2008

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Recommended Citation

Robert F. Blomquist, *Thinking About Law and Creativity: On the 100 Most Creative Moments in American Law*, 30 Whittier L. Rev. 119 (2008).

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

ROBERT F. BLOMQUIST^{*}

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, [and] resourceful.”¹ But what of creativity or innovation in the context of the

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1. *The Oxford Dictionary & Thesaurus: American Edition* 330 (Oxford U. Press 1996) [hereinafter *Oxford Dictionary*]. Indeed, creativity is valued by professionals in a number of disparate fields. See e.g. Curtis R. Carlson & William W. Wilmot, *Innovation: The Five Disciplines for Creating What Customers Want* (Crown Publg. Group 2006) (business); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and Law to Lock Down Culture and Control Creativity* (Penguin Press 2004) (digital capturing and sharing); John A. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (U. of Chi. Press 2005) (warfare); Keith Sawyer, *Group Genius: The Creative Power of Collaboration* (Basic Bks. 2007) (organizational theory); Twyla Tharp with Mark Reiter, *The Creative Habit: Learn It and Use It for Life: A Practical Guide* (Simon & Schuster 2003) (written by a dance choreographer who makes correlations between choreography and

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*⁵ was frank and astute. For our purposes, let us focus on his thoughts about law and creativity; he said “only in law is ‘innovative’ a pejorative” and “[w]e should not fear to reject [‘sterile verbalisms and outmoded distinctions’] for fear of being called innovative.”⁶

Judge Posner's *McKinney* concurrence was a 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,”⁷ labeling the notion as involving “bold initiatives” that flew in the face of United States Supreme Court precedent;⁸ 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.⁹ Moreover, Flaum's majority opinion in *McKinney* went further and called 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.¹⁰

real-life problem solving); Greg Ip, *Bernanke, in First Crisis, Rewrites Fed Playbook*, 250 Wall St. J., A1, A1, A18 (Oct. 31, 2007) (discussing the creative style of Federal Reserve Chairman Ben Bernanke in stabilizing the American financial system and in establishing monetary policy).

2. *U.S. v. McKinney*, 919 F.2d 405, 407-08 (7th Cir. 1990); *id.* at 418 (Posner, J., concurring).

3. See Robert F. Blomquist, *Judge Posner's Dissenting Judicial Oeuvre and the Aesthetics of Canonicity*, 36 N.M. L. Rev. 161, 161-62 (2006) (discussing Judge Posner's dissenting judicial opinions).

4. See *id.* at 161 nn. 1-2 (citing some of his intellectual books and articles).

5. *McKinney*, 919 F.2d at 418.

6. *Id.* at 421, 423.

7. *Id.* at 409 (majority) (quoting *id.* at 420 (Posner, J., concurring)).

8. *Id.* (citations omitted).

9. *Id.*

10. *Id.* at 411 n. 4 (citation omitted) (emphasis added).

The exchange between the appellate judges in *McKinney* is interesting for several reasons. First, the judges use a synonym for “creative”—the word “innovative.”¹¹ “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.”¹² Thus, innovation can be considered in the same company as “originality, inventiveness, creativity, imagination, imaginativeness; novelty, invention; modernization, alteration, [and] change.”¹³ Second, the warring judicial rhetoric uncovers a fundamental tension about creativity and the law expressed by Roscoe Pound years ago: “Law must be stable, and yet it cannot stand still.”¹⁴ 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, and executive official)? Also, 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)? Further, 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? Further, if legal innovation is to be differentiated from other forms of creative change, on what grounds should it be distinguished?

11. *Id.*; *id.* at 421, 423 (Posner, J., concurring).

12. *Oxford Dictionary*, *supra* n. 1, at 770.

13. *Id.*

14. David S. Shrager & Elizabeth Frost, *The Quotable Lawyer* 38 (New Eng. Publg. Assocs. 1986).

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,¹⁵ much remains to be written about how American legal innovation fits and should fit within the larger, overarching cultural milieu of American

15. *Infra* nn. 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* (HarperCollins Publishers 2005). Watson discusses many creative legal ideas throughout world history. Among the candidates of great legal innovations of ancient history, four are notable. First, the Sumerian laws set down by the ruler Lipit-Ishtar (1934-1924 BC) in southern Mesopotamia, which covered rules for, among 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, allowed his neighbor’s property to be broken into by an intruder. *Id.* at 95. Second, the code of Babylonian King Hammurabi (1792-1750 BC) set forth the first systematic set of laws arranged in a comprehensive and coherent fashion, and covered such subjects as

[O]ffences 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).” *Id.* at 93-94. Hammurabi’s Code exhibited the sophistication of two different forms—“[a]podictic laws [that were] absolute prohibitions, such as ‘Thou shalt not kill’ ” and “[c]asuistic laws . . . [such as] ‘If a man delivers to his neighbour 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.’ ” *Id.* at 94. Third, the ancient Roman republic’s innovation of applying the previously aristocratic legal concept of *imperium* (the “right to give orders to those of lower status and expect them to be obeyed”) to political government by two elected consuls who ruled “with equal *imperium*.” *Id.* at 200 (internal quotation marks omitted) (endnote omitted). Fourth, the incomparable code of Byzantium emperor Justinian (527-565 AD) was the culmination of a thousand years of Roman law,

[W]hich in turn largely shaped European law as it exists today, both in Europe itself and in many of those countries colonised 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 *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.

Id. at 203-04.

innovation and global innovation, in general.¹⁶ Such projects are beyond my present, rather modest, heuristic exercise. Like the famous joke of an economist stranded on a desert island 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 perambulation. 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 Teachers*¹⁸—I sent letters to approximately 426 American law professors listed as having taught the subject of legal history.¹⁹ I asked each professor, rather naïvely, but straightforwardly: “Given your

16. See *supra* n. 1 and accompanying text. A superb recent article on law and creativity is John F. Duffy, *Inventing Invention: A Case Study of Legal Innovation*, 86 Tex. L. Rev. 1 (2007) (discussing legal innovation by focusing on the nonobviousness doctrine of patent law).

17. Workjoke.com, *Economists Jokes*, <http://www.workjoke.com/economists-jokes.html> (accessed Nov. 30, 2008).

18. See Assn. of Am. L. Schs., *The AALS Directory of Law Teachers: 2005-2006* (Thomson West & Found. Press, Inc. 2005).

19. Letter from Robert F. Blomquist, Professor of Law, Valparaiso University School of Law, to James E. Viator, Professor of Law, Loyola University School of Law and approximately 400 other legal history American law professors (Sept. 8, 2005) (copy on file with Author).

background as a teacher and scholar of legal history, . . . [w]hat 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.

While all of the professional feedback that I received to my September 2005 query was interesting and provocative, I found a few responses to be unusually insightful.²² Professor Calvin Massey provided five suggestions for some of the most creative moments in Anglo-American law: "[1] The creation of the trust," "[2] 1689 [English] Declaration of Rights," "[3] Justice Curtis's opinion in *Cooley v. Board of Wardens*," "[4] *Marbury v. Madison*," and "[5] Justice Jackson's opinion in *Youngstown*."²³ Professor John Q. Barrett gave me another set of suggestions, focusing on American creative legal moments: "[1] The legislation of the New Deal," "[2] FDR's Court-packing proposal and the ensuing Supreme Court responses," "[3] Justice Jackson's and others' work creating the 8/45 London agreement and charter (the International Military Tribunal) and then prosecuting principal Nazi war criminals before it during 1945-46," and "[4] *Brown*, especially Chief Justice Warren's accomplishment of Supreme Court unanimity and his writing approach, especially in *Brown I*."²⁴ Professor Alfred L. Brophy waxed imaginative on his

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. (Editor's Note: in the same spirit, minor typographical corrections to the professors' suggestions are made without notice.)

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, 8:24 a.m. CDT) (copy on file with Author) (italics added).

24. E-mail from John Q. Barrett, Professor of Law, St. John's University School of

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.

(2) Kent's *Commentaries*—does for US in the nineteenth century what Blackstone did in the 19th. Makes law accessible and understandable.

(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).

(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.²⁵

Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 20, 2005, 09:39 a.m. CDT) (copy on file with Author) (italics added).

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, 2:13 p.m. CDT) (copy on file with Author) (italics added).

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—this 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.

[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 act created our modern multi-cultural society.²⁶

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 Congress 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

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 p.m. CDT) (copy on file with Author) (*italics added*).

27. E-mail from Stephen B. Presser, Raoul Berger Professor of Legal History,

Professor Judith E. Koons wrote: “I trust you will be including Seneca Falls [Convention on Women’s Voting Rights].”²⁸ An intriguing English nomination came from Professor Michael H. Hoffheimer in response to my query: “*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 suggestion of “the Declaration of Independence”—a work of creative law interpretation, law-breaking and law-making—juxtaposed with two further, not-so-obvious, creative American legal moments: “Alexander Hamilton’s plans for economic policy” and “Thomas Jefferson’s Louisiana Purchase.”³¹ Given by Professor Daniel R. Ernst were the following thoughts for inclusion on the top creative moments of Anglo-American law list: “[T]he Securities Act of 1933” and “the invention of the log labor lien in the Wisconsin lumber industry.”³² Professor Stephen Sheppard provided

Northwestern University School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 17, 2005, 3:39 p.m. CDT) (copy on file with Author) (*italics added*).

28. E-mail from Judith E. Koons, Assoc. 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, 5:17 p.m. CDT) (copy 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, 1:39 p.m. CDT) (copy on file with Author) (*italics added*).

30. Memo. from Stephan Landsman, Professor of Law, DePaul University College of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (undated) (received Sept. 2005) (copy on file with Author) (*italics added*).

31. Letter from Charles D. Kelso, Professor of Law, University of the Pacific, McGeorge School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 19, 2005) (copy on file with Author).

32. Memo 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) (copy on file with Author).

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

Collection of the Domesday 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 of 1689

Lawes and Liberties of Massachusetts (1647)

Samuel Sewall’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 the appointment of Blackstone to it (1756)

Publication of Blackstone’s *Commentaries* (1760-65)

Publication of Bentham’s *Introduction to the Principles of Morals*, 1789

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

Opening of Litchfield Law School (1794)

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:

— The “[c]reation of the American Law Institute and the Restatements” and “Christopher Columbus Langdell and the case method of study” at Harvard;³⁵

— “Public Law 600 of 1950, and 447 of 1952, on the establishment of the Commonwealth of Puerto Rico;” “[t]he Northwest Ordinance;” and the “1st Amendment” to the U.S. Constitution;³⁶

33. E-mail 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) (copy 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) (copy on file with Author). Professor Surrency enclosed Erwin C. Surrency, *The Transition from Colonialism to Independence*, 46 Am. J. Leg. Hist. 55 (2004).

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) (copy 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) (copy on file with Author).

— “*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

— “The transformation of the corporate charter into a routine business device at the end of the 18th century” which “culminat[ed] in the routine drafting of articles through the general incorporation state laws;”³⁹

— “*The Federalist Papers*”; “The Massachusetts Constitution crafted by John Adams”; “[t]he protection of the American debtor in tension with market capitalism” stemming from “the rebellion led by Daniel Shays after the American Revolution or the Texas homestead and the sanctuary for debtors”;⁴⁰

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

— “[T]he 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

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) (copy on file with Author) (italics provided).

38. Letter from James W. Paulsen, Professor of Law, Southern Texas College of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Oct. 23, 2005) (copy on file with Author).

39. Letter from Richard I. 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) (copy on file with Author).

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) (copy 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 p.m. CDT) (copy on file with Author).

decision in “*Allgeyer v. Louisiana* [to be treated] as a creative moment” because of the Court’s “final acceptance of substantive due process after decades of hesitation,” even though Professor Powell himself “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 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

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) (copy on file with Author).

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) (copy on file with Author).

45. Memo. from Richard Stith, Professor of Law, Valparaiso University School of Law, to Robert F. Blomquist, Professor of Law, Valparaiso University School of Law (Sept. 2005) (copy on file with Author).

46. *Id.* Cf. Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65, 70 nn. 20-21 (2006); *id.* at 98 (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.”).

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 decades. I am also an Anglophile—but I lack the deep historical connection with British political 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*

47. *Supra* nn. 23, 25, 29, 33, 37, 41 and accompanying text.

48. Still, I cannot resist listing my own “top three” favorites of British legal creativity. First, the *Magna Carta*. 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*, *supra* n. 1, at 963.

