{The Common Law.}\textsuperscript{300} Dean Langdell, as a basis for publishing his casebook, made the innovative, even revolutionary, assertion that law is a kind of science, that the raw materials for this science were in the original sources of reported cases and that the way to go about learning the law was through a critical analysis of selected judicial opinions—the case method.\textsuperscript{301} Langdell’s creative break with the then traditional way of learning law—readings and lectures but little or no class discussion—was opposed for many years; after several decades, though, the Langdellian case method emplified in his contracts casebook held sway and has been the predominant method of legal instruction in America for over a century.\textsuperscript{302} On its surface, Holmes’ book, \textit{The Common Law}, was a mere “summary of the different legal subjects” of contracts, succession, torts, property and criminal law.\textsuperscript{303} But, on a deeper level, \textit{The Common Law} was an audacious stroke of innovation that stressed the philosophy of American pragmatism applied to the law: law as not just a matter of logic and precedent; rather, law is—and should be—a matter of “experience” and “life.”\textsuperscript{304}

Proceeding with our examination of the second tier of the most creative moments in American legal history, we encounter three controversial (many would argue negatively creative Supreme Court opinions) as #19, #20 and #21; this is followed by three federal legislative enactments as #22, #23 and #24 on our ranking that are universally hailed as positively creative and responsible for historical paradigm shifts which contributed to the growth, development and refinement of American society. The first Supreme Court opinion is that of \textit{Dred Scott v. Sanford.}\textsuperscript{305} The

\begin{itemize}
\item \textsuperscript{299} \textsc{Christopher Columbus Langdell, A Selection of Cases on the Law of Contracts} (1871).
\item \textsuperscript{300} \textsc{Oliver Wendell Holmes, Jr., The Common Law} (1880).
\item \textsuperscript{301} Schwartz, \textit{supra} note 293, at 197-98.
\item \textsuperscript{302} Thomas G. Barnes, \textit{Introduction}, Notes From the Editors, A Selection of Cases on the Law of Contracts 8-9 (Legal Classics Library 1983).
\item \textsuperscript{303} Schwartz, \textit{supra} note 293, at 199.
\item \textsuperscript{304} Id.
\item \textsuperscript{305} 19 How. 393 (1857).
\end{itemize}
style and boldness of the decision (rationalized by Chief Justice Taney’s majority opinion and multiple concurring opinions of other Justices) was inventive and original; the Court assumed that the national High Court could, in the fashion of Alexander, cut the Gordian Knot of the slavery question and bring about the peace and harmony that the other branches of the federal government and the state governments could not achieve. The effect of the decision, however, was precisely the opposite. The substance of the majority rationale in Dred Scott, moreover, was so freely creative as to be in the nature of unbridled art—holding that blacks (even free blacks) were not and could never become citizens and that slavery was a national, constitutionally protected institution that Congress could not abolish by legislation in the federal territories. But “American legal and constitutional scholars consider the Dred Scott decision to be the worst ever rendered by the Supreme Court”—a decision that was later overruled by the Thirteenth and Fourteenth Amendments. Plessy v. Ferguson was an analogous, negatively creative judicial decision coming four decades after Dred Scott; arguably it is even more negatively creative than Dred Scott because of the cramped interpretation of the Civil War constitutional amendments dealing with black people. The majority opinion in Plessy read the Thirteenth Amendment as inapplicable to the state of Louisiana’s law that required separate, but equal, accommodations for “the white and colored races”; writing for the Court, Justice Henry Billings Brown “continued the Court’s practice of construing the Thirteenth Amendment to apply only to actions whose purpose was to reintroduce slavery itself”—in fundamental disagreement with Justice Harlan’s dissent which viewed the Thirteenth Amendment as “barring all badges of servitude.” Moreover, Brown’s

306 SCHWARTZ, supra note 293, at 70.
307 Id. at 70-71.
308 OXFORD SUPREME COURT GUIDE, supra note 163, at 278.
309 U.S. CONST., amends. XIII and XIV.
310 163 U.S. 537 (1896).
311 OXFORD SUPREME COURT GUIDE, supra note 163, at 239.
312 Id.
313 Id. at 240 (internal quotation marks omitted) (citation omitted).
opinion for the Court in Plessy found no Fourteenth Amendment equal protection of the laws violation by the Louisiana statute because, in a novel interpretation, the feeling of inferiority “arose only because one race chose to perceive the laws in such a way,” and, in an even more novel construction (in light of a federal constitutional imprimatur for equal protection of the laws) a “strong public sentiment as manifested by statutes requiring separation of the races in educational facilities” and pre-Civil War judicial precedent.\footnote{Id. at 239.} Roe v. Wade\footnote{410 U.S. 113 (1973).} follows in the ranking of most creative American legal moments. Roe is characterized by many strands of negative creativity in the sense that the nature of judicial interpretation by the Supreme Court was at odds with the traditions of the American legal process. First, the majority opinion (written by Justice Harry Blackmun and joined by six other Justices) was predicated on the Due Process Clause of the Fourteenth Amendment, untethered to any constitutionally-specific right.\footnote{Oxford Supreme Court Guide, supra note 163, at 263.} Second, the aforementioned nontextual basis of Roe was reminiscent of the Lochner v. New York\footnote{198 U.S. 45 (1905).} era when the Court used a similarly vague and nontextual “liberty of contract” rationale to invalidate many state statutes aimed at bettering the conditions of employees in the workplace.\footnote{Oxford Supreme Court Guide, supra note 163, at 263.} Third, the Court’s finding of a lack of substantive due process was fashioned on a cognate, nontextual constitutional right of privacy (itself a recent Court innovation from the Griswold v. Connecticut case\footnote{381 U.S. 479 (1965).}); moreover the Court stretched the Griswold privacy right from the use of contraceptives at one’s home to abortion of a fetus in a public medical setting.\footnote{Oxford Supreme Court Guide, supra note 163, at 263-64.} A fourth flawed aspect of the Roe creation by the Court was the trimester invention of Justice Blackmun whereby, during the first trimester a woman enjoys an almost unrestricted right to obtain an abortion, after consultation with her physician; during the second trimester of pregnancy states had a legitimate interest to regulate
abortions to protect a woman’s health; and, during the final trimester—subject to allowing abortions to save women’s’ lives—states were constitutionally-authorized to impose severe restrictions on abortions.\textsuperscript{322} Fifth, and related to the previous dimension of aggressive creativity, the Court’s trimester scheme is linked to an extra-record “study” by Blackmun of medical literature relating to abortion,\textsuperscript{323} without notice of counsel. Sixth, the Court’s abortion confection ignored the historical context of the adoption of the Fourteenth Amendment in the mid-Nineteenth Century when state abortion statutes as restrictive or more restrictive than the statutes at bar were in place throughout the country and Congress made no mention of abortion statutes as a rationale for the Amendment.\textsuperscript{324} Seventh, the Court’s opinion can be viewed as an imaginative political ploy to appease the rising “women’s movement” of the 1950s, 1960s and 1970s.\textsuperscript{325}

