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THE MYTH OF MERIT: THE GARLAND NOMINATION, THE FRIENDLY LEGACY, AND THE SLIPPERINESS OF APPELLATE COURT QUALIFICATIONS

*Andrew M. Siegel**

Introduction

In one of his most famous essays, the late Supreme Court Justice Antonin Scalia argued that American law is frighteningly inept at statutory interpretation, in part because American legal education is designed to make every student imagine themselves a common-law appellate judge and to relegate all other legal and judicial pursuits to secondary status.¹ Whatever one thinks of the methodological conclusions Justice Scalia drew from this observation, anyone with a knowledge of the history of American legal education from Christopher Columbus Langdell through at least the end of the Twentieth Century has to acknowledge that—descriptively—the observation itself was at least mostly true

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¹ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3-15 (Amy Gutmann ed., 1997).

in most places during most of that era.² What Justice Scalia failed to add—though I am sure he would have agreed with it—is that law students across the land were not being taught solely to imagine themselves as any old judge, but instead to try to envision themselves as one of a handful of judges whose names and opinions disproportionately fill law school casebooks: Benjamin Cardozo,³ Henry Friendly,⁴ Learned Hand,⁵ Oliver Wendell Holmes,⁶ and perhaps Roger Traynor.⁷ Either explicitly or implicitly (and usually explicitly), law students are taught that these are among the greatest judges of all time, a pantheon of meritocracy whose skills and smarts transcend partisan or methodological divisions.

The lionization of these judges (and perhaps a select few of their fellow jurists) extends well beyond the law school classroom. Their names are dropped with frequency in contemporary appellate opinions.⁸ Big biographies proclaim them, in one case explicitly, as the “greatest judge[s] of [thei]r era[s].”⁹ Their busts adorn courtrooms.¹⁰ Generations of legal scholars and historians work to establish intellectual and professional genealogies connecting them to each other or to other distinguished judges and disciples.¹¹

When President Barack Obama needed to muster intellectual and political resources in his ultimately quixotic attempt to fill Justice Scalia’s Supreme Court seat, he drew explicitly on this meritocratic tradition both in selecting Judge Merrick Garland and in packaging that nomination for public consumption. As he told the story, Judge Garland—a superstar student at Harvard College and Harvard Law School, law clerk to both Judge Friendly and Justice William Brennan, holder of some of the most prestigious positions in public and private

² For the origins of the modern case method and its implications, see WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGINS OF MODERN AMERICAN LEGAL EDUCATION* (1994).

³ 1870–1938: Judge, New York Court of Appeals, 1914–1927; Chief Judge, New York Court of Appeals, 1927–1932; Justice, United States Supreme Court, 1932–1938.

⁴ 1903–1986: Judge, United States Court of Appeals for the Second Circuit, 1959–1986.

⁵ 1872–1961: Judge, United States District Court for the Southern District of New York, 1909–1924; Judge, United States Court of Appeals for the Second Circuit, 1924–1961.

⁶ 1841–1935: Associate Justice, Supreme Judicial Court of Massachusetts, 1882–1899; Chief Justice, Supreme Judicial Court of Massachusetts, 1899–1902; Justice, Supreme Court, 1902–1932.

⁷ 1900–1983: Justice, California Supreme Court, 1940–1970.

⁸ See DAVID M. DORSEN, *HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA* 354 (2012) (calculating that the United States Supreme Court has cited Hand by name 362 times and Friendly 281 times, dwarfing numbers for other respected judges of their generations).

⁹ See *id.*; see also GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994); ANDREW L. KAUFMAN, *CARDOZO* (2000).

¹⁰ See DORSEN, *supra* note 8, at 358–59 (noting that the courtroom of the United States Court of Appeals for the Second Circuit in New York is flanked by two busts, one of Hand and one of Friendly).

¹¹ See, e.g., Brad Snyder, *The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts*, 71 OHIO ST. L.J. 1149 (2010).

practice, and long-time judge (and current Chief Judge) on the nation's second most prestigious court—was simply the best person for the job, the winner of a meritocratic scrum designed to identify the Hands and Friendlys of our era.¹²

To put matters bluntly, this argument fell flat on its face, neither convincing the President's opponents, mollifying the segment of his supporters who were disappointed by the Garland pick, nor shaping the media narrative. One is tempted to write off the failure of this meritocratic appeal as reflecting something scurrilous about contemporary judicial politics, a devolution from a set of norms that set apolitical standards that all could agree on for rank ordering judges and judicial candidates. This Essay argues to the contrary, however, insisting that the stark and hierarchical conception of "merit" used to evaluate appellate judges in the law school classroom and beyond was always something of a chimera, serving occasionally as a useful simplification but more often obscuring both many of the key characteristics of a successful judge and the moral responsibility we share for the content of our laws.

This Essay was inspired in part by a larger research project I am currently engaged in about Judge Friendly and his law clerks who became appellate judges.¹³ Part I presents information on Judge Friendly—both making the traditional case for him as one of the most brilliant and accomplished appellate judges in the history of the nation and then politely problematizing the degree to which that portrait over-simplifies an incredibly complicated man. Part II then presents three vignettes from the lives of Judge Friendly and his law clerks that illustrate both the allure and the dangers of the "myth of merit." Finally, Part III briefly sketches what is left out by a vision of the appellate role focused on "merit" and offers some speculation as to what might be gained by a discussion of appellate judging—and appellate nominations—that discards such a myth.