50. Cf. Andrew Stark, *What Was Old Is Young Again*, 250 Wall St. J. D7 (July 26, 2007) (reviewing Penelope J. Corfield, *Time and the Shape of History* (Yale U. Press 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 triumph and spiritual mystery, and causing us to disagree about such things, seemingly forever.”)

51. *Marbury v. Madison*, 5 U.S. 137 (1803).

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 Antitrust Act*,⁵⁵ the *Federal Reserve Act*,⁵⁶ the *Civil Rights Act of 1964*,⁵⁷ and the *USA PATRIOT Act*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."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).

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.⁶⁰ According to Watson, core intellectual ideas consist of the following: "[I]deas 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."⁶¹ Narrowly construed, legal ideas are intertwined

52. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

53. *Roe v. Wade*, 410 U.S. 113 (1973).

54. See generally Jonathan Alter, *The Defining Moment: FDR's Hundred Days and the Triumph of Hope* (Simon & Schuster 2006).

55. 26 Stat. 209, 209-10 (1890).

56. 38 Stat. 251, 251-75 (1913).

57. Pub. L. No. 88-352, 78 Stat. 241 (1964).

58. Pub. L. No. 107-56, 115 Stat. 272 (2001).

59. *Oxford Dictionary*, *supra* n. 1, at 963-64.

60. Watson, *supra* n. 15, at 10.

61. *Id.* Cf. the "Outline of Knowledge" given in *The New Encyclopedia Britannica*: "[1] Matter and Energy," "[2] The Earth," "[3] Life on Earth," "[4] Human Life," "[5] Human Society," "[6] Art," "[7] Technology," "[8] Religion," "[9] The History of

with economic and political ideas and 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 concepts⁶² are enormously important in the general history of ideas. Indeed, Watson has identified the “failure [of] both historians and scientists to get to grips 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 [are] all the rage.”⁶⁵ Indeed, “[c]hief executives implore their troops to be more creative, the editors of *BusinessWeek* are 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 the iPod).”⁶⁶ As explained, by way of

Mankind,” and “[10] The Branches of Knowledge.” *Propaedia: Outline of Knowledge and Guide to the Britannica* 9-15 (15th ed., Encyclopaedia Britannica, Inc. 1987).

62. See *supra* nn. 1, 12-13 and accompanying text.

63. Watson, *supra* n. 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*, 248 Wall St. J. A10 (July 3, 2006) for a recent intellectual, historical take on the American Founders, who 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 *imaginations of engineers*. They knew how to transform ideas into action, into policies and institutions.

Id. (emphasis added).

65. Paul B. Brown, *The Elusive Goal of Corporate Creativity*, 155 N.Y. Times B6 (July 2, 2006).

66. *Id.* As well as, more recently, the iPhone.

example, a 2006 book on corporate creativity entitled (creatively enough) *Juicing the Orange*, 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.)⁶⁷

By way of another example, derived from another recent book entitled *How Invention Begins*, hugely important creations “like the steam engine, the airplane, and the printing press . . . [were] the product[s] of group intelligence,” with inventors building on past ideas.⁶⁸ Thus, “[t]he 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 collective idea at the same time it is an expression of one person's genius.”⁶⁹

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;⁷⁰ at its best, this risk-taking is calculated and based on an astute and transparent weighing of

67. *Id.* (citing and quoting Pat Fallon & Fred Senn, *Juicing the Orange: How to Turn Creativity into a Powerful Business Advantage* 11 (Harvard Bus. Sch. Press 2006)) (internal quotation marks omitted).

68. *Id.* (citing John H. Lienhard, *How Invention Begins* viii (2006)).

69. *Id.* (quoting Lienhard, *supra* n. 68, at viii) (internal quotation marks omitted).

70. See e.g. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

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;⁷¹ creative judicial opinions may rely upon law review articles or the spirit of particular statutory enactments;⁷² or creative executive orders may rely upon legislation and constitutional provisions.⁷³ 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.⁷⁴

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.”⁷⁵ 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

71. See e.g. Rosemary O' Leary, *The Courts and the EPA: The Amazing “Flannery Decision,”* 5 Nat. Res. & Env. 18, 20 (Summer 1990) (discussing an EPA consent decree that led Congress to later endorse “the consent decree’s approach to the control of toxic pollutants and [write] several parts of the decree” into the *Clean Water Act*).

72. See e.g. *Sierra Club v. Morton*, 405 U.S. 727, 741-53 (1972) (Douglas, J., dissenting) (proposing a theory of standing based on Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972)).

73. See e.g. Exec. Or. 10340, 17 Fed. Reg. 3139 (1952) (authorizing the government seizure of steel production plants to avoid a labor strike and in the interest of national security).

74. See Sawyer, *supra* n. 1; see also Robert F. Blomquist, *In Search of Themis: Toward the Meaning of the Ideal Legislator—Senator Edmund S. Muskie and the Early Development of Modern American Environmental Law, 1965-1968*, 28 Wm. & Mary Envtl L. & Policy Rev. 539 (2004).

75. Brown, *supra* n. 65, at B6 (quoting Fallon & Senn, *supra* n. 67, at 11) (internal quotation marks omitted).

constraints, other statutory enactments, pertinent case law, and pre-administrative schemes. Second, unlike corporate creativity, which may take place with a charge of “[demanding] a ruthlessly simple definition of the business problem” at hand,⁷⁶ 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 “[t]hink big.”⁷⁷ 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 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, it commonly “carries with it a positive value-judgment.”⁷⁸ A prominent, but not exclusive, characteristic of artistic creativity advanced by some is “success in integrating complex elements within a unified whole” of a particular artwork.⁷⁹ “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.”⁸⁰ Yet, a countervailing view within the art community has arisen to dispute originality as a criterion of creative artistic excellence. Thus,

76. *Id.* (quoting Fallon & Senn, *supra* n. 67, at 11) (internal quotation marks omitted).

77. *Id.* (citing Fallon & Senn, *supra* n. 67, at 11).

78. Berys Gaut, *Creativity*, in *A Companion to Aesthetics* 88, 88 (David Cooper ed., Basil Blackwell Ltd. 1992).

79. *Id.*

80. *Id.* at 89.

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.⁸¹

A third characteristic of artistic creativity is objective: "Persons are called creative . . . [insofar] as they make things, generate novel thoughts, produce works of merit, express aesthetic ideas."⁸² 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."⁸³ The subjective view of artistic creativity "locates creativity in the creative process(es) taking place in artists, scientists, and other thinkers. This has been influential in . . . educational circles . . . as well as among psychologists of different persuasions."⁸⁴

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."⁸⁵ Thus, "[i]n this way a work of art is the common product of

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 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.

Id. (citations omitted).

85. *Id.* at 90 (internal quotation marks omitted) (citation omitted).

artist and observer.”⁸⁶ Yet, others have questioned this: “Whether it is helpful to speak of observers as creating—rather than, say, interpreting, or seeing aesthetically interesting features in a work—is doubtful.”⁸⁷

Based on five arguable aesthetic characteristics of artistic creativity discussed above,⁸⁸ it is possible for us to draw some parallels with legal creativity. First, like the view that posits coherence in integration of complex elements within a unified artistic whole,⁸⁹ there are some legal theorists, like Ronald Dworkin, who see legal coherence and integrity as a vital feature of legal creativity.⁹⁰ Second, similarly, some have spoken of originality in breaking with traditional legal concepts as a desirable focus of legal creativity.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 theorists of objective artistic creativity.⁹² Fourth, a creative legal idea (say, in a statute, 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

86. *Id.* (internal quotation marks omitted) (citation omitted).

87. *Id.*

88. *See supra* nn. 79-87 and accompanying text.

89. Gaut, *supra* n. 78, at 88.

90. *See e.g.* Ronald Dworkin, *Law’s Empire* 95-96, 225-27, 259-66 (Harvard U. Press 1986).

91. *See e.g.* Pierre Schlag, *The Aesthetics of American Law*, 115 Harv. L. Rev. 1047, 1098 (2002) (citation omitted).

92. *See* Gaut, *supra* n. 78, at 88; Richard A. Posner, *Public Intellectuals: A Study in Decline* (Harvard U. Press 2001).

93. Gaut, *supra* n. 78, at 90 (citation omitted).

persuasiveness, so-called subjective legal creativity that 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. In his book, *Patton: A Genius for War*,⁹⁶ Carlo D'Este referenced Patton's military creativity several times. The following paragraph is representative:

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

94. *Id.* at 88.

95. See generally David G. Chandler, *The Campaigns of Napoleon* (Macmillan Publ. Co., Inc. 1966) (discussing the bold and creative nature of Napoleonic warfare).

96. Carlo D'Este, *Patton: A Genius for War* (HarperCollins Publishers 1995).

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

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 Years' War, and [taken] part in all the great campaigns since then.¹⁰⁰

A third 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,

[P]reparing 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

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 320.

99. *Id.* at 322 (endnote omitted).

100. *Id.* (endnote omitted).

101. Nagl, *supra* n. 1.

102. *Id.* at xv.

103. *Id.* at xxi (quoting Donald A. Rumsfeld, *Transforming the Military*, 81 Foreign Affairs 2 (May/June 2002) (internal quotation marks omitted)).

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 the 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 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.¹⁰⁸ Legal creativity, by way of contrast, entails mastering a kind

104. See e.g. Bruce Kahn, *Applying the Principles and Strategies of Asian Martial Arts to the Art of Negotiation*, 58 Alb. L. Rev. 223, 231 n. 61 (1994); Richard K. Neumann, Jr., *On Strategy*, 59 Fordham L. Rev. 299, 303 n. 15, 304 (1990).

105. See *supra* nn. 95-103 and accompanying text.

106. See e.g. Irving Younger, *The Advocate's Deskbook: The Essentials of Trying a Case 1* (Prentice Hall L. and Bus. 1988).

107. See e.g. Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner's First Decade of Dissenting Opinions, 1981-1991—Toward an Aesthetics of Judicial Dissenting Style*, 69 Mo. L. Rev. 73, 160 (2004) (describing Judge Posner's dissenting judicial opinions as " 'precision bombing runs' ").

108. Even the intellectual warrior, General George S. Patton, Jr., boiled down the "Qualities of a Great General" essentially to 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

of meta-discourse which encompasses every form of human conduct with just the right type of legal intervention.¹⁰⁹ 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 legal doctrine tends to adapt and change when challenged by legal creativity.¹¹⁰

D'Este, *supra* n. 96, at 105-06 (endnote omitted).

109. See generally Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Applications of Law* 1-181 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press, Inc. 1994).

110. See e.g. Nagl, *supra* n. 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 twentieth century). Yet, Nagl points out, in the final paragraph of his book, the importance of quicker adaptation to change and, by implication, more nimble incorporation of creative military ideas into evolving American military doctrine:

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 of more importance 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 how 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). 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).

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 most important factor in rhetorical creativity.¹¹⁴ Rhetorical invention "includes the entire process of initial inquiry into uncertain questions, the reflection upon alternative possibilities of position, proofs, and perspectives."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."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: "[T]he character of the speaker," "the emotions of the audience," and "the character of the speech."¹¹⁷ "The *rhētōr* 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."¹¹⁸ But, unlike

111. *Encyclopedia of Rhetoric* 389 (Thomas O. Sloane ed., Oxford U. Press 2001).

112. *Id.* at 800.

113. *Id.*

114. *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. *Id.* "Creativity has become an academic specialty with its conferences, journals, and burgeoning literature." *Id.* See e.g. *The Creative Process: A Symposium* (Brewster Ghiselin ed., New Am. Lib. 1952) (a collection of essays by thirty-eight well-known creative individuals from assorted fields, all describing their own creative processes); William J. J. Gordon, *Synectics: The Development of Creative Capacity* (Collier-MacMillan Ltd. 1968) (an account of creative problem-solving in small groups); *The Nature of Creativity: Contemporary Psychological Perspectives* (Robert J. Sternberg ed., Cambridge U. Press 1988).

115. *Encyclopedia of Rhetoric*, *supra* n. 111, at 800.

116. *Id.*

117. *Id.* at 393-94.

118. *Id.* at 393.

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.”¹¹⁹ And while there are so-called “Constitutional moments” of legal creativity,¹²⁰ there are also “smaller domains of everyday legal” problem-solving.¹²¹ Creativity has been described as involving the following three components:

- (1) [R]elevant 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 determine[s] how an individual approaches a particular task (with intrinsic, self-directed motivation being more effective than extrinsically oriented motivations).¹²²

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.”¹²³ Some prominent legal theorists, 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.”¹²⁴ However, “[o]n 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’

119. Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 Harv. Negot. L. Rev. 97, 112 (2001).

