SMU | Dedman School of Law

SMU Law Review

Volume 50 | Issue 3 Article 3

January 1997

# Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation

Margaret V. Sachs

Recommended Citation
Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. Rev. 777 (1997)
https://scholar.smu.edu/smulr/vol50/iss3/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

# JUDGE FRIENDLY AND THE LAW OF SECURITIES REGULATION: THE CREATION OF A JUDICIAL REPUTATION

*Margaret V. Sachs**

TABLE OF CONTENTS



* Professor of Law, University of Georgia School of Law. A.B., Harvard University; J.D., Harvard Law School. The author wishes to express her appreciation to Barbara Black, Lynne L. Dallas, Robert W. Hillman, Therese H. Maynard, Alexander M. Meiklejohn, Jeffry M. Netter, and Robert C. Power for their helpful comments on earlier drafts of this Article.

## I. INTRODUCTION

FEW judges are more revered than the late Henry J. Friendly, a member of the United States Court of Appeals for the Second Circuit from 1959 to 1986.[1] Leading jurists and scholars have described him as "one of our wisest judges,"[2] "a legend in his own time,"[3] "the most remarkable legal mind of his generation,"[4] "the pre-eminent appellate judge of his era,"[5] and "the most distinguished judge in this country during his years on the bench."[6] How does such a reputation come about?

Historians and literary critics have shown that great reputations do not rest simply on great work.[7] Rather they are in significant measure the

1. For an overview of Judge Friendly's career and achievements, see *Extraordinary Session of the Court of Appeals for the Second Circuit, In Memoriam, Honorable Henry J. Friendly*, 805 F.2d LXXXI (1986) [hereinafter *Extraordinary Session*]. *See also* JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT 176-78 (1987) (biographical sketch of Judge Friendly).

2. Finley v. United States, 490 U.S. 545, 565 (1989) (Steven, J., dissenting).

3. Bruce A. Ackerman et al., *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1715 (1986) (comments of Prof. Paul Freund).

4. Edward Weinfeld, *A Tribute to Henry J. Friendly*, 1978 ANN. SURV. AM. L. xx, xxiv. Weinfeld was a member of the United States District Court for the Southern District of New York.

5. *Letter from Jon O. Newman, Judge, United States Court of Appeals for the Second Circuit, to the Editor*, N.Y. TIMES, March 24, 1986, at A18.

6. Michael Norman, *Henry J. Friendly, Federal Judge in Court of Appeals, Is Dead at 82*, N.Y. TIMES, March 12, 1986, at B6 (quoting Judge Richard A. Posner, a member of the United States Court of Appeals for the Seventh Circuit).

When Judge Friendly died, the *Harvard Law Review* published seven tributes to him. *See* Ackerman et al., *supra* note 3. Portraying him more as an icon than human being, the tributes made no mention of the fact that he had taken his own life. *See* Paul Gewirtz, *A Lawyer's Death*, 100 HARV. L. REV. 2053 (1987) (addressing the failure of the tributes to refer to Friendly's suicide). Professor Gewirtz noted that "we almost always pay a price when lawyers ignore the humanity of their subjects." *Id.* at 2055.

7. *See, e.g.*, JOHN RODDEN, THE POLITICS OF LITERARY REPUTATION: THE MAKING AND CLAIMING OF 'ST. GEORGE' ORWELL (1989); LAWRENCE H. SCHWARTZ, CREATING FAULKNER'S REPUTATION (1988); GARY TAYLOR, REINVENTING SHAKESPEARE (1989); CHARLOTTE TEMPLIN, FEMINISM AND THE POLITICS OF LITERARY REPUTATION (1995); JANE TOMPKINS, SENSATIONAL DESIGNS: THE CULTURAL WORK OF AMERICAN FICTION 1790-1860 (1985); GAYE TUCHMAN, EDGING WOMEN OUT: VICTORIAN NOVELISTS, PUBLISHERS, AND SOCIAL CHANGE (1989); PETER WIDDOWSON, HARDY IN HISTORY: A STUDY IN LITERARY SOCIOLOGY (1989); R.C. Lewontin, *Darwin, Mendel & the Mind*, N.Y. REV. BOOKS, Oct. 10, 1985, at 18; Marshall Missner, *Why Einstein Became Famous in America*, 15 SOC. STUD. SCI. 267 (1985). *See also* ROBERT E. KAPSIS, HITCHCOCK: THE MAKING OF A REPUTATION (1992); CHARLES J. MALAND, CHAPLIN AND AMERICAN CULTURE: THE EVOLUTION OF A STAR IMAGE (1989); Gladys E. Lang & Kurt Lang, *Recognition and Renown: The Survival of Artistic Reputation*, 94 AM. J. SOC. 79 (1988).

product of contingencies[8]—fortuitous features of the social context.[9] Consider how the reputation of George Orwell, who published *Nineteen Eighty-Four* in 1949,[10] benefited from the particular era in which he wrote. Orwell's treatment of the clash between freedom and totalitarianism was especially well received in an era obsessed about the Cold War. As a commentator recently observed, "If *Nineteen Eight-Four* had not become enmeshed in ongoing East-West polemics, its reputation might be strictly literary, and it might today be regarded as a period piece."[11]

Another contingency might be called "means" or "opportunity." Orwell gained enormously from writing in English: "Surely Orwell would be less well known today to the international reading public, no matter how appealing his prose style, if he had written in Bulgarian, a language with no internationally recognized literary tradition and whose linguistic community is without power or status."[12]

Consider also the advantages of a distinguished sponsor. While still a relative unknown, Orwell was acclaimed by Lionel Trilling, a professor of English at Columbia University whose own stature in literary and academic circles was "practically unrivalled."[13] Trilling's endorsements "go far to explain why Orwell—and not other writers . . .—came to figure in the '50s as an intellectual hero in many lives besides Trilling's."[14]

Consider finally that the sheer availability of voluminous work product precipitates scholarly attention. Charles Darwin, to whom the theory of evolution is largely credited, is far better known than Gregor Mendel, discoverer of the genetic laws that made Darwin's theory possible.[15] This is due partly to the fact that Darwin's extensive papers survived, whereas most of Mendel's were destroyed by fire.[16]

Although legal scholars write extensively about eminent judges,[17] they have largely ignored the impact of contingencies on judicial reputations.[18] Judge Posner's recent book on Cardozo is no exception.[19] Posner gave

---

8. Historians and literary critics speak of reputations as being "contingent." *See, e.g.*, TEMPLIN, *supra* note 7, at ix; Missner, *supra* note 7, at 288. This Article adopts that phraseology.

9. See studies cited in *supra* note 7.

10. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

11. RODDEN, *supra* note 7, at 404.

12. *Id.* at 63 (footnote omitted).

13. *Id.* at 82.

14. *Id.* at 83. *See also* TOMPKINS, *supra* note 7, at 9-10 (describing Henry Wadsworth Longfellow's sponsorship of Nathaniel Hawthorne).

15. Lewontin, *supra* note 7, at 18.

16. *Id.* at 19-20. *See also* TAYLOR, *supra* note 7, at 380 (making the point that only five percent of Sophocles's work survives, whereas virtually all of Shakespeare's work does).

17. *See, e.g.*, Michael J. Gerhardt, *The Art of Judicial Biography*, 80 CORNELL L. REV. 1595 (1995) (reviewing recent biographies of Justices Black and Powell and Judge Learned Hand); John W. Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643 (1995); Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996).

18. A recent exception is G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 20 N.Y.U. L. REV. 576 (1995).

19. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990).

contingencies—such as Cardozo's courting of academics and his membership on the New York Court of Appeals—only cursory mention.[20] Moreover, he lambasted emphasis on contingencies as "part of a radical-left project" bent on demonstrating that "white male Western culture has no intrinsic superiority."[21] Other scholars may worry that attention to the impact of contingencies on judicial careers risks undermining the legal profession's meritocratic self-image.[22]

Are great judicial reputations—like great literary and scientific reputations—also shaped by contingencies? Or does the legal profession for some reason stand apart? This Article shows that great judges are not special. Friendly was as much the beneficiary of contingencies as Orwell and Darwin.

Appointed to the bench at age fifty-five, following more than thirty years of private law practice[23] and a clerkship with Justice Brandeis,[24] Judge Friendly achieved renown in subjects as divergent as federal jurisdiction,[25] criminal procedure,[26] securities regulation,[27] and tax law.[28] This Article focuses on his reputation in securities regulation.[29]

Judge Friendly is said to have done "more to shape the law of securities regulation than any [other] judge in the country."[30] The author of eighty

---

20. *Id.* at 128-32. Posner attributed Cardozo's reputation largely to his "rhetoric and pragmatism." *Id.* at 132. These qualities of Cardozo are the focus of much of Posner's book. *See id.* chs. 2, 3, 6.

21. POSNER, *supra* note 19, at 63-64. He criticizes the studies of the impact of contingencies on literary reputations by erroneously insinuating the typicality of one study that marginalizes merit and treats contingencies as essentially all-determinative. *See id.* at 62-64 (discussing TAYLOR, *supra* note 7). This appears to be an apt description of Taylor's book. *See* TAYLOR, *supra* note 7, at 4-6, 373-411. However, it is not typical of the genre as a whole. *See, e.g.*, RODDEN, *supra* note 7, at ix, 58 (finding reputations to derive from both merit and contingencies); TOMPKINS, *supra* note 7, at 33 (same).

22. The many references to Judge Friendly's outstanding law school record represent an expression of this self-image. *See, e.g.*, Ackerman et al., *supra* note 3, at 1713 (comments of Judge Wilfred Feinberg); *Extraordinary Session*, *supra* note 1, at XC (comments of Judge J. Edward Lumbard); *id.* at LXXVII (comments of Justice Thurgood Marshall).

23. *See generally* Lyman M. Tondel, Jr., *Henry J. Friendly: Practicing Lawyer 1928-1959*, 1978 ANN. SURV. AM. L. xxv. *See also Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 900 (1967) (comments of Judge Henry Friendly) (noting that "I did not have very many proceedings before the SEC when I was in practice, at least not many on the front line").

24. For a summary of Friendly's pre-judicial career, see *Extraordinary Session*, *supra* note 1, at LXXXII (statement of Justice Thurgood Marshall).

25. *See* David P. Currie, *On Blazing Trails: Judge Friendly and Federal Jurisdiction*, 133 U. PA. L. REV. 5 (1984).

26. *See* Frank I. Goodman, *Judge Friendly's Contributions to Securities Law and Criminal Procedure: "Moderation is All,"* 133 U. PA. L. REV. 10, 23-32 (1984).

27. *See* Ackerman et al., *supra* note 3, at 1722 (comments of Prof. Louis Loss); Goodman, *supra* note 26, at 11-23.

28. *See* Weinfeld, *supra* note 4, at xxi & n.6 (collecting illustrative noteworthy Friendly opinions in the area of tax law).

29. How contingencies may have contributed to Judge Friendly's reputation in areas other than securities regulation is a fertile area for future study.

30. Ackerman et al., *supra* note 3, at 1723 (comments of Prof. Louis Loss). *See, e.g.*, RICHARD W. JENNINGS ET AL., SECURITIES REGULATION 1552 n.8 (7th ed. 1992) (describing Judge Bork as "perhaps alone unintimidated by the aura of Judge Friendly"); MARC I. STEINBERG, SECURITIES REGULATION § 1.05, at 22 (2d ed. 1993) (referring to "the eminent

majority opinions in the area,[31] he tackled everything from Rule 10b-5[32] and the proxy rules[33] to extraterritoriality,[34] criminality,[35] and tender offers.[36] His name appears in ten securities opinions of the United States Supreme Court[37] as well as in three hundred fifty-five securities opinions of the lower federal courts outside the Second Circuit.[38] Nineteen of his opinions (hereinafter the "casebook opinions") have appeared as principal cases[39] in securities regulation casebooks.[40]

This Article demonstrates the impact of contingencies on the develop-

---

Judge Friendly"); Adena Exploration, Inc. v. Sylvan, 860 F.2d 1242, 1252 (5th Cir. 1988) (describing Judge Friendly as "one of the leading interpreters of the federal securities laws").

31. To obtain this figure, the following search was run in Westlaw's Second Circuit (CTA2) file: Ju (Friendly) and ("securities exchange act" "securities act" "trust indenture act" "investment advisors act" "investment company act" "public utility holding company act" "securities investor protection act"). The resultant list was then purged of all opinions containing merely extraneous references to the federal securities statutes, such as references by analogy. Also eliminated were duplicate opinions, one-judge orders, concurrences, dissents, and en banc opinions.

32. *See, e.g.*, Goldberg v. Meridor, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978); Levine v. Seilon, Inc., 439 F.2d 328 (2d Cir. 1971). *See also* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 864 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969).

33. *See, e.g.*, Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973); Rosenblatt v. Northwest Airlines, Inc., 435 F.2d 1121 (2d Cir. 1970).

34. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

35. *See, e.g.*, United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976); United States v. Solomon, 509 F.2d 863 (2d Cir. 1975).

36. *See, e.g.*, Prudent Real Estate Trust v. Johncamp Realty, Inc., 599 F.2d 1140 (2d Cir. 1979); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969).

37. *See, e.g.*, Basic v. Levinson, 485 U.S. 224, 238 (1988); Aaron v. SEC, 446 U.S. 680, 701 (1980); Burks v. Lasker, 441 U.S. 471, 486 n.16 (1979) (citing Judge Friendly's observation concerning a Federal Rule of Civil Procedure); Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 n.27 (1978); Piper v. Chris-Craft Indus., 430 U.S. 1, 42 (1977); TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197, 211, 214 (1976); Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975); Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 604 n.31 (1973); Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 430 (1972). *See also* Reves v. Ernst & Young, 494 U.S. 56, 74 (1990) (Stevens, J., concurring); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 373, 387 n.86, 390 (1982) (Commodities Exchange Act); Radzanower v. Touche Ross & Co., 426 U.S. 148, 163 n.10, 166 (1966) (Stevens, J., dissenting).

38. To obtain this figure, the following search was run in Westlaw's file of federal cases ("allfeds"): ("securities act" "securities exchange act" "investment advisors act" "investment company act" "public utility holding company act" "trust indenture act" "securities investor protection act") & ("Judge Friendly" "Friendly, J.") % CO (two NY CT VT). After the Supreme Court opinions were eliminated, the resultant list contained 355 opinions. No attempt was made to eliminate opinions containing merely extraneous securities references, such as references by analogy. *Cf. supra* note 31.

39. "Principal cases" are opinions reprinted largely in full. In addition to majority opinions on behalf of three-judge panels, principal cases may include concurring, dissenting, and en banc opinions.