Three congressionally-instigated statutes rank near the top of the nation’s most creative legal moments; because these enactments were based on legislation, their innovative characteristics—unlike the negatively creative judicial opinions we have just touched on—\textsuperscript{326} are worthy of approbation.\textsuperscript{327} The Homestead Act of 1862\textsuperscript{328} (providing a free grant of up to 160 acres of surveyed western land owned by the federal government to any citizen or applicant for citizenship over 21 who had occupied and improved the land for at least five years)\textsuperscript{329} constituted a farsighted and efficient legislative means to foster national growth and responsible citizenship. The G.I. Bill, or

\textsuperscript{322} Id. at 263.
\textsuperscript{323} Id.
\textsuperscript{324} Id.
\textsuperscript{325} Id.
\textsuperscript{326} See supra notes 305-25 and accompanying text.
\textsuperscript{327} See also supra notes 292-304 and accompanying text (discussing legal creativity by judges writing independently as legal commentators engaging in nonjudicial legal creativity worthy of respect and characterized by positive dimensions).
\textsuperscript{328} 12 Stat. 392-394 (1862).
\textsuperscript{329} STATHIS, supra note 155, at 90.
Servicemen’s Readjustment Act of 1944\textsuperscript{330} (establishing a panoply of benefits for veterans of World War II including educational tuition and expenses, hiring preferences, occupational guidance, preferential loans for homes and farms and businesses, benefits for unemployment and hospitalization)\textsuperscript{331} represented a prescient and sensible national investment in higher education and social benefits for America’s brave warriors which helped indirectly to expand the nation’s prowess as a provider of world class universities. The National Environmental Policy Act of 1969 (NEPA)\textsuperscript{332} (declaring national policy to promote productive harmony between humans and nature, while also considering the welfare of future generations, fashioning the environmental impact requirement for significant federal agency decisionmaking, and constituting the Council on Environmental Quality (CEQ) to advise the president)\textsuperscript{333} represents a striking paradigm shift (or shifts) in American environmental law, which, according to Professor William H. Rodgers, Jr. is “[t]he most admired of all the environmental laws” in the United States.\textsuperscript{334}

NEPA: is admired for its form, its structure, and its robustness. It is praised for its eloquence of formulation and for the cleverness in the way it was attached to existing agency mandates. It has been emulated by a hundred other initiatives. It is celebrated for any number of paradigm shifts—from simple policy evaluation to impact assessment to comprehensive rationality to ecological experimentation to public participation to integrated decisionmaking. Even the part of the NEPA that did not work—section 101—is extolled for its embrace of the principles of stewardship (the public trust), nondegradation, cultural and biodiversity, recycling, sustainable use, and even (with a small stretch)

\begin{footnotes}
\item[331] STATHIS, supra note 155, at 224.
\item[333] STATHIS, supra note 155, at 277.
\end{footnotes}
environmental justice ("a wide sharing of life’s amenities").

Not a statute, nor a judicial opinion, nor an administrative agency regulation, nor a national constitutional text or amendment, the Seneca Falls Convention, meeting in Seneca Falls, New York, in July 1848 "was the first public political meeting in the United States dealing with women’s rights." Organized by Lucretia Mott and Elizabeth Cady Stanton, the participants of the Convention (which included 200 women and, unexpectedly 40 men, including the ex-slave abolitionist Frederick Douglass) perspicaciously modeled their “Seneca Falls Declaration of Sentiments” on the 1776 Declaration of Independence. This document listed “the ways in which men had oppressed American women, including depriving them of the vote, of equal property rights, of equal access to employment and education—in short, of the full rights and privileges of citizens.” The creative impetus of the Seneca Falls Convention spurred subsequent holding of national women’s conventions on an annual basis, thus providing increased visibility and solidarity to the growing women’s rights movement which over the course of several decades led to constitutional and legislative legal change granting American women equal rights.

Next on our enumeration of the top creative moments in American law is a national statute signed into law in the mid-Twentieth Century: the Land and Water Conservation Act of 1964. This congressional enactment discerningly leveraged federal revenue into a Land and Water Conservation Fund administered by the secretary of the interior; the statute allowed monies from the fund to be used for matching grants to the states for the purpose of acquiring recreational lands, for financing

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335 Id. at 31 (footnotes omitted).
336 THE READER’S COMPANION TO AMERICAN HISTORY 981 (Eric Foner & John A. Garraty, eds., 1991) [hereinafter COMPANION TO AMERICAN HISTORY].
337 Id.
338 Id.
339 Id. at 981-82.
wilderness components of federal water projects, and for federal land acquisitions for national forests, national parks and wilderness areas. Since its genesis, the “Land and Water Conservation Fund has accounted for” billions of dollars of insightful expenditures on “parklands, changing the face of urban and rural America.”

Members of Congress were moved by evocative and radiant rhetoric “of children of many colors coming together in the public playgrounds of the land” along with the prospect for “recreational opportunities for the poor and underprivileged”; the 1964 legislation “became the first and most successful step in what has lately become known as the environmental justice movement.”

Another law book, Benjamin N. Cardozo’s *The Nature of the Judicial Process*, published in 1921—written while he was Chief Judge of the New York Court of Appeals and immediately before his appointment and confirmation as a Justice of the United States Supreme Court—was “the first attempt by a judge to give a realistic description of how judges decide cases.” Cardozo unabashedly wrote about the plastic and malleable nature of the judicial process; moreover, Cardozo discussed how the freedom of choice available to a judge in selecting dispositive legal principles (and in interpreting these principles) was a creative process of decision based on a pragmatic sense of social utility and a fitness of social ends with legal means.