120. *Id.* (citing Bruce Ackerman, *We the People: Transformations* 4-5 (Belknap Press of Harv. U. Press 1998); Bruce Ackerman, *We the People: Foundations* (Belknap Press of Harv. U. Press 1991); Jack Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 Wm. & Mary Q. 424 (1987) (additional citations omitted)).

121. *Id.*

122. *Id.* at 114 (citing Teresa M. Amabile, *Creativity in Context* 83-127 (Westview Press 1996)).

123. *Id.*

124. *Id.* (citing Edward H. Levi, *An Introduction to Legal Reasoning* (U. of Chi. Press 1949); Karl N. Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and Law School* (Oxford U. Press 2008)).

creativity on those governed by law and rules.”¹²⁵ Moreover, “[u]nlike scientists working in secret labs 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 out[side] of the box”; “brain exercises are used to question assumptions, unpack stereotypic thinking, . . . change levels of 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 Yet, the “constituent element of all law” involves the “creat[ion] [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: “[C]orporations, trusts, regulatory agencies, condominiums, unions and tax shelters. In addition, our words have created new legal rights and constructs like leases, sexual harassment, probation,” and “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

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 elasticity that has been replicated in different forms throughout the world.” *Id.* (citing Robert Paul Weiner, *Creativity & Beyond: Culture, Values, and Change* 128 (State U. of N.Y. Press 2000)).

126. *Id.* at 116 (footnote omitted).

127. *Id.* at 119 (footnote omitted).

128. *Id.* at 125.

129. *Id.* at 127-28.

130. *Supra* nn. 1-129 and accompanying text.

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.
6. *Marbury v. Madison* (1803).
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).
10. *Brown v. Board of Education (Brown I & Brown II)* (1954-55).
11. President Franklin D. Roosevelt's New Deal Legislation (1933-1936).
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).
15. James Kent, *Commentaries on American Law* (1826-30).
16. Joseph Story, *Commentaries on the Constitution of the United States* (1833).
17. Christopher Columbus Langdell's initiation of the case method of study at Harvard Law School initiated by his

131. See *infra* Part IV.

casebook *A Selection of Cases on the Law of Contracts* (1871).

18. Oliver Wendell Holmes, Jr., *The Common Law* (1880).

19. *Scott v. Sanford* (1859).

20. *Plessy v. Ferguson* (1896).

21. *Roe v. Wade* (1973).

22. The *Homestead Act* (1862).

23. The *GI Bill* (1944).

24. The *National Environmental Policy Act* (1969).

25. The Seneca Falls Convention on Women's Rights (1848).

26. The *Land and Water Conservation Act* (1964).

27. Benjamin Cardozo, *The Nature of the Judicial Process* (1921).

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).

31. State constitutional "good government" changes of the Progressive Era (1889-1920).

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 United States Senate acquittal of Justice Samuel Chase (1805).
38. The *Administrative Procedure Act* (1946).
39. The *Legislative Reorganization Act* (1946).
40. Wisconsin's Personal Liberty law in defiance of the *Fugitive Slave Act* (1850s).
41. The *Clean Air Act* (1970).
42. The *Clean Air Act* Amendments (1990).
43. Rachel Carson, *Silent Spring* (1962).
44. Aldo Leopold, *A Sand County Almanac* (1949).
45. Justice Douglas' dissent in *Sierra Club v. Morton* (1972) (citing Christopher Stone's law review article, *Should Trees Have Standing?*).
46. Charles Reich, *The Greening of America* (1972).
47. *Citizens to Preserve Overton Park v. Volpe* (1971).
48. *Clean Water Act* (1972).
49. *Toxic Substances Control Act* (1976).
50. *Comprehensive Environmental Response, Compensation, and Liability Act* (1980).
51. *Chevron v. Natural Resources Defense Council* (1984).
52. *City of Philadelphia v. New Jersey* (1978).
53. *Endangered Species Act* (1973).
54. Richard Posner, *Economic Analysis of Law* (1973).
55. Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process* (1958).
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).
59. American ideas and efforts in creating the United Nations system (1944-45).
60. President Woodrow Wilson's proposal for the League of Nations (1919).
61. *The Wilderness Act* (1964).
62. Delaney Amendment (1954).
63. Earth Day (1970).
64. Nixon Administration's National Commission to Eliminate the Internal Combustion Engine by 1975 (late 1960s to early 1970s).
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 *Superfunds Amendments and Reauthorization Act*) (1986).
68. Al Gore, *Earth in the Balance* (1992) and *An Inconvenient Truth* (2006).
69. GATT and the formation of the World Trade Organization (WTO) (1946-1995).
70. NAFTA and environmental side agreements (1993).
71. *Sherman Anti-Trust Act* (1890).
72. Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (1952).
73. Promulgation of the Uniform Commercial Code (1940s).

74. President Lincoln standing for re-election during the Civil War (1864).
75. Louis D. Brandeis and Samuel D. Warren, *Privacy* article in *Harvard Law Review* (1890).
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).
79. *The Politics of Law* (1980).
80. John Adams' drafting of the Massachusetts state constitution (1779).
81. *Allgeyer v. Louisiana* (1897).
82. *Miranda v. Arizona* (1966).
83. *Baker v. Carr* (1962).
84. *Batson v. Kentucky* (1986).
85. *Missouri v. Holland* (1920).
86. *Gideon v. Wainwright* (1963).
87. *McCulloch v. Maryland* (1819).
88. *Gibbons v. Ogden* (1824).
89. *Lochner v. New York* (1905).
90. *United States v. Curtiss-Wright Export Corp.* (1936).
91. *Daubert v. Merrill Dow* (1993).
92. *Lemon v. Kurtzman* (1971).
93. *Euclid v. Ambler* (1926).
94. *Erie Railroad v. Tompkins* (1938).
95. *New York Times v. Sullivan* (1964).
96. *Katz v. United States* (1967).

97. *Shelley v. Kraemer* (1948).
98. *Lucas v. South Carolina Coastal Council* (1992).
99. *Miller v. California* (1973).
100. *Goldberg v. Kelly* (1970).

IV. EXPLAINING AND JUSTIFYING THE TENTATIVE RANKING

A. THE TOP TIER: RANKINGS #1 THROUGH #10

It is 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 ratification conventions. The durability of the Constitution for well over two centuries of American experience is a further testament to its supreme creative nature. I lump all of the *Federalist Papers* by John Jay, Alexander Hamilton and James Madison,¹³² as well as the state ratification debates,¹³³ 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 the governing charter of a new nation out of whole cloth.¹³⁴

132. *The Federalist* (Jacob E. Cooke ed., Wesleyan U. Press 1961) (papers by Alexander Hamilton, James Madison & John Jay).

133. See Alexander Hanebeck, *Democracy Within Federalism: An Attempt to Reestablish Middle Ground*, 37 S.D. L. Rev. 347, 367-68 (2000) (citations omitted) (discussing ratification debates).

134. See generally Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* (A. Mthly. Press 1966).

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.¹³⁵ Second, these “other” declarations built on the English practice of drafting written communications (“addresses, petitions and declarations”) to government officials.¹³⁶ Third, the 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 “overcom[ing] 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.”¹³⁷ Fourth, the relatively abstract ideas of the Declaration of Independence fostered a creative tension with the more down-to-earth, brokered, compromised, and concrete terms of the United States Constitution. President Abraham Lincoln recognized this tension nearly nine decades after the Declaration: “In 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 . . . separat[ion] from Britain than of [America’s] victory in the War for Independence.”¹³⁸

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”¹³⁹—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 like¹⁴⁰—as a prime American creative legal moment for two reasons. First, the “Anti-federalist critics of the Constitution and several state ratifying

135. Pauline Maier, *American Scripture: Making the Declaration of Independence* 48 (Alfred A. Knopf 1997).

136. *Id.* at 50.

137. *Id.* at 95-96.

138. *Id.* at 207.

139. *Id.* at xv.

140. U.S. Const. amends. I-X.

conventions had [originally] insisted upon a bill of rights.”¹⁴¹ James Madison’s original proposal to add a “prefix” to the existing United States Constitution, setting forth a “watered-down version of the more extensive bills of rights demanded by state ratifying conventions,” was then reduced by Congress to “twelve amendments that were to be listed at the end of the Constitution” and, in turn, reduced by the states to ten amendments by December 15, 1791.¹⁴² The legal process by which these reductions took place was a breathtakingly 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.¹⁴³ Thus, over time,

Those ten amendments became the federal Bill of Rights. And in time that abbreviation of an 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.”¹⁴⁴

As Professor Surrency has pointed out, the Articles of Confederation is a remarkably creative yet underrated moment in American law.¹⁴⁵ The separate colonies that had, previous to the Declaration of Independence, been tied directly to Great Britain by

141. Maier, *supra* n. 135, at 196.

142. *Id.* On June 8, 1789, Congressman James Madison “moved that a declaration be prefixed to the constitution” containing 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.

Id. at 195 (internal quotation marks omitted).

143. *See id.* at 213.

144. *Id.* at 196.

145. *See supra* n. 34 and accompanying text. *See generally The Transition from Colonialism to Independence, supra* n. 34, at 63-65 (2004).

different legal umbilical cords, realized that “they must cooperate,” but the rub was “to what extent!”¹⁴⁶ Although the delegates to the Second Continental Congress were prescient in adopting Richard Henry Lee’s June 7, 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,”¹⁴⁷ the seminal idea for a plan of colonial confederation had been floated earlier by Benjamin Franklin of Pennsylvania.¹⁴⁸ John Dickinson of Pennsylvania drafted the proposed Articles of Confederation in July of 1776, but because 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 March 1, 1781, when Maryland—“fear[ing] that those states which had Western lands would become so large, the smaller states would have no influence”—finally voted for adoption.¹⁴⁹ Yet, Congress acted creatively during the delay by governing “as if the plan was in effect.”¹⁵⁰ 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.”¹⁵¹ 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.¹⁵² As explained by the late, great, historian Samuel Eliot Morison, “[i]t is no wonder that the Articles were imperfect; even so, they were the best

146. *The Transition from Colonialism to Independence*, *supra* n. 34, at 63.

147. *Id.* (internal quotation marks omitted) (footnote omitted).

148. *Id.*

149. *Id.* at 63-64.

150. *Id.* at 64.

151. *Id.*

152. *Id.*

instrument of federal government adopted anywhere up to that time.”¹⁵³

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.¹⁵⁴ First, the Northwest Ordinance created an initial interim government for the federal territory consisting of a “governor, secretary and three judges appointed by Congress.”¹⁵⁵ Second, the Northwest Ordinance provided for an election of “a bicameral legislature and a nonvoting member of the House of Representatives” when the territory reached a population of “five thousand free male adults.”¹⁵⁶ 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 not more than five, states”).¹⁵⁷ Last, but most importantly and creatively, Congress declared the following civil and economic rights to apply within the Northwest Territory: “Prohibit[ion] [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.”¹⁵⁸ Indeed, “no more important enactment was ever made by the Confederation” because 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.¹⁵⁹

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 states—Ohio, Indiana, Illinois,

153. Samuel Eliot Morison, *The Oxford History of the American People* 277 (Oxford U. Press 1965).

154. Stephen W. Stathis, *Landmark Legislation: 1774-2002* 9 (CQ Press 2003).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. Morison, *supra* n. 153, at 300-01.

Michigan, and Wisconsin—carved out of the Northwest Territory.¹⁶⁰

*Marbury v. Madison*¹⁶¹ 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.”¹⁶² Chief Justice 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.¹⁶³ 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. 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

160. *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, is 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.
Than all the eastern sages knew.

Id.

161. *Marbury v. Madison*, 5 U.S. 137 (1803).

162. *The Oxford Guide to United States Supreme Court Decisions* 173-74 (Kermit L. Hall ed., 1999) [hereinafter *Oxford Supreme Court Guide*].

163. *Id.* at 174.

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.¹⁶⁴

Having considered brilliant, nascent creative moments at the constitutional level by American constitution-makers and political revolutionaries,¹⁶⁵ paused to examine a lustrous occasion of early legislative innovation,¹⁶⁶ and focused on a dazzling instance of judicial creativity in the first decade-and-a-half of the fledgling American Republic,¹⁶⁷ 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 during the Civil War 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 by "rais[ing] the ante" of his failed effort to pass

164. Dumas Malone, *Jefferson the President: First Term, 1801-1805* 148-49 (Little, Brown & Co. 1970) (footnotes omitted).

