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JUDGE HENRY FRIENDLY AND THE MIRROR OF CONSTITUTIONAL LAW

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Henry J. Friendly was one of the nation's preeminent appellate judges. Judge Michael Boudin, once a law clerk to Judge Friendly, describes Judge Friendly's career and judicial outlook in the New York University School of Law's annual James Madison Lecture. Drawing upon Judge Friendly's constitutional writings and decisions, the lecture touches upon Friendly's gifts of mind, energy, and writing ability, and certain of his judicial characteristics: his attitude toward precedent and other constraints, his practical judgment, his intellectual rigor, and his essential moderation.

My thanks to Dean Revesz, who heads this great law school, to Norman Dorsen—a friend for almost a half century—and to all of you for coming.

Henry Friendly served as a judge on the U.S. Court of Appeals for the Second Circuit from 1959 until his death in 1986. During that period, he wrote almost one thousand opinions,¹ several books,² thirty

* Copyright © 2007 by Michael Boudin, Chief Judge, U.S. Court of Appeals for the First Circuit. Appreciation is expressed to David Elsberg, who did preliminary research many years ago; to two sets of clerks who assisted me in different years: Felicia Ellsworth, Stephen Shackelford, Jr., and David Han, and Abby Wright, Matthew Price, and Joshua Kaul; and to two friends who read an early draft of this lecture: Judge Richard Posner and Professor Benjamin Friedman.

¹ Professor Barnett identified 813 majority opinions for the circuit court. Stephen R. Barnett, *Henry Jacob Friendly*, in *YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* (Roger K. Newman ed., forthcoming 2008). In addition to these opinions, Judge Friendly wrote majority opinions for three-judge district courts and for the railroad reorganization court whose work he described in his tribute to Judge Wisdom. Henry J. Friendly, *From a Fellow Worker on the Railroads*, 60 *TUL. L. REV.* 244, 246–54 (1985). A complete count of Friendly's opinions would also include his concurrences and dissents.

or so full-scale articles,³ and many tributes and book reviews.⁴ The power and quality of his work made him the most admired legal scholar and craftsman then sitting on the federal circuit courts, dominating his era as Learned Hand had dominated the 1930s through the 1950s.

A number of Friendly's articles and a share of his opinions concern constitutional law, broadly taken to include not just issues of "rights" but also such matters as jurisdiction, federal common law, and the state action doctrine. Yet my subject today is not legal doctrine, but rather what Friendly's articles and opinions on the subject tell us about him and about appellate judging. Friendly's work in constitutional law is a mirror in which we may hope to catch his reflection and measure his greatness.

Friendly's education and his career in practice bore directly on his judging. He was born in 1903 and grew up in Elmira, New York, then a modest-sized community.⁵ From the Elmira public schools, he entered Harvard College in 1919.⁶ There, he studied history; it was, as Paul Freund has noted, a period in which Harvard was uncommonly rich in great teachers of the subject.⁷ Charles McIlwain was of foremost importance to Friendly, whose special interest was medieval English history.⁸ Graduating summa cum laude in 1923,⁹ Friendly pondered an academic career as a historian.

Instead, Felix Frankfurter lured Friendly to law school, urging that he should try it for a year before making up his mind between law

² Friendly's books include HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); his bound Holmes Lectures at Harvard, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962) [hereinafter FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES*] and at Dartmouth, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* (1969) [hereinafter FRIENDLY, *THE DARTMOUTH COLLEGE CASE*]; and a collection of essays, articles, and lectures entitled *BENCHMARKS* (1967) [hereinafter FRIENDLY, *BENCHMARKS*].

³ See *infra* notes 24–32 and accompanying text.

⁴ See *infra* note 35 and accompanying text.

⁵ LEO GOTTLIEB, CLEARY, GOTTLIEB, STEEN & HAMILTON: *THE FIRST THIRTY YEARS* 32 (1983).

⁶ *Id.*

⁷ Professor Freund refers, as examples, to McIlwain, Merk, and Langer—he could easily have added Turner—in comparing Hand's experience as a philosophy student with James, Royce, and Santayana in Harvard's golden age of philosophy. Paul A. Freund, Remarks at the Unveiling of the Bust of Judge Henry J. Friendly 5 (Mar. 27, 1989).

⁸ Friendly described McIlwain as the one who, more than anyone else, brought F.W. Maitland and his approach to America. Henry J. Friendly, *Mr. Justice Frankfurter*, 51 VA. L. REV. 552, 552 (1965). Maitland's contributions, as a historian of the common law, are so various and remarkable as to defy brief summary. For a general appraisal of Maitland's works, see generally G.R. ELTON, F.W. MAITLAND (1985).

⁹ GOTTLIEB, *supra* note 5, at 32.

and history.¹⁰ At Harvard Law School, which he entered in 1924 after a year abroad on a traveling fellowship,¹¹ Friendly became a legend. When the class was challenged by its professor to identify the language in which the old English cases were reported, Friendly answered correctly that the language was Law French and then offered to translate the example provided to him. Friendly was president of the *Harvard Law Review* and ranked first in his class. Again, he graduated with a rare summa degree and an astonishing average of 86¹²—approximately an A double plus.

Among his teachers at the Law School was Thomas Reed Powell, an early but subtle exponent of realism in constitutional law.¹³ It was Powell who wrote that although law is to some extent “judicial whim or fiat[.] . . . [t]hose who see law as *only* this or *only* that see but narrowly.”¹⁴ And the spirit of James Bradley Thayer still hovered over the school with its message of judicial self-restraint in constitutional interpretation.¹⁵ Thayer’s view was one that Holmes and Hand championed on the bench. Yet the breadth of views within the faculty was remarkable, as able formalists like Samuel Williston and Joseph Beale contended with new tendencies of thought represented by professors such as Roscoe Pound, Felix Frankfurter, and Zechariah Chafee.

From Harvard Law School, Friendly went on to a clerkship with Justice Brandeis, surely at Frankfurter’s recommendation.¹⁶ Brandeis was himself a brilliant outsider who succeeded, as Friendly did thereafter, first at Harvard Law School, then in his law practice, and finally as a great judge. But Friendly, while mildly reformist in politics, had far less of a policy agenda than did Brandeis, whose law practice had

¹⁰ Friendly, *supra* note 8, at 552.

¹¹ GOTTLIEB, *supra* note 5, at 32.