Moving to the #28 spot of all-time American legal creativity is New York lawyer and law reformer David Dudley Field’s fashioning of his Code of Civil Procedure enacted in New York in 1848—the same year as the Seneca Falls Convention on

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341 STATHIS, supra note 155, at 262-63.
343 *Id.* at 25.
345 schwartz, supra note 293, at 201.
346 *Id.*
347 *Id.* at 226.
women’s rights.\textsuperscript{348} Doing away with “the distinction between actions at law and actions in equity,” a dichotomy which had developed under English law, Field’s Code of Civil Procedure constituted a significant innovation in law “that fitted in with the instrumentalist approach being developed by American law.”\textsuperscript{349} Field’s procedural code was borrowed by numerous other American states and, ironically, by England (the source of the original procedural confusion) in 1873.\textsuperscript{350}

Coming in as #29 on our ranking of the most creative American legal moments is the transformation of the selectively-granted corporate charter, in vogue in the late Eighteenth and early Nineteenth Centuries in America, to general state incorporation laws by the latter part of the Nineteenth Century. This moment took several decades. It started with initial judicial distinctions between public and private corporations and judicial confusion about whether or not private corporations should be protected from competition by rivals, and evolved into the first streamlined state incorporation statutes.\textsuperscript{351}

The final entry in the second tier of most important creative moments in American legal history was the crafting, proposing and adopting during the Civil War and its aftermath during the late 1860s and early 1870s of the Thirteenth,\textsuperscript{352} Fourteenth\textsuperscript{353} and

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{348}] See supra notes 336-39 and accompanying text.
\item[\textsuperscript{349}] SCHWARTZ, supra note 293, at 226.
\item[\textsuperscript{350}] Id. One observer has remarked that Field’s civil procedure legal reform was a “quantum change” that “[d]iscard[ed] entirely the common-law system, [while] it swept aside fictions, technicalities, and foreign verbiage and completely changed the law’s adjective side.” Id.
\item[\textsuperscript{351}] See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 111-18 (1977) (discussing the separation of public and private interests, the theory of competition and other aspects of American cases involving corporations).
\item[\textsuperscript{352}] U.S. CONST., amend. XIII.
\item[\textsuperscript{353}] U.S. CONST., amend. XIV.
\end{enumerate}
\end{footnotesize}
Fifteenth Amendments dealing, respectively, with the abolition of slavery, the granting of citizenship and civil liberties to persons born or naturalized in the United States, and guaranteeing the right to vote of the former slaves. The Thirteenth Amendment had its origin with Lincoln’s Emancipation Proclamation; “Lincoln and the Republican party recognized that the Emancipation Proclamation, as a war measure, might have no constitutional validity since the war was over” and that “[t]he legal framework of slavery could still exist in the former Confederate states as well as in the Union slave states that had been exempted from the proclamation,” therefore, “the party committed itself to a constitutional amendment to abolish slavery.” The Fourteenth Amendment entailed a two-year political debate between “abolitionists [who] criticized it for not going far enough, southerners [who] denounced its restrictions on ex-Confederates, and President [Andrew] Johnson [who] questioned the right of Congress to adopt an amendment without the participation of southern senators and representatives.” Between February 1860, when it passed Congress, and February 1870, when it was ratified by the requisite number of states, the Fifteenth Amendment became law. Taken together, the Civil War Amendments, as they are collectively known, involved a creative response by Abraham Lincoln and key Republican members of Congress to the historic opportunity presented by the defeat of the Confederacy to once-and-for-all, as a matter of national constitutional law, eliminate civil and political vestiges of slavery while attempting to make blacks fully equal citizens of the United States. Moreover, the constitutional power vested in Congress in each of the three Civil War Amendments to enforce by appropriate legislation the substantive details of civil and political entitlements set forth in the

354 U.S. CONST., amend. XV.
355 See supra notes 168-83 and accompanying text.
356 COMPANION TO AMERICAN HISTORY, supra note 336, at 352.
357 STATHIS, supra note 155, at 97.
358 Id. at 103.
359 Id. at 102.
constitutional provisions were new and innovative legal tools that had never before been placed in the Constitution.360

C. The Third Tier: Rankins #31 Through #60.

Thus far, we have lingered and elaborated on the reasons for the high status of the thirty most creative moments in American legal history.361 Given the constraints of space, however, the discussion of the rationales for rankings #31 through 100 will be more condensed.362

1. Rankins #31 to #40.

In this layer of our list of most creative American legal moments we start with the dynamic and instrumentalist reforms of the Progressive Era of American law and politics which led to the amendment of numerous state constitutions and statutes to delimit state legislatures, to allow citizens the opportunity to initiate legal change directly, and to open up the political process.363 Next, as a manifestation of Progressivism on the national level, the Federal Reserve Act of 1913364 is an insightful congressional enactment which permits national banking officials of the presidentially-appointed Board of Governors to regulate credit and, in the process, influence macroeconomic features of the American economy such as inflation, employment and growth.365

Two additional federal statutes—the Voting Rights Act of 1965366 and the Civil Rights Act of 1964367—follow as key creative moments in American legal history. The former statute

360 See U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.
361 See supra notes 132-360 and accompanying text.
362 See infra notes 363-519 and accompanying text.
363 COMPANION TO AMERICAN HISTORY, supra note 336, at 869. The Progressive Era entailed “a climate of creativity, an ethos, a persuasion making the events of the thirty years between 1889 and 1920 cohere as everyone assumed they did at the time.” Id.
364 38 Stat. 251-75 (1913).
365 COMPANION TO AMERICAN HISTORY, supra note 336, at 78.
invented legal processes to federally regulate voter literacy tests, voter qualification devices, and voting regulations. The latter congressional enactment creatively broke the legislative logjam in Congress from persistent southern state opposition to expansive civil rights guarantees in outlawing racial segregation in public facilities, employment and education.

A remarkable time of American legal creativity was the period from the appointment by President Harry Truman in the spring of 1945 of U.S. Supreme Court Justice Robert H. Jackson as the American representative to a special Allied conference held in London from June 26 to August 8, 1945 through the trial and sentencing of Nazi war criminals in Nuremberg, which was completed in 1946. Opposing a British proposal “declaring the top Nazis to be outlaws and summarily shooting them,” Jackson advanced the American “fundamental objection to the bill of attainder concept; an objection growing out of [American] eighteenth-century experience and anchored in the United States Constitution.” “At the London Conference, [with leadership by Jackson], agreement was reached on the establishment of an international tribunal and the procedures it would follow.”

The Missouri Compromise of 1820, whereby Congress authorized the inhabitants of Missouri to form a constitution and state government and directed that slavery was forever prohibited in the remainder of the Louisiana Territory north of 36 degrees 30 minutes latitude, except in the state of Missouri, although “criticized by many southerners because it established the principle that Congress could make laws regarding slavery” and, in turn, by northerners who “condemned it for acquiescing in the expansion of slavery (though only south of the compromise line)” should be

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368 STATHIS, supra note 155, at 266.
369 COMPANION TO AMERICAN HISTORY, supra note 336, at 178-79.
371 Id.
372 Id. (endnote omitted).
373 Id
374 3 Stat. 545-48 (1820).
viewed as a creative compromise between a handful of members of the House and the Senate which “helped hold the Union together for more than thirty years.”

The United States Senate, acting as court of impeachment for the trial of U.S. Supreme Court Justice Samuel Chase in 1805, decided the then novel constitutional question of whether federal judges could be removed for merely political reasons by accepting the argument of Chase’s defense that the property, liberty and lives of Americans could only be secured by an independent judiciary. The Senate acquittal of Chase resulted from a constitutional majority of senators who innovatively interpreted the standard for removal of judges through the impeachment process as precluding merely political reasons for removal.