165. *Supra* nn. 132-53 and accompanying text.

166. *Supra* nn. 154-60 and accompanying text.

167. *Supra* nn. 161-64 and accompanying text.

gradual compensated emancipation legislation for the border states and of the passage of tepid legislation to confiscate slaves of southern slaveholders who had taken up arms against the Union.¹⁶⁸ 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.¹⁶⁹ 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 1862.¹⁷⁰ The final Emancipation Proclamation was signed into effect by President Lincoln on January 1, 1863.¹⁷¹ 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-sympathizing Taney Supreme Court.¹⁷² 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 the war,” leaving out of its scope the border states since, not being in the rebellion, “they had not legally put themselves in the way of Lincoln’s military necessity” rationale.¹⁷³ 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

168. Allen C. Guelzo, *Abraham Lincoln: Redeemer President* 338 (Wm. B. Eerdmans Publg. Co. 1999).

169. *Id.* at 340.

170. *Id.* at 341.

171. *Id.* at 342-43.

172. *Id.* at 344.

173. *Id.* at 343-44.

war, that was exactly what Chief Justice Taney had shown he was willing to do in *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.¹⁷⁴

Had President Lincoln overplayed his hand, moreover, southern opposition could have intensified the war and led to widespread chaos.¹⁷⁵

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.”¹⁷⁶ 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”;¹⁷⁷ 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).¹⁷⁸ Lincoln told Secretary of the Treasury Salmon P. Chase that “[n]o commanding general shall do such a thing, upon *my* responsibility, without consulting me.”¹⁷⁹ 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

174. *Id.* at 344.

175. *Id.* at 344-45.

176. David Herbert Donald, *Lincoln* 363 (Simon & Schuster 1995).

177. *Id.*

178. *Id.*

179. *Id.* (internal quotation marks omitted).

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 foolscap, 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 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 cause sound the best. No doubt, too, he was pleased to retain total flexibility, since these discussions committed him to nothing.¹⁸⁰

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.¹⁸¹ Lincoln used Swett as a final sounding board.¹⁸² “[A]t the

180. *Id.* at 363-64.

181. *Id.* at 366.

182. *See id.* at 366.

same time,” Lincoln skillfully “began preparing public opinion for a proclamation of freedom if one was to be issued” by proposing black colonialization (knowing that it would likely be rejected)¹⁸³ 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.”¹⁸⁴ Lincoln’s classic, lawyerly letter in response to Greeley stated:

My paramount object in this struggle *is* to save the Union, and is *not* either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that. What I 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.¹⁸⁵

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 victory” for the Union, 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.”¹⁸⁶

The *Judiciary Act of 1789*¹⁸⁷—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

183. *Id.* at 367-68.

184. *Id.* at 368.

185. *Id.* (internal quotation marks omitted).

186. Richard Carwardine, *Lincoln: A Life of Purpose and Power* 228 (Alfred A. Knopf 2006) (internal quotation marks omitted).

187. *Judiciary Act of 1789*, 1 Stat. 73, 73-93 (1789).

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.”¹⁸⁸ This seminal federal statute formed the foundation for the subsequent growth and evolution of the federal judicial system over the ensuing centuries.¹⁸⁹ Second, Congress, in 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.¹⁹⁰

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 supported 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.”¹⁹¹ The doctrine of prerogative is reflected in Article I, section 9, clause 2 of the Constitution, which permits the suspension of the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁹² Two, President Lincoln was innovative in making the

188. Stathis, *supra* n. 154, at 12.

189. See generally David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801* 49-51 (U. of Chi. Press 1997).

190. Stathis, *supra* n. 154, at 12.

191. Arthur M. Schlesinger, Jr., *Abraham Lincoln and Franklin D. Roosevelt in Lincoln the War President: The Gettysburg Lectures* 145, 152 (Gabor S. Boritt ed., Oxford U. Press 1992).

192. U.S. Const. art. I, § 9, cl. 2. 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* n. 191, at 153. “Burr’s acquittal by the courts helped limit subsequent resort to emergency prerogative” by presidents during the first half of the nineteenth century. *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

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, “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.”¹⁹³ 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.”¹⁹⁴ 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.¹⁹⁵

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 constitutional

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 waters extending to the Gulf Stream, engaged in rearmament without congressional appropriations, and not infrequently withheld information from Congress.

Id. After Jefferson left office, “[e]mergencies considerably more authentic than the Burr conspiracy took place in the next thirty years. But Presidents as forceful as Jackson and Polk refrained from invoking emergency prerogative—even in the face of the nullification crisis and the war with Mexico.” *Id.*

193. Schlesinger, *supra* n. 191, 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* n. 186, at 164.

194. Schlesinger, *supra* n. 191, at 156.

195. *Id.* (internal quotation marks omitted) (endnote omitted).

provisions: “[T]hrough 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 designation of the President as commander in chief.”¹⁹⁶ 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.”¹⁹⁷ 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 [sic] was the organic law. Was it possible to lose the nation, and yet preserve the Constitution?¹⁹⁸

Eight, Lincoln leavened the rationale for suspension of writ of habeas corpus with a “homely analogy to defend his course.”¹⁹⁹ According to Lincoln’s logic, human beings are driven to “protect life and limb,” “[y]et often a limb must be amputated to save a life; but a life is never wisely given to save a limb.”²⁰⁰ He went on to assert: “I felt that measures, otherwise unconstitutional, might become lawful by

196. *Id.* at 157 (internal quotation marks omitted) (endnote omitted); see Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. Rev. 1 (2004).

197. Schlesinger, *supra* n. 191, at 157-58.

198. *Id.* at 158 (internal quotation marks omitted) (endnote omitted).

199. *Id.* at 160.

200. *Id.* (internal quotation marks omitted).

becoming indispensable to the preservation of the constitution, through the preservation of the nation.”²⁰¹

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*)²⁰² and the 1955 decision on the question of relief (*Brown II*)²⁰³ 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) 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.”²⁰⁴ The moment is bracketed by the 1958 decision on the merits in *Cooper v. Aaron*.²⁰⁵ Another important part of this legal moment was “when the United States attorney general, for the first time ever, signed an amicus curiae brief in a race case” in the real estate, racial, restrictive covenant case of *Shelley v. Kraemer*²⁰⁶ in 1948, “which signaled the federal government’s symbolic support for the NAACP strategy.”²⁰⁷ *Shelley*, in turn, was followed by two more key Supreme Court opinions: The 1950 cases of *McLaurin v. Oklahoma State Regents*²⁰⁸ and *Sweatt v. Painter*.²⁰⁹ 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

201. *Id.* at 160, 162 (internal quotation marks omitted) (endnote omitted).

202. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 486, 495 (1954).

203. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 298 (1955).

204. *Oxford Supreme Court Guide*, *supra* n. 162, at 34.

205. *Cooper v. Aaron*, 358 U.S. 1 (1958).

206. *Shelley v. Kraemer*, 334 U.S. 1, 3-4 (1948).

207. *Oxford Supreme Court Guide*, *supra* n. 162, at 34.

208. *McLaurin v. Okla. St. Regents*, 339 U.S. 637, 642 (1950) (invalidating racial discrimination in state graduate schools).

209. *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950) (invalidating racial discrimination in state law schools).

of remedy in a follow-up opinion after reargument.²¹⁰ 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.²¹¹ Furthermore, Warren’s crafting of the brisk, “nontechnical,” “nonaccusatory” ten-page opinion in *Brown I* 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;²¹² 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*.²¹³ Arguments exist, however, for viewing *Brown I* and *Brown II* and its kin as negative creative moments in American law.²¹⁴ First, the curt opinion in *Brown I* avoided all the difficult questions: “[T]he evidence of the historical understanding of the Equal Protection Clause—upon which the parties had been directed to focus their reargument” was labeled “inconclusive;”²¹⁵ the Court relied upon questionable social science data that racial segregation in public education caused harm to black school children;²¹⁶ and did not squarely overrule the “separate but equal” doctrine²¹⁷ of *Plessy v. Ferguson*. Second, *Brown II*’s “all deliberate speed”²¹⁸ 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.”²¹⁹ 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

210. *Oxford Supreme Court Guide*, *supra* n. 162, at 34-35.

211. *Id.* at 35.

212. *Id.*

213. *Id.* (internal quotation marks omitted).

214. *See supra* nn. 43-46 and accompanying text.

215. *Oxford Supreme Court Guide*, *supra* n. 162, at 35 (internal quotation marks omitted).

216. *Id.*

217. *Id.*

218. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955).

219. *Oxford Supreme Court Guide*, *supra* n. 162, at 35.

financed, and targets of hostility.”²²⁰ 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*,²²¹ when, in *Cooper v. Aaron*, 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.”²²² 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.²²³

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 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.²²⁴ Important legislation initiated by

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* See also Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill Co., Inc. 1962); Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L. J. 421 (1960).

224. Stathis, *supra* n. 154, 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

Roosevelt and enacted by Congress in 1933 to help the nation recover from economic depression included the following: (1) *Emergency Banking Relief Act*;²²⁵ (2) *Civilian Conservation Corps*;²²⁶ (3) *Agricultural Adjustment Act*;²²⁷ (4) *Federal Emergency Relief Act of 1933*;²²⁸ (5) *Tennessee Valley Authority Act of 1933*;²²⁹ (6) *Securities Act of 1933*;²³⁰ (7) *Home Owners' Loan Act of 1933*;²³¹ (8) *Banking Act of 1933 (Glass-Steagall Act)*;²³² (9) *National Industrial Recovery Act*;²³³ (10) *Emergency Railroad Transportation Act*;²³⁴ and (11) *Farm Credit Act of 1933*.²³⁵

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*;²³⁶ (2) *Federal Farm Mortgage Corporation Act*;²³⁷ (3) *Crime Control Act*;²³⁸ (4) *Securities Exchange Act of 1934*;²³⁹ (5) *National Housing Act*;²⁴⁰ (6) *Communications Act of 1934*;²⁴¹ (7) *Silver Purchase Act of 1934*;²⁴² and (8) *Federal Credit Union Act*.²⁴³

immediate action rallied the nation.

Id.

225. Pub. L. No. 73-1, 48 Stat. 1 (1933).

226. Pub. L. No. 73-5, 48 Stat. 22 (1933).

227. Pub. L. No. 73-10, 48 Stat. 31 (1933). Certain provisions of this act were subsequently held unconstitutional in *U.S. v. Butler*, 297 U.S. 1, 74 (1936).

228. Pub. L. No. 73-15, 48 Stat. 55 (1933).

229. Pub. L. No. 73-17, 48 Stat. 58 (1933).

230. Pub. L. No. 73-22, 48 Stat. 74 (1933).

231. Pub. L. No. 73-43, 48 Stat. 128 (1933).

232. Pub. L. No. 73-66, 48 Stat. 162 (1933).

233. Pub. L. No. 73-67, 48 Stat. 195 (1933). Various provisions of this act were later held unconstitutional in *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 541-42 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

234. Pub. L. No. 73-68, 48 Stat. 211 (1933).

235. Pub. L. No. 73-75, 48 Stat. 257 (1933).

236. Pub. L. No. 73-87, 48 Stat. 337 (1934).

237. Pub. L. No. 73-88, 48 Stat. 344 (1934).

238. Pub. L. No. 73-230, 48 Stat. 780 (1934).

239. Pub. L. No. 73-291, 48 Stat. 881 (1934).

240. Pub. L. No. 73-479, 48 Stat. 1246 (1934).

241. Pub. L. No. 73-416, 48 Stat. 1064 (1934).

242. Pub. L. No. 73-438, 48 Stat. 1178 (1934).

243. Pub. L. No. 73-467, 48 Stat. 1216 (1934).

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*,²⁴⁴ (2) *Wagner-Connery National Labor Relations Act*,²⁴⁵ (3) *Motor Carrier Act of 1935*,²⁴⁶ (4) *Social Security Act*,²⁴⁷ (5) *Banking Act of 1935*,²⁴⁸ (6) *Public Utility Holding Company Act of 1935*,²⁴⁹ (7) *Frazier-Lemke Farm Mortgage Moratorium Act*,²⁵⁰ and (8) *Railroad Retirement Act of 1935*.²⁵¹ During 1936, this most legislatively productive and innovative four-year interaction between the President and the Congress saw the following economic stabilization and recovery national enactments signed into law: (1) *Soil Conservation and Domestic Allotment Act*,²⁵² (2) *Rural Electrification Act of 1936*,²⁵³ (3) *Federal Antiprice Discrimination Act (Robinson-Patman Act)*,²⁵⁴ (4) *Flood Control Act of 1936*,²⁵⁵ (5) *Merchant Marine Act of 1936*,²⁵⁶ and (6) *Walsh-Healey Government Contracts Act*.²⁵⁷