¹² *Id.*

¹³ For four descriptive tributes to Powell, see generally Felix Frankfurter, *Thomas Reed Powell*, 69 HARV. L. REV. 797 (1956); Paul A. Freund, *Thomas Reed Powell*, 69 HARV. L. REV. 800 (1956); Erwin N. Griswold, *Thomas Reed Powell*, 69 HARV. L. REV. 793 (1956); Henry M. Hart, Jr., *Thomas Reed Powell*, 69 HARV. L. REV. 804 (1956).

¹⁴ Thomas Reed Powell, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 269, 280 (Julius Rosenthal Found. ed., 1941); see also Freund, *supra* note 7.

¹⁵ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136–38, 150–52 (1893). See generally Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1 (1993). For a broader picture of Thayer’s work and influence, see generally *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

¹⁶ See Henry J. Friendly, *Mr. Justice Brandeis: The Quest for Reason*, 108 U. PA. L. REV. 985, 992 (1960).

mixed business representation with legal good works.¹⁷ Nor did Friendly share Brandeis's crusading zeal.

At the end of the clerkship, Friendly faced a fork in the road: to teach law at Harvard or to enter law practice. Although Frankfurter urged him to return to Cambridge,¹⁸ Friendly chose to practice in New York with Root, Clark, Buckner & Ballantine. Thirty years later, Friendly chided one of his own law clerks for making the same choice. To the clerk's obvious response that Friendly was the natural scholar, Friendly replied that law teaching was a lot less interesting in the 1920s: The common law subjects, he said, had been worked through, and the explosion of New Deal legislation, the rise of the agencies, and much else was hidden around the corner.

The presiding litigator at Root Clark in 1928 was Emory Buckner, who recruited his young lawyers not just from the regular cadre of conventional Ivy Leaguers but also from among Jewish students, like Friendly, and those whose law training had been obtained in England, like Hugh Cox and John Harlan.¹⁹ Friendly's law practice came to combine administrative law, common-carrier regulation, and appellate practice. In 1946, he and others broke away from Root Clark and, with Hugh Cox returning to private practice after his work for the government, formed the Cleary Gottlieb firm—initially Cleary, Gottlieb, Friendly & Cox. In the same year, Friendly became the general counsel of his longtime client, Pan American World Airways, and thereafter held two full-time jobs.²⁰

When Henry Friendly came to the bench in 1959, it was a “merit” selection. Hand had written a letter to President Eisenhower—a rare intervention for Hand—urging Friendly's appointment.²¹ Friendly himself told a law clerk that the Republican politician who gave Friendly final clearance had said with dismay that he was tired of being sent candidates like Friendly who had done nothing for the party. A *New York Times* editorial referred glowingly to Friendly's “outstanding qualifications.”²²

¹⁷ See generally ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 4 (1946).

¹⁸ Professor Freund quotes Frankfurter's letter to Friendly: “Your fullest fruition would be not at the bar but in this school Such powers as you have call for their fulfillment as much as Kreisler's gifts call for playing the violin.” Freund, *supra* note 7.

¹⁹ MARTIN MAYER, *EMORY BUCKNER* 141–44 (1968).

²⁰ Leo Gottlieb, *Honorable Henry J. Friendly (1903–1986)*, 28 *CLEARGOLAW NEWS* 155, 158 (1986).

²¹ GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 650 (1994). Hand's letter spoke of Friendly's “unblemished reputation,” “high scholarship,” “balanced wisdom,” and “wide outlook.” *Id.* Later, Hand wrote that “Friendly is realizing all our hopes.” *Id.* at 652.

²² Editorial, *Mr. Friendly for the Bench*, *N.Y. TIMES*, Mar. 11, 1959, at 34.

The appointment was a salvation for a man who (as he later confided to a law clerk) had been rapidly tiring of large law firm practice. The judgeship opened not only a new perspective on law, which Friendly described in an early essay,²³ but also other opportunities. He joined the Council of the American Law Institute in 1961 and became active in its work; he was already a member of the Council on Foreign Relations and often attended its meetings. In addition, he began the career of extracurricular legal scholarship that dovetailed with his judicial work and much magnified his influence as a judge.

From 1959 onward, Friendly produced a set of major articles of extraordinary quality, as well as books, shorter articles, book reviews, and tributes.²⁴ Among the articles—to mention only constitutional subjects—are his Cardozo Lecture on *Erie v. Tompkins*²⁵ at the New York City Bar Association,²⁶ his Holmes Lectures at Harvard on administrative law,²⁷ another Holmes Lecture at Dartmouth on the public-private distinction in constitutional law,²⁸ and important articles on the Fifth Amendment,²⁹ the right to hearings,³⁰ criminal procedure,³¹ and habeas corpus.³²

Friendly's natural gifts—the mainspring of his achievements—began with the raw power of his mind. In the summer of 1959, while awaiting his Senate confirmation hearing, Friendly absorbed for the first time Hart and Wechsler's famous (and famously intricate) casebook, *The Federal Courts and the Federal System*,³³ saying afterwards: "The book, while not exactly summer reading, proved to be the most stimulating and exciting law book I had encountered since Wigmore's *Evidence*."³⁴ The invited mental picture of the young law

²³ Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 219–22 (1961).

²⁴ FRIENDLY, BENCHMARKS, *supra* note 2, contains many but by no means all of the lectures, articles, and tributes.

²⁵ 304 U.S. 64 (1938).

²⁶ Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

²⁷ FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES, *supra* note 2.

²⁸ FRIENDLY, THE DARTMOUTH COLLEGE CASE, *supra* note 2.

²⁹ Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

³⁰ Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

³¹ Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

³² Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

³³ HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

³⁴ Henry J. Friendly, *In Praise of Herbert Wechsler*, 78 COLUM. L. REV. 974, 974 (1978).

student plowing steadily through the five volumes of Wigmore's 1923 edition may not be wholly imaginary.