I. Judge Friendly as an Exemplar of "Merit"

A. The Absolutely True Adventures of the Most Meritorious Judge

While, as a general matter, the appellate case model of legal education is meant to empower students to think of themselves as potential common-law lawmakers, students who hear the biography of Judge Henry Friendly can be forgiven if they find themselves intimidated rather than empowered. Raised in luxury in upstate New York in a business-owning German-Jewish¹⁴ family, Friendly entered Harvard College at the age of sixteen and did spectacularly well, earning particular recognition for the quality of his historical scholarship.¹⁵

¹² See *Transcript: Obama Announces Nomination of Merrick Garland to Supreme Court*, WASH. POST (Mar. 16, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/03/16/transcript-obama-announces-nomination-of-merrick-garland-to-supreme-court/?utm_term=.f94953fdc18c.

¹³ ANDREW M. SIEGEL, MERIT, IDEOLOGY, AND THE EVOLVING UNDERSTANDING OF APPELLATE JUDGING: HENRY FRIENDLY'S LAW CLERKS AS APPELLATE JUDGES (manuscript chapters on file with author).

¹⁴ See DORSEN, *supra* note 8, at 5–8.

¹⁵ See *id.* at 12–20.

Frightened that he might pursue a career as an academic historian, Friendly's family parlayed connections and convinced Harvard Law School Professor and future Supreme Court Justice Felix Frankfurter to take Friendly under his wing and to steer him to law school.¹⁶ Frankfurter succeeded both in convincing Friendly to try the law and in preparing him for what to expect in law school. Friendly hit the ground running, becoming the subject of famous anecdotes about his prowess from literally his first day of law school and ultimately earning arguably the most impressive academic record in the history of the school.¹⁷ Upon graduation, Frankfurter arranged for Friendly to clerk for the other Jewish Harvard Law Professor turned Supreme Court Justice, Louis Brandeis. After his clerkship (and at several later points), Friendly turned down offers to join the Harvard Law School faculty,¹⁸ preferring instead to go into private practice.

As a lawyer and judge, Friendly added to his legend, making partner at a top firm, before leading a group of young lawyers who broke away to form the elite firm now known as Cleary, Gottlieb, Steen & Hamilton. While a partner at Cleary, Friendly simultaneously had a second full-time job as General Counsel to Pan American Airlines.¹⁹ When he decided to seek appointment to the bench, his case was pressed by leading practitioners and judges, notably including the normally reticent Learned Hand.²⁰ Appointed to the United States Court of Appeals for the Second Circuit in his mid-fifties, Friendly served with distinction for more than a quarter-century, writing leading opinions in almost every area of the law²¹ while simultaneously producing a volume of high-quality scholarship that would have been the envy of nearly every full-time academic.²² He collected a set of elite clerks with sparkling academic résumés, many of whom were themselves destined for the bench.²³

The personal characteristics and work habits that allowed Friendly to reach these heights of academic and personal success are themselves part of his legend. He apparently had a photographic memory, practically unmatched analytic ability, and the rare gift of composing in his head fully-formed (and fully-cited)

¹⁶ Friendly's mother's sister was friendly with another important Jewish jurist, Julian Mack, in Chicago; the worried mother consulted Judge Mack, who in turn connected Mrs. Friendly with Professor Frankfurter. *See id.* at 20–21.

¹⁷ *See id.* at 21–27; *see also infra* notes 63–65 and accompanying text (discussing and problematizing one such anecdote).

¹⁸ *See DORSEN, supra* note 8, at 31, 37.

¹⁹ *See id.* at 60.

²⁰ *See id.* at 71–77; *see also infra* notes 66–69 and accompanying text.

²¹ Dorsen's biography spends more than half its pages methodically engaging with Friendly's decisions and his broader ideas about substantive law. *See DORSEN, supra* note 8, at 139–338.

²² *See id.* at 367–70 (containing a full bibliography).

²³ Friendly clerks who serve as judges include John Roberts (Chief Justice, United States Supreme Court); Michael Boudin (United States Court of Appeals, First Circuit); Pierre Leval (United States Court of Appeals, Second Circuit); Merrick Garland (United States Court of Appeals, District of Columbia Circuit); A. Raymond Randolph (United States Court of Appeals, District of Columbia Circuit); William Bryson (United States Court of Appeals, Federal Circuit); and Martin Glenn (United States Bankruptcy Court, Southern District of New York). *See id.* at 361–66 (containing a full list of his clerks).

paragraphs that need only be “copied” onto paper.²⁴ He combined those skills with extraordinary erudition, extreme dedication, and a well-earned but still, at times, shocking self-confidence that allowed him to identify and execute elegant solutions to legal problems that no one—not even the parties—had ever raised before.²⁵ Put it all together, and you had a man who routinely wrote long, lasting legal precedents in less than a day without the assistance of law clerks or modern technology.²⁶