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 thirteen years [since President Wilson left office], but mostly because the cards were dealt with such bewildering rapidity."²⁵⁸ Another aspect of FDR's legal creativity in crafting the New Deal

244. Pub. L. No. 74-46, 49 Stat. 163 (1935).

245. Pub. L. No. 74-198, 49 Stat. 449 (1935).

246. Pub. L. No. 74-255, 49 Stat. 543 (1935).

247. Pub. L. No. 74-271, 49 Stat. 620 (1935).

248. Pub. L. No. 74-305, 49 Stat. 684 (1935).

249. Pub. L. No. 74-333, 49 Stat. 803 (1935).

250. Pub. L. No. 74-384, 49 Stat. 942 (1935).

251. Pub. L. No. 74-399, 49 Stat. 967 (1935).

252. Pub. L. No. 74-461, 49 Stat. 1148 (1936).

253. Pub. L. No. 74-605, 49 Stat. 1363 (1936).

254. Pub. L. No. 74-692, 49 Stat. 1526 (1936).

255. Pub. L. No. 74-738, 49 Stat. 1570 (1936).

256. Pub. L. No. 74-835, 49 Stat. 1985 (1936).

257. Pub. L. No. 74-846, 49 Stat. 2036 (1936).

258. Morison, *supra* n. 153, at 953.

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."²⁵⁹ Likewise, James MacGregor Burns wrote 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."²⁶⁰ Burns also marveled at Roosevelt's creativity: "The President soon proved himself an artist in government—in his fine sense of timing, his adroit application of pressure, his face-to-face persuasiveness, his craft in playing not only foes but friends off against one another."²⁶¹ 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.²⁶²

Between 1789 and 1795, 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. 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

259. *Id.* at 959 (internal quotation marks omitted).

260. James MacGregor Burns, *The Crosswinds of Freedom* 27 (Alfred A. Knopf, Inc. 1989).

261. *Id.* at 27-28.

262. *Id.* at 28 (internal quotation marks omitted).

states.²⁶³ Second, Hamilton “proposed the next step in his master financial plan,”²⁶⁴ which, like his debt refinancing, was bold and brilliant. “Hamilton urged that Congress charter the Bank of the United States” as “a great engine of state” that “would deal only in large-scale operations” such as “servic[ing] the national debt; mak[ing] loans to the government and for major private projects.”²⁶⁵ 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.”²⁶⁶ 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.²⁶⁷ 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.²⁶⁸ Third, “[d]uring the congressional session that ran from December, 1791, to May, 1792, Hamilton presented his [ingenious] Report on Manufactures.”²⁶⁹ One biographer has explained Hamilton’s Report on Manufactures as “contain[ing] the embryo of modern America.”²⁷⁰ 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 northern processing of southern staples would help unite the nation; demonstrated that the United States could

263. James Thomas Flexner, *Washington: The Indispensable Man* 233-37 (Little, Brown & Co. 1974). Interestingly, the ultimate political compromise that 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: “[I]n exchange for enough Northern votes to put the capital in the South, enough southern votes would be recruited to pass assumption. On this basis, the issue was settled.” *Id.* at 235-37.

264. *Id.* at 239.

265. *Id.* (internal quotation marks omitted).

266. *Id.* at 239-40.

267. *Id.* at 242.

268. *Id.* at 240-41.

269. *Id.* at 247-48.

270. *Id.* at 248 (quoting Hamilton’s biographer John C. Miller) (internal quotation marks omitted).

not safely depend on imports in case of war; and deduced that Congress should encourage native manufactures through tariffs, bounties, subsidies, and premiums.²⁷¹

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."²⁷² Taken together, Hamilton's three plans for American 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.²⁷³

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.²⁷⁴ 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 Talleyrand's offer, on behalf of Napoleon, to sell the "whole of Louisiana" to the United States.²⁷⁵ 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."²⁷⁶

271. *Id.*

272. *Id.* (internal quotation marks omitted).

273. *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, [H]e 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 McKittrick, *The Age of Federalism* 95 (Oxford U. Press 1993).

274. See generally Charles A. Cerami, *Jefferson's Great Gamble: The Remarkable Story of Jefferson, Napoleon and the Men behind the Louisiana Purchase* (Sourcebooks, Inc. 2003).

275. Morison, *supra* n. 153, at 366 (internal quotation marks omitted).

276. *Id.*

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.”²⁷⁷ Moreover, “[t]he boundaries were indefinite; how far north Louisiana extended, and whether it included West Florida or Texas, or neither, was uncertain”;²⁷⁸ 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.”²⁷⁹ President Jefferson’s geopolitical and legal strategy and tactics in “pushing through the Louisiana Purchase”²⁸⁰ can be characterized in a number of ways: “[D]efiantly bold behavior”;²⁸¹ “brilliantly successful”;²⁸² an “irony of ironies” in establishing “federal jurisdiction over the western territories as a clear [constitutional] precedent”;²⁸³ “alert and skillful”;²⁸⁴ and showing Jefferson “at the peak of his presidential career.”²⁸⁵ 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.²⁸⁶

Next on our list of superlative creative legal moments in American history is the promulgation of the *Laws and Liberties of Massachusetts* in 1648.²⁸⁷ As a communal undertaking (spearheaded by John Winthrop, Sr., the first governor of the Bay Colony and the

277. *Id.*

278. *Id.*

279. *Id.*

280. Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* 74 (Vintage Bks. 2000).

281. *Id.*

282. *Id.* at 212.

283. *Id.* at 241. This was the view of Jefferson’s rival—and later friend—John Adams. *Id.*

284. Malone, *supra* n. 164, at 286.

285. *Id.* at 301-02.

286. *Id.* at 301.

287. *Laws and Liberties of Massachusetts 1641-1691* (Scholarly Resources Inc. 1976).

Rev. John Cotton, one of the leading ministers) this “first printed compilation of the laws of any English colony” and later model “for similar efforts elsewhere”²⁸⁸ was remarkably innovative. First, contrary to the letters patent of March 4, 1629—the charter of the Bay Colony—the *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.²⁸⁹ For example, the Massachusetts enactment had fewer capital felonies than English law, but “in particular crimes” was “more severe.”²⁹⁰ Second, dowries to widows “in the matter of goods and chattels” were far more generous under the *Laws and Liberties* than under English common law.²⁹¹ A third innovative feature of the 1648 Massachusetts Bay Colony’s statutory enactment was that it was loaded with “far-reaching liberties” and, thus, for the first time in the English-speaking world, contained *both* laws and liberties.²⁹² Finally, the *Laws and Liberties* constituted a pragmatic blend of the English past and the promise of a unique American future.²⁹³

Two treatises authored by two great nineteenth century judges are next on our list of most creative moments in American. First, at #15, is James Kent’s *Commentaries on American Law*; a four-volume masterpiece published between 1826 and 1830.²⁹⁴ Kent’s treatise was “the first systemization of American law during its formative period.”²⁹⁵ 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.²⁹⁶ Kent used his retirement from the New York appellate bench to give a number of lectures as an early American

288. Thomas G. Barnes, *Introduction*, in *The Laws and Liberties of Massachusetts* 3, 3 (Leg. Classics Lib. 1982).

289. *Id.* at 13 (citing *The Charter of Massachusetts Bay: 1629* [¶ 8] (available at <http://avalon.law.yale.edu/17thcentury/mass03.asp>)).

290. *Id.*

291. *Id.* at 14.

292. *Id.* at 12.

293. *Id.* at 3.

294. James Kent, *Commentaries on American Law* (William S. Hein & Co. 1984) (originally published 1826-30).

295. Bernard Schwartz, *A Books of Legal Lists: The Best and Worst in American Law* 133 (Oxford U. Press 1997).

296. *Id.*

law professor at Columbia; the “lectures were published as his *Commentaries* . . . earn[ing] for its author the sobriquet ‘American Blackstone.’ ”²⁹⁷ 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.²⁹⁸

Almost contemporaneously with Kent’s treatise, United States Supreme Court Justice Joseph Story’s *Commentaries on the Constitution of the United States* was published in 1833.²⁹⁹ 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.³⁰⁰ 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.³⁰¹

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*,³⁰² (the first law casebook) by Harvard Law School dean, Christopher Columbus Langdell,³⁰³ and the 1881 book by Oliver Wendell Holmes entitled *The Common Law*.³⁰⁴ Dean

297. *Id.* at 193.

298. *Id.*

299. Joseph Story, *Commentaries on the Constitution of the United States* (William S. Hein & Co., Inc. 1994) (originally published 1833).

300. Schwartz, *supra* n. 296, at 195.

301. *Id.*

302. C.C. Langdell, *A Selection of Cases on the Law of Contracts* (Little, Brown & Co. 1871).

303. *Id.*

304. Oliver Wendell Holmes, Jr., *The Common Law* (Little, Brown & Co. 1881).

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.³⁰⁵ 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 exemplified in his contracts casebook held sway and has been the predominant method of legal instruction in America for over a century.³⁰⁶ On its surface, Holmes’ book, *The Common Law*, was a mere “summary of the different legal subjects” of “criminal law, torts, property, contracts, and succession.”³⁰⁷ But, on a deeper level, *The Common Law* was an audacious stroke of innovation that stressed the philosophy of American pragmatism applied to the law: Law is not just a matter of “logic” and “precedent”; rather, law is—and should be—a matter of “experience” and “life.”³⁰⁸

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 at #19, #20 and #21. These are followed by three federal legislative enactments at #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 *Dred Scott v. Sandford*.³⁰⁹ The 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.³¹⁰

305. Schwartz, *supra* n. 295, at 197-98.

306. Thomas G. Barnes, *Notes from the Editor*, in *A Selection of Cases on the Law of Contracts* 8-9 (Leg. Classics Lib.1983).

307. Schwartz, *supra* n. 295, at 199.

308. *Id.*

309. *Dred Scott v. Sandford*, 60 U.S. 393 (1856), *superseded*, U.S. Const. amend. XIII; amend. XIV, § 1.

310. Schwartz, *supra* n. 295, at 70; *Dred Scott*, 60 U.S. at 399.

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.³¹¹ But “American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court”³¹²—a decision that was later constitutionally superseded by the Thirteenth and Fourteenth Amendments.³¹³

*Plessy v. Ferguson*³¹⁴ 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* held that Louisiana’s law requiring separate but equal “accommodations for the white and colored races” did not violate the Thirteenth Amendment.³¹⁵ “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”³¹⁶—in fundamental disagreement with Justice Harlan’s dissent, which viewed the Thirteenth Amendment as barring all “badge[s] of . . . servitude.”³¹⁷ Moreover, Brown’s 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”³¹⁸ 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

311. Schwartz, *supra* n. 295, at 70-71.

312. *Oxford Supreme Court Guide*, *supra* n. 162, at 278.

313. U.S. Const. amends. XIII, XIV.

314. *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

315. *Id.* at 540, 543-44 (internal quotation marks omitted).

316. *Oxford Supreme Court Guide*, *supra* n. 162, at 239.

317. *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting).

318. *Oxford Supreme Court Guide*, *supra* n. 162, at 239.

of the races in educational facilities” and pre-Civil War judicial precedent.³¹⁹

*Roe v. Wade*³²⁰ 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.³²¹ Second, the aforementioned nontextual basis of *Roe* “was reminiscent of the *Lochner v. New York* 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.³²² 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*³²³ case); moreover, the Court stretched the *Griswold* privacy right from the use of contraceptives in one’s home to abortion of a fetus in a public medical setting.³²⁴

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.³²⁵ 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, without

319. *Id.* (emphasis added).

320. *Roe v. Wade*, 410 U.S. 113 (1973).

321. *Oxford Supreme Court Guide*, *supra* n. 162, at 263.

322. *Id.*

323. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

324. *Oxford Supreme Court Guide*, *supra* n. 162, at 263-64.