Congress exercised legislative creativity in two landmark procedural enactments in the year following World War II: the Administrative Procedure Act of 1946 and the Legislative Reorganization Act of 1946. The first-mentioned enactment was a collaborative creation among numerous participants: “Following nine months of study by Congress, the Justice Department, and various bar organizations, President Truman in May 1946 signed the Administrative Procedure Act. It established principles and procedures for a broad range of government activities, including rule making, agency adjudication, and judicial

375 COMPANION TO AMERICAN HISTORY, supra note 336, at 737. The Missouri Compromise, however, which also allowed Maine (formerly part of Massachusetts) to enter the Union as a free state: was repealed by the Kansas-Nebraska Act of 1854, which established popular sovereignty (local choice) regarding slavery in Kansas and Nebraska, though both were north of the compromise line. Three years later, the Supreme Court in the Dred Scott case declared the Missouri Compromise unconstitutional, on the grounds that Congress was prohibited by the Fifth Amendment from depriving individuals of private property without due process of law.

376 SCHWARTZ, supra note 293, at 245-46.
review of administrative decisions.”  

The second-mentioned statute was a dazzling congressional moment of fundamental reform of the federal legislative process: the Legislative Reorganization Act of 1946 constituted congressional reform “of its own internal structure by reducing the number of standing committees, strengthening its professional staff and information resources, establishing lobbying registration requirements, and providing an annual legislative budget to complement the president’s budget.”

Completing the top layer of the third tier of superlative creative moments in American legal history brings us to one of the few state legislative enactments on our top 100 list: Wisconsin’s personal liberty law, passed in 1850s in open defiance of the federal Fugitive Slave Act. The Wisconsin statute instantiated “an assertive states’ rights position” legally claimed in an imaginative interpretation of the relative rights between anti-slavery states and the then southern influenced Congress that the federal “Fugitive Slave Law” was inoperable within Wisconsin.

2. Rankings #41 to #50.

The next layer within the third tier of paramount moments of creativity in American law might be viewed as the “green” layer since all ten moments relate to books, legislation or judicial opinions dealing with environmental protection. First, the Clean

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379 STATHIS, supra note 155, at 226.
380 Id.
381 The Fugitive Slave Act of 1793 was the seminal federal legislation. 1 Stat. 302-05 (1793). It “[e]mpowered slave owners, or their agents, to seize and return a fugitive slave to servitude by presenting an affidavit of ownership” to state officials, “who were required to enforce the law.” STATHIS, supra note 155, at 15. In 1850, Congress amended the Fugitive Slave Act by “removing fugitive slave cases from state jurisdiction”; trials were henceforth to be conducted by federal commissioners. Id. at 75. 9 Stat. 466-67 (1850).
382 CARWARDINE, supra note 183, at 95.
383 Indeed, creative environmental moments in American legal history proliferate on my top 100 list. I acknowledge an environmental law bias, created by my twenty-plus years of teaching and consulting in this subject area.
Air Act of 1970,\textsuperscript{384} the product of the masterful legislative
generalship of Senator Edmund S. Muskie of Maine,\textsuperscript{385} was “the
first great anti-pollution statute” in America and included the
prototype citizen suit provision whereby, subject to prior notice to
the Environmental Protection Agency (EPA) administrator, “any
person may commence a civil action ... for violation” of an air
pollution standard or government failure to perform a non-
discretionary duty under the Act.\textsuperscript{386} Second, in the green layer of
American legal creativity, the Clean Air Act Amendments of 1990
deserve mention in light of the innovative provisions adopted by
Congress that established a market-oriented emission trading
scheme for buying and selling sulfur dioxide (SO\textsubscript{2}) air discharge
credits.\textsuperscript{387} While controversial at the time it was signed into
federal law, this new concept in environmental law spawned a
panoply of subsequent “environmental trading” schemes including
laws and proposed laws for addressing volatile organic compound
(VOC) cap and trade arrangements,\textsuperscript{388} trading of mercury air
emissions,\textsuperscript{389} carbon sequestration projects to offset greenhouse
gas emissions,\textsuperscript{390} habitat conservation banking,\textsuperscript{391} and water
quality trading.\textsuperscript{392} Positioned next on the list is a book: Rachel

\begin{footnotes}
\item[385] See generally, Blomquist, supra note 74.
\item[386] David Sive, \textit{Words That Formed Environmental Law}, 11 ENVTL. F. 14, 15-
16 (1994) (internal quotation marks omitted).
155, at 337.
\item[388] See David A. Savage & Matthew G. Paulson, \textit{The Advent of Local VOC Cap-and-Trade for Controlling Ozone}, 20 NAT. RESOURCES & ENV’T 10 (Summer 2005).
\item[392] See Lynda Hall and Eric Raffini, \textit{Water Quality Trading: Where Do We Go From Here?} 20 NAT. RESOURCES & ENV’T 38 (Summer 2005). \textit{Cf.} Stephen E.
Carson’s 1962 creative landmark, *Silent Spring.* This book awoke Americans to the perils of excessive pesticide usage and, further, “gave birth to the science and art of risk assessment, based upon the then-somewhat revolutionary concept that the production of more and bigger goods may ... be a positive hindrance to the elevation of [human]kind.” Following in overarching importance is another original classic book: Aldo Leopold’s *A Sand County Almanac.* This book articulated the seminal concept of a “land ethic” “exclusively in scientific terms” transcending the “essentially religious terms” of the earlier ideas advanced by Henry David Thoreau and John Muir.

Following in importance is the combined creative judicial dissent by Justice William O. Douglas in *Sierra Club v. Morton* assisted by the law review article, *Should Trees Have Standing?* written by law professor Christopher Stone. William H. Rodgers, Jr. has called this one-two punch one of the great “Aha! moments” in American environmental law. Next is the pathbreaking book, *The Greening of America,* published in 1972 by law professor Charles A. Reich—“a clarion call to the young, in body or spirit, to do what Thoreau had urged most: to simplify.” Close behind in creative importance is the 1971 Supreme Court decision in *Citizens to Preserve Overton Park v. Draper,* *The Unintended Consequences of Tradable Property Rights to Water,* 20 NAT. RESOURCES & ENV’T 49 (Summer 2005).
©02 The fine interpretation by the Court of the Administrative Procedure Act’s judicial review section©03 led the Court to hold that discretionary decision making by federal agencies (in this case the Secretary of Transportation’s decision to allow I-40 to be constructed through Memphis’s Overton Park) was reviewable by the federal judiciary; the other creative aspect of Overton Park was the meaning of a federal law, “prudent and feasible alternative,” a phrase which became “as poetic to environmentalists as any by Shelley or Keats ....”©04