Nor did Friendly forget very much of what he read. He could say to a clerk, "I think the passage to support this proposition is in such and such decision, in volume 274 U.S., somewhere near the end of the opinion." His essays, even his book reviews, glimmer with aphorisms and quotations, especially to works of legal history and philosophy, that were stored in his head. An early book review of Mark de Wolfe Howe's biography of Justice Holmes shows Friendly's intimidating command of legal history and jurisprudence.³⁵

Writing ability was another gift: The connection between quality of writing and influence as an appellate judge cannot be overstated. Friendly wrote his own opinions from scratch and so maintained a distinctive voice. Although without the poetic magic of Holmes or the King James resonances of Hand or Jackson, Friendly had a command of metaphor, a stock of literary and operatic references, a deft use of sarcasm, and a crisp way of summing up a matter. Consider this classic first line in an opinion: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."³⁶

To watch Friendly crafting an opinion was to feel sorry for the Learned Hand depicted in Gerald Gunther's magnificent biography.³⁷ Hand prepared meticulously even to the point of modeling or diagramming ship collisions on his desk, often wrote draft after draft, and visibly agonized in hard cases.³⁸ Friendly, writing on a pad with briefs and law books stacked around him, normally produced a single draft—often over a period no longer than a weekend. It was then typed, edited by the judge in a single session with a law clerk who had

³⁵ Henry J. Friendly, *A Shattering Book from Beacon Hill*, N.Y. TIMES, Aug. 11, 1963, § 7 (Book Review), at 6 (reviewing MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES, VOL. II: THE PROVING YEARS, 1870–1882 (1963) and OLIVER WENDELL HOLMES, THE COMMON LAW (Mark DeWolfe Howe ed., 1963)). In the course of this review, Friendly referred to, among others, Immanuel Kant, J.G. Heineccius, Sir Frederick Pollock, Justice Cardozo, Justice Stone, John Austin, James Bradley Thayer, John Chipman Gray, William James, Charles Darwin, Sir Henry Maine, Friedrich Carl von Savigny, and F.W. Maitland.

³⁶ *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960). Or consider another Friendly classic: "We cannot subscribe to plaintiffs' view that the Eighth Commandment 'Thou shalt not steal' is part of the law of nations." *IIT v. Vencap Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). In *IIT*, Friendly also described the Alien Tort Claims Act, 28 U.S.C. § 1350 (1970), as "a kind of legal Lohengrin." 519 F.2d at 1015.

³⁷ GUNTHER, *supra* note 21.

³⁸ *See id.* at 306–10.

read the cases cited in the opinion, and dispatched for a final retyping and circulation to his colleagues.

This disciplined energy probably owed something to the demands of law practice and, without it, Friendly could not have led the double life of a judge and a scholar. If nothing else, a successful lawyer is an overworked and therefore usually efficient lawyer. The reflective tone of Hand's opinions, such as his brilliant soliloquy on the Sherman Act,³⁹ is less common with Friendly; Friendly's thinking was deep but swift, and his sometimes cryptic sentences mirror the train of his actual thinking as words flowed from his mind through his pen. Consider this dense gem from an opinion discussing a hearsay exception:

True, inclusion of a past event motivating the plan adds the hazards of defective perception and memory to that of prevarication; but this does not demand exclusion or even excision, at least when, as here, the event is recent, is within the personal knowledge of the declarant and is so integrally included in the declaration of design as to make it unlikely in the last degree that the latter would be true and the former false.⁴⁰

These gifts were merely the ingredients. What mattered most about Friendly as a judge was the pattern of thinking that his opinions and other writing revealed. Out of a number of Friendly's characteristics, let us dwell briefly on four: his intense respect for precedent and the other constraints of the craft; his immense practicality; his intellectual seriousness and integrity; and his essential moderation.

In the common law tradition, judges—especially appellate judges—occupy a curious position. In the course of deciding cases, often the judge is not just applying law but making law in miniature. Yet, in principle, such lawmaking is not free-form legislative action: It is constrained lawmaking. There is room to create and alter, but it is limited room. As Willard Hurst once wrote: “[T]he wisdom of the great judge consists in a grasp both of the potentialities and the limitations of the kind of power that he wields.”⁴¹ And the integrity of the process—indeed, the legitimacy of the judge's action—depends upon respecting the constraints and acting within the boundaries they set.

The constraints are the familiar stuff of first-year law school: the language of statutes and constitutions, history and precedent, public and legislative policy, *stare decisis*, canons of construction and legal maxims, neutral principles, and all the rest. Still, these are elastic constraints whose force varies from one case to another. Nor is it easy to weigh one hard-to-measure variable against another of a different

³⁹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427–30 (2d Cir. 1945).

⁴⁰ *United States v. Annunziato*, 293 F.2d 373, 378 (2d Cir. 1961).

⁴¹ Willard Hurst, *Who Is the "Great" Appellate Judge?*, 24 *IND. L.J.* 394, 399 (1949).

kind. And the formal constraints may vie with practical considerations.

Friendly was a master of the formal constraints and, what is more important, he took them very seriously, perhaps more seriously than our own jaded age allows. True, the ability to operate inventively within the constraints is one of the marks of great and creative judges. To take this as saying that clever judges can get around the rules is a mistranslation. Rather, a judge like Friendly can justify an improving change while at the same time shaping and limiting the change to maintain continuity, to minimize disruption, and to mark its limits in the interest of a new stability.

To Friendly, precedent was a constraint as central as any. Recall that Friendly was trained at Harvard College as a historian. Decided cases are themselves history comprised of the real-world events, the litigation, and the rules thus generated. Precedents, and the wisdom encoded in them, are one of the central motivating forces of the common law but also one of the great constraints. Law, said Hand, “is the precipitate of a long past of active controversy.”⁴²

Friendly’s most dramatic excursion into precedent and large-scale history is his tour de force Cardozo Lecture at the New York City Bar Association, titled *In Praise of Erie—and of the New Federal Common Law*.⁴³ The lessons of this lecture were that *Erie*⁴⁴ had been correctly decided, that Brandeis had been correct to declare *Swift v. Tyson*⁴⁵ at odds with the Constitution, and that by obliterating *Swift*’s “spurious uniformity” the decision opened the way “for the truly uniform federal common law on issues of national concern.”⁴⁶ What was extraordinary about the lecture was the conceptual basis of this assessment, which displays (among other virtues) Friendly’s use of history at every level.

He begins with a terse recounting of the scholarly backlash against the reasoning of the *Erie* decision. Then, with a study of precedent and constitutional history, he demolishes two of the less ambitious lines of reasoning that *Erie*’s critics proposed to substitute for that of Brandeis: namely, a withering-away approach to *Swift*⁴⁷ and a

⁴² Learned Hand, *Mr. Justice Holmes at Eighty-five*, in *THE SPIRIT OF LIBERTY* 24, 24 (Irving Dilliard ed., 1952).

⁴³ Friendly, *supra* note 26.

⁴⁴ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁴⁵ 41 U.S. 1 (1842).

⁴⁶ Friendly, *supra* note 26, at 384.