40. For a list of opinions by Judge Friendly that appear in current securities regulation casebooks or in earlier editions of those casebooks, see *infra* Appendix I.

ment of Judge Friendly's reputation.[41] Its purpose is to help move analysis of contingencies into the mainstream of legal scholarship. Disregard of contingencies is costly because valuable insights about both individual judges and the judicial system are simply shut out.

Part II examines the interplay between Judge Friendly's work and his era. A judicial activist, Friendly worked during an era in which judicial activism held sway.[42] In general, activist judges have greater opportunities for renown than do those devoted to maintaining the status quo or to curtailing a previous era's excesses. The activist receives credit for the doctrines she creates, whereas the status quo maintainer and the curtailer at most share credit with the authors of the doctrines they seek to maintain or curtail.

Part III focuses on Judge Friendly's court. Known as securities regulation's "Mother Court,"[43] the Second Circuit provided a securities docket that was quantitatively large and qualitatively meaty. During securities regulation's activist era, Second Circuit opinions accounted for up to seventy percent of the federal appeals court opinions appearing as principal cases in securities regulation casebooks.

Part IV shows the ways in which Judge Friendly's reputation was enhanced by Professor Louis Loss of Harvard Law School,[44] this century's leading securities regulation scholar.[45] Much of the material for this part

---

41. This Article does not consider the ways in which contingencies may contribute to the maintenance of Judge Friendly's reputation. *Cf.* Lang & Lang, *supra* note 7 (addressing the maintenance of reputations).

42. This Article uses the term judicial activism to refer to loose statutory construction and the identification and creation of new rights on behalf of the legislature's chosen beneficiaries. *See infra* text accompanying note 49.

43. Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting); Continental Grain (Australia) Pty Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 413 (8th Cir. 1979); SEC v. Kasser, 548 F.2d 109, 115 & n.29 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 (D.C. Cir. 1987) (referring to "the Second Circuit's preeminence in the field of securities law").

44. Professor Loss joined the Harvard faculty in 1952. From 1962-84, he was the William Nelson Cromwell Professor. In 1984, he became Professor Emeritus. ASSOCIATION OF AM. LAW SCHS., AALS DIRECTORY OF LAW TEACHERS 1996-97, at 641.

Professor Loss was of course himself affected by his era and circumstances, including his association with Judge Friendly. Analysis of Loss's reputation, however, is beyond the scope of this Article.

45. *See, e.g.*, Jeffrey D. Bauman, *Loss and Seligman on Securities Regulation: An Essay for Don Schwartz*, 78 GEO. L.J. 1753, 1753 (1990) ("the preeminent scholar in the field"); Norman S. Poser, *A Monument to a Regulatory System*, 92 MICH. L. REV. 1797, 1797 (1994) ("the foremost scholar" of securities law); Stephen Labaton, *For the Father of Securities Law, Yet Another Milestone*, N.Y. TIMES, Sept. 23, 1993, § 3, at 8 (noting that "[f]or most of the second half of this century, Louis Loss has been known as the intellectual father of securities law"). For Loss's autobiography, see LOUIS LOSS, ANECDOTES OF A SECURITIES LAWYER 1-76 (1995) [hereinafter LOSS, ANECDOTES].

Professor Loss is the author (along with Professor Joel Seligman) of the authoritative treatise on securities regulation. I-XI LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION (3d ed. 1989 & Supps. 1995 & 1996) [hereinafter LOSS & SELIGMAN, THIRD EDITION]. The second edition of the treatise, which Loss authored alone, was published in 1961 and amplified by a three-volume supplement in 1969. I-III LOUIS LOSS, SECURITIES REGULATION (2d ed. 1961); IV-VI SECURITIES REGULATION (2d ed. Supp. 1969) [hereinafter LOSS, SECOND EDITION]. The first edition of the treatise, likewise authored solely by

comes from Friendly's own papers.[46]

Part V addresses the volume of Judge Friendly's securities opinions, which far exceeded that of any other Second Circuit judge during the activist era in securities regulation. Part V identifies both the factors that caused Friendly to write more securities opinions than his colleagues as well as the reputational benefits that he reaped as a result.

## II. JUDGE FRIENDLY'S ERA IN SECURITIES REGULATION

How did Judge Friendly's era affect his reputation in securities regulation? A starting point for answering this question is an observation of Judge Posner that runs somewhat counter to his overall view of contingencies: "Given two . . . judges . . . of equal quality, one may be more influential than another simply because he is working at a time . . . [when] standards . . . are more fluid than at other times . . . ."[47] While Posner did not elaborate,[48] this observation is eminently plausible. When standards are fluid, judges are freer to write opinions that change the law—opinions more likely to be reputation-enhancing than those that simply recapitulate well-settled understandings. The former are news, whereas the latter are not.

While freedom to change the law may be advantageous, the degree of advantage may turn on the nature of the changes that a judge brings about. Some changes—borne of judicial activism—involve loose statutory construction and the identification and creation of new rights on behalf of the legislature's chosen beneficiaries. Other changes—borne of judicial restraint—involve curtailing the excesses of a previous era.[49] In general, activist judges have greater opportunities for renown than do judges who curtail past excesses. The activist receives credit for the doctrines she creates, whereas the curtailer at most shares credit with the authors of the doctrines he pares back.

Moreover, the reputation of an activist judge depends to a significant degree on whether the changes endure. Transient changes—such as those quickly trumped by Congress or the Supreme Court—are apt soon to be

---

Loss, was published in 1951 and supplemented in 1955. LOUIS LOSS, SECURITIES REGULATION (1951 & Supp. 1955) [hereinafter Loss, FIRST EDITION].

46. The Henry J. Friendly Papers [hereinafter Friendly Papers] are available in the Harvard Law School Library. They comprise more than 100 boxes of materials, including professional and personal correspondence and memoranda to other members of the Second Circuit regarding cases before the court.

47. POSNER, *supra* note 19, at 71. Posner made this observation in the context of discussing whether to measure a judge's reputation by the frequency with which she is cited. *Id.* at 70-71. Since Posner did not apply this observation to Cardozo (or to any other judge), it is hard to know just how he would square it with his overall view of contingencies, which is discussed *supra* notes 19-21 and accompanying text.

48. *See* POSNER, *supra* note 19, at 71; *see also supra* note 47.

49. For a discussion of judicial activism and restraint, see Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 347-63 (1989).

forgotten, along with the judges who brought them about.[50] Enduring changes—and the judges who brought them about—are likely to be remembered.

Finally, a judge who espouses his era's prevailing philosophy is more apt to be celebrated than is a judge of equivalent caliber who challenges that philosophy head-on. Thus, for example, neither Brandeis nor Holmes would have been likely to develop a great reputation in "the premodernist era."[51]

Judge Friendly's years on the bench encompassed the 1960s and early 1970s, a time of substantial judicial activism in the law of securities regulation. What triggered the activism? Did the activism spawn important and enduring changes? And did Judge Friendly engage in activism himself?

### A. WHY JUDICIAL ACTIVISM HELD SWAY

The 1960s and early 1970s saw judicial activism at play across the legal landscape. Indeed, during this time the Supreme Court discovered in the Constitution rights to privacy[52] and abortion,[53] loosened standing requirements for challenges to agency action,[54] and recognized implied actions as to which Congress had been silent.[55]

Securities regulation was fertile soil for activist judges. This was due in part to the new importance of securities regulation as an area of law. Its importance derived from several factors. First, there had been a dramatic increase in the quantity of transactions to which the federal securities laws apply[56]—the number of public offerings in 1968 was more than triple that in 1958[57] and the dollar volume of stocks sold on the stock exchanges

---

50. *Cf.* Harry M. Reasoner, *The Inner Workings of a Great Court*, 50 TEX. L. REV. 210, 210-11 (1971) (reviewing MARVIN SCHICK, LEARNED HAND'S COURT (1970)) (noting that if a United States circuit judge "writes brilliantly and wisely upon a major issue, his decision may well be overshadowed by a superseding but inferior decision of the Supreme Court").

51. White, *supra* note 18, at 619.

52. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

53. *See* Roe v. Wade, 410 U.S. 113 (1973). *See generally* Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 122-29 (1987).

54. *See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154-56 (1970).

55. *See* Cannon v. University of Chicago, 441 U.S. 677, 735-38 (1979) (Powell, J., dissenting) (collecting and discussing cases).

56. There are seven federal securities statutes: Securities Act of 1933, 15 U.S.C. § 77(a)-(mm) (1994); Securities Exchange Act of 1934, 15 U.S.C. § 78(a)-(kk) (1994); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79a to 79z-6 (1994); Trust Indenture Act of 1939, 15 U.S.C. § 77aaa-77bbbb (1994); Investment Company Act of 1940, 15 U.S.C. § 80a-1 to 80a-64 (1994); Investment Advisors Act of 1940, 15 U.S.C. § 80b-1 to 80b-21 (1994); and Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa-78lll (1994).

The most important of these are the 1933 Act and the 1934 Act. The 1933 Act is principally directed at the initial distribution of securities, while the 1934 Act concentrates on the secondary markets. For an overview of the federal securities statutes, see LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 33-47 (3d ed. 1995).

57. *See* 35 SEC ANN. REP. 187 (1969). The total number of registrations in 1958 was 16,490. In 1968, the number had climbed to 54,076. *Id.*

more than quintuple.[58] In addition, more companies than ever before had become subject to the 1934 Act's periodic disclosure, proxy solicitation, and insider trading provisions following a 1964 amendment to that Act.[59] And finally, the volume of securities litigation had reached new heights.[60]

Another reason that the law of securities regulation drew the attention of activist judges is that many of the important statutory provisions are phrased in broad language. For example, section 10(b) of the 1934 Act[61] prohibits "any manipulative or deceptive device or contrivance,"[62] and Rule 10b-5[63] prohibits "any device, scheme, or artifice to defraud."[64] Moreover, the 1933 and 1934 Acts provide no definition of crucial terms

---

58. *See id.* at 193. The dollar volume in thousands for 1958 was 38,419,560. In 1968, the figure had climbed to 197,117,957. *Id.*

59. *See id.* at 42. Prior to the 1964 amendment, these provisions were applicable only to companies traded on national securities exchanges. The effect of the amendment was to make them applicable as well to companies of a specified size whose securities were traded over the counter. *See generally* Richard M. Phillips & Morgan Shipman, *An Analysis of the Securities Acts Amendments of 1964*, 1964 DUKE L.J. 706, 710-97.

60. This statement is based on searches in Westlaw's "allfeds" file for the years 1958 and 1968. In 1958, there were 60 opinions which cited to one or more of the seven federal securities statutes, which are set forth *supra* note 56. In 1968, the number of such opinions issued was 197. *Cf.* Jeffry Netter, *Using Financial Economics in Securities Fraud Litigation*, *in* MODERNIZING U.S. SECURITIES REGULATION 162 n.2 (Kenneth Lehn & Robert W. Kamphuis, Jr. eds., 1992) (noting that "the increase in securities fraud suits is highly correlated with the increase in the volume of shares traded").

61. Section 10 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1994).

62. For the text of § 10(b), see *supra* note 61.

63. Rule 10b-5, promulgated by the Securities and Exchange Commission (SEC) in 1942, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading,
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1996).

64. For the text of Rule 10b-5, see *supra* note 63.

such as "seller,"[65] "tender offer,"[66] and a "transaction . . . not involving any public offering."[67] This generality was, in all likelihood, an invitation to activism for judges who were even moderately predisposed in that direction.

Within the lower federal courts in particular, activism flourished as the result of securities decisions of the United States Supreme Court. Before the 1960s, the Court had given broad readings to the definition of a security[68] and to the private offering exemption.[69] It also allowed investors to sue for fraud notwithstanding an arbitration agreement to the contrary.[70] During the 1960s and early 1970s, the Court authorized implied actions under several statutory provisions[71] and established presumptions of reliance on behalf of those who sued under those provisions.[72]

Activism also thrived during the 1960s and early 1970s because of the wide range of securities issues that the Supreme Court had yet to address. These included regulation of tender offers[73] as well as the application of Rule 10b-5 to insider trading[74] and to transnational transactions.[75] In addressing these issues, the lower federal courts were largely unconstrained.

This Article refers to the era of judicial activism in securities regulation as the "critical period." The critical period is deemed to start on November 8, 1961, the date of the SEC's decision applying Rule 10b-5 to insider trading.[76] It is deemed to end on March 23, 1977, the date of the

65. Sellers of securities are subject to liability under § 12 of the 1933 Act. *See* 15 U.S.C. § 77l (1994). As the Supreme Court has noted, however, "the Securities Act nowhere delineates who may be regarded as a statutory seller." Pinter v. Dahl, 486 U.S. 622, 642 (1988).

66. *See* LOSS & SELIGMAN, *supra* note 56, at 513 (noting that "[i]t is odd that . . . 'tender offer' . . . is defined by neither statute nor rule").

67. This is the language of § 4(2) of the 1933 Act, 15 U.S.C. § 77d (1994), popularly known as the private offering exemption. As the Supreme Court has noted, the 1933 Act does not set forth the boundaries of this exemption. *See* SEC v. Ralston Purina Co., 346 U.S. 119, 122 (1953).

68. *See* SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943).

69. *See Ralston Purina*, 346 U.S. at 126-27.

70. Wilko v. Swan, 346 U.S. 427, 434-38 (1953), *overruled by*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

71. *See* Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) (Rule 10b-5); J.I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964) (Rule 14a-9).

72. Affiliated Ute Citizens v. United States, 406 U.S. 128, 152-54 (1972) (presumption under Rule 10b-5); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384-85 (1970) (presumption under Rule 14a-9). For a history of Supreme Court decisions in the securities area, see Alfred E. Conard, *Securities Regulation in the Burger Court*, 56 U. COLO. L. REV. 193, 194-204 (1985).

73. The Supreme Court first addressed the tender offer provisions of the 1934 Act in Piper v. Chris-Craft Indus., 430 U.S. 1 (1977).

74. The first Supreme Court decision to address the application of Rule 10b-5 to insider trading was Chiarella v. United States, 445 U.S. 222 (1980).

75. The Supreme Court expressly reserved the question of the extraterritorial reach of Rule 10b-5 in Scherk v. Alberto-Culver Co., 417 U.S. 506, 514 n.8, 518 n.12 (1974).