325. *Id.* at 263.

notice of counsel.³²⁶ 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 as the statutes at bar were in place throughout the country and Congress made no mention of abortion statutes as a rationale for the Amendment.³²⁷ 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.³²⁸

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 judicial opinions we have just touched on³²⁹—are worthy of approbation.³³⁰ The *Homestead Act of 1862*³³¹ "provid[ed] a free grant of up to 160 acres of surveyed western public land" owned by the federal government "to any citizen, or applicant for citizenship, over twenty-one . . . who occupied and improved [the land] for five years,"³³² and constituted a farsighted and efficient legislative means to foster national growth and responsible citizenship. The *G.I. Bill*, or *Servicemen's Readjustment Act of 1944*,³³³ established 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,³³⁴ and 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)*³³⁵ declared national policy to promote productive harmony between humans and

326. *Id.*

327. *Id.*

328. *Id.*

329. *Supra* nn. 309-28 and accompanying text.

330. *See also supra* nn. 294-308 and accompanying text (discussing judges writing independently as legal commentators engaging in nonjudicial legal creativity worthy of respect and characterized by positive dimensions).

331. 12 Stat. 392, 392-94 (1862).

332. Stathis, *supra* n. 154, at 90 (citing 12 Stat. at 392).

333. Pub. L. No. 78-346, 58 Stat. 284 (1944).

334. Stathis, *supra* n. 154, at 224.

335. Pub. L. No. 91-190, 83 Stat. 852 (1969).

nature, while also considering the welfare of future generations, fashioning the environmental impact requirement for significant federal agency decision-making, and creating the Council on Environmental Quality (CEQ) to advise the president.³³⁶ Furthermore, *NEPA* represented 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.³³⁷ *NEPA*

[I]s 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 public policy evaluation to impact assessment to comprehensive rationality to ecological experimentation to public participation to integrated decisionmaking [sic]. 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) environmental justice (“a wide sharing of life’s amenities”).³³⁸

Not a statute, nor a judicial opinion, nor an administrative agency regulation, nor a national constitutional text or amendment, the Seneca Falls Convention in July 1848 “was the first public political meeting in the United States dealing with women’s rights.”³³⁹ The Convention “was organized by Lucretia Mott and Elizabeth Cady Stanton,” and its participants (who numbered 200 women and, unexpectedly, forty men, including the “ex-slave abolitionist” Frederick Douglass) perspicaciously modeled their “Seneca Falls Declaration of Sentiments” on the 1776 Declaration of Independence.³⁴⁰ This document listed “the ways in which men had oppressed American

336. *Id.* at 852, 854.

337. William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: “The Whats”*, 2000 U. Ill. L. Rev. 1, 31 (2000) (citing William H. Rodgers, Jr., *Environmental Law* 801-09 (2d ed. West Publ. Co. 1999)).

338. *Id.* at 31 (footnotes omitted).

339. *The Reader’s Companion to American History* 981 (Eric Foner & John A. Garraty eds., Houghton Mifflin 1991) [hereinafter *Companion to American History*].

340. *Id.*

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.”³⁴¹ The creative impetus of the Seneca Falls Convention spurred the 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 changes granting American women equal rights.³⁴²

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 Fund Act of 1964*.³⁴³ 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 to make matching grants to states to acquire recreational lands . . . finance wilderness aspects of federal water projects,” and for “federal land acquisitions” for “national forests,” “national parks,” and “wilderness areas.”³⁴⁴ Since its genesis, the “Land and Water Conservation Fund Act . . . has resulted in” billions of dollars of insightful expenditures on “parklands, changing the face of urban and rural America.”³⁴⁵ Members of Congress were moved by evocative and radiant rhetoric “of children of many colors coming together in public playgrounds” across the land, along with the prospect for “[r]ecreational opportunities for the poor and underprivileged.” The 1964 legislation “became the first and most successful step in what has recently become known as the environmental justice movement.”³⁴⁶

Another law book, Benjamin N. Cardozo’s *The Nature of the Judicial Process*,³⁴⁷ published in 1921—written while he was a Judge of the New York Court of Appeals and over a decade before his appointment and confirmation as a Justice of the United States

341. *Id.*

342. *See id.* at 981-82.

343. Pub. L. No. 88-578, 78 Stat. 897 (1964).

344. Stathis, *supra* n. 154, at 262-63.

345. William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 Loy. L.A. L. Rev. 1009, 1010 (1994) (footnote omitted).

346. *Id.* at 1015 (internal quotation marks omitted).

347. Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale U. Press 1966) (originally published 1921).

Supreme Court—was “the first attempt by a judge to give a realistic description of how judges decide cases.”³⁴⁸ 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.³⁴⁹

Moving to the #28 spot of all-time American legal creativity we encounter New York lawyer and law reformer David Dudley Field’s fashioning of his Code of Civil Procedure, enacted in New York in 1848³⁵⁰—the same year as the Seneca Falls Convention on women’s rights.³⁵¹ 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.”³⁵² Field’s procedural code was borrowed by numerous other American states and, ironically, by England (the source of the original procedural confusion) in 1873.³⁵³

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, into general state incorporation laws by the latter part of the nineteenth century.³⁵⁴ This moment took several decades.³⁵⁵ It started with initial judicial distinctions between public

348. Schwartz, *supra* n. 295, at 201.

349. *Id.*

350. *Id.* at 226.

351. *Supra* nn. 339-42 and accompanying text.

352. Schwartz, *supra* n. 295, at 226.

353. *Id.* One observer has remarked that Field’s civil procedure legal reform was a “quantum change” that “[discarded] entirely the common-law system, [while] it swept aside fictions, technicalities, and foreign verbiage and completely changed the law’s adjective side.” *Id.*

David Dudley Field, “a man of genius in a family of geniuses” (his brother Stephen J. Field “became one of the most influential Justices in Supreme Court history”) was a prominent advocate and passionate law reformer. *Id.* at 224-25 (internal quotation marks omitted).

354. See Morton J. Horwitz, *The Transformation of American Law: 1780-1860* 111-14, 116-17 (Harvard U. Press 1977).

355. See *id.* at 111-18.

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.³⁵⁶

The final entry in the second tier of most important creative moments in American legal history is the crafting, proposing and adopting (during the Civil War and its aftermath in the late 1860s and early 1870s) of the Thirteenth, Fourteenth and Fifteenth Amendments dealing, respectively, with the abolition of slavery,³⁵⁷ the granting of citizenship and civil liberties to persons born or naturalized in the United States,³⁵⁸ and guaranteeing the right to vote of the former slaves.³⁵⁹ The Thirteenth Amendment had its origin with Lincoln's Emancipation Proclamation:³⁶⁰ "Lincoln and the Republican party recognized that the Emancipation Proclamation, as a war measure, might have no constitutional validity once the war was over," and that "[t]he legal framework of slavery would 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."³⁶¹ 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."³⁶² After being approved by Congress in February 1869 and ratified by the requisite number of states in February 1870, the Fifteenth Amendment became law.³⁶³ 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

356. *Id.* (discussing the separation of public and private interests, the theory of competition, and other aspects of American cases involving corporations).

357. U.S. Const. amend. XIII.

358. U.S. Const. amend. XIV.

359. U.S. Const. amend. XV.

360. *See supra* nn. 168-86 and accompanying text.

361. *Companion to American History, supra* n. 339, at 352.

362. Stathis, *supra* n. 154, at 97.

363. *Id.* at 103.

make black people fully equal citizens of the United States.³⁶⁴ 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 constitutional provisions were new and innovative legal tools that had never before been placed in the Constitution.³⁶⁵

C. THE THIRD TIER: RANKINGS #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.³⁶⁶ Given the constraints of space, however, the discussion of the rationales for rankings #31 through #100 will be more condensed.³⁶⁷

1. Rankings #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.³⁶⁸ Next, as a manifestation of Progressivism on the national level, the *Federal Reserve Act of 1913*³⁶⁹ was an insightful congressional enactment that permitted 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.³⁷⁰

Two additional federal statutes—the *Voting Rights Act of 1965*³⁷¹ and the *Civil Rights Act of 1964*³⁷²—follow as key creative moments in

364. *Id.* at 102.

365. U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

366. *See supra* nn. 132-365 and accompanying text.

367. *See infra* nn. 368-524 and accompanying text.

368. *See Companion to American History, supra* n. 339, 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.*

369. Pub. L. No. 63-43, 38 Stat. 251 (1913).

370. *Companion to American History, supra* n. 339, at 78.

371. Pub. L. No. 89-110, 79 Stat. 437 (1965).

American legal history. The former statute invented legal processes to federally regulate voter literacy tests, voter qualification devices, and voting regulations.³⁷³ 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.³⁷⁴

A remarkable time of American legal creativity was the period from the appointment by President Harry Truman, in the spring of 1945, of United States 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 1946.³⁷⁵ Opposing a British proposal "declaring the top Nazis to be outlaws and summarily shooting them,"³⁷⁶ 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."³⁷⁷

The *Missouri Compromise of 1820*³⁷⁸—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 thirty-six degrees, thirty 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 viewed as a creative compromise between a handful of members of the House and the

372. Pub. L. No. 88-352, 78 Stat. 241 (1964).

373. 79 Stat. 437-46.

374. See *Companion to American History*, *supra* n. 339, at 178-79.

375. Gerhard L. Weinberg, *A World at Arms: A Global History of World War II* 835 (Cambridge U. Press 1994).

376. *Id.*

377. *Id.* (endnotes omitted).

378. 3 Stat. 545, 545-48 (1820).

Senate, which “helped hold the Union together for more than thirty years.”³⁷⁹

The United States Senate, acting as court of impeachment for the trial of United States 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’s 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.³⁸⁰

Congress exercised legislative creativity in two landmark procedural enactments in the year following the end of World War II: The *Administrative Procedure Act of 1946*³⁸¹ and the *Legislative Reorganization Act of 1946*.³⁸² 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 Procedures Act. It established principles and procedures for a broad range of government activities, including rule making, agency adjudication, and judicial review of administrative decisions.³⁸³

The second-mentioned statute was a dazzling congressional moment of fundamental reform of the federal legislative process: The

379. *Companion to American History*, *supra* n. 339, at 737. The Missouri Compromise, however, which also allowed Maine (formerly part of Massachusetts) to enter the Union as a free state,

[W]as 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 ground that Congress was prohibited by the Fifth Amendment from depriving individuals of private property without due process of law.

Id.

380. Schwartz, *supra* n. 295, at 245-46.

381. Pub. L. No. 79-404, 60 Stat. 237 (1946).

382. Pub. L. No. 79-601, 60 Stat. 812 (1946).

383. Stathis, *supra* n. 154, at 226.

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 for an annual legislative budget to complement the president's budget."³⁸⁴

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 the 1850s in open defiance of the federal *Fugitive Slave Act*.³⁸⁵ 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 Act* was inoperable within Wisconsin.³⁸⁶

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.³⁸⁷ First, the *Clean Air Act of 1970*,³⁸⁸ the product of the masterful legislative generalship of Senator Edmund S. Muskie of Maine,³⁸⁹ was "the first great anti-pollution statute" in America and included the prototype citizen suit provision whereby, "subject to prior notice to the EPA [Environmental Protection Agency] administrator, 'any person may commence a civil action' . . . for

384. *Id.*

385. Carwardine, *supra* n. 186, at 95. The *Fugitive Slave Act of 1793* was a seminal federal legislative act regarding the rights of slave owners. 1 Stat. 302, 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 [then] required to enforce the law." Stathis, *supra* n. 154, 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.

386. Carwardine, *supra* n. 186, at 95.

387. 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.

388. Pub. L. No. 91-604, 84 Stat. 1676 (1970).

389. See generally Blomquist, *supra* n. 74.

violation of an air pollution standard, or [government] failure to perform any non-discretionary duty under the act.”³⁹⁰ 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 (SO₂) air discharge credits.³⁹¹ 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 “cap-and-trade” programs,³⁹² trading of mercury air emissions,³⁹³ carbon sequestration projects to offset greenhouse gas emissions,³⁹⁴ habitat conservation banking,³⁹⁵ and water quality trading.³⁹⁶ Positioned next on the list is a book: Rachel Carson’s 1962 creative landmark, *Silent Spring*.³⁹⁷ This book awakened 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 hinderance to the elevation of [human]kind.”³⁹⁸ Following in overarching importance is another original classic book: Aldo Leopold’s *A Sand County Almanac*.³⁹⁹ This book articulated the seminal concept of a “land ethic” “exclusively in scientific terms”

390. David Sive, *Words That Formed Environmental Law*, 11 *Envtl. Forum* 14, 15-16 (Nov.-Dec. 1994) (quoting 42 U.S.C. § 7604(a) (1988)).