⁴⁷ Judge Clark had criticized Brandeis’s supposed failure to realize that *Swift*’s doctrine, “already tending toward decay and death, did not need the sledge-hammer blows” of *Erie*. Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 *YALE L.J.* 267, 295 (1946).

broad construction of section 34 of the Judiciary Act of 1789.⁴⁸ The withering-away approach Friendly shows to be medicine worse than the disease;⁴⁹ the expansion of section 34, Friendly refutes—in a neat move of confession and avoidance—by assuming the accuracy of Charles Warren’s account of the statute’s original intent but showing that Story’s reading of the statute was too settled to disturb.⁵⁰

This leads him to consider the constitutional rightness of *Swift v. Tyson*, constitutional errors being more open to correction by the Court despite their age than statutes, where errors of interpretation can always be repaired by Congress. Friendly embarks on a demonstration of the soundness of *Erie* as constitutional law, grappling with section 34, pertinent case law, and the implications of the “necessary and proper” clause.⁵¹ The conclusion, temperate but forceful, is vintage Friendly and gives one some sense of the powerful generalizations to which his elegant and detailed analysis led him:

A great constitutional decision is not often compelled in the sense that a contrary one would lie beyond the area of rationality. I shall not insist that *Erie* was the rare exception. But it provided a far better fit with the scheme of the Constitution as that had developed over the years than do the assertions that the “necessary and proper” clause empowers Congress to establish substantive law for the federal courts in fields otherwise reserved to the states, or that federal courts themselves may do so—thereby not merely permitting but insuring unequal justice under law.⁵²

This lecture was on a grand scale; but many of Friendly’s opinions, constitutional and otherwise, contain remarkable essays that trace, summarize, and explain the evolution of precedent on the subject in question. A memorable example is his treatment of the “arising under” test for federal jurisdiction in *T.B. Harms Co. v. Eliscu*,⁵³ neatly distinguishing between the phrase’s use in the Constitution and the narrower reading given to the same phrase in the statute and offering this gracious gloss on Holmes’s own incomplete “cause of action” test: “It has come to be realized that Mr. Justice

⁴⁸ Ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2000)). This view, reading the Judiciary Act to bind federal courts to respect state common law as well as statutory law, had been endorsed by Justice Reed in his *Erie* concurrence. 304 U.S. at 91 (Reed, J., concurring).

⁴⁹ Friendly, *supra* note 26, at 386–88.

⁵⁰ *Id.* at 388–91.

⁵¹ *Id.* at 392–98.

⁵² *Id.* at 398.

⁵³ 339 F.2d 823 (2d Cir. 1964).

Holmes' formula is more useful for inclusion than for the exclusion for which it was intended."⁵⁴

Precedent is only one of the constraints with which Friendly dealt masterfully. Others of particular importance to him were statutory language and institutional competence, and on both subjects he wrote thoughtful articles.⁵⁵ Needless to say, Friendly learned much else from his training as a historian, including a commitment to factual accuracy and the need to underpin generalizations, surely reinforced by his work with Brandeis. But we must pass on to another subject: practical judgment.

Ordinarily, a judge faced with a legal problem starts with the directions or clues provided by language, historical context, precedent, and the underlying policies imputed to the constitutional provision or statute involved or derived from prior common law decisions. If these were enough, judging would be a self-contained, if still demanding, discipline. In truth, more worldly considerations bear upon decision: They range from broad-canvas judgments of social problems, institutions, and tolerable rates of change, to more specific mental pictures as to what goes on in police stations, union meetings, or households, and as to what remedies will fix an existing problem.

Friendly brought to his task something more than the ordinary, though invaluable, experience of a practicing lawyer who had spent three decades addressing real-world problems. His work for Pan American had exposed him not only to federal regulation and administrative practice but also to international issues and war-related matters and a certain amount of work with Congress and state legislatures. He once remarked to a law clerk that Justice Brandeis, always enthusiastic about local governance, might have been shocked by some of what Friendly had encountered in state legislatures.

Whatever the sources of his insights, Friendly rivaled Justice Jackson in giving readers the sense that his decisions were grounded in reality. An illustration is provided by a pair of Friendly's articles. The first is *The Bill of Rights as a Code of Criminal Procedure*,⁵⁶ which challenged (among much else) the Warren Court's selective incorporation doctrine, the mechanical application of provisions of the first

⁵⁴ *Id.* at 825.

⁵⁵ On competence, see Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963) [hereinafter Friendly, *The Gap in Lawmaking*], and Friendly's Harvard Holmes Lectures, FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES*, *supra* note 2. On statutory language, see Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: *THE JUDGE* 30 (Wallace Mendelson ed., 1964).

⁵⁶ Friendly, *supra* note 31.

eight amendments—by their terms applicable only to the federal government—to the states as well.⁵⁷ Friendly's concern was in part the inflexibility of the federal regime thereby imposed on the states and in part the questionable basis and reach of a number of the Warren Court's decisions interpreting specific Bill of Rights provisions.⁵⁸

But what animates the article is Friendly's larger concern with the Supreme Court's seeming indifference to any countervailing interests and its unwillingness to place any limits on its newly expanded rights and remedies. As Friendly observed, "Maximizing protection to persons suspected of crime was hardly [the Framers'] sole objective; the famous words of the Preamble speak of establishing justice, insuring domestic tranquillity, and promoting the general welfare."⁵⁹ He continued in even more practical terms, speaking of the line of precedent that would culminate in the *Miranda*⁶⁰ decision:

Kidnapping raises the issue still more poignantly. If such a tragedy were to strike at the family of a writer who is enthused about extending the assistance of counsel clause to the station house, would he really believe the fundamental liberties of the suspect demanded the summoning of a lawyer, or at least a clear warning as to the right immediately to consult one, before the police began questioning in an effort to retrieve his child?⁶¹

The companion piece, *Is Innocence Irrelevant?*,⁶² had a different target. The Warren Court was in the midst of a campaign to expand habeas corpus for state prisoners.⁶³ This took the form of extending the writ from its historic function of testing the authority of a jailer into a device for de novo review by lower federal courts of anything in

⁵⁷ *Id.* at 933–38 ("Whatever one's views about the historical support for Mr. Justice Black's wholesale incorporation theory, it appears undisputed that the selective incorporation theory has none.").

⁵⁸ See, e.g., *Griffin v. California*, 380 U.S. 609 (1965) (incorporating Fifth Amendment protection against commentary by prosecutor on silence of accused); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (incorporating qualified Sixth Amendment guarantee of consultation with counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating exclusionary rule for Fourth Amendment violations). Friendly discusses these opinions in Friendly, *supra* note 31, at 940–43, 951–53.

⁵⁹ Friendly, *supra* note 31, at 948.

⁶⁰ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that evidence obtained as a result of interrogation is inadmissible unless prosecution demonstrates that prescribed warnings were given).

⁶¹ Friendly, *supra* note 31, at 949.

⁶² Friendly, *supra* note 32.