76. *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

Supreme Court's most significant curtailment of Rule 10b-5.[77]

### B. How Judicial Activism Changed the Law of Securities Regulation

During the critical period, lower federal court judges brought to life a vast array of rights and duties designed to protect the investing public.[78] One illustration is the use of section 10(b) and Rule 10b-5 to prohibit insider trading. Neither provision mentions insider trading,[79] which is addressed expressly, albeit narrowly, by an entirely different provision of the 1934 Act.[80] Following the lead of a 1961 decision by the SEC,[81] lower federal courts nevertheless read Rule 10b-5 to prohibit insider trading.[82]

Another illustration involves Rule 10b-5's extraterritorial reach. Congress provided no direct guidance on this subject,[83] which arose increasingly in the 1960s and early 1970s as the securities markets became more internationalized.[84] Lower federal courts nonetheless applied Rule 10b-5 to transactions involving various foreign components, such as foreign plaintiffs and defendants, foreign securities, and trades or misrepresentations made in foreign countries.[85]

A third illustration is the private action under Rule 10b-5. Congress and the SEC conceived of section 10(b) and Rule 10b-5 as enforceable by the government only[86] and thus did not expressly authorize a private action for their violation.[87] By 1969, ten of the eleven federal courts of

---

77. *See* Santa Fe Indus. v. Green, 430 U.S. 462 (1977). *Cf.* James D. Cox et al., Securities Regulation 753 (1991) (characterizing *Santa Fe* as "perhaps the most fundamental of the Supreme Court's retrenchment decisions under Rule 10b-5").

78. For an overview of judicial activism in the federal statutory context, see Levy & Glicksman, *supra* note 49, at 355-58.

79. For the text of § 10(b), see *supra* note 61. For the text of Rule 10b-5, see *supra* note 63.

80. See § 16(b) of the 1934 Act, 15 U.S.C. § 78p(b) (1994), which prohibits purchases and sales, or sales and purchases, by specified persons within a six month period. For an overview of § 16(b), see Loss & Seligman, *supra* note 56, at 554-91.

81. *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

82. *See, e.g.*, Arber v. Essex Wire Corp., 490 F.2d 414, 418 (6th Cir.), *cert. denied*, 419 U.S. 830 (1974); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 851 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969).

83. *See, e.g.*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 (D.C. Cir. 1987). *But cf.* Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Trans. L. 677 (1990) (arguing that Congress chose to extend the benefits of the 1933 and 1934 Acts only to those investors whose trades occur in the United States).

84. For a history of the internationalization of the securities markets, see SEC, Report to Senate Comm. on Banking, Housing and Urban Affairs and House Comm. on Energy and Commerce on the Internationalization of the Securities Markets ch. III, at 29-33 (1987).

85. *See, e.g.*, SEC v. Kasser, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); *Bersch*, 519 F.2d at 993; Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

86. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729-30 (1975).

87. For the text of § 10(b), see *supra* note 61. For the text of Rule 10b-5, see *supra* note 63.

appeals had nonetheless implied a private action.[88] By the mid-1970s, the implied action under Rule 10b-5 had become "a judicial oak . . . grown from little more than a legislative acorn."[89]

The private action for proxy fraud furnishes a fourth illustration. The provisions governing proxy fraud—section 14(a) of the 1934 Act[90] and Rule 14a-9[91]—do not expressly authorize private lawsuits.[92] But in 1964, the Supreme Court recognized an implied action for proxy fraud,[93] and lower federal courts subsequently gave that action an expansive scope.[94]

Consider finally the matter of tender offers, which were not addressed in the 1934 Act as originally enacted.[95] In the wake of the proliferation of tender offers during the 1960s,[96] Congress amended the 1934 Act in 1968 to cover them.[97] During the critical period, lower federal courts construed the amendment liberally[98] and implied an action for fraud connected with a tender offer.[99]

The creation of new rights and duties under the federal securities laws did not continue indefinitely. By the mid-1970s, the Supreme Court began to take a more restrictive view of the federal securities laws[100] as well as of implied actions,[101] thereby bringing the activist era in securities regulation to a close.

Even though judicial activism in securities regulation subsided, the rights and duties that activism had spawned endured. Indeed, courts today routinely apply Rule 10b-5 to insider trading[102] and transnational

88. *See* Margaret V. Sachs, *The Relevance of Tort Law Doctrines to Rule 10b-5: Should Careless Plaintiffs Be Denied Recovery?*, 71 CORNELL L. REV. 96, 96 n.3 (1985).

89. *Blue Chips Stamps*, 421 U.S. 723 at 737.

90. Section 14(a) of the 1934 Act, 15 U.S.C. § 78n(a) (1994).

91. 17 C.F.R. § 240.14a-9 (1996) (Rule 14a-9).

92. *See* 15 U.S.C. § 78n(a) (1994); 17 C.F.R. § 240.14a-9 (1996).

93. *See Borak*, 377 U.S. at 430-31.

94. *See, e.g.*, Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 384 (2d Cir. 1974) (broad interpretation of causation element), *cert. denied*, 421 U.S. 976 (1975); Colonial Realty Corp. v. Baldwin-Montrose Chem. Co., 312 F. Supp. 1296, 1299 (E.D. Pa. 1970) (finding defendant's failure to disclose its belief that it had obtained "working control" as the result of a merger to be materially misleading).

95. For an overview of Congress's consideration of tender offers, see V LOSS & SELIGMAN, THIRD EDITION, *supra* note 45, at 2161-69.

96. *See* Piper v. Chris-Craft Indus., 430 U.S. 1, 22 (1977).

97. The Williams Act, a set of amendments to the 1934 Act enacted in 1968, is codified at 15 U.S.C. §§ 78m(d)-(e), n(d)-(f) (1994).

98. *See, e.g.*, Smallwood v. Pearl Brewing Co., 489 F.2d 579, 598 (5th Cir.) (broad definition of term "tender offer"), *cert. denied*, 419 U.S. 873 (1974); Cattlemen's Inv. Co. v. Fears, 343 F. Supp. 1248, 1251 (W.D. Okla. 1972) (same).

99. *See, e.g.*, H.K. Porter Co. v. Nicholson File Co., 482 F.2d 421, 424 (1st Cir. 1973); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 946 (2d Cir. 1969).

100. *See* Conard, *supra* note 72; Paul D. Freeman, *A Study in Contrasts: The Warren and Burger Courts' Approach to the Securities Laws*, 83 DICK. L. REV. 183 (1979); Lewis D. Lowenfels, *Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings*, 65 GEO. L.J. 891 (1977).

101. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.3.3, at 359-63 (2d ed. 1994).

102. *See, e.g.*, San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Co., 75 F.3d 801, 814-15 (2d Cir. 1996); SEC v. Maio, 51 F.3d 623, 632-34 (7th Cir. 1995).

transactions.[103] Moreover, the private actions under Rules 10b-5 and 14a-9, while modified in some respects,[104] remain cornerstones of federal securities practice,[105] as do the rights and duties associated with tender offers.[106] Thus, in the words of Professors Loss and Seligman, "One may still cry, 'Viva la revolución!'"[107]

### C. Judicial Activism and Judge Friendly

While generally an activist, Judge Friendly was no slavish adherent to activism in all circumstances.[108] But he did not appreciably distance himself from activism either, even in those instances in which he declined to adopt an activist position.

As examples of his activism, consider the casebook opinions in *Leasco Data Processing Equipment Corp. v. Maxwell*[109] and *Bersch v. Drexel Firestone, Inc.*[110] Both addressed Rule 10b-5's extraterritorial reach, a subject on which Congress had provided no direct guidance.[111] Judge Friendly nonetheless generated principles of extraterritoriality based on "a purely hypothetical legislative intent"[112]—"what Congress would have wished if these problems had occurred to it."[113] He did so even as he conceded that "if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond."[114]

Another example of Friendly's activism comes from the casebook opinion in *Goldberg v. Meridor*,[115] which salvaged the plaintiffs' Rule 10b-5 action through artful construction of the Supreme Court's opinion in *Santa Fe Industries v. Green*.[116] A footnote in *Santa Fe* had held Rule 10b-5 unavailable to shareholders who sought to challenge a merger when they lacked both a vote on the merger and the right to enjoin it

---

103. *See, e.g.*, Itoba, Ltd. v. Lep Group, PLC, 54 F.3d 118, 122 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 702 (1996); Sloane Overseas Fund, Ltd. v. Sapiens Int'l Corp., 941 F. Supp. 1369, 1373-74 (S.D.N.Y. 1996).

104. *See, e.g.*, Central Bank v. First Interstate Bank, 511 U.S. 164, 177 (1994) (eliminating aiding and abetting liability in Rule 10b-5 private actions); Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1099-1108 (1991) (eliminating presumption of reliance in Rule 14a-9 private actions where management has sufficient votes to approve the transaction).

105. *See generally* IX Loss & Seligman, Third Edition, *supra* note 45, at 4339-60 (discussing private action under the proxy rules); *id.* at 4383-4431 (discussing private action under Rule 10b-5).

106. *See* V Loss & Seligman, Third Edition, *supra* note 45, at 2123-2262; IX Loss & Seligman, Third Edition, *supra* note 45, at 4375-82.

107. VII Loss & Seligman, Third Edition, *supra* note 45, at 3489.

108. This Article uses judicial activism to refer to loose statutory construction and the identification and creation of new rights on behalf of the legislature's chosen beneficiaries. *See supra* text accompanying note 49.

109. 468 F.2d 1326 (2d Cir. 1972).

110. 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

111. *See supra* note 83 and accompanying text.

112. *Zoelsch*, 824 F.2d at 30.

113. *Bersch*, 519 F.2d at 993. *See Maxwell*, 468 F.2d at 1337.

114. *Bersch*, 519 F.2d at 993.

115. 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

116. 430 U.S. 462 (1977).

under state law.[117] Writing in *Goldberg*, Judge Friendly seized on the *Santa Fe* footnote's "'negative implication'"[118] and held that shareholders who had the right to enjoin a merger under state law had a concomitant right to use Rule 10b-5.[119] He thereby ran roughshod over the final part of the *Santa Fe* opinion,[120] which cautioned against expanding Rule 10b-5 to "overlap and quite possibly interfere with state corporate law,"[121] on the ground that to do so risked violating the intent of Congress.[122]

Other casebook opinions fall outside the activist mold.[123] In his concurring opinion in *SEC v. Texas Gulf Sulphur Co.*,[124] Judge Friendly maintained that section 10(b) did not encompass negligence and that therefore plaintiffs suing under Rule 10b-5 had to establish the defendant's scienter.[125] His position was hardly activist, since it entailed strict statutory construction and made it harder for investors to sue. Yet he distanced himself from activism only so far. For example, nowhere in *Texas Gulf Sulphur* did he argue that a private action under Rule 10b-5 should not have been implied in the first place.

Likewise largely devoid of activism is Friendly's majority opinion in *Barnes v. Osofsky*.[126] At issue was the express private action for fraud in a registration statement set forth in section 11 of the 1933 Act.[127] Grounding his arguments in legislative history and statutory language,[128] Judge Friendly required all section 11 plaintiffs to "trace" their shares to the registration statement they claimed was fraudulent.[129] In so doing, he turned a deaf ear to the difficulties that tracing presents for some plaintiffs.[130] But the departure from activism was not substantial, since tracing

117. *See id.* at 474 n.14. The reason given was that the shareholders failed to "indicate how they might have acted differently" if they had had full disclosure. *Id.*

118. Healey v. Catalyst Recovery of Pa., Inc., 616 F.2d 641, 652 (3d Cir. 1980) (Aldisert, J., dissenting) (quoting Kerrigan v. Merrill Lynch, Pearce, Fenner & Smith, Inc., 450 F. Supp. 639, 644 (S.D.N.Y. 1978)).

119. *See* Goldberg, 567 F.2d at 219-20.

120. The *Santa Fe* opinion consisted of four parts. *See Santa Fe*, 430 U.S. 465-80. The footnote at issue in *Goldberg* appeared in part three of the *Santa Fe* opinion. *See id.* at 474.

121. *Id.* at 479.

122. *See id. See also* Abrams v. Occidental Petroleum Corp., 450 F.2d 157, 162-64 (2d Cir. 1971) (disparaging "mechanistic" interpretation of § 16(b) of 1934 Act and endorsing focus on underlying policy considerations), *aff'd sub nom.* Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1972); Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 946 (2d Cir. 1969) (recognizing implied action for nontendering shareholders under 1934 Act provisions governing tender offers); Brown v. Bullock, 294 F.2d 415, 418 (2d Cir. 1961) (en banc) (recognizing implied action under the Investment Company Act).

123. This Article uses judicial activism to refer to loose statutory construction and the identification and creation of new rights on behalf of the legislature's chosen beneficiaries. *See supra* text accompanying note 49.

124. 401 F.2d 833, 864 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969).

125. *See id.* at 868. For the text of § 10(b), see *supra* note 61.

126. 373 F.2d 269 (2d Cir. 1967).

127. Section 11 of the 1933 Act, 15 U.S.C. § 77k (1994).

128. *See Barnes*, 373 F.2d at 272-73.

129. *Id.* at 272-73 & n.2.

130. *See id.* at 271-72 (describing the difficulties).

difficulties are not so ubiquitous as to render litigation under the section a rarity.[131]

The fact that Judge Friendly sometimes tempered his activism may have worked to his reputational advantage. Commenting on rampant inconsistency in the opinions of Justice Holmes, Judge Posner noted that "once the world is convinced of a . . . thinker's merit despite the ambiguities and equivocations of his work, those attributes enhance his fascination, provide occasions for research and debate, and magnify his following."[132]

In short, Judge Friendly benefited from all the reputational advantages that an era can bestow. He was a leading activist in an activist era that precipitated significant and lasting changes.

## III. JUDGE FRIENDLY'S COURT

How did membership on the Second Circuit affect Judge Friendly's reputation in securities regulation? Recognized as the country's leading commercial court during the 1940s and 1950s,[133] the Second Circuit was the ideal tribunal from which to write securities opinions during the critical period.[134]

The Second Circuit's advantages derived ultimately from the fact that it heard appeals from the United States District Court for the Southern District of New York.[135] The Southern District encompasses New York City[136]—financial hub of the nation and situs of the New York and American Stock Exchanges and much of the securities industry. On the basis of litigants' convenience, if nothing else, the Southern District was bound

131. *See id.* at 271-73 (by implication). For other examples of Friendly opinions falling outside the activist mold, see Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 182 (2d Cir. 1966) (refusing to imply actions under stock exchange rules in all instances), *cert. denied*, 385 U.S. 817 (1966); Willheim v. Murchison, 342 F.2d 33, 40-41 (2d Cir. 1965) (refusing to expand a definition under the Investment Company Act because of the lack of evidence that Congress "gave any thought" to the matter at issue), *cert. denied*, 382 U.S. 840 (1965).

132. POSNER, *supra* note 19, at 62. To be sure, had Friendly been a knee-jerk activist, he would have attracted attention as a "type." *Cf. id.* at 66. While this might have enhanced his conspicuousness, it would also have undoubtedly undermined his reputation for thoughtfulness.