391. Pub. L. No. 101-549, 104 Stat. 2399 (1990); see Stathis, *supra* n. 155, at 337.

392. David A. Savage & Matthew G. Paulson, *The Advent of Local VOC Cap-and-Trade for Controlling Ozone*, 20 *Nat. Res. & Env.* 10, 10 (Summer 2005).

393. Robert M. Sussman & Jon M. Queen, *EPA’s Mercury Rulemaking: Expanding CAA Trading Programs*, 20 *Nat. Res. & Env.* 15, 15 (Summer 2005).

394. Margaret A. Yowell & Jessica K. Ferrell, *Using Carbon Sequestration Projects to Offset Greenhouse Gas Emissions*, 20 *Nat. Res. & Env.* 20, 20 (Summer 2005).

395. See J.B. Ruhl, Alan Glen & David Hartman, *A Practical Guide to Habitat Conservation Banking Law and Policy*, 20 *Nat. Res. & Env.* 26, 26 (Summer 2005).

396. See Lynda Hall & Eric Raffini, *Water Quality Trading: Where Do We Go from Here?* 20 *Nat. Res. & Env.* 38, 38 (Summer 2005). Cf. Stephen E. Draper, *The Unintended Consequences of Tradable Property Rights to Water*, 20 *Nat. Res. & Env.* 49, 49 (Summer 2005).

397. Rachel Carson, *Silent Spring* (Houghton Mifflin 1962).

398. Sive, *supra* n. 390, at 14 (internal quotation marks omitted). See Robert F. Blomquist, “Clean New World”: Toward an Intellectual History of American Environmental Law, 1961-1990, 25 *Val. U. L. Rev.* 1, 22-24 (1990).

399. Aldo Leopold, *A Sand County Almanac* (Oxford U. Press 1949).

transcending the “essentially religious terms” of the earlier ideas advanced by Henry David Thoreau and John Muir.⁴⁰⁰

Following in importance is the combined creative judicial dissent by Justice William O. Douglas in *Sierra Club v. Morton*,⁴⁰¹ assisted by the law review article, *Should Trees Have Standing?*, written by law professor Christopher Stone.⁴⁰² William H. Rodgers, Jr. has called this one-two punch one of the great “‘aha!’ moments” in American environmental law.⁴⁰³ Next is the pathbreaking book, *The Greening of America*, published in 1970 by law professor Charles A. Reich⁴⁰⁴—“a clarion call to the young, in body or spirit, to do what Thoreau had urged most: to simplify.”⁴⁰⁵ Close behind in creative importance is the 1971 Supreme Court decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*.⁴⁰⁶ The fine interpretation by the Court of the judicial review section of the *Administrative Procedure Act* 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.⁴⁰⁷ The other creative aspect of *Overton Park* was the meaning of the phrase “feasible and prudent alternative” in federal law; a phrase which became “as poetic to environmentalists as any by Shelley or Keats.”⁴⁰⁸

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*,⁴⁰⁹ the *Toxic Substances Control Act of 1976 (TSCA)*,⁴¹⁰ and the *Comprehensive Environmental Response, Compensation, and*

400. J. Baird Callicott, *Introduction in Companion to a Sand County Almanac: Interpretive & Critical Essays* 3, 6 (J. Baird Callicott ed., U. of Wis. Press 1987).

401. *Sierra Club v. Morton*, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting).

402. Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972).

403. William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: The Who’s*, 39 Washburn L. J. 1, 13 (1999).

404. Charles A. Reich, *The Greening of America* (Random House 1970).

405. Sive, *supra* n. 390, at 15.

406. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

407. *Id.* at 406, 410.

408. *Id.* at 411-13; Sive, *supra* n. 390, at 16.

409. Pub. L. No. 92-500, 86 Stat. 816 (1972).

410. Pub. L. No. 94-469, 90 Stat. 2003 (1976).

Liability Act of 1980 (“Superfund”).⁴¹¹ *The Clean Water Act of 1972*—with an absolute prohibition of the “discharge of any pollutant by any person,” ingeniously mandated and achieved significant gains in the nation’s water quality.⁴¹² *TSCA*—unlike the other media-specific federal environmental statutes, brilliantly attacks multi-media toxic pollutants by requiring advanced notice of manufacturing a new chemical to EPA along with extensive preparation of safety data for existing chemicals.⁴¹³ 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 “revolutionize[] commercial property management and exchange in the United States” and helped to rid the landscape of abandoned hazardous waste dump sites.⁴¹⁴

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*⁴¹⁵ and *City of Philadelphia v. New Jersey*.⁴¹⁶ *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.⁴¹⁷ At #53 is another creative federal statute: *The Endangered Species Act of 1973*⁴¹⁸—containing a sweepingly

411. Pub. L. No. 96-510, 94 Stat. 2767 (1980).

412. William H. Rodgers, Jr., *The Seven Great Wonders*, 11 *Envtl. Forum* 23, 23 (Nov.-Dec. 1994).

413. Jeffrey Rudd, *Regulating the Impacts of Engineered Nanoparticles under TSCA: Shifting Authority from Industry to Government*, 33 *Colum. J. Env'tl. L.* 215, 222-25 (2008).

414. Rodgers, *supra* n. 412, at 24.

415. *Chevron U.S.A. v. Natl. Resources Def. Council*, 467 U.S. 837 (1984).

416. *City of Phila. v. N.J.*, 437 U.S. 617 (1978).

417. *Chevron*, 467 U.S. at 845; *City of Phila.*, 437 U.S. at 626-29. Both decisions, however, have been subject to criticism. See e.g. *U.S. v. Handy*, 570 F.Supp.2d 437, 471 (2008) (citing cases in opposition to the holding in *Chevron*); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 *Or. L. Rev.* 409, 447-453 (1992).

418. Pub. L. 93-205, 87 Stat. 884 (1973).

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.”⁴¹⁹ The *Endangered Species Act* is “the most protective of all domestic environmental laws, admired throughout the world” for its elegant effectiveness.⁴²⁰ Next on our list is Judge Richard A. Posner’s monumental work, *Economic Analysis of Law*, published in 1972.⁴²¹ In effect, Posner invented the law and economics approach, which posits efficiency as “the overriding goal” of the legal system which, in turn, is “best promoted by free operation of the market.”⁴²² 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 Sacks’s *The Legal Process: Problems in the Making and Application of Law*.⁴²³ This outstanding casebook 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.⁴²⁴

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 1965.⁴²⁵ 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

419. Rodgers, *supra* n. 412, at 23 (quoting 16 U.S.C. § 1536(a)(2) (1988)).

420. *Id.*

421. Richard A. Posner, *Economic Analysis of Law* (Little, Brown & Co. 1972).

422. Schwartz, *supra* n. 295, at 206. Posner’s Law and Economics approach has, nevertheless, been criticized by many. See e.g. Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, in *The New Palgrave Dictionary of Economics and the Law* 465 (Peter Newman ed., Macmillan Reference Ltd. 1998).

423. Hart & Sacks, *supra* n. 109.

424. *Id.* For an extended meditation on the importance of Professors Hart’s and Sacks’s book in the area of legislation, see Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 38 Akron L. Rev. 895 (2005).

425. Restatement (Second) of Torts § 520 (1965).

by the activity will be imposed.⁴²⁶ 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.⁴²⁷ Stacking up at #57 in our creative ranking is President Eisenhower’s stellar legislative achievement: The *Federal Aid Highway Act of 1956*.⁴²⁸ 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;⁴²⁹ it also strategically

[A]uthorized 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 of apportioning interstate funds among the states, established a Highway Trust Fund, and authorized significant appropriations for . . . primary[] and secondary roads.⁴³⁰

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, 1953.⁴³¹ His idea “was for the United States and Soviet

426. *Id.*

427. Sive, *supra* n. 390, at 17. 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.” Dan B. Dobbs, *The Law of Torts* 953 (West Group 2000).

428. Pub. L. No. 84-627, 70 Stat. 374 (1956).

429. Dwight D. Eisenhower, *Mandate for Change: The White House Years: 1953-1956* 548 (Doubleday & Co., Inc. 1963).

430. Stathis, *supra* n. 154, at 244. However, consider 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 *Envtl. Forum* 20, 21 (Nov.-Dec. 1994).

431. Morison, *supra* n. 153, at 1088.

Russia to make joint contributions from their uranium stockpiles to the United Nations.”⁴³² The details of Eisenhower’s proposal involved the administration of the Atoms for Peace program “by a UN atomic energy agency to serve the peaceful pursuits of mankind; especially to provide abundant electrical energy in the power-starved areas of the world.”⁴³³ Unfortunately, Ike’s idea was met “with surly contempt” by the Soviet government.⁴³⁴

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 effort of President Franklin D. Roosevelt, his Secretary of State Cordell Hull, Republican United States 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”;⁴³⁵ 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”⁴³⁶—President Woodrow Wilson’s creative intellectual and political efforts established the foundation for what would become the United Nations a quarter century after the United States Senate shot

432. *Id.*

433. *Id.* (internal quotation marks omitted).

434. *Id.* In contrast, consider 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* n. 429, at 21.

435. Morison, *supra* n. 153, at 1054. See Paul Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations* 25-47 (Random House 2006).

436. Morison, *supra* n. 153, at 877.

down ratification of the treaty, which would have authorized the United States to join the League of Nations.⁴³⁷

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*⁴³⁸ 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 untrammelled by [humans], where man himself is a visitor who does not remain.’ ” It had “given rise to a tenfold expansion in protected acreage” from 1964 to 1994 “and coincidentally offers the opportunity to secure advances in the protection of North American biodiversity.”⁴³⁹

Following at #62 is another ingenious legislative invention: The Delaney Amendment to the *Food, Drug, and Cosmetic Act*, section 409 of the *Food Additives Amendment of 1958*,⁴⁴⁰ “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.”⁴⁴¹ According to William Rodgers, “[t]he 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.”⁴⁴² Alas, in a legal gesture of arguable negative creativity, Congress passed the *Food Quality Protection Act of 1996*,⁴⁴³ 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.”⁴⁴⁴

437. *Id.* at 877-83; see Kennedy, *supra* n. 435, at 8-20.

438. Pub. L. No. 88-577, 78 Stat. 890 (1964).

439. Rodgers, *supra* n. 412, at 23 (quoting 16 U.S.C. § 1131(c) (1988)).

440. Pub. L. No. 85-929, 72 Stat. 1784 (1958).

441. Rodgers, *supra* n. 412, at 23 (internal quotation marks omitted).

442. *Id.*

443. Pub. L. No. 104-170, 110 Stat. 1489 (1996).

444. Stathis, *supra* n. 154, at 354.

At #63 in the ranking is a politico-legal *event*: One day—April 22, 1970—known as “Earth Day.”⁴⁴⁵ One person, Denis Hayes, “dream[ed] up Earth Day,”⁴⁴⁶ spearheading a national “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.⁴⁴⁷ 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”⁴⁴⁸—#64 on our all time creative legal moments list. Next, at #65, is a valiant, synoptic and galvanizing effort by President Eisenhower to generate—through a national commission—worthy goals for America’s future.⁴⁴⁹ Another environmental law moment—#66 on our list—is the eventual phase-out of leaded gasoline, initiated by litigation and administrative action by the EPA.⁴⁵⁰ 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 1986,⁴⁵¹ 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; businesses do not want to be singled out in newspaper headlines as one of the “dirtiest” polluters in

445. Richard N. L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy* 225 (Yale U. 1999).

446. Rodgers, *supra* n. 403, at 13 (internal quotation marks omitted).

447. See Andrews, *supra* n. 445, at 225.

448. Robert Yuhnke, *Launch of a Movement*, 11 *Envtl. Forum* 32, 34 (Jan.-Feb. 1994). Unfortunately, however,

There was no consensus . . . about the direction such a program should take, and a lot of uncertainty about whether cleaner fuels for a new engine could be supplied nationwide.

Out of frustration, a bill was first introduced into the California Senate prohibiting the sale of internal combustion engines after 1975.

Id.

449. See Gerald Gunther, *Learned Hand: The Man and the Judge* 643, 676 (Alfred A. Knopf, Inc. 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.).