⁶³ See, e.g., *Fay v. Noia*, 372 U.S. 391, 426–27, 435 (1963) (limiting federal habeas statute's exhaustion requirement to "state remedies still open to the habeas applicant at the time he files his application in federal court"); *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963) ("Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court . . .").

a state court criminal case to which the label of constitutional error could be attached. And, as the Supreme Court was rapidly cultivating the garden of new rights so labeled, the effect was a revolution, only partly completed at the time that Friendly wrote.

The title of Friendly's habeas lecture raised the question whether the Warren Court had lost sight of the central objectives of criminal law: to convict the guilty so as to deter crime and to protect the public while taking all reasonable precautions to avoid conviction of innocent defendants. Many of the Warren Court's substantive rulings were concerned with neither of these goals but with other objectives: for example, with excluding illegally seized but often reliable evidence,⁶⁴ and with giving the poor the same opportunities to thwart police interrogation as were enjoyed by the rich.⁶⁵

Friendly thought it unsound that federal courts should spend their time undoing state court convictions of defendants whose trials had provided them with basic fairness and who made not the slightest pretense of actual innocence. Friendly's own remedy was that habeas should be restricted to cases of fundamental unfairness or, absent that, error coupled with some showing of potential innocence.⁶⁶ In time, the pendulum did swing back, although along a somewhat different axis.⁶⁷

Friendly's concern with the real world was not limited to such large issues. Many of his decisions remind one of Jackson's arresting injections of common sense into his opinions.⁶⁸ For example, in explaining the rule allowing inconsistent jury verdicts in criminal cases, Friendly added that "[t]he vogue for repetitious multiple count indictments may well produce an increase in seemingly inconsistent

⁶⁴ *Mapp v. Ohio*, 367 U.S. 643, 648–49 (1961).

⁶⁵ *Miranda*, 384 U.S. at 472–73.

⁶⁶ Friendly, *supra* note 32, at 160.

⁶⁷ See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–107, 110 Stat. 1214, 1217–26 (codified at 28 U.S.C. §§ 2244, 2253–55, 2261–66 (2000)) (establishing limits to habeas review); *Teague v. Lane*, 489 U.S. 288, 310 (1989) (generally denying application of new constitutional rulings to cases on habeas review); *Wainwright v. Sykes*, 433 U.S. 72, 90–91 (1977) (adopting cause-and-prejudice test for unpreserved claims of unconstitutional admissions of evidence); *Stone v. Powell*, 428 U.S. 465, 494–96 (1976) (holding that where state has provided full and fair opportunity to present Fourth Amendment claim, state prisoner cannot obtain habeas relief for admission of evidence obtained by unconstitutional search or seizure).

⁶⁸ Especially memorable is Jackson's summing up of certain rules governing impeachment as "archaic, paradoxical and full of compromises and compensations," but then concluding, "[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice." *Michelson v. United States*, 335 U.S. 469, 486 (1948).

jury verdicts, where in fact the jury is using its power to prevent the punishment from getting too far out of line with the crime.”⁶⁹

Similarly, in Friendly’s article “*Some Kind of Hearing*,”⁷⁰ there is a passage in which he suggests differentiating between license denial and license revocation, adding that even the Magna Carta drew the distinction;⁷¹ and, more broadly, he urges that some consequences in some contexts do not justify the cost of hearings and that the extent of a hearing should vary with need and cost.⁷² He put these recipes into effect in his own management as chief judge of the special railroad court, whose achievements included assigning (within a relatively brief period) a dollar value to the entire northeastern railroad system, which was being taken over by the government.⁷³

A story exists that the prospect of a district court judgeship had once been presented to Friendly and that, to inform himself, he spent some hours watching proceedings in the federal district court in Manhattan, concluding that the job was not for him. Yet when he took over the railroad court, he and his two colleagues managed the litigation, narrowing the legal issues in a series of opinions; and, without the use of special masters, they superintended the mammoth discovery of facts pertinent to the valuation puzzle. After four years of discovery, in a matter that could have lasted decades, a set of opinions on major issues precipitated settlements for all of the railroads but one (whose claim was then swiftly resolved on the merits).⁷⁴

This brings us to a third element in Friendly’s work: a combination of rigor, candor, and depth. Even the many admirers of the Warren Court must admit that its decisions in the 1960s and 1970s are not always models of serious reflection. Fiercer critics have pointed to doubtful assumptions of fact, rhetorical overstatement, law-office history, a wrenching of constitutional phrases from historical context, and an unwillingness to address contrary arguments or to acknowledge limits on the generalizations abundantly produced.⁷⁵

⁶⁹ *United States v. Maybury*, 274 F.2d 899, 902 (2d Cir. 1960). For another example of Friendly’s practicality, see his treatment of interlocutory appeals in *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 659–60 (2d Cir. 1975) (Friendly, J., concurring).

⁷⁰ Friendly, *supra* note 30.

⁷¹ *Id.* at 1295–96.

⁷² *Id.* at 1275–76.

⁷³ See Friendly, *supra* note 1, at 244, 247, 253–54 (discussing work of special railroad court).

⁷⁴ *Id.* at 253–54.

⁷⁵ See, e.g., ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 45–101 (1978); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 101–06 (1970); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 135–42.

“Conventional notions of finality of litigation,” said Justice Brennan in a habeas case, “have no place where life or liberty is at stake and infringement of constitutional rights is alleged.”⁷⁶ “Why do they have *no* place?” asked Friendly in his article on habeas, going on to point out the implications and weaknesses of Brennan’s rhetoric.⁷⁷ In his *Bill of Rights* lecture, Friendly compared a sonorous pronouncement of Chief Justice Taft in defense of property rights with an almost identically phrased one by Justice Goldberg in a civil liberties case.⁷⁸

By contrast, Friendly’s own opinions sought to grapple with the underlying dilemmas in cases: to reveal the tensions between policies and the confusions in the precedents and to acknowledge that one goal often comes at the price of another. None of this made him doubt the capacity of reason to resolve an issue—he almost never showed Hand’s unease⁷⁹—nor was Friendly hesitant about coming to conclusions and laying down rules. After all, for decades as a lawyer he had made decisions or given advice on which others would act. And he had the skilled craftsman’s confidence that the process of legal thinking would lead him in the right direction.