B. The Equally True Adventures of a Very Human Judge

The story above—the one they tell us in the law school classroom—is not, however, the whole story of Henry Friendly. While everything in the achievement-driven narrative above is true, it is also buried in a deeper, richer, more poignant story that makes Friendly’s accomplishments even more impressive but also cautions against holding him up as an unproblematic model of merit. On one level, the missing pieces are personal. As his biography respectfully documents, Judge Friendly struggled against boredom and depression for much of his life, contributing perhaps to a surprisingly poor track record as a practicing attorney and to his ultimate decision to take his own life (in the aftermath of his wife’s death and in the midst of declining eyesight).²⁷ He judged others by his own impossible standards, grievously wounding his relationships with his own children and leading him to carry around in his brain a stark rank ordering of his own clerks.²⁸ He seemed unduly impressed with wealth and connection, cultivating social relationships with clerks and others in rough proportion to their social and economic stature.²⁹ Like many successful professional men of his generation, he relied on the support of a devoted wife who asked little of him in return and had minimum compassion when the familial needs of others conflicted with his own professional pursuits or personal preferences.³⁰

²⁴ Dorsen narrates these qualities well, *see id.* at 92–95, but here the first-hand accounts of his former clerks are more evocative, for example, Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1 (2010); Pierre N. Leval, *Henry J. Friendly: In Memory of a Great Man*, 52 BROOK. L. REV. 571 (1986); A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1 (1999).

²⁵ *See, e.g.*, DORSEN, *supra* note 8, at 94; Leval, *supra* note 24, at 571.

²⁶ *See* Randolph, *supra* note 24, at 3 (“During my year of clerking I never saw the judge spend more than a day writing an opinion (and write them all he did).”).

²⁷ *See, e.g.*, DORSEN, *supra* note 8, at xi (describing the life-long effects of Judge Friendly’s vision problems and depression); *id.* at 72 (discussing his record as a practicing attorney); *id.* at 341–45 (discussing his suicide and ending with a moving quotation from his daughter locating the decision in a lifetime of struggle against melancholy and despair).

²⁸ *See id.* at 51–59 (examining his difficult relationships with his children); *see id.* at 109 (discussing his mental ranking of his clerks).

²⁹ *See id.* at 111 (noting increased social interaction with clerks when clerks came from prominent families).

³⁰ *See id.* at 109 (recounting staggering stories of indifference, albeit often laced with a bit of humor).

On another level, the missing pieces of the story are professional as well. Judge Friendly's prodigious output is universally respected but not universally followed. Judges and academics speak gingerly when they criticize Judge Friendly's work product, but, nonetheless, offer some common concerns.³¹ As critics on both the left and the right have noted, Judge Friendly was prone to reinventing the wheel in his opinions, whether by recasting the doctrinal history of a field, proposing an all-encompassing test for the resolution of particular kinds of claims, or simply proposing rules and resolutions never briefed by the parties.³² His was a very confident judicial pen, little troubled by questions of comparative expertise or judicial capacity.³³

At the same time, his was not a pen wont to spout grand theories or to launch aggressive quests against existing precedents or approaches. Judge Friendly moved the law boldly and decisively, but in small, technical steps. For his many fans and disciples, this approach was a virtue: Judge Friendly was a lawyer's lawyer, committed to his craft before all else and properly governed by "a powerful inclination toward moderation."³⁴ For his many fewer critics, it was a minor flaw, a shortage of vision that inherently limited both his substantive legacy and his influence on other jurists.³⁵

Here I need to pause, for, while Judge Friendly is not the primary focal point of this Essay, a small point about his jurisprudence opens the door for the broader claims that follow. Judge Friendly's acolytes and critics appear to share a common assumption that Judge Friendly's work was, to the extent that such is possible, timeless and apolitical. Reading through the body of Judge Friendly's work, and in particular, reading it in conversation with the work of today's leading jurists (including Judge Friendly's own clerks), however, I reach almost the exact opposite conclusion: Judge Friendly's opinions and other writings exactly reflect his own experiences and core beliefs. Judge Friendly was a true political moderate, a Northeastern moderate Republican (when that phrase meant something).³⁶ He was a child of privilege who thrived in mainstream institutions and spent his pre-judicial career problem solving in the halls of

³¹ For the rare sharp public criticism, see Stephen Bainbridge, *Dissenting from Judge Leval's Hagiographic "Remarks on Henry Friendly,"* PROFESSOR BAINBRIDGE.COM (July 22, 2012), <http://www.professorbainbridge.com/professorbainbridge.com/2012/07/dissenting-from-judge-levals-hagiographic-remarks-on-henry-friendly.html>; see also Adrian Vermeule, *Local Wisdom*, NEW REPUBLIC (Mar. 22, 2012), <https://newrepublic.com/article/98607/henry-friendly-supreme-court-david-dorsen> (reviewing DORSEN, *supra* note 8).

³² See DORSEN, *supra* note 8, at xiii, 95.

³³ To be fair, Judge Friendly was deeply concerned about questions of judicial authority and the relevant responsibilities of judges and legislators. See, e.g., Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963); A. Raymond Randolph, *Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1036 (2006).