Coming in as #48, #49 and #50 on the ranking of all-time creative legal moments are three key federal environmental statutes enacted within a few years of one another: respectively, the Clean Water Act of 1972,©05 the Toxic Substances Control Act of 1976 (TSCA)©06 and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund").©07 The Clean Water Act—with an absolute prohibition of the unpermitted “discharge of any pollutant by any person” ingeniously mandated and achieved significant gains in the nation’s water quality.©08 TSCA—unlike the other media-specific federal environmental statutes—brilliantly attacks multi-media toxic pollutants by requiring advanced notice by manufacturing a new chemical to EPA along with extensive preparation of safety data for existing chemicals. Superfund—by imposing “strict, joint and several liability on any person whose disposal of hazardous substances results in the incurrence of response costs by the affected property owner” served to creatively “revolutionized commercial property management and exchange in the United States” and helped to rid the landscape of abandoned hazardous waste dump sites.©09

404 Sive, supra note 386, at 16.
408 Rodgers, supra note 342, at 23.
409 Id. at 24.
3. Rankings #51 to #60.

The lower layer of the third tier of outstanding creative moments in American legal history is comprised of an interesting mix—at #51 and #52 are two imaginative Supreme Court decisions: *Chevron v. National Resources Defense Council* and *City of Philadelphia v. New Jersey*. *Chevron* developed a powerful doctrine of judicial deference to administrative rulings by federal agencies; *City of Philadelphia* invented the concept of unwanted garbage as a “bad” in interstate commerce which could not be discriminated against simply for its out-of-state origin. At #53 is another creative federal statute: the Endangered Species Act of 1973—containing a sweepingly protective provision “which states that no federal agency shall take action likely to jeopardize the continued existence of a protected species or result in the destruction or adverse modification of its habitat.” The Endangered Species Act is “the most protective of all domestic environmental laws, admired throughout the world” for its elegant effectiveness. Next on our list is Judge Richard A. Posner’s monumental work, *Economic Analysis of Law*, published in 1973. In effect, Posner invented the Law and Economics approach which posits efficiency as “the overriding goal” of the legal system which goal, in turn, is “best promoted by free operation of the market.” Posner’s book is followed by another book which also served to create a distinctive school of jurisprudence. The book—“tentatively” issued in an unpublished version in 1958 and finally posthumously published in 1994—is Henry Hart’s and Albert Sack’s *The Legal Process: Problems in the Making and Application of Law*. This outstanding casebook

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412 Both decisions, however, have been subject to criticism.
414 Rodgers, *supra* note 342, at 23 (internal quotation marks omitted).
415 Id.
417 SCHWARTZ, *supra* note 293, at 206. Posner’s Law and Economics approach has, nevertheless, been criticized by many.
consists of numerous open-ended discussion problems of key facets of the American legal system—from private lawmaking through the lawyerly drafting of contracts to the nature of judicial precedent; from arbitration to the legislative process; from administrative rulemaking and adjudication to the purposive interpretation of statutes.419

As the #56 most creative moment in American legal history, we come to Section 520 of the Restatement (Second) of Torts, promulgated by the American Law Institute in 1965.420 Section 520 addresses “abnormally dangerous activities” based on a flexible weighing of six factors by the judge; if factors predominate in favor of a finding of abnormally dangerous activity then strict liability for damages caused by the activity will be imposed.421 This “restatement section is at the center of the explosive development” in the last quarter century of “toxic torts”—a field that combines statutory-based environmental claims with tort claims.422 Stacking up at #57 in our creative ranking is President Eisenhower’s stellar legislative achievement: the Federal Aid Highway Act of 1956.423 The highway legislation was not only “the biggest peacetime construction project of any description ever undertaken by the United States or any other country,” as Eisenhower put it in his memoirs,424 it also strategically “authorized completion of the entire forty-one-thousand-mile National System of Interstate and Defense Highways, provided for its financing, required that broad criteria be established for the interstate system, established a new method

420 RESTATEMENT (SECOND) OF TORTS (1965).
422 Sive, supra note 386, at 15. The freewheeling factors approach, however, has been criticized as a “disguised negligence regime” that “is needless at best and probably should be subjected to Occam’s razor.” DOBBS, supra note 421, at 953.
of apportioning interstate funds among the states” and further “established a Highway Trust Fund, and authorized significant appropriations for primary, and secondary roads.”425 President Eisenhower’s own creative idea culminated in a “[h]ighly praiseworthy” “Atoms for Peace” proposal to the United Nations in a speech he gave before the U.N. General Assembly on December 8, 1953.426 His idea “was for the United States and Soviet Russia to make joint contributions from their uranium stockpiles to the United Nations.”427 The details of Eisenhower’s proposal involved the administration of the Atoms for Peace program “by a U.N. atomic energy agency to serve the peaceful pursuits of mankind; especially to provide abundant electrical energy in the power-starved areas of the world.”428 Unfortunately, Ike’s idea was met “with surly contempt” by the Soviets.429

425 STATHIS, supra note 155, at 244. But see the following negative view: [Lewis Mumford] predicted, with great accuracy, that our cities would soon become “corpses” smothered in concrete. [The 1956 Highway Act], and the cheap gas policies that accompanied it, have been preserved by every president and Congress since, creating the most profound change in the American landscape since the beginning of the industrial age. In 1956 the United States committed itself to subsidy of an automobile culture, accelerating suburban sprawl and all the transportation, social and environmental problems that have accompanied it. When the government subsidizes and in effect makes permanent car dependency, how effective can a Clean Air Act or Clean Water Act be? The parts—you and I—have no say in the whole. A Time to Take a Step Back, 11 ENV'TL F. 20, 21 (Nov./Dec. 1994).

426 MORISON, supra note 154, at 1088.

427 Id.

428 Id. (internal quotation marks omitted).

429 Id. But see the negative view of this proposal by President Eisenhower: But the [International Atomic Energy Agency] was driven by two conceits born of a failure to look at the whole. First, that even the poorest nations, where no power grid existed and only one in a hundred owned an electrical appliance, could benefit from atomic energy. Second, that under a system of safeguards, the fuels and by-products could be stored safely and prevented from being made into weapons. The expense of nuclear power has proved the first premise wrong. Iraq and North Korea show the futility of safeguards, and no one has solved the storage problem yet.