In this belief, Friendly in part reflected the outlook of the legal process movement that came to dominate Harvard Law School from World War II through the mid-1960s. Once again, the protean Thomas Reed Powell was a forerunner. Powell, who knew and admired John Dewey, had leanings both toward pragmatism and toward the weight that Thayer placed on self-restraint and *stare decisis*. But Powell, perhaps above all else, was concerned with the integrity of the process of judging. The minimum, Powell thought, was (in the words of a scholar):

internal coherence, consistency with professed criteria, and fair treatment of the existing precedents, whether favorable or not. The most vital ingredient, however, was “intellectual rectitude”; judges must “support their judgments with that degree of candor” that will provide “adequate disclosure of the real steps by which they have reached where they are.”⁸⁰

⁷⁶ *Sanders v. United States*, 373 U.S. 1, 8 (1963).

⁷⁷ Friendly, *supra* note 32, at 149.

⁷⁸ See Friendly, *supra* note 31, at 955 & n.141 (noting similarity of language used in *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring), and *Truax v. Corrigan*, 257 U.S. 312, 338 (1921) (Taft, C.J.)).

⁷⁹ See *supra* note 38 and accompanying text (comparing writing styles of Friendly and Hand).

⁸⁰ John Braeman, *Thomas Reed Powell on the Roosevelt Court*, 5 CONST. COMMENT. 143, 150 (1988) (quoting Thomas Reed Powell, *Some Aspects of American Constitutional Law*, 53 HARV. L. REV. 529, 549–50, 552 (1940)).

The emphasis on these values came to represent a school of legal thought to which many figures contributed. The canonical text is Hart and Sacks's *The Legal Process*, and the hallmark phrase is "reasoned elaboration."⁸¹ Of this technique Friendly was a master, and he was greatly admired by the Harvard Law School faculty of the 1960s. But Friendly was an exemplar and not a product of such thinking; as already noted, his own legal education had covered a period of greater ferment,⁸² and it was probably the richer for it.

But why should rigor in reasoning and candor in expression matter in judicial opinions? Especially in constitutional law, as it has developed in this country, analysis can take one only so far—for example, in resolving matters for which the framers used general language but (so far as we can tell) gave no precise thought. In such instances an instinct for judicial statesmanship matters more than technical excellence. Even candor perhaps can occasionally be unwise: Would it have been better in *Brown v. Board of Education*⁸³ for the Court to have dwelled on the weight of precedent, or might this have been the wrong occasion to sound an uncertain trumpet?

Yet a sound decision, even if its origins lie (as they often do) in the instinct of the experienced judge, is usually confirmed and fine-tuned by good reasoning. Hand, it appears, sometimes wrote a decision both ways to see which one worked best. So, too, good reasoning tends to check bad results, overexpansive holdings, or unnecessary dicta. Thus, a judge may report back to colleagues that the tentative conclusion reached at *semble* after the oral argument "just would not write." To rest on rhetoric instead of analysis leads not merely to poor thinking but also to results that are poorer than they need be.

For example, if the exclusionary rule for illegally seized evidence in state courts had been developed thoughtfully, *Mapp v. Ohio*⁸⁴ would have been a better opinion and more widely accepted. As Friendly suggested,⁸⁵ the rule might well have directed the exclusion of evidence where it was seized in patent violation of the Fourth Amendment but not (in Cardozo's phrase) where the constable had

⁸¹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958) was finally published in 1994 in an edition edited by William Eskridge and Philip Frickey whose introductory essay recounts the history of the movement. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra*, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also Braeman, *supra* note 80, at 150 (describing Powell as intellectual father of "reasoned elaboration" school).

⁸² See *supra* text accompanying notes 13–15.

⁸³ 347 U.S. 483 (1954).

⁸⁴ 367 U.S. 643 (1961).

⁸⁵ See *supra* notes 66–67 and accompanying text.

merely blundered.⁸⁶ The deterrent value of exclusion is minimal for inadvertent fumbles, and the evidence remains reliable albeit wrongly seized. The Supreme Court has been inching in this direction.⁸⁷ How much better to have struck the balance at the outset.

Nowhere is the rigor of Friendly's thinking more in evidence than in his Dartmouth Holmes Lecture devoted to the so-called state action doctrine.⁸⁸ This is the label for a set of Supreme Court decisions determining when action is so governmental as to bring into play constitutional constraints that apply only to official (as opposed to private) conduct. Lowering the threshold could bring vast areas of previously private conduct within the Constitution and so within the reach of the federal courts.

At the time Friendly spoke, it was unclear whether the balance was going to tip in the direction of a major enlargement of this sphere, for example, by treating at least some corporations as state actors, so as to expand the kinds of activities treated as inherently governmental, or by extending the state action label to the state toleration of private discrimination. His lecture treats with exquisite subtlety the case law, the possibilities for line drawing, and the dangers of a promiscuous enlargement of the state action category.

Friendly saw that his own vision was more likely to prevail if the Supreme Court did not attempt to lay down the abstract doctrines that it had so favored in the criminal area but rather confined itself to results:

Today's activist Court has thus far been treading rather cautiously in the area we have been discussing. . . . The lack of satisfactory theoretical explication may have been an advantage rather than the ground for criticism it seemed at first to be; on the whole it may be better that the Court should plot a few reference points, even on what may be largely an intuitive basis, which can be erased if they prove unwise, before it attempts to project a curve to which all future determinations must conform.⁸⁹

There may be some irony in having Friendly, himself a master of synthesis and the projection of doctrine, recommend that the Supreme Court concentrate on results rather than reasoning. But he was nothing if not practical and, as with criminal law, he trusted the Court's intuitive judgment more than its explanations. He had one

⁸⁶ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

⁸⁷ See *United States v. Leon*, 468 U.S. 897, 926 (1984) (holding that exclusionary rule does not apply when officers rely in good faith on invalid warrant); *Stone v. Powell*, 428 U.S. 465, 482 (1976) (denying federal habeas relief for introduction of unconstitutional evidence at trial).

⁸⁸ FRIENDLY, *THE DARTMOUTH COLLEGE CASE*, *supra* note 2.

⁸⁹ *Id.* at 31 (citations omitted).

more practical lesson in mind, warning that legislative action to resolve unrighted wrongs was the key: “[W]e can learn a lesson from the consequences of the long legislative default in the reform of criminal procedure if we only will.”⁹⁰

This Dartmouth Holmes Lecture, like much of his academic writings, showed a continuing interplay between Friendly’s scholarship and his judicial writing.⁹¹ An issue addressed in an opinion might spark further reflections in a talk or book review; a synthesis developed in a lecture could provide context for an opinion. With ease, Friendly bridged the gap, which has sadly grown wider since his time, between the twin worlds of legal scholarship and the law in action.