³⁴ Pierre N. Leval, *Remarks on Henry Friendly on the Award of the Henry Friendly Medal to Justice Sandra Day O'Connor*, 15 GREEN BAG 2D 257, 261 (Spring 2012).

³⁵ See, e.g., Vermeule, *supra* note 31.

³⁶ See DORSEN, *supra* note 8, at 74–75 (discussing Friendly's politics).

power.³⁷ He was enough of an outsider to understand that prejudice and injustice persist,³⁸ but enough of a victor to believe that a meritocratic America was constantly whittling away at those archaic barriers. In Judge Friendly's worldview (one shared not incidentally by many of the other leading lights in post-World War II America), our institutions, arrangements, and legal structures are basically sound and will continue to be so as long as we entrust their management to moderate men of talent and training.³⁹ In making said management his life's work, Judge Friendly was serving his moderate political principles, not eschewing them.

II. Problematising "Merit": Three Vignettes

A. Reaction to the Garland Nomination

When choosing a Supreme Court nominee in the winter of 2016, President Obama faced a difficult political landscape, in which the Republicans who controlled the United States Senate were forthrightly insisting that they would run out the clock on his term without even considering his nominee.⁴⁰ In order to force a vote, he and his allies needed to mobilize sufficient public opinion and political pressure to force a vote. The President received a great deal of (highly contradictory) advice as to what kind of nominee might unlock the gates of the Senate.⁴¹ In selecting Judge Garland, President Obama bet heavily on a narrative built around the Judge's gold-plated credentials.⁴² I do not think I am giving anything away to say that he lost that bet.

While the events of the Garland nomination would take months to play out, the die was cast in the first few days after the nomination, when left-wing

³⁷ See generally *id.* at 5–70 (discussing his upbringing and his private practice experience).

³⁸ See *id.* at 18–19 (describing Friendly's reaction to proposals targeting Jewish students while he was at Harvard).

³⁹ His opinions are famous for tinkering with doctrine, untangling complicated facts, and clearing up doctrinal ambiguity, rather than for their bold new ideas. See Vermeule, *supra* note 31. His most famous extra-judicial writings often wear their moderation in their titles. See, e.g., Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Henry J. Friendly, *In Praise of Erie—and the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); see also Randolph, *supra* note 33 (recounting an unpublished Friendly opinion that, before the Supreme Court weighed in, expressed sympathy for legislative repeal of anti-abortion laws but rejected an asserted constitutional right).

⁴⁰ See, e.g., David M. Herszenhorn, *G.O.P. Senators Say Obama Supreme Court Pick Will Be Rejected*, N.Y. TIMES (Feb. 23, 2016) (“Senate Republican leaders said Tuesday that there would be no confirmation hearings, no vote, not even a courtesy meeting with President Obama's nominee to replace Justice Antonin Scalia, all but slamming shut any prospects for an election-year Supreme Court confirmation.”).

⁴¹ Disputants debated whether the President ought to pick a nominee who might mollify the Republicans because of his or her moderation, age, or personal connections, or, alternatively, whether the President ought to focus on igniting his base and forcing a vote through political pressure by picking an exciting or trail-blazing candidate.

⁴² See *Transcript*, *supra* note 12.

interest groups expressed mild irritation about the nominee's demographics and relative moderation, right-wing groups gave him no particular solicitude, and the bulk of the public remained indifferent. The degree to which President Obama's merit-grounded case for Garland failed to get traction is perhaps best illustrated by comparing two articles published literally one day apart by Harvard Law School Professor Noah Feldman, a Bloomberg View legal columnist.⁴³ On the day of the nomination, Professor Feldman—fittingly the Felix Frankfurter Professor at Harvard—gave his full-throated endorsement to Obama's strategy in a column entitled "Obama Makes a Smart Bet for Supreme Court."⁴⁴ In that short piece, Feldman breathlessly recounted Garland's many offices and achievements and offered an analogy to Roman leaders who painstakingly followed the "cursus honorum," a path of offices leading inexorably to the highest positions.⁴⁵ By picking the judge with the shiniest résumé, President Obama had done the nation proud.

By the next day, Professor Feldman's tone had changed. In a column entitled "Obama Picked a Stellar Judge. He Could Have Done Better.," he reiterated his respect for Judge Garland but aggressively questioned whether President Obama had missed an opportunity by not picking someone more demographically or professionally diverse from the current Justices or even someone with a bolder and more generative legal mind.⁴⁶ Quoting liberally from an email he received from one of his favorite students, Professor Feldman implicitly took himself to task for the earlier column, offering an endorsement of the student's pointed question, "Can you provide any description of Merrick Garland that's not a platitude from the positive discrimination playbook?"⁴⁷

At the heart of the student's question (and of Professor Feldman's conversion) is the rejection of the President's implication that Judge Garland was uniquely qualified for the Supreme Court. The problem was not with Judge Garland, whose Harvard grades, clerkships, appellate service, and general legal skills are impressive and are genuine credentials for the high Court. The part that didn't hunt was the idea that there was a single best-qualified candidate who might be identified by placing résumés side-by-side. Among those with the skills and experience to succeed on the Supreme Court, we must pick our judges using some other set of criteria. To use Harvard Law School grade point average or number of years as an appellate judge or number of citations by other appellate