133. *See* John P. Frank, *The Top U.S. Commercial Court*, FORTUNE, Jan. 1951, at 92; KARL LLEWELYN, THE COMMON LAW TRADITION 48 (1960) (describing the Second Circuit as "the most distinguished and admired bench in the United States"); Marvin Schick, *Judicial Relations on the Second Circuit, 1941-51*, 44 N.Y.U. L. REV. 939, 940 & nn. 1-3 (1969) (collecting tributes to the Second Circuit made during the 1940s and 1950s). *See also* J. WOODWARD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS xix (1981) (noting that the Second Circuit "has long been regarded as the nation's leading commercial court").

134. The critical period runs from Nov. 8, 1961 to Mar. 23, 1977. *See supra* notes 76-77 and accompanying text.

135. The Southern District of New York is one of four judicial districts in the State of New York. *See* 28 U.S.C. § 112 (1994). The Second Circuit encompasses the States of New York, Connecticut, and Vermont. *See id.* § 41.

136. *See id.* § 112(b).

to draw a disproportionate share of the country's major securities litigation during the critical period.[137]

Overseer of the Southern District of New York, the Second Circuit became known as the "Mother Court" of securities regulation.[138] In practice this meant that it served as the "de facto Supreme Court"[139] on those matters of securities regulation on which the de jure Supreme Court had yet to pass.[140] The transition from the leading commercial court to the leading securities court was natural once securities regulation became an important area of law in its own right.[141]

Table 1 sets forth the number of reported securities opinions that the eleven federal appeals courts issued during the critical period.[142] As Table 1 shows, the number that the Second Circuit produced (411) was nearly five times the average of the other federal appeals courts (85).[143] Indeed, the Second Circuit's output of securities opinions represented almost one-third of the combined outputs of all eleven circuit courts.[144]

TABLE 1
*Securities Opinions of Federal Appeals Courts—Critical Period*
Total all circuits: 1262 .

| Circuit | Ops. | Circuit | Ops. | Circuit | Ops. |
|---|---|---|---|---|---|
| D.C. | 60 | Fourth | 28 | Eighth | 67 |
| First | 31 | Fifth | 174 | Ninth | 131 |
| Second | 411 | Sixth | 53 | Tenth | 106 |
| Third | 79 | Seventh | 122 | | |

Average of circuits outside Second: 85

137. The federal securities laws provide for nationwide service of process. *See generally* X LOSS & SELIGMAN, THIRD EDITION, *supra* note 45, at 4992-95.

138. *See supra* note 43 and accompanying text.

139. Jan G. Deutch, Chiarella v. United States*: A Study in Legal Style*, 58 TEX. L. REV. 1291, 1299 (1980) (referring specifically to § 10(b)). *Cf. Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 900 (1967) (comments of Judge Friendly) (noting that "I suppose there is some sort of conclusive presumption that judges of the Second Circuit where so much securities litigation is centered must know something about the securities laws").

140. For illustrative securities issues on which the Supreme Court had yet to pass as of the end of the critical period, see *supra* notes 73-75 and accompanying text.

141. For a discussion of the new importance of securities regulation as an area of law during the critical period, see *supra* notes 56-60 and accompanying text.

142. The Eleventh Circuit, which was carved out of the Fifth Circuit, came into being in 1981. *See* Fifth Circuit Court of Appeals Reorg. Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (1994)).

143. The figures in Table 1 were generated by the following Westlaw search, conducted separately for each federal court of appeals in its respective (CTA) file: ("securities act" "securities exchange act" "investment advisors act" "investment company act" "public utility holding company act" "trust indenture act" "securities investor protection act") and da(aft 11/8/61 and bef 3/24/77). The figures are to some extent overinclusive, since no attempt was made to eliminate any opinions containing securities references that were merely extraneous, such as references by analogy. *Cf. supra* note 31.

144. In terms of overall caseload, the Second Circuit was smaller than the Fifth and Ninth Circuits and only slightly larger than the District of Columbia and Fourth Circuits. *See* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF UNITED STATES COURTS ANN. REP.

Table 1 nonetheless probably understates the extent of the Second Circuit's dominance over securities regulation during the critical period. Raw numbers of opinions cannot capture the fact that securities disputes originating at the nation's financial epicenter were especially likely to be significant.[145] Nor can raw numbers of opinions capture the respect that the legal community accorded securities opinions of the Second Circuit.[146]

A more telling measure of the Second Circuit's hegemony during the critical period comes from the choices made by authors of securities regulation casebooks. Experts in their fields, casebook authors are charged with determining which cases are sufficiently influential to warrant student attention.[147] As Table 2 shows, up to seventy percent of the federal courts of appeals opinions appearing as principal cases in securities regulation casebooks during the critical period came from the Second Circuit.[148]

TABLE 2
*Principal Cases in Securities Regulation Casebooks During the Critical Period: Percentage of United States Circuit Court Opinions from the Second Circuit*

| Casebook | 2d Cir. Ops. | Total Cir. Ops. | % from 2d Cir. |
|---|---|---|---|
| Jennings (1st ed. 1963) | 10 | 21 | 48% |
| Jennings (2d ed. 1968) | 19 | 27 | 70% |
| Jennings (3d ed. 1972) | 31 | 44 | 70% |
| Ratner (1st ed. 1975) | 33 | 47 | 70% |
| Jennings (4th ed. 1977) | 29 | 42 | 69% |

Thus, service on the Second Circuit during the critical period provided a cornucopia of reputational advantages. The Second Circuit's securities docket was substantial both quantitatively and qualitatively. In addition, its securities opinions commanded a degree of attention not accorded those of any other court.

184-87 (1969) (comparing federal courts of appeals by number of cases commenced for fiscal year ending 1969).

145. *See* Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice of Law" Approach*, 70 TEX. L. REV. 1799, 1812 (1992); Henry J. Friendly, Book Review, 86 POL. SCI. Q. 470, 473 (1971) (observing that the Second Circuit's securities opinions "have been particularly important because of its location at the seat of the country's principal financial market").

146. *See supra* notes 138-41 and accompanying text.

147. *Cf.* POSNER, *supra* note 19, at 90-91 (endorsing frequency of citation in casebooks as a measure of judicial reputation but cautioning that "opinions are selected for inclusion in casebooks for their teachability as well as for their intrinsic merit or their influence").

148. Table 2 includes only those casebooks published during the critical period for which there is a current successor edition. It excludes opinions involving state securities law only.

## IV. THE IMPACT OF PROFESSOR LOSS ON JUDGE FRIENDLY

Judge Friendly was a contemporary of Harvard Law School's Professor Louis Loss, this century's preeminent scholar of securities regulation.[149] Loss made a multifaceted contribution to Friendly's reputation.

### A. THE FEDERAL SECURITIES CODE

Professor Loss served as the Reporter of the Federal Securities Code, an ALI-sponsored endeavor intended to integrate all seven federal securities statutes[150] into one comprehensive scheme.[151] No mere cut and paste of statutes already on the books, the Code made substantial alterations in existing law.[152] Completed between 1969 and 1978,[153] and thereafter approved by the ABA[154] and the SEC,[155] the Code probably would have been introduced into Congress in 1981 had the Democrats not lost control of the Senate in 1980.[156]

To assist him with the Code, Loss assembled a very distinguished group of consultants and advisers.[157] Friendly was one of two United States circuit judges and the only Second Circuit judge in the group.[158] Other members were leading academics, practitioners, and former chairmen of the SEC.[159] The group was not a mere showpiece.[160] Beginning in 1969, it "met several times yearly, for two or three days at a time, over a period

149. *See supra* note 45 and accompanying text.

150. For a list of the seven federal securities statutes, see *supra* note 56.

151. *Compare* 1 A.L.I., FED. SEC. CODE xix (1980) [hereinafter FED. SEC. CODE] (noting the goal of integrating the six federal securities statutes enacted between 1933 and 1940) *with id.* at xxii (noting the assimilation into the Code of the Securities Investor Protection Act of 1970, enacted after work on the Code had begun).

152. *See id.* at xxvi-lvi (discussing changes in the law that the Code would bring about). *See also* Louis Loss, *Keynote Address: The Federal Securities Code*, 33 U. MIAMI L. REV. 1431, 1437-48 (1979) (same).

153. *See* 1 FED. SEC. CODE, *supra* note 151, at xxi-xxii.

154. *See* 65 A.B.A. J. 341 (1979).

155. *See* Statement Concerning Codification of the Federal Securities Laws, Exchange Act Release No. 6242 [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,655 (Sept. 18, 1980).

156. *See* I Loss & SELIGMAN, THIRD EDITION, *supra* note 45, at 283. For Loss's own account of the Code, see LOSS, ANECDOTES, *supra* note 45, at 219-49. The Code spawned a number of symposia. *See, e.g., A Symposium on the Proposed Federal Securities Code*, 1 PACE L. REV. 279 (1981); *Fourth Annual Baron de Hirsch Meyer Lecture Series*, 33 U. MIAMI L. REV. 1425 (1979) (symposium on the Code) [hereinafter *Miami Symposium*]; Symposium, *The American Law Institute's Proposed Federal Securities Code*, 32 VAND. L. REV. 455 (1979).

157. The consultants and advisers were formally named by the ALI. *See* 1 FED. SEC. CODE, *supra* note 151, at xxi. But as Reporter, Loss had a role in their selection. *See* Louis Loss, *The Current Status of SEC Codification*, 26 BUS. LAW. 555, 556 (1971).

158. The other United States circuit judge was Thomas E. Fairchild of the Seventh Circuit. *See* 1 FED. SEC. CODE, *supra* note 151, at v.

159. For a complete list of the consultants and advisers, see 1 FED. SEC. CODE, *supra* note 151, at v-vi.

160. Loss's own formulation was that it was a "decidedly no letterhead group." 1 FED. SEC. CODE, *supra* note 151, at xxiv.

of some eight years,"[161] logging a total of "hundreds of hours" of work.[162]

While Judge Friendly made significant contributions to the Code,[163] he also benefited considerably from his association with it. Indeed, the experience exposed him not only to the entire panoply of securities issues,[164] but also to the views of Professor Loss and other leading experts.[165] This education came at an ideal time: when work began on the Code in the fall of 1969,[166] Judge Friendly had yet to write most of his critical period opinions.[167] Moreover, his connection with the Code likely enhanced his standing as a securities expert among his Second Circuit colleagues. This in turn probably increased the number of important securities opinions that he was assigned to write.[168]

### B. JUDGE FRIENDLY'S OPINIONS

Judge Friendly's opinions contain numerous citations to Professor Loss's treatise.[169] Yet these citations do not reflect the full extent of Loss's contributions. Indeed, Loss edited important sentences[170] and also supplied ideas and modes of analysis for several key opinions for which he received no attribution.[171]

This section examines Professor Loss's contributions to six of the nineteen casebook opinions.[172] The six may well be merely illustrative, since much of the evidence for Loss's contributions comes from the

161. Ackerman et al., *supra* note 3, at 1722 (comments of Prof. Louis Loss).

162. *Compare* Loss, ANECDOTES, *supra* note 45, at 29 (describing the "hundreds of hours" that the advisory group worked on the Code) *with* Ackerman et al., *supra* note 3, at 1722 (comments of Prof. Louis Loss) (recalling Friendly's "begging off [from a Code advisory group meeting] just once . . . for a dentist's appointment").

163. *See* Ackerman et al., *supra* note 3, at 1722 (comments of Prof. Louis Loss) (referring to Friendly's "invaluable participation" in the work of the Code).

164. For the Code's table of contents, see 1 FED. SEC. CODE, *supra* note 151, at xiii-xvi.

165. *See supra* notes 157-59 and accompanying text.

166. *See* 1 FED. SEC. CODE, *supra* note 151, at xxi.

167. For a list of Judge Friendly's securities opinions written during the critical period, see *infra* Appendix II.

168. *See infra* notes 307, 314-17 and accompanying text.

169. *See, e.g.*, Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1299, 1300 (2d Cir. 1973); Diskin v. Lomasney & Co., 452 F.2d 871, 874, 875, 876 (2d Cir. 1971); Rosenfeld v. Black, 445 F.2d 1337, 1342-43 (2d Cir. 1971), *cert. dismissed*, 409 U.S. 802 (1972); Barnes v. Osofsky, 373 F.2d 269, 272, 273 (2d Cir. 1967); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 181, 183 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

170. *See infra* notes 176-201 and accompanying text.

171. *See infra* notes 202-43 and accompanying text. During the 1940s, Second Circuit Judges Clark and Frank disputed the appropriateness of consulting Yale Law School faculty members about pending cases. *See* SCHICK, supra note 50, at 124-30. In a review of Schick's book, Friendly characterized the Clark-Frank dispute as "pettiness." Henry J. Friendly, Book Review, 86 POL. SCI. Q. 470, 474 (1971). *But see* Archibald Cox, *More Learned than Witty*, 7 HARV. C.R.- C.L. L. REV. 501, 503 (1972) (reviewing SCHICK, *supra* note 50) (characterizing the consultation dispute as one of many "continuing issues" over which Judges Clark and Frank battled). *See generally* C.T. Harhut, *Ex parte Communication Initiated by a Presiding Judge*, 68 TEMPLE L. REV. 673 (1995).

172. For a list of the casebook opinions, see *infra* Appendix I.

Friendly Papers,[173] and those Papers contain many gaps.[174] Moreover, it is likely that at least some opinion-related communications between the two men were oral.[175]

### 1. *Editing Important Sentences*

Judge Friendly's opinions in *Colonial Realty Corp. v. Bache & Co.*[176] and *Goldberg v. Meridor*[177] were issued eleven years apart and addressed entirely different issues. The two opinions nonetheless have something in common: they were both edited by Professor Loss.

#### a. *Colonial Realty Corp. v. Bache & Co.*

Decided in 1966, *Colonial Realty* raised the question of whether to recognize implied actions under rules promulgated by stock exchanges.[178] In his opinion for the Second Circuit, Judge Friendly held that there was no answer applicable in all cases. Instead, in each case the court must consider "the nature of the particular rule and its place in the regulatory scheme."[179]

In the *Colonial Realty* slip opinion of March 10, 1996, Judge Friendly explained that to authorize implied actions under every stock exchange rule "would saddle the federal courts with garden-variety customer-broker suits . . .unless we were to make the large assumption that . . . Congress meant the federal courts to develop a new body of broker-customer law."[180] As written, this explanation proved too much: whenever a court implies an action under any stock exchange rule, it brings into being the "new body of broker-customer law" that Friendly suggested Congress did not intend.[181] Professor Loss—to whom Judge Friendly had sent a copy of the slip opinion[182]—made this point in letters dated March 29[183] and

---

173. *See supra* note 46.

174. For illustrative correspondence missing from the Friendly Papers, *supra* note 46, see *infra* notes 182, 206.

175. Other than over the telephone, these communications could easily have occurred face-to-face on the occasion of meetings of the Code's advisory group. *See supra* notes 157-62 and accompanying text.