The same lecture, along with much else that he wrote, illustrates the final facet of Friendly’s approach to constitutional issues on which we have time to dwell: temperance. Most of Friendly’s writings on constitutional law aim at intermediate solutions: *Swift* was wrong but federal common law—a much narrower and better-justified variation on *Swift*—is right; the exclusionary rule is justifiable (perhaps) but not for reasonable violations of officers committed in good faith; habeas should go beyond jurisdictional error but with marked qualifications such as a threshold showing of potential innocence; the state action label should be applied beyond the classic case of the purely government actor but with great discretion.

This is what Paul Freund, speaking of Lewis Powell, called “the gift of moderation”⁹² and, quoting Thomas Fuller, the “silken string running through the pearl-chain of all virtues.”⁹³ So, too, the *Book of Common Prayer*, in a passage that might have been written for judges, lauds “the happy mean between too much stiffness in refusing, and too much easiness in admitting variations in things once advisedly established.”⁹⁴ As Friendly himself said in the Dartmouth Holmes Lecture—the phrase was addressed to a particular issue but could

⁹⁰ *Id.*

⁹¹ For example, Friendly also addressed state action issues in cases. See *Jackson v. Statler Found.*, 496 F.2d 623, 636–41 (2d Cir. 1974) (Friendly, J., dissenting from denial of reconsideration en banc) (“A holding that an otherwise private institution has become an arm of the state . . . can have far more serious consequences than a determination that the state has impermissibly fostered private discrimination.”); *Powe v. Miles*, 407 F.2d 73, 82 (2d Cir. 1968) (Friendly, J.) (holding that limits on protests by administrators of state college qualify as state action).

⁹² Paul A. Freund, *Justice Powell—the Meaning of Moderation*, 68 VA. L. REV. 169, 169 (1982).

⁹³ *Id.* at 170 (quoting 2 THOMAS FULLER, *THE HOLY STATE AND THE PROFANE STATE* 205 (Maximilian Graff Walten ed., AMS Press, Inc. 1966) (1642)).

⁹⁴ *Preface to THE BOOK OF COMMON PRAYER*, at v, v (1928) (1789).

have been a motto—"I prefer the midway course, with all its difficulties."⁹⁵

The argument for temperance in making new constitutional law is familiar. A statutory interpretation, a reading of an agency rule, and a new direction in common law: all these can be overturned by legislation. A constitutional ruling, with limited exceptions,⁹⁶ tends to be final—regardless of what Congress or anyone else thinks about it—unless or until the Court changes its mind. It is therefore easy to argue for a presumption against interference. Hand said that a law that gets enacted is likely to be "not wholly unreasonable";⁹⁷ for federal enactments, it is probably constitutional as well.

Yet little in Friendly's writings or decisions shows a mechanical hostility to judicial intervention. Friendly knew that much of constitutional law was open ended and that choices were available to judges. And unlike Holmes, he was not a skeptic about betterment. On the contrary, his pragmatic impulse was strong. Speaking in praise of Frankfurter, he said: "[T]o [Frankfurter], as to Brandeis, law was pre-eminently an aspect of public affairs, an instrument for maximizing the goodness of life for all."⁹⁸ These were two of the men that Friendly most admired. Consider, as well, the following passage from the introduction to Friendly's *Bill of Rights* lecture:

[T]here are few brighter pages in the history of the Supreme Court than its efforts over the past forty years to improve the administration of criminal justice. How can any lawyer not be proud of the decisions condemning convictions obtained by mob rule, testimony known to the prosecutor to be perjured, coerced confessions, or trial by newspaper? . . . [Or] insistence that persons charged with serious crime shall receive the assistance of counsel at their pleas and trials[?] . . . [T]he fingers of one hand would outnumber the instances where I disagree with decisions, as distinguished from opinions, in this area.⁹⁹

But while Friendly believed that law was an instrument for social change, he also believed that, as Thayer had taught, legislators must take the lead in altering the law, and that courts should be slow to

⁹⁵ FRIENDLY, *THE DARTMOUTH COLLEGE CASE*, *supra* note 2, at 23 (advocating against all-or-nothing approach to Fourteenth Amendment state action restrictions on charitable institutions).

⁹⁶ Although constitutional amendments and jurisdiction-stripping statutes are sometimes employed, the principal means of undoing mistaken constitutional decisions is the appointing of new Justices, an alternative with the disadvantages of uncertainty and delay.

⁹⁷ Hand, *supra* note 42, at 28.

⁹⁸ Henry J. Friendly, Mr. Justice Frankfurter, Remarks at a Memorial Meeting of the Bar of the Supreme Court of the United States (Oct. 25, 1965), *in* FRIENDLY, *BENCHMARKS*, *supra* note 2, at 320.

⁹⁹ Friendly, *supra* note 31, at 931.

interfere with considered legislative judgments and cautious when they do so. This view reinforced his respect for the craft's constraints—which temper the pace and extent of intervention and changes in the law by judges. He was thus often counted as a conservative judge, but this label—so far as it implies conservative political values—is misleading.

Friendly's judicial career coincided with the Warren Court era—certainly the most liberal federal judiciary in American history—and against that backdrop his generally moderate views appear conservative. Critics of the Warren Court were free to seize on Friendly's pointed criticisms for their own ends, ignoring the fact that many were directed only to the breadth of the opinions and the weaknesses of analysis. They also ignored the truth that Friendly was often for reform but discriminated as to when it was within the province of judges.

One clue lies in Friendly's ever-present concern with relative competence. Judges are good at working out what kind of hearing the Constitution ought to—and therefore will—provide in diverse circumstances. Procedural rights in criminal cases are, and should be, a specialty of judges. But the bench, he thought, is perhaps less well-equipped to decide when to innovate where divisive issues of social policy are at stake or where a solution requires the kind of information or line drawing in which Congress has the advantage.

Friendly's article subtitled *Judges Who Can't and Legislators Who Won't*¹⁰⁰ speaks directly to this subject. It is a thoughtful explanation—with roots in Thayer and Brandeis—of why legislatures, having superior information and a greater choice in solutions, are usually better than courts at solving large social problems. But, of course, the larger context is the ability of legislatures to reflect public preferences and the doubtful charter of judges to act as what Hand called “Platonic Guardians.”¹⁰¹ Elected officials, after all, can easily be replaced.

Friendly would readily have joined in *Brown v. Board of Education*,¹⁰² sharing none of the doubts Hand expressed in his own

¹⁰⁰ Friendly, *The Gap in Lawmaking*, *supra* note 55, at 791–92 (discussing legislative superiority to courts in fact gathering, generality, pragmatism, transformation, prospectivity, and legitimacy); *see also* FRIENDLY, *THE DARTMOUTH COLLEGE CASE*, *supra* note 2, at 17–19 (same).