⁴³ Compare Noah Feldman, *Obama Makes a Smart Bet for Supreme Court*, BLOOMBERG VIEW (Mar. 16, 2016), <https://www.bloomberg.com/view/articles/2016-03-16/merrick-garland-s-supreme-court-nomination-is-a-smart-bet> (hereinafter "*Smart Bet*"), with Noah Feldman, *Obama Picked a Stellar Judge. He Could Have Done Better.*, BLOOMBERG VIEW (Mar. 17, 2016), <https://www.bloomberg.com/view/articles/2016-03-17/garland-s-a-fine-supreme-court-choice-but-not-the-best-one> (hereinafter "*Could Have Done Better*").

⁴⁴ See *Smart Bet*, *supra* note 43.

⁴⁵ *Id.*

⁴⁶ See *Could Have Done Better*, *supra* note 43.

⁴⁷ *Id.*

judges⁴⁸ as your metric is at best arbitrary and possibly also (given existing structures of privilege) discriminatory. To do so is to parody merit rather than to pursue it.

B. Friendly, Brennan, and the Role of the Judge

Judge Friendly corresponded regularly with many of his former clerks, whose letters often overflowed with praise for their clerkship experience and quite often reflected a concomitant sense of disappointment about their new professional endeavors.⁴⁹ Having sat for a year at the right hand of the master as he crafted appellate opinions, these clerks—schooled in the law school experience Justice Scalia lampooned in his Princeton lectures⁵⁰—had in some fundamental way already accessed the ur-legal experience; there was little room for future opportunities (short of their own appellate judgeship) ever to compete.

This dynamic, however, was complicated when clerks moved on from Judge Friendly's chambers to those of a Supreme Court Justice. On the one hand, no sitting Supreme Court Justice was as respected as Judge Friendly among the intellectual and cultural communities from which those clerks emerged. On the other hand, the stakes and stage were much larger at the Supreme Court than in Foley Square. Ultimately, most embraced their Supreme Court experience, conceptualizing it as a different yet equally important and similarly fulfilling assignment as their clerkship with Judge Friendly. (Future Chief Justice John Roberts reached this conclusion with characteristic alacrity.⁵¹)

There were, however, moments of resistance and hesitation if the letters of the former clerks are to be believed. In one notable letter written early in his clerkship with William Brennan, future Stanford Law Dean Larry Kramer wrote Judge Friendly:

I really miss working for you. I don't want to give the wrong impression by seeming to complain too much, for I like this job a lot. The cases are all challenging and many of them are really fascinating. Justice Brennan is a wonderful man to work for, and the other clerks are all both very nice and very smart. But there are a few things about the job that I am less pleased with. There are too many clerks. We all work on everything, and since we all think very differently, it's hard to feel completely satisfied with the final work product because, whatever it is, it invariably includes a lot of ideas I disagree with. (And we haven't even gotten to writing opinions yet!) Mostly, though, I am dissatisfied

⁴⁸ Cf. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CALIF. L. REV. 299 (2004) (proposing with seeming seriousness that judges should be elevated to the Supreme Court based on objective indicia of influence and efficiency).

⁴⁹ This point is discussed in detail in Snyder, *supra* note 11, especially at 1221–22.

⁵⁰ See SCALIA, *supra* note 1; see also text accompanying notes 1–7 *supra*.

⁵¹ See *id.* (quoting Letter from John G. Roberts to Henry J. Friendly (Nov. 1, 1980) (on file with Henry Friendly Papers, Harvard Law School, Special Collections Library, Box 219, Folder 219–5) (describing Supreme Court clerkship as “invigorating”)).

with the Court as an institution. Last year, I always felt like I was working for a *judge* who viewed himself as a member of a *court*. (And I must thank you for the training I received which I am only now beginning to fully appreciate.) I knew that I could approach every case with an open mind, formulate my ideas as to the proper result based on the law, and have that idea seriously considered (if not ultimately accepted). Here, my job is largely to manipulate cases to get the “right” result, the right result having been determined beforehand and without reference to the law What I miss the most from last year is the “law intensesness” with which we worked on cases. For me, that’s the fun of being a lawyer.⁵²

That letter is rich and complicated and can be read many ways. To some extent, it can be written off as a young, ambitious, and genuinely thankful young man offering his eighty-two-year-old mentor praise in exactly the coin that he would most appreciate. To the extent that it is more substantive, part of the letter’s point is simply that the Supreme Court is a different kind of institution than the lower courts: a conclusion that echoes with the scholarship of many astute critics of the modern court, including Eric Segall and Richard Posner.⁵³ Still, it is hard to read the letter without thinking that in some subtle—and perhaps unconscious—way it is conceptualizing the role of the judge in such a way so as to elevate Judge Friendly’s prodigious talents (his technical legal skill, his processing speed, his deep knowledge of the details and interconnections that make up the common law) and to diminish Justice Brennan’s very different yet equally impressive skill set (his power of persuasion, his vision, his sense of justice).⁵⁴