176. 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

177. 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

178. *Colonial Realty*, 358 F.2d at 178.

179. *Id.* at 182.

180. Colonial Realty Corp. v. Bache & Co., No. 144, slip op. at 1227-28 (2d Cir. Mar. 10, 1966) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 70, H.J.F. OPINIONS, 1965 term).

181. Similarly, the recognition of implied actions under Rules 10b-5 and 14a-9 created new bodies of law on behalf of investors. *See supra* notes 86-94 and accompanying text.

182. The Friendly Papers do not contain a cover letter recording this transmittal. However, they do contain a letter from Loss to Friendly thanking Friendly for sending him a copy of the *Colonial Realty* opinion. *See* Letter from Louis Loss to Henry J. Friendly 1 (Mar. 29, 1966) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 98, folder 1).

183. *See id.* at 2.

30.[184] In a response dated April 1, 1966, Friendly concluded as follows: "If you think some language changes would express these thoughts more clearly, I would be delighted to have your suggestions."[185] Professor Loss replied in a letter dated April 7.[186]

Judge Friendly brought the matter to a head in an April 29 memorandum to the other members of the *Colonial Realty* panel.[187] He reported to his colleagues that as the consequence of an exchange of letters with Professor Loss, he wanted to enlarge his explanation for why implication of actions under stock exchange rules should not be automatic.[188] Previously he had stated that such implication "would saddle the federal courts with garden-variety customer-broker suits . . .unless we were to make the large assumption that . . . Congress meant the federal courts to develop a new body of broker-customer law."[189] To that statement he now wished to append the following qualification:

> Although familiar principles require federal courts to do precisely this as to those exchange rules whose violation is held to create a federal claim, Congress scarcely contemplated judicial creation of a new body of federal broker-customer law whenever the complaint in what would otherwise be an action under state law alleged conduct inconsistent with just and equitable principles of trade.[190]

The additional language—which became a part of the official opinion published in West's Reporter[191]—represents a virtually verbatim use of a formulation proffered by Professor Loss in his letter of April 7.[192]

b. *Goldberg v. Meridor*

Decided by the Second Circuit in 1977, *Goldberg*[193] put at issue the meaning of the Supreme Court's decision in *Santa Fe Industries v. Green.*[194] In *Green*, the Supreme Court held that Rule 10b-5 created a

184. *See* Letter from Louis Loss to Henry J. Friendly (Mar. 30, 1966) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 98, folder 1).

185. Letter from Henry J. Friendly to Louis Loss 2 (Apr. 1, 1966) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 98, folder 1).

186. *See* Letter from Louis Loss to Henry J. Friendly (Apr. 7, 1966) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 98, folder 1).

187. *See* Memorandum from H.J.F. (Apr. 29, 1966) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 13, *Colonial Realty* folder).

188. *See id.*

189. *See supra* note 180 and accompanying text.

190. Memorandum from H.J.F. (Apr. 29, 1966) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 13, *Colonial Realty* folder).

191. *See Colonial Realty Corp.*, 358 F.2d at 183.

192. *See* Letter from Louis Loss to Henry J. Friendly 2 (Apr. 7, 1966) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 98, folder 1).

193. Goldberg v. Meridor, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

194. 430 U.S. 462 (1977).

cause of action for fraud based on the omission or misrepresentation of material information[195] but not for a mere lack of "fairness."[196]

*Green* notwithstanding, the *Goldberg* slip opinion contained language suggesting that unfairness was violative of Rule 10b-5:

> [W]e do not read *Green* as ruling that no action lies under Rule 10b-5 when a controlling corporation causes a partly owned subsidiary to sell its securities to the parent in an *unfair* transaction and fails to make a disclosure, or, as can be alleged here, makes a misleading disclosure.[197]

The obscuring of *Green*'s crucial distinction between fraud and unfairness arguably failed to pay *Green* sufficient homage. Professor Loss, to whom Judge Friendly had sent a copy of the slip opinion,[198] made this point in a letter dated September 14.[199]

In a September 23 memorandum to the other members of the *Goldberg* panel, Judge Friendly acknowledged that the slip opinion's reference to an "unfair transaction" might have been unwise: "Professor Loss has written me that while he entirely agrees with the decision, he thinks it was unfortunate to use the words 'an unfair' [transaction]. . . . I agree with his comment and would like to substitute the words 'a fraudulent [transaction].'"[200]

Consistent with Judge Friendly's memorandum and Professor Loss's suggestion, the official opinion published in West's Reporter reads:

> [W]e do not read *Green* as ruling that no action lies under Rule 10b-5 when a controlling corporation causes a partly owned subsidiary to sell its securities to the parent in a *fraudulent* transaction and fails to make a disclosure, or, as can be alleged here, makes a misleading disclosure.[201]

### 2. *Supplying Specific Ideas*

Judge Friendly's 1968 concurring opinion in *SEC v. Texas Gulf Sulphur Co.*[202] contains specific ideas that appear to be derived from, but are not attributed to, Professor Loss. These ideas come not only from the second edition of Loss's treatise, published in 1961,[203] but also from the three-

195. *See id.* at 474-77.
196. *Id.* at 478.
197. Goldberg v. Meridor, No. 77-7146, slip op. at 5818-19 (2d Cir. Sept. 8, 1977) (emphasis added) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 71, H.J.F. OPINIONS, 1976 Term).
198. *See* Letter from Henry J. Friendly to Louis Loss (Sept. 9, 1977) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 102, folder 108).
199. *See* Letter from Louis Loss to Henry J. Friendly 1 (Sept. 14, 1977) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 38, *Goldberg* folder).
200. Memorandum from H.J.F. (Sept. 23, 1977) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 38, *Goldberg* folder).
201. *Goldberg*, 567 F.2d at 217-18 (emphasis added).
202. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 864 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969).
203. I-III LOSS, SECOND EDITION, *supra* note 45.

volume supplement to the second edition published in 1969.[204] Judge Friendly had access to the supplement because Professor Loss mailed him the page proofs.[205]

Indeed, Judge Friendly made two requests for the proofs while the *Texas Gulf Sulphur* case was pending in the Second Circuit. In his first request, he asked Professor Loss to send him the proofs pertaining to Rule 10b-5.[206] Since *Texas Gulf Sulphur* was an SEC action, Professor Loss sent only those pages addressing Rule 10b-5 actions brought by the SEC.[207] Friendly wished to read the treatment of private Rule 10b-5 actions as well, however, and wrote again:

> Many thanks for your promptness in sending me the pages of your Supplement. While you have been more than generous, I would appreciate also having the pages dealing with the remedial aspects of Rule 10b-5 as applied to private litigation, since I do not think we could deal intelligently with the instant case [*Texas Gulf Sulphur*] without considering its effect in that field.[208]

Armed with the supplement as well as the treatise itself, Friendly made far greater use of both than the express language of his concurrence reveals.

Consider his discussion of whether a Rule 10b-5 plaintiff must prove that the defendant acted with scienter. Judge Friendly pressed hard the idea—endorsed by both the second edition[209] and its supplement[210]—that mere negligence is inconsistent with section 10(b): "It can, indeed, be argued that . . . Rule 10b-5(2), absent the reading in of a scienter requirement, goes beyond the authority granted by [section] 10(b) of the 1934 Act."[211] Although his concurrence cites no authority for this idea,[212] his memorandum to the other members of the *en banc* court reveals that the idea came from Professor Loss:

> No one even intimates that the [press] release was not an honest effort to attain a good objective . . . . [I]f clause (2) of Rule 10b-5 imposes liability in such a case, it goes beyond the powers vested in the SEC by [section] 10(b). *That is Professor Loss' view, p. 1766* [of

204. IV-VI LOSS, SECOND EDITION, *supra* note 45.

205. *See infra* notes 206-08 and accompanying text. Since the supplement to the second edition was not yet in the public domain, neither the SEC nor any other party to the *Texas Gulf Sulphur* litigation had the opportunity to argue that Loss was wrong. Any possible questions about the propriety of Judge Friendly's consultation with Loss are outside the scope of this Article. *See also supra* note 171.

206. The Friendly Papers do not contain a letter from Friendly making this request. However, a subsequent letter from Friendly to Loss extends his "[m]any thanks for your promptness in sending me the pages of your Supplement." Letter from Henry J. Friendly to Louis Loss (May 27, 1968) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 59, *Texas Gulf Sulphur* folder).

207. *See id.*

208. *Id.*

209. *See* III LOSS, SECOND EDITION, *supra* note 45, at 1766.

210. *See* VI LOSS, SECOND EDITION, *supra* note 45, at 3883-85.

211. *Texas Gulf Sulphur*, 401 F.2d at 868.

212. *See id.*

the *Second Edition*], *and I agree with it.*[213]

Consider also Judge Friendly's discussion of whether to imply a private action under section 17(a) of the 1933 Act,[214] a close counterpart to Rule 10b-5.[215] Marshalling the arguments that Congress had not meant to authorize a private action under the section,[216] he offered a construction of the relevant legislative history[217] in which he cited no authority other than the legislative history itself.[218] The construction offered by Friendly appears verbatim in the supplement to Loss's second edition.[219]

*3. Inspiring Modes of Analysis*

a. The Extraterritorial Reach of Rule 10b-5

Rule 10b-5's extraterritorial reach was at issue in two casebook opinions: *Leasco Data Equipment Processing Corp. v. Maxwell*[220] and *Bersch v. Drexel Firestone, Inc.*[221] The two opinions announced principles governing Rule 10b-5's extraterritoriality based on "what Congress would have wished if these problems had occurred to it."[222] The contents of this "hypothetical legislative intent"[223] came in part from the American Law Institute's Restatement (Second) of Foreign Relations Law of the United States,[224] with which Friendly presumed that Congress would have

213. Memorandum from Henry J. Friendly 8 (May 8, 1968) (emphasis added) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 59, *Texas Gulf Sulphur* folder).

Professor Loss had stated in pertinent part as follows in the passage to which Judge Friendly referred:

> It is perhaps open to serious question whether Clause (2) of the rule [10b-5], which refers merely to material misstatements and half-truths without using fraud or *scienter* language of any kind, is a permissible implementation of a statutory provision which speaks in terms of "any manipulative or deceptive device or contrivance." . . . Consequently, . . . the courts may read some sort of watered-down *scienter* element into Clause (2) of Rule 10b-5 in order to avoid holding that clause to be *ultra vires*.

III LOSS, SECOND EDITION, *supra* note 45, at 1766 (footnote omitted).

214. Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a) (1994).

215. The language of Rule 10b-5 was adopted from that of § 17(a). *See* LOSS & SELIGMAN, *supra* note 56, at 778-79.

216. *Texas Gulf Sulphur Co.*, 401 F.2d at 867.

217. The construction was as follows:

> When the House Committee Report listed the sections that "define the civil liabilities imposed by the Act" it pointed only to [sections] 11 and 12 and stated that "[t]o impose a greater responsibility [than that provided by sections 11 and 12] * * * would unnecessarily restrain the conscientious administration of honest business with no compensating advantage to the public."

*Id.* (citing H.R. REP. NO. 85, 73d Cong., 1st Sess. at 9-10 (1933)).

218. *See id.*

219. *See* VI LOSS, SECOND EDITION, *supra* note 45, at 3912. It is of course conceivable that Loss borrowed this language from Friendly prior to finalizing the supplement.

220. 468 F.2d 1326 (2d Cir. 1972).

221. 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

222. *Id.* at 993.

223. Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 30 (D.C. Cir. 1987).

224. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter RESTATEMENT (SECOND)]. The Restatement (Second) has since been supplanted. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

wished the securities laws to be consistent.[225] Shaping Rule 10b-5's extraterritorial reach in accordance with hypothetical legislative intent and the Restatement (Second)—a mode of analysis which at the time had no caselaw precedent[226]—legitimated extending Rule 10b-5 to transactions involving various foreign components, such as foreign plaintiffs and defendants, foreign securities, and trades and misrepresentations made in foreign countries.[227] Such a broad reach probably would not have been possible if a grounding in actual congressional intent had been perceived to be necessary.

The inspiration for this mode of analysis may well have been the then current second edition of Loss's treatise. The second edition not only suggested the applicability of the Restatement (Second) to securities offenses,[228] but also justified extending the fraud provisions extraterritorially on the basis of hypothetical legislative intent: "[I]t is easier to ascribe to Congress a purpose to prohibit the use of the United States as a base from which to defraud her neighbors than an intention that every Canadian buyer receive a statutory prospectus even though no offers are made in the United States."[229]

Indeed, even Professor Loss's phraseology—"base" and "neighbors"—found its way into Judge Friendly's opinions. Thus, the *Bersch* opinion observed that "Congress did not mean the United States to be used as a *base* for fraudulent securities schemes even when the victims are foreigners."[230] And in a securities opinion issued simultaneously with *Bersch*, Judge Friendly opined that "[t]his country would surely look askance if one of our *neighbors* stood by silently and permitted misrepresented securities to be poured into the United States."[231]

---

225. *See Bersch*, 519 F.2d at 985, 987; *Leasco*, 468 F.2d at 1339.

226. Pre-*Leasco* opinions on Rule 10b-5's extraterritorial reach focused on actual congressional intent. *See, e.g.*, Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir.), *modified on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); Ferraioli v. Cantor, [1964-66 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,615, at 95, 310-11 (S.D.N.Y. Dec. 28, 1965); Kook v. Crang, 182 F. Supp. 388, 390 (S.D.N.Y. 1960). Moreover, a Westlaw search for securities opinions issued prior to *Leasco* reveals no opinions that relied on the Restatement (Second).

The briefs in *Leasco*, at least as originally filed, largely ignored the question of extraterritoriality. Assigned to write the opinion, Judge Friendly spotted the importance of the extraterritoriality question and caused the Second Circuit to direct the filing of additional briefs addressing subject matter jurisdiction under "principles of international law" and the 1934 Act. *See* Supplemental Memorandum of H.J.F. (Nov. 17, 1971) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 27, *Leasco* folder); Letter from Henry J. Friendly to Wilkie Farr & Gallagher (Nov. 19, 1971) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 27, *Leasco* folder). Faced with the directive to address international law, the briefs did cite Restatement (Second). But their focus was the actual—not the hypothetical—intent of Congress. *See* Brief of Plaintiffs-Appellants, Brief of Defendants-Appellees, *Leasco* (No. 71-1563).

227. *See Bersch*, 519 F.2d at 974; *Leasco*, 468 F.2d at 1326.

228. *See* IV Loss, Second Edition, *supra* note 45, at 2254.

229. I Loss, Second Edition, *supra* note 45, at 369.

230. *Bersch*, 519 F.2d at 987 (emphasis added) (citing IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975)).