¹⁰¹ LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958).

¹⁰² *See* Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1292 (1982) [hereinafter Friendly, *The Public-Private Penumbra*] (“The equal protection clause does not allow a state or a city to institutionalize Jim Crow.”); Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 22, 29 (1978) (arguing that psychological data in *Brown v. Board of Education*, 347

Holmes Lecture.¹⁰³ Indeed, speaking of *Shelley v. Kraemer*,¹⁰⁴ Friendly later wrote: “[M]ost people would say of it, as Paul Freund is reputed to have said of *Brown v. Board of Education*, ‘can you imagine it having been decided in the other way?’”¹⁰⁵ Whatever the claims of stare decisis, the Equal Protection Clause spoke directly to racial discrimination. Similarly, Friendly’s notion of using the First Amendment against McCarthyesque abuses was more aggressive than the Warren Court’s procedural tactics.¹⁰⁶ But, again, the language of the First Amendment and its historical concern with protecting political speech gave some warrant for what he proposed.

It is not surprising that Friendly, according to Judge Randolph’s report, faced the abortion issue later resolved in *Roe v. Wade*¹⁰⁷ and tentatively came out the other way before the case was mooted by New York’s repeal of the challenged statute.¹⁰⁸ Friendly’s draft opinion makes the familiar arguments: for example, that the extension sought by the plaintiffs would imperil a good many other statutes not yet brought into question, such as those punishing attempted suicide, sodomy, bestiality, and perhaps drug use.¹⁰⁹ Friendly said that the Constitution did not enact “Mill’s views on the proper limits of law-making.”¹¹⁰

One closing observation in the opinion is of special interest, however, and is underscored by Friendly’s own dislike of the New York anti-abortion statute, which is clearly expressed in the opinion. The opinion concludes with one of his signature multipart sentences:

The contest on this, as on other issues where there is determined opposition, must be fought out through the democratic process, not by utilizing the courts as a way of overcoming the opposition of what plaintiffs assume but we cannot know to be a minority and thus clearing the decks, thereby enabl[ing] legislators to evade their proper responsibilities.¹¹¹

U.S. 483, 494–95 & n.11 (1954), were unnecessary in light of unconstitutionality of racial discrimination).

¹⁰³ Hand, *supra* note 42, at 54–55 (arguing that *Brown* and *Bolling v. Sharpe*, 347 U.S. 497 (1954), were reappraisals of legislative decisions and expressing concern that there was no principle to “explain when the Court will assume the role of a third legislative chamber”).

¹⁰⁴ 334 U.S. 1 (1948).

¹⁰⁵ Friendly, *The Public-Private Penumbra*, *supra* note 102, at 1292.

¹⁰⁶ See Friendly, *supra* note 29, at 696–97.

¹⁰⁷ 410 U.S. 113 (1973).

¹⁰⁸ A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly’s Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL’Y 1035, 1037, 1040 (2006).

¹⁰⁹ *Id.* at 1038.

¹¹⁰ *Id.* at 1039.

¹¹¹ *Id.* at 1061.

No one can prove that a judge should take Friendly's temperate approach to changing settled rules of constitutional law. Self-restraint was Holmes's view of a judge's role, but it was not John Marshall's or Hugo Black's or Roger Traynor's. As it happens, Friendly had a grudging respect for Black, fighting successfully to get him an honorary degree from Harvard, and his tribute to Traynor, a liberal judge, was titled, *Ablest Judge of His Generation*.¹¹² What mattered most to Friendly was that Black and Traynor, although different from one another, each had a commitment to law.

What should be said in closing about Friendly's influence? In contrast to almost all other lower court judges, whose views rarely outlive them, Friendly did have an effect on the legal landscape in a few areas: for example, in crafting the template for the modern view of federal common law and in calling for a saner balance in criminal law between the interests of defendants and the needs of society. So also, Friendly's skeptical view in his Dartmouth College Holmes Lecture toward expansion of the state action doctrine¹¹³ has largely prevailed, with only small back-and-forth shifts in where the line is drawn.¹¹⁴

Still, these results owe more to a shift in the tidal current than to any individual's views. And Friendly did not bequeath to us an explicit philosophy of law or, in contrast to Holmes and Cardozo, express much interest in the subject. His own attitude was a composite of the influences already described: his training as a historian and respect for precedent, a dose of legal realism, a pragmatic interest in outcomes, a respect for legal process, an insistence on relative competence, a sense of what is practical, and a concern with judicial overreaching.

Friendly tended to decide cases from the inside out; he knew, as the critic Louis Menand observed in his study of Holmes and his circle, that "a case comes to court as a unique fact situation" and enters a "vortex of discursive imperatives," an "unpredictable weather pattern" of diverse pressures to conform to precedent, to do justice, to

¹¹² 71 CAL. L. REV. 1039 (1983). Friendly put Hand to one side, noting that Hand had begun his work many years before Traynor and ended it earlier. *Id.* at 1039 n.1.

¹¹³ FRIENDLY, THE DARTMOUTH COLLEGE CASE, *supra* note 2, at 11–12.

¹¹⁴ *Compare, e.g.,* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 43–44 (1999) (holding that insurers acting pursuant to state workers' compensation scheme are not state actors), *with* Brentwood Acad. v. Tenn. Secondary Sch. Ass'n, 531 U.S. 288, 291 (2001) (holding that regulation of public school athletics by nonprofit interscholastic association constitutes state action), *and* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1995) (holding that government-created and -controlled corporations are part of government for First Amendment purposes).

achieve a socially useful result, and so on.¹¹⁵ A judge's first take is often an intuitive response to these pressures. The obligation remains to test this first approximation against reasoning and to articulate an explanation. Judging is about exercising judgment, for which no mechanical formula has yet been found adequate.

Friendly's influence on the law, including constitutional law, is primarily of a different kind. He provides a model—of ability, of scholarship, of integrity in analysis, of practicality, and of balanced judgment—for others who labor in the same workshop. Even after years in the profession, one learns in reading a Friendly opinion what can be wrought out of such virtues, coupled with immense hard work, and what great judging can be.

Grant Gilmore once wrote that “the opinions of our better judges set a model for rational and humane discourse which the rest of us can only envy.”¹¹⁶ No one on the federal circuit courts ever did this better than Henry Friendly and Learned Hand. No one ever will.

¹¹⁵ LOUIS MENAND, *THE METAPHYSICAL CLUB* 339 (2001).

¹¹⁶ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 16 (1977).