In comparing different judges and courts, this young representative of the legal establishment demonstrated the predictable yet telling tendency to evaluate judges in comparison to some idealized vision of their job rather than with regard to the richer, more complicated job they actually perform. Speaking in a passionately personal voice but articulating ideas inculcated through years of reading and mentorship, Kramer postulates an apolitical “law” that the best judges pursue “with an open mind” and contrasts that with the experience at the Supreme Court, where decisions are reached “without reference to the law.”⁵⁵ I am and have always been a profound skeptic about the proposition that there is a right answer to most important Supreme Court cases that we could all

⁵² See *id.* (quoting Letter from Larry Kramer to Henry J. Friendly 1–2 (Sept. 25, 1985) (on file with Friendly Papers, *supra* note 51, Box 221, Folder 221–6) (hereinafter “Kramer letter”).

⁵³ See ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012); Richard A. Posner, *Foreword—A Political Court*, 119 HARV. L. REV. 31 (2005).

⁵⁴ The identity of the speaker makes the letter even more interesting. In his later career as a Dean and Foundation President, Dean Kramer—much like Chief Justice Roberts—manifested both the technical legal acumen characteristic of Judge Friendly and the practical and political skills characteristic of his Supreme Court mentor.

⁵⁵ Kramer Letter, *supra* note 52.

agree on if we just got beyond our personal preferences and prejudices, but one need not share that conviction to acknowledge that we do not live in a world where the neutral pursuit of such answers is the sole, or even the main, work of the Supreme Court.

Given that reality, it seems like a strange category mistake to evaluate or nominate judges (and particularly Justices) based solely on their technical legal acumen and their knowledge of the common law. We get different law if we pick judges with different experiences, values, and inter-personal skills and it is our job to take the likely effects of those factors into account in staffing the courts and evaluating their members.⁵⁶ William Brennan was very smart but no one confused him with Henry Friendly when he was at Harvard Law School.⁵⁷ On the other hand, Justice Brennan possessed a capacity for conceptualizing constitutional justice in concrete and meaningful ways and the practical skills necessary to realize that vision that Judge Friendly neither possessed nor aspired to. The traditional notion of judicial “merit” micro-measures the former while ignoring the latter. My modest proposition is that we should acknowledge that judicial aptitude is multi-dimensional; my slightly more provocative corollary is that those dimensions are sufficiently incommensurate to make even a revised metric of “merit” illusory.

C. Of Merits and Bootstraps

The above anecdotes and the corresponding analysis critique the notion of “merit” by suggesting that our understanding of judicial merit is not rich enough and, relatedly, does not map on very well to the actual job of an appellate judge. Here, I want to present some incidents and anecdotes that suggest that—even on its own terms—our traditional conceptions of merit are complicated by, and often obscure, dense networks of privilege and patronage.⁵⁸ Judge Friendly and his clerks who ascended to the bench were extraordinarily bright and talented men who worked hard and achieved a great deal of earned success. The record also indicates, however, that they cultivated and benefitted from a series of important relationships with powerful people that assisted them in obtaining opportunities and allowed them to demonstrate their skills and build their legacies. It does not demean those legacies (or those skills) to suggest that there are many others who might have built equally profound judicial legacies if given similar opportunities. It simply acknowledges the truth famously articulated by Justice Thurgood Marshall (briefly Judge Friendly’s colleague and long his

⁵⁶ Cf. Andrew M. Siegel, *Constitutional Theory, Constitutional Culture*, 18 U. PA. J. CONST. L. 1068 (2016) (explaining how the content of our constitutional law is shaped by contingent and ever-shifting practices, norms, and institutional arrangements and arguing that we ultimately have a great deal of power to choose and shape those cultural features).

⁵⁷ Justice Brennan’s life is well-chronicled in SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL LION* (2010). His strong but unmemorable academic performance at Harvard Law School is discussed at pp. 19–25.

⁵⁸ Special thanks to Professor Tommy Crocker for convincing me that this critique belonged in this Essay.

admirer)⁵⁹ that, “[N]one of us got where we are solely by pulling ourselves up by our bootstraps. We got here because somebody—a parent, a teacher, an Ivy League crony, or a few nuns—bent down and helped us pick up our boots.”⁶⁰

Judge Friendly’s career at Harvard Law School and beyond was guided by then-Professor and later-Justice Felix Frankfurter, who was recruited by Friendly’s family to mentor Friendly while he was still an undergraduate after they were introduced by a mutual acquaintance.⁶¹ Frankfurter helped Friendly in many visible ways throughout the early years of his career—encouraging him to go to law school, preparing him for what to expect, mentoring him while there, arranging a clerkship with Justice Louis Brandeis, and securing for him multiple offers to teach at Harvard.⁶²

It is, however, one incident of invisible help that best illustrates the crucial role mentorship and connections play in building a record of merit. Judge Friendly began to make his mark in the legal world on his first day of law school when he famously answered a professor’s obscure question about the language an old document was written in (“Law French”) and then successfully translated that dense legal document from its archaic language into modern English.⁶³ His reputation as an incomparable student began that day. While Friendly was confident in his own abilities, even he had to wonder how he stumbled into a question that so perfectly strayed into his areas of academic expertise and experience.⁶⁴ It was many decades before anyone had the guts to tell him that Frankfurter had likely set the whole thing up, presumably to test him and to allow him to shine.⁶⁵