231. *Vencap*, 519 F.2d at 1017 (emphasis added).

It is also possible that Professor Loss inspired Judge Friendly's analysis of extraterritoriality otherwise than through the medium of the treatise. The inspiration could have come instead—or in addition—through work on the Code, which gave extraterritoriality considerable attention.[232] In fact, Loss once said that he "like[s] to think" that discussions on extraterritoriality within the Code advisory group had influenced Friendly's opinions on this subject.[233]

b. Notes as "Securities"

The casebook opinion in *Exchange National Bank v. Touche Ross & Co.*[234] addressed the issue of when a "note" qualified as a security under the federal securities laws.[235] There is reason to suppose that Loss inspired the mode of analysis proposed by Judge Friendly to resolve this issue.

*Exchange National Bank* held that a note was presumptively a security,[236] but that the presumption of an investment could be rebutted if the note bore a "strong family resemblance" to certain paradigmatic commercial transactions.[237] Friendly derived this presumption by "recourse to the statutory language":[238]

> The 1934 Act says that the term "security" includes "any note . . . [excepting one] which has a maturity at the time of issuance of not exceeding nine months," and the 1933 Act says that the term means "any note" save for the registration exemption in [section] 3(a)(3). These are the plain terms of both acts, to be applied "unless the context otherwise requires."[239]

None of the previous lower court opinions addressing when a note was a security had given the statutory language comparable weight.[240]

Judge Friendly's approach may well have been inspired by Professor Loss. This supposition grows out of the similarities between Judge Friendly's approach and the approach endorsed in the then current sec-

---

232. *See* 2 FED. SEC. CODE, *supra* note 151, at 981-1006 (text and commentary).

233. *See* Ackerman et al., *supra* note 3, at 1723-24 (comments of Prof. Louis Loss). For a list of Judge Friendly's leading opinions on the extraterritorial reach of the federal securities laws, see LOSS & SELIGMAN, *supra* note 56, at 1269 & n.1.

234. 544 F.2d 1126 (2d Cir. 1976).

235. *Id.*

236. *See id.* at 1137-38.

237. *Id.* at 1138 (setting forth the paradigmatic commercial transactions). *See also* Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930, 939 (2d Cir.) (adding a commercial transaction), *cert. denied*, 469 U.S. 884 (1984).

238. *Exchange Nat'l Bank*, 544 F.2d at 1137.

239. *Id.*

240. In the wake of *Exchange National Bank*, lower federal courts outside the Second Circuit rejected Friendly's approach as excessively literal. *See, e.g.*, American Fletcher Mortgage Co. v. United States Steel Credit Corp., 635 F.2d 1247, 1254 (7th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). For an overview of the approaches taken by the other circuits, see Janet Kerr & Karen M. Eisenhauer, Reves *Revisited*, 19 PEPP. L. REV. 1123, 1124-29 (1992). In 1988, the Supreme Court purported to adopt the *Exchange National Bank* approach. *See* Reves v. Ernst & Young, 494 U.S. 56, 65 (1990). In the view of commentators, however, *Reves*'s adoption of the *Exchange National Bank* approach was more apparent than real. *See, e.g.*, LOSS & SELIGMAN, *supra* note 56, at 176.

ond edition of Loss's treatise. Professor Loss focused on statutory language in analyzing whether the federal securities laws apply to a borrower who fraudulently obtains a loan from a bank and gives a note in exchange: "[I]t is difficult to say whether the borrower has violated the antifraud provisions of the 1933 and 1934 Acts . . . . Under a literal reading the answer would seem to be yes. But . . . the definitions—of both 'security' and 'sale'— . . . apply 'unless the context otherwise requires.'"[241]

Professor Loss may have inspired Judge Friendly's approach to notes in ways other than through the medium of his treatise. The inspiration could again have come from Loss's work on the Code, which specifically addressed the treatment of notes.[242] Indeed, in a memorandum to the other members of the *Exchange National Bank* panel, Judge Friendly observed that Professor Loss and the Code advisory group had had "extended discussion" about the circumstances that would render a note a security.[243]

### C. Professor Loss's Treatise

The authoritative reference work in securities regulation since the publication of the first edition in 1951,[244] Professor Loss's treatise had the potential to influence Judge Friendly's reputation. How did its portrayal of Judge Friendly's opinions compare with its portrayal of the work of other judges? This question is especially intriguing given that Professor Loss had himself contributed to some of the Friendly opinions that his treatise discussed.[245]

The appropriate focus of attention is the second edition of the treatise, which was published in three volumes in 1961[246] and amplified by a three-volume supplement in 1969.[247] A beacon throughout the critical pe-

241. I Loss, Second Edition, *supra* note 45, at 546.

242. *See* 1 Fed. Sec. Code, *supra* note 151, § 202(150)(B)(iii) & cmt. 6.

243. Memorandum from H.J.F. 2 (Apr. 8, 1976) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 23, *Exchange National Bank* folder).

244. Loss, First Edition, *supra* note 45. *See* William O. Douglas, Book Review, 40 Calif. L. Rev. 636 (1951) (comparing Loss's treatise to Wigmore's treatise on evidence); Mark A. Sargent, *A Sense of Order: The Virtues and Limits of Doctrinal Analysis*, 104 Harv. L. Rev. 634, 635 (1990) (noting that the first and second editions of Loss's treatise "virtually defined the nascent field of securities law"); A. A. Sommer, Jr., Book Review, 46 Bus. Law. 1895, 1901 (1991) (describing the first, second, and third editions of Loss's treatise as "the most authoritative source of interpretation of the federal securities laws extant").

245. Professor Loss contributed to Friendly's opinions in Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966), and SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969). *See supra* notes 178-92, 202-19 and accompanying text. Both of these opinions were discussed in the second edition of Loss's treatise. *See infra* notes 270-72 and accompanying text.

246. Loss, Second Edition, *supra* note 45.

247. *Id.*

riod,[248] the second edition did not give way to a third edition until 1989,[249] at which point Judge Friendly was deceased and his reputation firmly established.[250]

To compare the portrayal of Friendly and non-Friendly opinions, a manageable sample of significant opinions had to be created.[251] The sample consisted of the principal cases[252] included in the 1972 edition of the Jennings and Marsh securities regulation casebook[253] and decided prior to December 1, 1968—the date up to which the second edition was current.[254] The sample encompassed opinions of the Supreme Court,[255] federal appeals courts,[256] and federal

248. A Westlaw search reveals that Loss's treatise was cited in 584 opinions during the critical period. The critical period runs from Nov. 8, 1961 to Mar. 23, 1977. *See supra* text accompanying notes 76-77.

249. LOSS & SELIGMAN, THIRD EDITION, *supra* note 45.

250. The third edition may help to maintain Judge Friendly's reputation. But the maintenance of his reputation is beyond the scope of this Article. *See supra* note 41 and accompanying text.

251. The second edition does not contain an index of judges. Moreover, the Tables of Cases contain hundreds of entries, far more than can feasibly be examined. *See* III LOSS, SECOND EDITION, *supra* note 45, at 2039-99; VI LOSS, SECOND EDITION, *supra* note 45, at 4163-4251.

252. For the definition of "principal cases," see *supra* note 39. Principal cases decided by state courts were not considered.

253. This casebook was used because it is the only casebook existing at the time of publication of the supplement to the second edition that also has a present-day successor edition.

254. *See* IV LOSS, SECOND EDITION, *supra* note 45, at vi. The only principal case from the Jennings & Marsh casebook that did not appear in Loss's Tables of Cases was United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968) (Woodbury, J., sitting by designation), *cert. denied*, 394 U.S. 946 (1969).

255. The Supreme Court opinions were SEC v. United Benefit Life Ins. Co., 387 U.S. 202 (1967); J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Silver v. NYSE, 373 U.S. 341 (1963); SEC v. Ralston Purina Co., 346 U.S. 119 (1953); Travelers Health Ass'n v. Virginia. *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943).

256. The federal appeals court opinions were Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968) (Kaufman, J.), *cert. denied*, 395 U.S. 977 (1969); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (Waterman, J.), *cert. denied*, 394 U.S. 976 (1969); *id.* at 864 (Friendly, J., concurring); *id.* at 869 (Kaufman, J., concurring); *id.* (Anderson, J., concurring); *id.* (Hays, J., concurring in part and dissenting in part); *id.* at 870 (Moore, J., dissenting); Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968) (Medina, J.), *cert. denied*, 395 U.S. 903 (1969); *id.* at 917 (Moore, J., dissenting); Jordan Bldg. Corp. v. Doyle, O'Connor & Co., 401 F.2d 47 (7th Cir. 1968) (Schnackenberg, J.); Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967) (Feinberg, J.); *id.* at 548 (Moore, J., dissenting in part); Chemical Fund, Inc. v. Xerox Corp., 377 F.2d 107 (2d Cir. 1967) (Lumbard, J.); United States v. Custer Channel Wing Corp., 376 F.2d 675 (4th Cir.) (Sobeloff, J.), *cert. denied*, 389 U.S. 850 (1967); Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967) (Friendly, J.); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.) (Friendly, J.), *cert. denied*, 385 U.S. 817 (1966); Merritt Vickers, Inc. v. SEC, 353 F.2d 293 (2d Cir. 1965) (Moore, J.); B.T. Babbitt, Inc. v. Lachner, 332 F.2d 255 (2d Cir. 1964) (Kaufman, J.); Willheim v. Murchison, 342 F.2d 33 (2d Cir.) (Friendly, J.), *cert. denied*, 382 U.S. 840 (1965); Garfield v. Strain, 320 F.2d 116 (10th Cir. 1963) (Murrah, J.); Berko v. SEC, 316 F.2d 137 (2d Cir. 1963) (Marshall, J.); Kahn v. SEC, 297 F.2d 112 (2d Cir. 1961) (Marshall, J.); *id.* at 114 (Clark, J., concurring in the result); Brown v. Bullock, 294 F.2d 415 (2d Cir. 1961) (Friendly, J.); *id.* at 423 (Moore, J., dissenting); SEC v. Guild Films Co., 279 F.2d 485 (2d Cir.) (Moore, J.), *cert. denied*, 364 U.S. 819 (1960); Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir.) (Lumbard, J.), *cert. denied*, 361 U.S. 896 (1959); Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953) (Stephens, J.);

district courts,[257] and included five opinions authored by Judge Friendly.[258]

Consider first the portrayal of the non-Friendly opinions. Supreme Court opinions aside,[259] the judge who authored the opinion was in most instances not identified.[260] Instead, the holding or distinction in question was attributed simply to "the court" or to the specific circuit.[261] This was so even where the opinion was quoted or otherwise presented as sound.[262] Moreover, some of the named judges might have preferred anonymity, given what was said about their opinions. For example, an opinion by Judge Lumbard was said to "leave a number of perplexing questions"[263] and one by Judge Moore was said to produce "uncertainty" and "danger."[264] Moreover, with the exception of three federal district

---

Joseph v. Farnsworth Radio & Television Corp., 198 F.2d 883 (2d Cir. 1952) (per curiam); *id.* at 884 (Frank, J., dissenting); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.) (A. Hand, J.), *cert. denied*, 343 U.S. 956 (1952); SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738 (2d Cir.) (A. Hand, J.), *cert. denied*, 314 U.S. 618 (1941); *id.* at 742 (Swan, J., dissenting).

257. The federal district court opinions were Escott v. Barchris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968) (McLean, J.); Entel v. Allen, 270 F. Supp. 60 (S.D.N.Y. 1967) (Bonsal, J.); Laurenzano v. Einbender, 264 F. Supp. 356 (E.D.N.Y. 1966) (Dooling, J.); Lennerth v. Mendenhall, 234 F. Supp. 59 (N.D. Ohio 1964) (Connell, J.); SEC v. Midwest Technical Dev. Corp., [1961-64 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,252 (D. Minn. July 5, 1963) (Nordbye, J.); Winter v. D.J. & M. Inv. & Constr. Corp., 185 F. Supp. 943 (S.D. Cal. 1960) (Byrne, J.); United States v. Sherwood, 175 F. Supp. 480 (S.D.N.Y. 1959) (Sugarman, J.); United States v. Robertson, 181 F. Supp. 158 (S.D.N.Y. 1959) (Herlands, J.); Wilko v. Swan, 127 F. Supp. 55 (S.D.N.Y. 1955) (Bicks, J.); Joseph v. Farnsworth Radio & Television Corp., 99 F. Supp. 701 (S.D.N.Y. 1951) (Sugarman, J.), *aff'd*, 198 F.2d 883 (2d Cir. 1952); Remar v. Clayton Sec. Corp., 81 F. Supp. 1014 (D. Mass. 1949) (Wyzanski, J.).

258. The opinions by Judge Friendly were SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 864 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969); Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967); Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); Willheim v. Murchison, 342 F.2d 33 (2d Cir.), *cert. denied*, 382 U.S. 840 (1965); Brown v. Bullock, 294 F.2d 415 (2d Cir. 1961).

259. For a list of the Supreme Court opinions, see *supra* note 255.

260. For those lower court judges who were named, see *infra* notes 263-66 and accompanying text.

261. *See, e.g.*, V LOSS, SECOND EDITION, *supra* note 45, at 3502 (discussing Berko v. SEC, 316 F.2d 137 (2d Cir. 1963)); *id.* at 3045 (discussing B.T. Babbitt, Inc. v. Lachner, 332 F.2d 255 (2d Cir. 1964)); III LOSS, SECOND EDITION, *supra* note 45, at 1774 (discussing Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953)); *id.* at 1469 (discussing Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952)); I LOSS, SECOND EDITION, *supra* note 45, at 550-51 (discussing SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738 (2d Cir.), *cert. denied*, 314 U.S. 618 (1941)).

262. *See, e.g.*, V LOSS, SECOND EDITION, *supra* note 45, at 3502 (discussing Berko v. SEC, 316 F.2d 137 (2d Cir. 1963)); I LOSS, SECOND EDITION, *supra* note 45, at 550-51 (discussing SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738 (2d Cir.), *cert. denied*, 314 U.S. 618 (1941)).

263. V LOSS, SECOND EDITION, *supra* note 45, at 3057 (discussing Chemical Fund, Inc. v. Xerox Corp., 377 F.2d 107 (2d Cir. 1967)).