450. See Robert V. Percival et al., *Environmental Regulation: Law, Science and Policy* 353-60, 497-99 (2003).

451. Pub. L. No. 99-499, § 313, 100 Stat. 1613, 1741 (1986).

the state.⁴⁵² 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*⁴⁵³ and *An Inconvenient Truth* (also a documentary movie).⁴⁵⁴

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 role of American intellectuals and diplomats in giving birth to these open trade multinational institutions.⁴⁵⁵ 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.⁴⁵⁶

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*.⁴⁵⁷ This powerful, elegant, and incisive new-fangled enactment by Congress “[e]mpowered the federal government to prosecute any corporation or person entering into contracts in restraint of interstate trade” and provided private individuals injured in their “business or property by monopolistic practices the right to sue for triple damages.”⁴⁵⁸ At #72 is Justice Robert Jackson’s concurring opinion in the steel seizure case of *Youngstown Sheet & Tube Co. v. Sawyer*.⁴⁵⁹ Jackson’s opinion “provided an important precedent for resisting . . .

452. See Robert F. Blomquist, *The Logic and Limits of Public Information Mandates Under Federal Hazardous Waste Law: A Policy Analysis*, 14 Vt. L. Rev. 559, 571-78 (1999).

453. Al Gore, *Earth in the Balance* (Houghton Mifflin 1992).

454. Al Gore, *An Inconvenient Truth* (Rodale 2006); *An Inconvenient Truth* (Paramount Classics 2006) (motion picture).

455. I.M. Destler, *American Trade Politics* 6 (Inst. for Intl. Econ. 1986); see Philippe Legrain, *Open World: The Truth about Globalization* 104-07 (Abacus 2002).

456. Destler, *supra* n. 455, at 199-206.

457. 26 Stat. 209, 209-10 (1890).

458. Stathis, *supra* n. 154, at 134 (internal quotation marks omitted).

459. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 592 (1952) (Jackson, J., concurring).

claims of presidential inherent authority in areas such as impoundment, executive privilege, electronic surveillance, and national security.” Jackson developed an innovative 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.”⁴⁶⁰ Continuing, #73 is the artful drafting and promulgation of the *Uniform Commercial Code* (UCC)—largely the product of Columbia Law School Professor Karl Llewellyn.⁴⁶¹ Next, at #74, is the creative and courageous act of constitutional faith by President Lincoln to be the first (and only) president to 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.⁴⁶² Boston lawyer, 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* article⁴⁶³ and brilliantly reinterpreted numerous English and American judicial opinions to find a residual right of privacy; the article—#75 on the list—has 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;⁴⁶⁴ #77—the opening of Litchfield Law School in 1784;⁴⁶⁵ #78—the appointment of George Wythe as America’s first full-time law professor at the College of William and Mary in 1779;⁴⁶⁶ and, #79—the publication in 1982 of the paradigm-shifting book, *The Politics of Law*,⁴⁶⁷ which crystallized Critical Legal Studies jurisprudence in America.

460. *Oxford Supreme Court Guide*, *supra* n. 162, at 345.

461. See Lawrence M. Solan, *Contract as Agreement*, 83 Notre Dame L. Rev. 353, 394 (2007) (footnote omitted); William Twining, *Karl Llewellyn and the Realist Movement* 302-40 (Willmer Bros. Ltd. 1973).

462. Morison, *supra* n. 153, at 692-95.

463. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

464. See generally Gunther, *supra* n. 449, at 410-11 (describing ALI founding).

465. Lawrence M. Friedman, *A History of American Law* 239 (Simon & Schuster 1973).

466. *Id.* at 240.

467. *The Politics of Law: A Progressive Critique* (David K. Kairys ed., Pantheon

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,"⁴⁶⁸ single-handedly used his extensive legal, political and historical knowledge to compose what is "the oldest functioning written constitution in the world."⁴⁶⁹ Among the innovative and novel provisions contained in Adams's draft of the Massachusetts Constitution were: (a) "[T]he establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected, and for life";⁴⁷⁰ (b) his "The Encouragement of Literature, Etc." section reflecting "Adams's faith in education as the bulwark of the good society";⁴⁷¹ and, (c) language outlining the "duty of government to countenance and inculcate the principles of humanity, charity, industry, frugality, honesty, sincerity—virtue, in sum."⁴⁷² 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.⁴⁷³

Bks. 1982).

468. David McCullough, *John Adams* 220 (Simon & Schuster 2001).

469. *Id.* at 225.

470. *Id.* at 222.

471. *Id.* at 222-23 (internal quotation marks omitted).

472. *Id.* at 224 (internal quotation marks omitted).

473. *Id.* at 220.

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 United States Supreme Court decisions. For this final layer of the fourth tier of the 100 most creative moments, selective facets of the decisions are identified and elaborated.

The twenty Supreme Court majority (or plurality) opinions are ranked as follows: #81, *Allegeyer v. Louisiana*;⁴⁷⁴ #82, *Miranda v. Arizona*;⁴⁷⁵ #83, *Baker v. Carr*;⁴⁷⁶ #84, *Batson v. Kentucky*;⁴⁷⁷ #85, *Missouri v. Holland*;⁴⁷⁸ #86, *Gideon v. Wainwright*;⁴⁷⁹ #87, *McCulloch v. Maryland*;⁴⁸⁰ #88, *Gibbons v. Ogden*;⁴⁸¹ #89, *Lochner v. New York*;⁴⁸² #90, *United States v. Curtiss-Wright Export Corp.*;⁴⁸³ #91, *Daubert v. Merrell Dow Pharmaceuticals Inc.*;⁴⁸⁴ #92, *Lemon v. Kurtzman*;⁴⁸⁵ #93, *Euclid v. Ambler Realty Co.*;⁴⁸⁶ #94, *Erie R.R. v. Tompkins*;⁴⁸⁷ #95, *New York Times v. Sullivan*;⁴⁸⁸ #96, *Katz v. U.S.*;⁴⁸⁹ #97, *Shelley v. Kraemer*;⁴⁹⁰ #98, *Lucas v. South Carolina Coastal Council*;⁴⁹¹ #99, *Miller v. California*;⁴⁹² and #100, *Goldberg v. Kelly*.⁴⁹³

Like peeling back the multiple layers of a large onion, what do we find in these twenty judicial opinions? First, Justice Brennan racks up

474. *Allegeyer v. La.*, 165 U.S. 578 (1897).

475. *Miranda v. Ariz.*, 384 U.S. 436 (1966).

476. *Baker v. Carr*, 369 U.S. 186 (1962).

477. *Batson v. Ky.*, 476 U.S. 79 (1986).

478. *Mo. v. Holland*, 252 U.S. 416 (1920).

479. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

480. *McCulloch v. Md.*, 17 U.S. 316 (1819).

481. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

482. *Lochner v. N.Y.*, 198 U.S. 45 (1905).

483. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

484. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

485. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

486. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

487. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

488. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

489. *Katz v. U.S.*, 389 U.S. 347 (1967).

490. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

491. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

492. *Miller v. Cal.*, 413 U.S. 15 (1973).

493. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

the top prize for the most creative opinions for the Court, with three: *Baker* (the impetus of the “apportionment revolution,”⁴⁹⁴ the reshaping of the political question doctrine⁴⁹⁵ and, according to Justice Frankfurter’s dissent, an exercise in “destructively novel judicial power”);⁴⁹⁶ *New York Times* (a decision which swept aside past Supreme Court precedents that libelous statements are unprotected by the First Amendment,⁴⁹⁷ inflated the constitutional importance of false assertions about matters of public debate,⁴⁹⁸ and confected an “actual malice” standard based on “reckless disregard” of the truth or falsity of a statement about a public official);⁴⁹⁹ and *Goldberg* (an opinion which “injected the concept of entitlement into the concept of property right protected by the Due Process Clause”⁵⁰⁰ 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”).⁵⁰¹

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 “determin[ing] the distribution of powers between the federal government and the states,”⁵⁰² 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”);⁵⁰³ and *Gibbons* (an artful decision which defined the Commerce Clause of the Constitution broadly as encompassing more than “mere exchange of goods”).⁵⁰⁴ Chief Justice Warren Burger also wrote two: *Lemon* (an attempt to syncretize what he characterized as the “cumulative criteria developed

494. *Oxford Supreme Court Guide*, *supra* n. 162, at 17.

495. *Id.* at 18-19.

496. *Id.* at 19 (internal quotation marks omitted).

497. *Id.* at 215.

498. *See id.*

499. *Id.* at 216 (internal quotation marks omitted).

500. *Id.* at 106-07.

501. *Id.* at 107.

502. *Id.* at 182.

503. *Id.* at 183.

504. *Id.* at 104.

by the Court over many years” into a three-part balancing test “to consider the constitutionality of statutes under the Establishment Clause”);⁵⁰⁵ and *Miller* (another syncretizing performance in cobbling 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 speech lacking in “serious literary, artistic, political, or scientific value”).⁵⁰⁶ Chief Justice Earl Warren authored one of the twenty opinions in this final layer of legal creativity: *Miranda*—a rejection of the prior “totality of the circumstances” test for adjudicating the voluntariness of a criminal suspect’s confession to the police;⁵⁰⁷ a novel application of the Fifth Amendment privilege beyond formal court proceedings to include “informal compulsion exerted by law enforcement officers during custodial interrogation”;⁵⁰⁸ and a famous judicially composed four-part warning that police must give before the start of in-custody questioning:

(1) [Y]ou 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.⁵⁰⁹

Chief Justice Fred M. Vinson also wrote one of these twenty Supreme Court opinions: *Shelley* (“an important [creative] event in modern constitutional history” because it “invalidat[ed] enforcement of racial covenants” and “destroyed one of the most formidable instruments yet devised to effectuate racial discrimination”;⁵¹⁰ provided a legal “impetus for further efforts in the civil rights struggle”;⁵¹¹ and represented a dramatic “raising [of] the problem of housing segregation to a constitutional level,” thereby “cloth[ing] the issues with greater seriousness and moral concern”).⁵¹²

505. *Id.* at 158-59.

506. *Id.* at 188-89 (internal quotation marks omitted).

507. *Id.* at 192.

508. *Id.* at 193 (internal quotation marks omitted).

509. *Id.* at 193-94.

510. *Id.* at 283-84.

511. *Id.* at 284.

512. *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. Peckham composed two Substantive Due Process blockbusters: *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);⁵¹³ and *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,”⁵¹⁴ —the decision was characterized by a “glaring subjectivity,” and “made the Court the overseer of all kinds of state regulatory legislation”).⁵¹⁵ Justice George Sutherland authored two important and innovative opinions for the Court: *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);⁵¹⁶ and *Curtiss-Wright* (upholding the president’s power to embargo arms shipments to South America in the 1930s, 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”).⁵¹⁷

Justice Harry Blackmun—the author of highly (negative) creative abortion opinion, *Roe v. Wade*,⁵¹⁸ also authored another problematically creative opinion for the Court: *Daubert* (holding the adoption of the *Federal Rules of Evidence* in 1975 had undone the *Frye* standard generally accepted by scientists and replaced it with a relevant and reliable standard for admitting scientific and technical proof, which

513. *Id.* at 10.

514. *Id.* at 162 (internal quotation marks omitted).

515. *Id.* at 163.

516. *Id.* at 86-87.

517. *Id.* at 69 (internal quotation marks omitted).

518. See *supra* nn. 320-28 and accompanying text.

required district court judges to exercise astute discretion in deciding what proof to admit at trial).⁵¹⁹

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).⁵²⁰ 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”).⁵²¹

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”);⁵²² *Katz* (a 1967 opinion by 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 approach);⁵²³

519. *Id.* at 72-73. See Robert F. Blomquist, *The Dangers of “General Observations” on Expert Scientific Testimony: A Comment on Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 82 Ky. L.J. 703 (1993).

520. *Id.* at 196-97 (internal quotation marks omitted).

521. *Id.* at 85-86 (internal quotation marks omitted).

522. *Id.* at 105-06 (internal quotation marks omitted).

523. *Id.* at 147-48.

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”).⁵²⁴

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”).⁵²⁵

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 canvassed.⁵²⁶ 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 moments without justification.⁵²⁷ We culminated our discussion by a tentative and bold attempt to organize and rank the top 100 creative moments in American legal history.⁵²⁸

Indeed, this entire Article has been, in a nutshell, my own creative attempt to discern and to evaluate legal creativity. American law could

524. *Id.* at 23-24.

525. Ralph A. Rossum, *Antonin Scalia’s Jurisprudence: Text and Tradition* 155 (U. Press of Kan. 2006) (endnote omitted).

526. *See supra* nn. 18-46 and accompanying text.

527. *See supra* nn. 47-131 and accompanying text.

528. *See supra* nn. 132-525 and accompanying text.

profit by a more conscious and systematic study of Law and Creativity.⁵²⁹

529. See e.g. Robert S. Summers, *Form and Function in a Legal System: A General Study* 7 (Cambridge U. Press 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.”).