When Friendly finally found a job for which he was willing to leave practice—an appellate judgeship—he relied heavily on his network of contacts to make such a transition possible. His biography recounts in painstaking detail the steps that Friendly and his friends (led by Justice Frankfurter) took to win him the seat.⁶⁶ Over the course of several appellate court vacancies, they lobbied the Eisenhower administration, solicited letters from professional contacts across the country, politicked against other candidates, and attempted to engage the press on his behalf.⁶⁷ Perhaps their greatest coup was convincing Learned Hand to write a strong letter of recommendation and even make a few phone

⁵⁹ See Thurgood Marshall, *Remarks at the Extraordinary Session of the Court of Appeals for the Second Circuit in Memoriam of Judge Henry J. Friendly* 8 (1986) (transcript available in 805 F.2d LXXXI).

⁶⁰ These words are often quoted but rarely sourced. For one recent usage in a similar context, see John C. Brittain & Kenneth W. Chandler II, *What Was Key to Becoming a Judge? A Survey of Minorities and Women on the Bench*, 48 *JUDGES’ J.* 10, 10 (Fall 2009).

⁶¹ See DORSEN, *supra* note 8, at 20–21 (narrating event); *supra* note 16 (providing detail).

⁶² See DORSEN, *supra* note 8, at 20–27, 31, 37.

⁶³ See *id.* at 21–22.

⁶⁴ See *id.* at 22.

⁶⁵ See *id.*

⁶⁶ See *id.* at 71–77.

⁶⁷ See *id.*

calls, despite his general aversion to such endeavors.⁶⁸ When Friendly briefly left the country at a crucial time, he left a law partner in charge of his campaign and provided instructions that he be recalled if the partner felt one-on-one politicking from the candidate was in order.⁶⁹

A generation later, when Judge Friendly's clerks began to ascend to the bench, they benefitted from similar assistance to open doors. Pierre Leval was selected by a "merit panel" for an open district court seat with the assistance of overwhelmingly positive letters of recommendation by Judge Friendly and Robert Morgenthau.⁷⁰ Michael Boudin—Friendly's favorite clerk according to most sources⁷¹—was so well-connected (and well-respected) that he was able to secure an appellate court nomination even after resigning a district court judgeship for personal reasons.⁷² John Roberts was able to channel the unique qualification of ranking among the favorite clerks of both Judge Friendly and Chief Justice Rehnquist into a rocket career path that included a specially-created post-clerkship position as a Special Assistant to the Attorney General, an appointment as Deputy Solicitor General at 34, and an initial nomination to the United States Court of Appeals for the District of Columbia at 37.⁷³

Perhaps the easiest way to understand the contingency that is opportunity is to imagine a roadblock that might very plausibly have been thrown in Judge Friendly's path. During the years when Judge Friendly was coming of age, Harvard (and other Ivy League schools) engaged in serious conversations regarding what to do about the increasing prevalence of Jewish students and utilized a series of mechanisms to control the number of Jewish students.⁷⁴ During the middle of Friendly's undergraduate career, the University's President proposed a quota that would have drastically reduced the number of Jewish transfer students; though he would not have been personally affected, Friendly threatened not to return for his Junior year if the plan was adopted.⁷⁵ It is not hard to imagine a slightly different world in which opportunities at Harvard College and Harvard Law School were more drastically closed off to

⁶⁸ See *id.* at 73, 75, 77.

⁶⁹ See *id.* at 74.

⁷⁰ Judge Friendly and District Attorney Morgenthau continued to promote the career of Judge Leval after his initial judicial appointment, singing his praises to the *New York Times* in 1984, for example. See Arnold H. Lubasch, *Judge With Gentle Firmness*, N.Y. TIMES (Oct. 10, 1984), <http://www.nytimes.com/1984/10/10/arts/judge-with-gentle-firmness.html>; see also Snyder, *supra* note 11, at 1229–30 (referencing Friendly's letter for Leval).

⁷¹ See, e.g., DORSEN, *supra* note 8, at 109.

⁷² See David Margolick, *An Unusual Court Nominee, Judging By His Family*, N.Y. TIMES (Apr. 24, 1992), <http://www.nytimes.com/1992/04/24/news/an-unusual-court-nominee-judging-by-his-family>.

⁷³ See Snyder, *supra* note 11, at 1220–29.

⁷⁴ On these controversies, see generally JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* (2006); DAN A. OREN, *JOINING THE CLUB: A HISTORY OF JEWS AND YALE* (1986).

⁷⁵ On this particular controversy, see KARABELL, *supra* note 74, at 77–109. On Friendly's reaction, see DORSEN, *supra* note 8, at 18.