264. I LOSS, SECOND EDITION, *supra* note 45, at 650, 651 (discussing SEC v. Guild Films Co., 279 F.2d 485 (2d Cir.), *cert. denied*, 364 U.S. 819 (1960)). Similarly, Judge Clark was said to have "overstated . . . [a particular] proposition." *See* VI LOSS, SECOND EDITION, *supra* note 45, at 3712 (discussing Kahn v. SEC, 297 F.2d 112 (2d Cir. 1961)). Moreover, Judge Bonsal was described as having "left . . . camp before the end of the battle." VI LOSS, SECOND EDITION, *supra* note 45, at 3640 (discussing Entel v. Allen, 270 F. Supp. 60 (S.D.N.Y. 1967)). Also, Judge Wyzanski was criticized for the "implicit assumptions"

judges—two of whom received criticism[265]—no judge of a lower federal court was named more than once in connection with a given opinion.[266]

Now consider the portrayal of the five Friendly opinions.[267] All were quoted or otherwise presented as sound.[268] Judge Friendly was specifically identified as the author of four of the opinions.[269] Moreover, he is named three and four times each, respectively, in connection with his

---

made in his opinion in Remar v. Clayton Sec. Corp., 81 F. Supp. 1014 (D. Mass. 1949). *See* II LOSS, SECOND EDITION, *supra* note 45, at 996 n.521.

265. The three federal district judges named more than once in connection with a particular opinion are Judges Bonsal, McLean, and Wyzanski. For mention of Judge Bonsal, see VI Loss, SECOND EDITION, *supra* note 45, at 3639-40 (discussing Entel v. Allen, 270 F. Supp. 60 (S.D.N.Y. 1967)). For criticism of the *Entel* opinion, see *id.* at 3640. For mention of Judge Wyzanski, see II Loss, SECOND EDITION, *supra* note 45, at 995-96, 1264 (discussing Remar v. Clayton Sec. Corp., 81 F. Supp. 1014 (D. Mass. 1949)). For criticism of the *Remar* opinion, see *id.* at 996 n.521. For mention of Judge McLean, see VI Loss, SECOND EDITION, *supra* note 45, at 3849, 3856 (discussing Escott v. BarChris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968)).

266. Nine lower court judges were mentioned once in connection with a particular opinion. For mention of Judge Clark, see VI Loss, SECOND EDITION, *supra* note 45, at 3712 (discussing Kahn v. SEC, 297 F.2d 112 (2d Cir. 1961) (Clark, J. concurring)). For mention of Judge Connell, see VI Loss, SECOND EDITION, *supra* note 45, at 3837 (discussing Lennerth v. Mendenhall, 234 F. Supp. 59 (N.D. Ohio 1964)). For mention of Judge Dooling, see V Loss, SECOND EDITION, *supra* note 45, at 2936 (discussing Laurenzano v. Einbender, 264 F. Supp. 356 (E.D.N.Y. 1966)). For mention of Judge Feinberg, see VI Loss, SECOND EDITION, *supra* note 45, at 3875 (discussing Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967)). For mention of Judge Frank, see III Loss, SECOND EDITION, *supra* note 45, at 1792 (discussing Joseph v. Farnsworth Radio & Television Corp., 198 F.2d 883, 884 (2d Cir. 1952) (Frank, J., dissenting)). For mention of Judge Lumbard, see V Loss, SECOND EDITION, *supra* note 45, at 3056 (discussing Chemical Fund, Inc. v. Xerox Corp., 377 F.2d 107 (2d Cir. 1967)). For mention of Judge Medina, see VI Loss, SECOND EDITION, *supra* note 45, at 3887 (discussing Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969)). For mention of Judge Moore, see I Loss, SECOND EDITION, *supra* note 45, at 648 (discussing SEC v. Guild Films Co., 279 F.2d 485 (2d Cir. 1960), *cert. denied*, 364 U.S. 819 (1960)); VI Loss, SECOND EDITION, *supra* note 45, at 3617 (discussing Mutual Shares Corp. v. Genesco, Inc., 384 F.2d 540, 548 (2d Cir. 1967) (Moore, J., dissenting)); VI Loss, SECOND EDITION, *supra* note 45, at 3645 (discussing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 870 (2d Cir. 1968) (Moore, J., dissenting), *cert. denied*, 394 U.S. 976 (1969)); V Loss, SECOND EDITION, *supra* note 45, at 2900 (discussing Brown v. Bullock, 294 F.2d 415 (2d Cir. 1968) (Moore, J., dissenting)). For mention of Judge Waterman, see VI Loss, SECOND EDITION, *supra* note 45, at 3544 (discussing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969)).

267. For a list of these opinions, see *supra* note 258.

268. For discussion of Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967), see V Loss, SECOND EDITION, *supra* note 45, at 3850-51. For discussion of Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966), see VI Loss, SECOND EDITION, *supra* note 45, at 2887-89, 2956. For discussion of Brown v. Bullock, 294 F. 2d Cir. 415 (2d Cir. 1961), see V Loss, SECOND EDITION, *supra* note 45, at 2899-2900. For discussion of SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 864 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969), see VI Loss, SECOND EDITION, *supra* note 45, at 3639, 3644-45, 3895, 3913. For discussion of Willheim v. Murchison, 342 F.2d 33 (2d Cir. 1965), *cert. denied*, 382 U.S. 840 (1965), see IV Loss, SECOND EDITION, *supra* note 45, at 2557; V Loss, SECOND EDITION, *supra* note 45, at 2699-2700, 2702.

269. Judge Friendly is not identified as the author of the opinion in Willheim v. Murchison, 342 F.2d 33 (2d Cir. 1965), *cert. denied*, 382 U.S. 840 (1965). For discussion of the *Willheim* opinion, see IV Loss, SECOND EDITION, *supra* note 45, at 2557; V Loss, SECOND EDITION, *supra* note 45, at 2699-2700, 2702, 2902.

opinions in *Colonial Realty*[270] and *Texas Gulf Sulphur*[271]—the only two opinions in the sample with which Professor Loss is known to have assisted.[272]

Based on the sample, it appears that Judge Friendly benefited from the portrayal of his opinions in the second edition of Professor Loss's treatise. The combination of positive portrayals of his opinions and repeated mention of his name conveyed the message that he was important. Because he wrote a large number of opinions,[273] this message gained in strength.

Consider finally Professor Loss's treatment of Judge Friendly's opinions outside the sample—opinions written prior to December 1, 1968[274] but not included as principal cases in the 1972 Jennings and Marsh casebook.[275] There were twenty such majority opinions,[276] nineteen of which received at least some mention in the Loss treatise.[277] All were presented as sound in result,[278] although one was mildly criticized for its

---

270. *See* V Loss, Second Edition, *supra* note 45, at 2887-88, 2956.

271. *See* VI Loss, Second Edition, *supra* note 45, at 3639, 3644-45, 3895, 3913.

272. *See supra* notes 178-92, 202-19 and accompanying text.

273. No lower court judge authored more of the sample opinions than Judge Friendly. *See supra* notes 256-57. For a discussion of the quantity of Friendly's securities opinions, see *infra* part V.

274. This is the date up to which the second edition of the Loss treatise was current. *See supra* text accompanying note 254.

275. For the parameters of the sample, see *supra* notes 252-58 and accompanying text.

276. The twenty opinions were the following: SEC v. General Time Corp., 407 F.2d 65 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969); General Time Corp. v. Talley Indus., 403 F.2d 159 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969); Donlon Indus. v. Forte, 402 F.2d 935 (2d Cir. 1968); SEC v. Talley Indus., 399 F.2d 396 (2d Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969); Bruns Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); SEC v. Sterling Precision Corp., 393 F.2d 214 (2d Cir. 1968); Phillips v. SEC, 388 F.2d 964 (2d Cir. 1968); SEC v. Frank, 388 F.2d 486 (2d Cir. 1968); Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966); Fox v. Glickman Corp., 355 F.2d 161 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966); United States v. Doyle, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); Wolf v. Barkes, 348 F.2d 944 (2d Cir.), *cert. denied*, 382 U.S. 941 (1965); SEC v. Canandaigua Enters. Corp., 339 F.2d 14 (2d Cir. 1964); United States v. Benjamin, 328 F.2d 854 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964); Phelps v. Burnham, 327 F.2d 812 (2d Cir. 1964); Katz v. Kilsheimer, 327 F.2d 633 (2d Cir. 1964); United States v. Ross, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963); United States v. Crosby, 314 F.2d 654 (2d Cir.), *cert. denied*, 373 U.S. 923 (1963); Chabot v. National Sec. & Research Corp., 290 F.2d 657 (2d Cir. 1961); United States v. Guterma, 281 F.2d 742 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960).

277. The only opinion that did not appear in Loss's Table of Cases was Katz v. Kilsheimer, 327 F.2d 633 (2d Cir. 1964).

278. For discussion of SEC v. General Time Corp., 407 F.2d 65 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969), see V-VI Loss, Second Edition, *supra* note 45, at 2903, 3621, 3622-23. For discussion of General Time Corp. v. Talley Indus., 403 F.2d 159 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969), see V-VI Loss, Second Edition, *supra* note 45, at 2865, 2870, 2903, 3621, 3622. For discussion of Donlon Indus. v. Forte, 402 F.2d 935 (2d Cir. 1968), see VI Loss, Second Edition, *supra* note 45, at 3913, 3991. For discussion of SEC v. Talley Indus., 399 F.2d 396 (2d Cir. 1968), *cert. denied*, see VI Loss, Second Edition, *supra* note 45, at 4060, 4078. For discussion of Bruns Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968), see VI Loss, Second Edition, *supra* note 45, at 4143. For discussion of SEC v. Sterling Precision Corp., 393 F.2d 214 (2d Cir. 1968), see V-VI Loss, Second Edition, *supra* note 45, at 3059-60, 3571, 4067. For discussion of Phillips v. SEC, 388 F.2d 964 (2d Cir. 1968), see V Loss, Second Edition, *supra* note 45, at 2697, 2705. For discussion of SEC v. Frank, 388

reasoning.[279] Friendly was specifically identified as the author of eight of the nineteen opinions[280] and was named three times in connection with one of them.[281] This attentiveness to Judge Friendly—while admittedly somewhat less than in the sample[282]—is nonetheless not inconsistent with the sample results. Indeed, since opinions outside the sample were not selected for inclusion as principal cases,[283] as a group they are probably less worthy of note than those in the sample.

In short, Professor Loss contributed to Judge Friendly's opinions and gave them favorable and conspicuous mention in his treatise. In addition, he provided Friendly with an incomparable education through the medium of the Code. The conclusion that Loss enhanced Friendly's reputation seems inescapable.

---

F.2d 486 (2d Cir. 1968), see VI LOSS, SECOND EDITION, *supra* note 45, at 4110, 4114, 4119. For discussion of Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966), see V-VI LOSS, SECOND EDITION, *supra* note 45, 2830, 2840, 2925-26, 4115. For discussion of Fox v. Glickman Corp., 355 F.2d 161 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966), see VI LOSS, SECOND EDITION, *supra* note 45, at 3825, 3962. For discussion of United States v. Doyle, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965), see VI LOSS, SECOND EDITION, *supra* note 45, at 4123-24, 4136-37. For discussion of Wolf v. Barkes, 348 F.2d 954 (2d Cir.), *cert. denied*, 382 U.S. 941 (1965), see VI LOSS, SECOND EDITION, *supra* note 45, 3969-70. For discussion of SEC v. Canandaigua Enters. Corp., 339 F.2d 14 (2d Cir. 1964), see V LOSS, SECOND EDITION, *supra* note 45, at 2690, 2691-93. For discussion of United States v. Benjamin, 328 F.2d 854 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964), see IV-V LOSS, SECOND EDITION, *supra* note 45, at 2379, 3373. For discussion of Phelps v. Burnham, 327 F.2d 812 (2d Cir. 1964), see VI LOSS, SECOND EDITION, *supra* note 45, at 3990. For discussion of United States v. Ross, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963), see VI LOSS, SECOND EDITION, *supra* note 45, at 3549, 3708, 3711. For discussion of United States v. Crosby, 314 F.2d 654 (2d Cir.), *cert. denied*, 373 U.S. 923 (1963), see VI LOSS, SECOND EDITION, *supra* note 45, at 3533. For discussion of Chabot v. National Sec. & Research Corp., 290 F.2d 657 (2d Cir. 1961), see VI LOSS, SECOND EDITION, *supra* note 45, at 3991. For discussion of United States v. Guterma, 281 F.2d 742 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960), see II, III & V LOSS, SECOND EDITION, *supra* note 45, at 1040, 1097, 1101, 1991, 1992, 1993, 3059.

279. For criticism of Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966), see V LOSS, SECOND EDITION, *supra* note 45, at 2925-26.

280. *See* VI LOSS, SECOND EDITION, *supra* note 45, at 4115 (identifying Judge Friendly as the author of Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966)); VI LOSS, SECOND EDITION, *supra* note 45, at 3622-23 (identifying Judge Friendly as the author of SEC v. General Time Co., 407 F.2d 65 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969)); VI LOSS, SECOND EDITION, *supra* note 45, at 4119 (identifying Judge Friendly as the author of SEC v. Frank, 388 F.2d 486 (2d Cir. 1968)); V LOSS, SECOND EDITION, *supra* note 45, at 3059-60 (identifying Judge Friendly as the author of SEC v. Sterling Precision Corp., 393 F.2d 214 (2d Cir. 1968)); VI LOSS, SECOND EDITION, *supra* note 45, at 4136-37 (identifying Judge Friendly as the author of United States v. Doyle, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965)); VI LOSS, SECOND EDITION, *supra* note 45, at 3708 (identifying Judge Friendly as the author of United States v. Ross, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963)); V LOSS, SECOND EDITION, *supra* note 45, at 2690, 2691 (identifying Judge Friendly as the author of SEC v. Canandaigua Enters. Corp., 339 F.2d 14 (2d Cir. 1964)); IV LOSS, SECOND EDITION, *supra* note 45, at 2379 (identifying Judge Friendly as the author of United States v. Benjamin, 328 F.2d 854 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964)).

281. *See* V LOSS, SECOND EDITION, *supra* note 45, at 2690 (identifying Judge Friendly as the author of SEC v. Canandaigua Enters. Corp., 339 F.2d at 14 (2d Cir. (1964)); *id.* at 2691 (two mentions of Judge Friendly's authorship of *Canandaigua* on this page).

282. *See supra* notes 267-72 and accompanying text.

283. For the parameters of the sample, see *supra* notes 252-58 and accompanying text.

## V. THE QUANTITY OF JUDGE FRIENDLY'S SECURITIES OPINIONS

Professor Loss once mused that Judge Friendly had "probably written more SEC opinions than most . . . other judges combined."[284] Was Loss's speculation accurate? If so, what were the reputational consequences for Friendly? And how did Judge Friendly come to write so many securities opinions in the first place?