EISENHOWER, supra note 424, at 21.
Completing the final layer of the third tier of our rankings are American contributions to trying to found an international body of nations to resolve international problems in a peaceful fashion. At #59 is the coordinated efforts of President Franklin D. Roosevelt, his Secretary of State Cordell Hull, Republican U.S. Senator Arthur H. Vandenberg of Michigan and others who worked out a detailed preliminary outline of the United Nations Charter in a 1944 conference in Washington, D.C. also attended by representatives of Great Britain, Russia and China; this preliminary outline became the “basis of the charter which issued from a plenary conference of fifty different nations in April 1945."\(^{430}\)

And, although he ultimately failed in his attempt to convince his fellow Americans to join the post-World War I League of Nations, perhaps because Americans were skeptical of the notion of an international body to “prevent future wars,”\(^{431}\) President Woodrow Wilson’s creative intellectual and political efforts established the foundation for what would become the United Nations a quarter century after the U.S. Senate shot down ratification of the treaty which would have authorized the United States to join the League of Nations.\(^{432}\)

D. The Fourth Tier: Rankings #61 Through #100.

1. Rankings # 61 to 70.

The top layer of the fourth tier of superlative creative moments in American law is a fascinating amalgam of ideas. At #61, the Wilderness Act of 1964\(^{433}\) pops on stage—artistically establishing a “National Wilderness Preservation System” and expansively defining American “wilderness as an area where the earth and its community of life are untrammeled by [humans], where man himself is a visitor who does not remain,” while it “has given rise to a tenfold expansion in protected area” from 1964 to 1994 “and

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\(^{431}\) MORISON, supra note 154, at 877.

\(^{432}\) Id. at 877-83. See also, KENNEDY, supra note 430, at 8-20.

coincidentally offers the opportunity to secure advances in the protection of North American biodiversity.

Following at #62 is another ingenious legislative invention: the Delaney Amendment to the Food, Drug, and Cosmetic Act Amendments of 1954 which says that no food additive shall be deemed to be safe if it is found to induce cancer when ingested by human or animal. According to William Rodgers, “the Delaney Amendment is much more than a low-level pollutants-in-food law; this statute should be best remembered for bringing down DDT and putting in motion a worldwide social revolution against the serious problem of pesticide pollution.”

Alas, in a legal gesture of arguable negative creativity, Congress passed the Food Quality Protection Act of 1996 which, among other provisions, repealed the Delaney Clause “that prohibited even the most minute traces of cancer-causing pesticide residues in processed foods,” and fashioned in its place a risk-based balancing of “health risks when setting standards.”

At #63 in the ranking is a politico-legal event: one day—April 22, 1970 known as “Earth Day.” One person, Denis Hayes, “dream[ed] up Earth Day,” spearheading a rational “teach-in” of students, professors, scientists and citizens who learned about the environmental dangers facing the planet and talked about changing laws and institutions in America to help clean up the environment. President Richard Nixon showed an ability to think outside-the-box, on a long range basis, by proposal of “a new federally sponsored government-industry partnership to develop an alternative to the internal combustion engine by 1975—#64 on our all time creative legal moments list. Next, at
#65, was a valiant, synoptic and galvanizing effort by President Eisenhower to generate—through a national commission—worthy goals for America’s future. Another environmental law moment—#66 on our list—was the eventual phaseout of leaded gasoline, initiated by litigation and administrative action by the EPA. The ingenious requirement of a Toxics Release Inventory (TRI) to be assembled and made public by major industrial firms in the Emergency Planning and Community Right to Know Act, passed by Congress in 1986, revolutionized environmental policy—and stands at #67 on our list—by creating a reputational incentive for polluters to reduce their air, water and land pollutants; they don’t want to be singled out in newspaper headlines as one of the “driest” polluters in the state. Al Gore—lawyer, politician and environmental author—deserves the #68 ranking for his two creative books on the global imperatives of environmental improvement: Earth in the Balance and An Inconvenient Truth (also a documentary movie).

Two international agreements—the General Agreement on Tariffs and Trade (GATT), “negotiated in the late 1940s and implemented in the decades thereafter” and the World Trade Organization (WTO), founded in 1995—stand at #69 on our list of most creative American legal moments because of the prominent

for a new engine could be supplied nationwide.” Id. “Out of frustration, a bill was first introduced into the California Senate prohibiting the sale of internal combustion engines after 1975.” Id.

See generally GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE, 767 (1994) (“In February 1960, President Eisenhower, at the beginning of his final year in office, appointed a Commission on National Goals to articulate the [future] ideals that should guide” the United States; Judge Learned Hand of the United States Court of Appeals for the Second Circuit was a member).


AL GORE, AN INCONVENIENT TRUTH (2006).
role of American intellectuals and diplomats in giving birth to these open trade multinational institutions. The other noteworthy creative moment is the negotiation and deft proposing of the North American Free Trade Agreement (NAFTA) and its environmental “side-agreement” by President Bill Clinton and members of his administration in the early 1990s.

2. Rankings #71 to 80.

The second layer of the fourth tier of most creative American legal moments starts with #71—the Sherman Anti-trust Act of 1890. This powerful, elegant and incisive new-fangled enactment by Congress empowered the “federal government to prosecute any corporation or person entering into contracts in restraint” of trade and provided private individuals injured in their “business or property by monopolistic practices” “the right to sue for triple damages.” At #72 is Justice Robert Jackson’s concurring opinion in the steel seizure case of Youngstown Sheet & Tube Co. v. Sawyer. Jackson’s opinion “provided an important precedent for resisting ... claims of presidential inherent authority in areas such as impoundment, executive privilege, electronic surveillance, and national security”; Jackson developed an innovative and three-part scheme for judicial review whereby the president’s power is “strongest with a congressional authorization, weakest against a congressional prohibition, and uncertain alongside a congressional silence.” Continuing, #73 is the artful drafting and promulgation of the Uniform Commercial Code—a largely the product of Columbia Law School Karl Llewellyn. Next at #74 was the creative and courageous act of constitutional faith by President Lincoln to be the first (and only) president to

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452 Statthis, supra note 155, at 134 (internal quotation marks omitted).
453 343 U.S. 579, 637(1952) (Jackson, J., concurring).
stand for re-election during a civil war when he might have (in a negatively creative way) claimed emergency powers to continue as president pending the outcome of the rebellion.\footnote{MORISON, supra note 154, at 692-95.} Boston lawyers Louis D. Brandeis and his partner Samuel D. Warren confected a common law (as distinct from a constitutional) right of privacy in their 1890 Harvard Law Review article\footnote{Louis D. Brandeis & Samuel D. Warren, The Right to Privacy, 4 HARV. L. REV. 193 (1890).}; the article brilliantly reinterpreted numerous English and American judicial opinions to find a residual right of privacy; the article (#75 on the list) had enormous persuasive influence.