Jewish students and in which Henry Friendly was not able to gain admission to one or both (or a world in which Friendly left in protest over anti-Semitic policies). If Friendly had attended a less prestigious undergraduate institution and then, say, the respected but much more practice-oriented law school at New York University, as many of his Jewish contemporaries did, he surely would have gone on to a successful career, but I doubt very much that I would be writing this Essay. Without the Frankfurter connections, the Brandeis clerkship, and the legend he built at Harvard, his professional opportunities would have been more limited and his path to the bench more dubious. Even if, against all odds, he had mobilized his extraordinary talents to build an alternative path to the bench, the gatekeepers of the appellate pantheon would have been much less likely to induct him into their inner circle without those golden nuggets.

III. Getting Beyond “Merit”

The idea that federal appellate judges and nominees can be rank-ordered according to some semi-objective metric of merit is a classic legal fiction: a lie that we tell ourselves about law and legal institutions that, up to a point, facilitates the orderly operation of the legal universe. Like most legal fictions, it is initially helpful in this case by focusing our attention on some crucial markers for the analytic ability without which appellate judges are likely to flounder and by providing us with a common set of exemplars for use in teaching legal reasoning and writing. Like many legal fictions, however, it also has a tendency, if taken too literally, to distort our imaginations and, eventually, our legal institutions. As the anecdotes detailed above suggest, this particular legal fiction runs this risk of over-valuing micro-differences in grade point averages and résumés at the expense of more meaningful but less quantifiable characteristics,⁷⁶ of over-simplifying and distorting our vision of the jobs actually performed by judges and justices,⁷⁷ and of causing us to ignore the role that (often asymmetric) opportunity plays in allowing individuals to demonstrate their judicial qualifications.⁷⁸

Recognizing the degree to which judicial “merit” is a myth reorients our thinking and our institutional incentives in a variety of ways and contexts. When it comes to judicial selection, for example, this Essay suggests that decisionmakers and commentators ought to lose the illusion that there is a single ideal candidate or résumé, and think much more holistically about both the specific candidates they are considering and the overall composition of the courts they are responsible for filling. While candidates who are not extremely bright, knowledgeable about substantive law, and well-versed in the technical skills necessary to interpret statutes and develop the common law can—absent extraordinary circumstances—be filtered from most judicial pools, factors other than raw computational power ought to predominate when making the final selection. Candidates bring to the table different backgrounds, professional

⁷⁶ See Part II.A *supra*.

⁷⁷ See Part II.B *supra*.

⁷⁸ See Part II.C *supra*.

experiences, temperaments, values, and interpretive commitments. Balancing these different vectors is hard work and it is tempting for a President (or another decisionmaker) to fall back on résumé triggers and semi-objective indicia such as law school ranking or GPA, but to do so is to elevate rough proxies for one subset of judicial skills into the whole ball of wax and to end up with a Supreme Court where all the Justices went to Harvard or Yale.⁷⁹ Critics left, right, and center consistently make many of the same points: our courts need more public defenders, more business lawyers, and more folks with legislative experience; they need more first-generation college-graduates and more people with disabilities and more first-generation Americans; they need more people with mediation experience and active listening skills and genuine compassion; and they need more people who are willing to forthrightly and good naturedly explain and defend their interpretive theories and judicial philosophies. What we often fail to realize is the degree to which the myth of merit impedes our pursuit of those goals.

Legal educators also can benefit in a variety of ways from moving beyond traditional notions of judicial merit. Casebooks can be filled with the work of a wider variety of judges, both to recognize the contributions of more individuals and to demonstrate the degree to which judges with different perspectives and experiences approach the same problem in different ways. When the names of Friendly and Hand and Holmes come up, we can emphasize not only their technical skills, but also their limitations and the degree to which their opinions—like everyone else’s—reflect their times and their moral and intellectual pre-commitments. When we talk judicial biography, we can emphasize the contingency of appointment and opportunity. In counseling and signaling, we can help our most compassionate students and our best listeners think of themselves as potential judges, not just our best exam takers. Most importantly, we can take seriously the importance of inculcating in all of our graduates the kind of soft skills that will make them not only better lawyers and citizens, but also better judges.

Ultimately, the central insight of moving beyond the myth of judicial merit is one that applies to all of us as participants and observers of our broader legal culture. Put bluntly, we are morally and practically responsible for the law we create and sustain. Law is not a creature with its own will that needs to be tended by a cadre of technically-proficient and politically-agnostic brainiacs. It is instead an arena in which we work through our conflicts about the first principles of our social organization through stylized and historically-inflected interactions. When we are picking appellate judges, we are picking the most important voices in these interactions, our representatives as we balance change and continuity, law and order, efficacy and autonomy.⁸⁰ The stakes are too high to let any legal

⁷⁹ For those not keeping score, this has been true of the Supreme Court ever since Justice Sotomayor replaced Justice Stevens (though Justice Ginsburg will proudly tell you that she spent her third year at and received her degree from Columbia).

⁸⁰ Michael Boudin’s reconstruction of Henry Friendly’s craft of judging, Boudin, *supra* note 24, makes a compelling case that Judge Friendly brought to this collective conversation a much larger and more practical set of skills than the traditional merit

fiction choose our representatives, let alone one whose premise denies the very stakes of appellate decisionmaking.

narrative implicates. *See id.* at 2-5. It may well be that the crowning irony of our merit discourse is that it shortchanges even the judges whom it exalts.