The next four ranked creative moments (#76 through #79) are mutually characterized by the involvement of legal scholars: #76, the formation of the learned and influential American Law Institute (ALI) in 1922;\footnote{See generally GUNTHER, supra note 443, at 410-11 (describing ALI founding).} #77, the opening of Litchfield Law School in 1784;\footnote{LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 239 (3d ed. 2005).} #78, the appointment of George Wythe as America’s first full-time law professor at the College of William and Mary in 1779;\footnote{Id. at 240.} and, #79, the publication in 1980 of a paradigm-shifting book, The Politics of Law\footnote{THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David K. Kairys ed. 1980).} which crystallized the Critical Legal Studies jurisprudence in America.

Completing the second layer of the fourth tier of most creative American legal moments is John Adams’s drafting of the state constitution for his native state of Massachusetts in 1779. David McCullough has admirably described how Adams—“a sub-sub committee of one,”\footnote{DAVID MCCULLOUGH, JOHN ADAMS 220 (2001).} singlehandedly used his extensive legal, political and historical knowledge to compose what is “the oldest functioning written constitution in the world.”\footnote{Id. at 225.} Among the innovative and novel provisions contained in Adams’s draft

\footnote{456}
Massachusetts Constitution were: (a) “the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected, and for life”;\textsuperscript{464} (b) his “The Encouragement of Literature, Etc.” chapter reflecting “Adams’s faith in education as the bulwark of the good society”;\textsuperscript{465} and (c) language outlining the “duty of government to countenance and inculcate the principles of humanity, charity, industry, frugality, honesty, sincerity-virtue, in sum.”\textsuperscript{466} John Adams shined at this singular creative legal project because of a lucky confluence of circumstances and personal characteristics:

The work was to be his alone, and if ever he had a chance to rise to an occasion for which he was ideally suited, this was it. So many of his salient strengths—the acute legal mind, his command of the English language, his devotion to the ideals of the good society—so much that he knew of government, so much that he had read and written, could now be brought to bear on one noble task.

Nor could circumstances have been much more in his favor. He was rested, refreshed, inspired .... He could work at home in familiar surroundings, his books and papers about him and with [his wife] Abigail’s steadying presence, which was always to his advantage. That his efforts were for his own Massachusetts was also of very great importance.\textsuperscript{467}

3. Rankings #81 to #100.

We complete discussion of the top creative moments in American legal history by briefly describing the innovative energy in twenty U.S. Supreme Court decisions. For this final lawyer of the fourth tier of 100 most creative moments selective facets of the decisions are identified and elaborated.

\textsuperscript{464} Id. at 222.
\textsuperscript{465} Id. at 222-23.
\textsuperscript{466} Id. at 224.
\textsuperscript{467} Id at 220.

Like peeling back the multiple skins of a large onion, what do we find in these twenty judicial opinions? First, Justice Brennan racks up the top prize for the most creative opinions for the Court—there are three: *Baker* (the impetus of the “apportionment revolution,” the reshaping of the political question doctrine and, according to Justice Frankfurter’s dissent, an exercise in

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468 165 U.S. 578 (1897).
470 369 U.S. 186 (1962).
472 252 U.S. 416 (1920).
474 4 Wheat. (17 U.S.) 316 (1819).
475 9 Wheat. (22 U.S.) 1 (1824).
476 198 U.S. 45 (1905).
477 299 U.S. 304 (1936).
479 403 U.S. 602 (1971).
480 272 U.S. 365 (1926).
481 304 U.S. 64 (1938).
484 334 U.S. 1 (1948).
488 OXFORD SUPREME COURT GUIDE, supra note 163, at 17.
489 Id. at 18-19.
“destructively novel judicial power”); New York Times (a decision which swept aside past Supreme Court precedents that libelous statements are unprotected by the First Amendment, inflated the constitutional importance of false assertions about matters of public debate, and confected an “actual malice” standard based on “reckless disregard” of the truth or falsity of a statement about a public official); and Goldberg (an opinion which “injected the concept of entitlement into the property right protected by the Due Process Clause” and invented the calculus that the interest of the government “in conserving fiscal and administrative resources” is “outweighed by the interest of the recipient in uninterrupted receipt of public assistance, which is not mere charity but a means to promote the general welfare”). Second, among the twenty highly creative High Court opinions, six opinions were authored by Chief Justices. Chief Justice John Marshall wrote two: McCulloch (an eloquent and pathbreaking opinion which “settled the meaning of the Necessary and Proper Clause” of the Constitution while determining the distribution of powers between the federal government and the states, which construed implied federal powers, and in upholding the power of Congress to charter a national bank opined “we must never forget that it is a constitution we are expounding”); and Gibbons (an artful decision which defined the Commerce Clause of the Constitution broadly as encompassing more than “mere exchange of goods”). Chief Justice Warren Burger also wrote two: Lemon (an attempt to syncretize what he characterized as the “cumulative criteria developed by the Court over many years” into a three-part balancing test “to consider the constitutionality of statutes under the Establishment Clause”); and Miller (another

490 Id. at 19 (internal quotation marks omitted).
491 Id. at 215.
492 Id.
493 Id. at 216 (internal quotation marks omitted).
494 Id. at 107.
495 Id.
496 Id. at 182.
497 Id. at 183.
498 Id. at 104.
499 Id. at 158-59.
syncretizing performance in cobb[ling] together a three-pronged test of unprotected obscenity under the First Amendment focusing on “prurient” appeals, “hard core” sexual conduct that was “patently offensive” and a total lack of “serious literary, artistic, political, or scientific value”\textsuperscript{500}. Chief Justice Earl Warren authored one of the twenty opinions in this final layer of legal creativity: \textit{Miranda} (a rejection of the prior “totality of the circumstances” test for adjudicating the voluntariness of a criminal suspect’s confession to the police,\textsuperscript{501} a novel application of the Fifth Amendment privilege beyond formal court proceedings to include “informal compulsion exerted by law enforcement officers during custodial interrogation,”\textsuperscript{502} and a famous judicially composed four-part warning safe harbor that police must give before the start of in-custody questioning:

\begin{quote}
(1) you have the right to remain silent; (2) anything you say can and will be used against you; (3) you have the right to talk to a lawyer before being questioned and to have him present when you are being questioned; and (4) if you cannot afford a lawyer, one will be provided for you before any questioning if you so desire.\textsuperscript{503}
\end{quote}

Chief Justice Fred M. Vinson also wrote one of these twenty Supreme Court opinions: \textit{Shelley} (“an important [creative] event in modern constitutional history” by the opinion’s “invalidating enforcement of racial covenants” and “destroy[ing] one of the most formidable instruments yet devised to effectuate racial discrimination”,\textsuperscript{504} a legal “impetus for further efforts in the civil rights struggle”;\textsuperscript{505} and a dramatic “raising [of] the problem of housing segregation to a constitutional level” thereby “cloth[ing] the issues with greater seriousness and moral concern”).\textsuperscript{506}

\textsuperscript{500} \textit{Id.} at 188-89.
\textsuperscript{501} \textit{Id.} at 192.
\textsuperscript{502} \textit{Id.} at 193.
\textsuperscript{503} \textit{Id.} at 193-94.
\textsuperscript{504} \textit{Id.} at 284.
\textsuperscript{505} \textit{Id.}
\textsuperscript{506} \textit{Id.}
Third, two Associate Justices who wrote Court opinions on this culminating list of twenty creative legal moments in American history each wrote a pair of opinions. Justice Rufus W. Peckam composed two Substantive Due Process blockbusters: \textit{Allgeyer} (an 1897 decision that boldly concocted, for the first time, a “right to enter into lawful contracts” implicit in the Due Process Clause of the Fourteenth Amendment);\textsuperscript{507} and \textit{Lochner} (a 1905 follow-up opinion which “more firmly entrenched the doctrine of liberty of contract into constitutional law by ruling that New York’s attempt to regulate hours of labor in bakeries necessarily interfered with the right of contract between the employer and the employee”\textsuperscript{508} and which was characterized by a “glaring subjectivity” and “made the Court the overseer of all kinds of state regulatory legislation”).\textsuperscript{509} Justice George Sutherland authored two important and innovative opinions for the Court: \textit{Euclid} (upholding municipal land use zoning regulations as a constitutional exercise of state police power, imaginatively analogizing zoning to nuisance law which must be viewed in a given context with a flexible judicial weighing of public welfare benefits against the reduction of land value\textsuperscript{510}); and \textit{Curtiss-Wright} (upholding the president’s power to embargo arms shipments to South America in the 1930’s, insightfully construing “[t]he powers of the federal government in foreign affairs” as being “derived principally from inferences based on the history and structure of the Constitution, rather than from specific constitutional language” and holding “that the president of the United States had plenary powers in the foreign affairs field not dependent upon congressional delegation”).\textsuperscript{511}

Justice Harry Blackmun—the author of highly (negative) creative abortion opinion, \textit{Roe v. Wade},\textsuperscript{512} also authored another problematically creative opinion for the Court: \textit{Daubert} (holding the adoption of the \textit{Federal Rules of Evidence} in 1975 had undone

\textsuperscript{507} Id. at 10.
\textsuperscript{508} Id. at 162 (internal quotation marks omitted).
\textsuperscript{509} Id. at 163.
\textsuperscript{510} Id. at 87.
\textsuperscript{511} Id. at 69 (internal quotation marks omitted).
\textsuperscript{512} See supra notes 316-25 and accompanying text.
the *Frye* standard generally accepted by scientists and replaced it with a relevant and reliable standard for admitting scientific and technical proof which required district court judges to exercise astute discretion in deciding what proof to admit at trial\(^{513}\).

Two famous Supreme Court jurists from the first part of the Twentieth Century composed creative Court opinions. Justice Oliver Wendell Holmes elegantly crafted the *Missouri* opinion (holding that a congressional statute was a “necessary and proper means of executing the powers of the federal government, valid under Article I, section 8” of the Constitution “because the United States had the authority to implement treaty obligations,” and because of primary interpretational emphasis on “historic practice, rather than the intent of the framers,” while expansively reasoning “that matters of international concern necessarily give rise to federal power” over state laws\(^{514}\)). Holmes’s colleague on the Court, Louis Brandeis, authored the enterprising landmark decision in *Erie* (broadly proclaiming “that there is no federal general common law,” overruling past Court precedent as an “intrusion on rights reserved to the states by the Tenth Amendment”\(^{515}\).

Of the remaining four Supreme Court opinions on our top creative moments in American legal history list, three are criminal constitutional law decisions: *Gideon* (by Justice Hugo Black, holding that the “Sixth Amendment, as applied to the states by the Fourteenth Amendment, required that counsel be appointed to represent indigent defendants charged with serious offenses in state criminal trials”; *Gideon* “marked the beginning of the Court’s due process revolution, which resulted in the constitutionalization of state criminal procedure and a series of only partially successful attempts to convince the Court to extend due process guarantees to civil and quasi-legal proceedings”\(^{516}\); *Katz* (a 1967 opinion by


\(^{515}\) *Id.* at 85-86 (internal quotation marks omitted).

\(^{516}\) *Id.* at 105-06 (internal quotation marks omitted).
Justice Potter Stewart, which significantly altered “the approach that courts must use in determining, under the Fourth Amendment, whether certain police conduct constitutes a search that is subject to the amendment’s warrant and probable cause limitations” based on a flexible expectation of privacy standard rather than the old physical intrusion approach517; and Batson (an opinion by Justice Lewis Powell, Jr., which “placed substantial limits on the prosecutor’s use of preemptory challenges” in criminal jury selection under the Equal Protection Clause, “transform[ing] preemptory challenges into challenges for cause” and making de facto “racial quotas for trial juries since the racially disproportionate use of peremptories now may be attacked as constitutionally improper”518).

The Lucas decision (an opinion by Justice Antonin Scalia) rounds out our discussion of 100 most creative legal moments; in Lucas Scalia wrote for the Court “that land-use regulations that deny the property owner all economically viable use of his land constitute a taking requiring just compensation.”519

V. CONCLUSION

We have covered much ground in this Article. At first, the opinions and impressions of nationally prominent American legal historians on the most creative legal moments in Anglo-American legal history were canvassed520. Then, we undertook some rambles, meanders and perambulations which narrowed our focus to top American legal creativity, examined the meaning of a “moment,” looked at creativity and intellectual history in general, compared legal creativity with corporate creativity, compared legal creativity with artistic creativity, examined the parallels and differences between military creativity and legal creativity, considered the kinship of rhetorical creativity and legal creativity, and offered a rough ranking of the top 100 American creative legal

517 Id. at 147-48.
518 Id. at 23-24.
520 See supra notes 18-46 and accompanying text.
moments without justification. We culminated discussion by a tentative and bold attempt to organize and rank the top 100 creative moments in American legal history.

Indeed, this entire Article has been, in a nutshell, my own creative attempt to discern and to evaluate legal creativity. American law could profit by a more conscious and systematic study of Law and Creativity.

521 See supra notes 47-131 and accompanying text.
522 See supra notes 132-519 and accompanying text.
523 See e.g., Robert S. Summers, Form and Function in a Legal System: A General Study 7 (2006) (“The overall forms of functional legal units, as manifest in duly constructed wholes, stand as tributes to the organizational inventiveness of developed Western societies. The realization of humanistic values of Western civilization, including justice, order, liberty, democracy, rationality, the rule of law, and more, has been heavily dependent on this inventiveness.”).