### A. A Comparison of Judge Friendly and His Colleagues

A total of twenty-one judges served on the Second Circuit for at least some portion of the critical period.[285] Table 3 sets forth their respective outputs of securities opinions during that period.[286] Only majority opinions of three-judge panels are included.[287]

As Table 3 shows, Judge Friendly produced far more securities opinions than did the other judges. His output of fifty-six such opinions was more than triple the outputs of sixteen of his colleagues[288] and more than double the outputs of the remaining four.[289] He surpassed not only the thirteen judges who served for a portion of the critical period[290] but also the seven judges who, like him, served for the entire period.[291]

Judge Friendly derived reputational benefits from the sheer quantity of securities opinions that he produced. One was the accentuation of his visibility in the securities regulation area. Another was the opportunity to develop an expertise in securities regulation. In turn, that expertise could only have improved the quality of his opinions, thereby further enhancing his reputation.

---

284. Panel Discussion, *Miami Symposium*, *supra* note 156, at 1522 (comments of Prof. Loss).

285. This figure does not include Judge Chase, who was listed as a Second Circuit judge until 1969. 417 F.2d IX & n.1 (noting his death on Nov. 17, 1969). However, the date of his last published opinion was 1957. United States v. Johnson, 247 F.2d 5 (2d Cir.), *cert. denied*, 355 U.S. 867 (1957).

286. The figures in Table 3 were determined in a two-step process. The first step involved culling from Westlaw's file of Second Circuit cases (CTA2) each judge's majority opinions that contained references to at least one of the seven federal securities statutes, which are listed *supra* note 56. The second step involved eliminating any opinions in which the securities references were merely extraneous, such as references by analogy. Also eliminated were duplicate opinions, one-judge orders, concurrences, dissents, and en banc opinions.

287. Concurrences, dissents, and en banc opinions were excluded. *See supra* note 286.

288. The sixteen were Judges Anderson, Clark, Feinberg, Gurfein, Hays, Hincks, Mansfield, Marshall, Medina, Meskill, Mulligan, Oakes, Smith, Swan, Van Graafeiland, and Waterman.

289. The four were Judges Lumbard, Kaufman, Moore, and Timbers.

290. The thirteen were Judges Anderson, Clark, Feinberg, Gurfein, Hincks, Mansfield, Marshall, Meskill, Mulligan, Oakes, Swan, Timbers, and Van Graafeiland.

291. The seven were Judges Hays, Kaufman, Lumbard, Medina, Moore, Smith, and Waterman.

TABLE 3
*Securities Opinions of 2d Cir. Judges During the Critical Period*

| Judge | Ops. | Judge | Ops. | Judge | Ops. |
|---|---|---|---|---|---|
| Hincks | 1 | Gurfein | 8 | * Waterman | 16 |
| Meskill | 2 | Anderson | 9 | * Smith | 17 |
| Swan | 2 | Mansfield | 10 | * Lumbard | 20 |
| Van Graafeiland | 2 | * Medina | 11 | * Kaufman | 23 |
| Clark | 3 | Oakes | 13 | * Moore | 25 |
| Marshall | 4 | Feinberg | 14 | Timbers | 25 |
| Mulligan | 6 | * Hays | 16 | * Friendly | 56 |

* Indicates service throughout the critical period.

### B. Explaining Judge Friendly's Disproportionate Output

How did Judge Friendly come to write more securities opinions than his colleagues? Focusing on him and the seven other Second Circuit judges who served throughout the critical period, this section tests three possible hypotheses.

#### *1. Panel Assignments*

United States circuit judges hear cases in panels of three,[292] to which they are assigned by their court's chief judge.[293] Only members of the panel that hear a case are eligible to write the opinion deciding it.[294] Perhaps Judge Friendly wrote more securities opinions than his colleagues because he heard more securities cases than they did.

Table 4 sets forth the number of securities cases[295] and total cases heard during the critical period by Judge Friendly and his colleagues that culminated in published opinions.[296] Also set forth is the percentage of each judge's total cases that his securities cases represented.

Table 4 provides at least some support for the hypothesis that Judge Friendly's disproportionate output of securities opinions is traceable to the number of securities cases that he heard. To be sure, he did not hear an appreciably greater percentage of securities cases than did his colleagues.[297] But consider the fact that Judge Friendly heard 110 securities cases, a number more than 1.5 times greater than the 68.2 securities cases that his colleagues averaged. Thus, he had more opportunities than his

292. *See* 28 U.S.C. § 46(c) (1994). A case can be considered en banc if a majority of the court's active judges so decides. *See id.*

293. *Cf. id.* U.S.C. § 45(b) & 46(a).

294. *See id.* U.S.C. § 46(c).

295. A securities case was a case in which the opinion deciding it referred to one of the seven federal securities statutes, which are listed *supra* note 56. Where the securities reference was extraneous, such as a reference by analogy, the case was excluded.

296. No account is taken of cases heard which did not culminate in published opinions. The resultant data are nonetheless instructive, since the fact of publication evidences the importance of the legal issues presented. *See* Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REF. 119, 134-37 (1994).

297. No judge had a percentage below four, and four judges had a percentage of five. Thus, Judge Friendly's six percent figure does not seem especially out of line.

colleagues to write securities opinions.[298]

TABLE 4
*Securities Cases and Total Cases Heard During the Critical Period by Second Circuit Judges Who Served Throughout that Period*

| Judge | Secs. Cases | Total Cases | % Secs. Cases |
|---|---|---|---|
| Waterman | 62 | 1468 | 4 |
| Kaufman | 67 | 1548 | 4 |
| Smith | 77 | 1769 | 4 |
| Lumbard | 82 | 1803 | 5 |
| Medina | 18 | 380 | 5 |
| Moore | 82 | 1701 | 5 |
| Hays | 90 | 1712 | 5 |
| Friendly | 110 | 1947 | 6 |

Average no. of secs. cases for judges other than Friendly: 68.2

### 2. *Overall Productivity*

Perhaps Judge Friendly's disproportionate output of securities opinions can be explained by reference to his general productivity. If so, he would have to have written not only more securities opinions than his colleagues but also more opinions overall.

Table 5 presents the average yearly outputs of opinions for Judge Friendly and his colleagues during the critical period. Only majority opinions of three-judge panels are included.[299]

The table provides at least some support for the productivity hypothesis. Indeed, Judge Friendly wrote an average of 36.3 opinions per year, whereas his colleagues averaged 24.2 opinions per year. His output thus exceeded that of his colleagues by 33%, a figure that drops to 26% upon the exclusion of Judge Medina, who wrote far fewer opinions than the others.[300]

298. The literature on panel assignments is sparse. After studying the Second, Fifth, and D.C. Circuits for the years 1965-67, Professor Howard concluded that "there was more evidence of nonrandom panel assignment than the judges admitted or perhaps perceived." HOWARD, *supra* note 133, at 239. In a study of the Fifth Circuit between 1961-63, Professors Atkins and Zavoina found evidence of panel manipulation in race-related cases. *See* Burton M. Atkins & William Zavoina, *Judicial Leadership of the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit*, 18 AM. J. POL. SCI. 701, 701 (1974).

299. After each judge's opinions were obtained from Westlaw, his concurring, dissenting, and en banc opinions were excluded, as were any duplicate opinions and one-judge orders.

300. Judge Medina assumed senior status on March 1, 1958. 250 F.2d VIII & n.1. Consistent with that status he did not have to work full-time. *See* Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 410 (1990).

TABLE 5
*Average Number of Opinions Written per Year During the Critical Period by Second Circuit Judges Serving Throughout that Period*

| Judge | Yearly Av. | Judge | Yearly Av. |
|---|---|---|---|
| Medina | 9 | Moore | 28.1 |
| Waterman | 22.1 | Lumbard | 29.4 |
| Kaufman | 23.6 | Smith | 29.7 |
| Hays | 27.9 | Friendly | 36.3 |

Average for judges other than Friendly: 24.2

Yet Judge Friendly's general productivity does not fully explain his disproportionate output of securities opinions. Consider the average yearly number of securities opinions written by Friendly and his colleagues during the critical period, which are set out in Table 6.[301] As Table 6 shows, Friendly's colleagues averaged 1.2 securities opinions per year, a fact suggesting that Friendly—whose overall output of opinions was 33% larger than theirs[302]—could be expected to write 1.6 securities opinions per year. But Friendly wrote a striking 3.8 securities opinions per year—more than three times his colleagues' average.

TABLE 6
*Average Yearly Number of Securities Opinions Written During the Critical Period by Second Circuit Judges Serving Throughout that Period*

| Judge | Yearly Av. | Judge | Yearly Av. |
|---|---|---|---|
| Medina | .7 | Lumbard | 1.3 |
| Hays | 1.1 | Kaufman | 1.5 |
| Waterman | 1.1 | Moore | 1.7 |
| Smith | 1.1 | Friendly | 3.8 |

Average for judges other than Friendly: 1.2

### 3. *Opinion Assignments*

Opinions are assigned by the panel's presiding judge—the member in active service with the longest tenure on the court.[303] Thus, Judge Friendly may have written more securities opinions than his colleagues did because presiding judges (perhaps including Friendly himself[304]) were more likely to assign them to him than to others.

Table 7 sets forth each judge's securities opinions as a percentage of his total opinions. Only majority opinions of three-judge panels are included.[305]

301. For the method of determining securities opinions, see *supra* note 286.
302. *See supra* text accompanying note 300.
303. *See* 28 U.S.C. § 45(a) (1994).
304. *Cf.* SCHICK, *supra* note 50, at 82 (noting that "[t]here may be some tendency for the presiding judge to assign to himself a disproportionate number of important opinions. . . .").
305. *See supra* notes 286, 299 and accompanying text.

The table provides support for the assignment explanation. Securities opinions represented, on average, five percent of the opinions written by Judge Friendly's colleagues, whereas they represented ten percent of the opinions written by Judge Friendly himself. While Judge Medina's percentage was eight, he wrote far fewer opinions—as well as far fewer securities opinions —than did the others.[306]

TABLE 7

*Securities Opinions and Total Opinions Written During the Critical Period by Second Circuit Judges Who Served Throughout that Period*

| Judge | Secs. Ops. | Total Ops. | % | Judge | Secs. Ops. | Total Ops. | % |
|---|---|---|---|---|---|---|---|
| Smith | 16 | 445 | 4 | Moore | 24 | 421 | 6 |
| Hays | 16 | 418 | 4 | Kaufman | 23 | 354 | 6 |
| Lumbard | 20 | 441 | 4 | Medina | 11 | 135 | 8 |
| Waterman | 16 | 332 | 5 | Friendly | 57 | 545 | 10 |

Average for judges other than Friendly: 5%

Why were presiding judges inclined to turn to Judge Friendly when it came to securities opinions? The reason cannot simply be that they regarded him highly, since that would not account for his disproportionate share of securities opinions in particular. The next section proposes an alternative explanation.

### C. Explaining Judge Friendly's Opinion Assignments

Presiding judges probably assigned Judge Friendly a disproportionate share of securities opinions for three reasons: he was (1) interested in securities regulation; (2) an expert in the subject area; and (3) senior to many of his colleagues at a relatively early stage of his judicial career. Interest, expertise, and seniority weigh heavily with presiding judges in assigning opinions.[307]

Judge Friendly made known his general interest in the securities area by serving as adviser to the ALI's Federal Securities Code.[308] Moreover, it appears that he also expressed interest in writing specific majority opinions. On the Second Circuit, such interest could be communicated by a long voting memorandum[309]—a document by which a judge indicates to his fellow panel members how he expects to vote on a particular case and

306. *See supra* text accompanying note 300. Others have found evidence of subject matter specialization among judges. *See* HOWARD, *supra* note 133, at 234; Burton M. Atkins, *Opinion Assignments on the United States Courts of Appeals: The Question of Issue Specialization*, 27 W. POL. Q. 409, 409 (1974).

307. *See, e.g.*, HOWARD, *supra* note 133, at 234-35 (noting the roles of interest, seniority, and expertise); *id.* at 249 (seniority); *id.* at 250 (expertise); *id.* at 255-56 (seniority, interest, and expertise); SCHICK, *supra* note 50, at 101 (noting the roles of interest and expertise).

308. *See supra* text accompanying notes 150-68.

309. *See* Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 301 (1986).

the reasons for so voting.[310] Voting memoranda were typically one to two pages long.[311] It may therefore be noteworthy that for casebook opinions that were majority opinions of three-judge panels,[312] Friendly's voting memoranda averaged 4.1 pages.[313]

As the only Second Circuit judge to serve as an adviser to the ALI's Federal Securities Code,[314] Friendly had become conversant not only with the entire panoply of securities issues[315] but also with the views held by leading securities regulation experts.[316] Moreover, his expertise was undoubtedly to some extent self-perpetuating because the more securities opinions he wrote—whether based on his expertise or interest or a combination of both—the more additional expertise he acquired. Furthermore, his perceived expertise was likely accentuated by his highly favorable portrayal in Professor Loss's treatise.[317]

---

310. For discussion of voting memoranda, see *id.* at 298-303; Gerald Gunther, *Reflections on Judicial Administration in the Second Circuit, from the Perspective of Learned Hand's Days*, 60 BROOK. L. REV. 505, 509 (1994) (noting that Second Circuit judges used voting memoranda less often after 1986).

311. Feinberg, *supra* note 309, at 299.

312. The casebook opinions included not only majority opinions of three-judge panels but also concurring, dissenting, and en banc opinions. For a list of the casebook opinions, see *infra* Appendix I.

313. This figure represents the average of the voting memoranda available in the Friendly Papers for the casebook opinions that were majority opinions of three-judge panels. *See* Memorandum of H.J.F. (June 10, 1977) (3 pages) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 38, *Goldberg* folder) (casebook opinion in Goldberg v. Meridor, 567 F.2d 209 (2d Cir. 1977); Memorandum of H.J.F. (Apr. 8, 1976) (1.9 pages) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 23, *Exchange National Bank* folder) (casebook opinion in Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976)); Memorandum of H.J.F. (Dec. 3, 1975) (5 pages) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 24, folder 9) (casebook opinion in United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976)); Memorandum of H.J.F. (Feb. 20, 1973) (9 pages) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 30, *Gerstle* folder) (casebook opinion in Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973)); Memorandum of H.J.F. (Nov. 11, 1971) (3 pages) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 30, *Leasco* folder) (casebook opinion in Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972)); Memorandum of H.J.F. (May 12, 1971) (3 pages) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 25, folder 56) (casebook opinion in Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971)); Memorandum of H.J.F. (Jan. 14, 1968) (6.5 pages) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 19, *Electrical Specialty* folder) (casebook opinion in Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969)); Memorandum of H.J.F. (Nov. 9, 1965) (2.8 pages) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 13, *Colonial Realty* folder) (casebook opinion in Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966)); Memorandum of H.J.F. (Dec. 7, 1964) (3.2 pages) (on file with the Harvard Law School Library as part of the Friendly Papers, *supra* note 46, box 12, folder 60) (casebook opinion in Willheim v. Murchison, 342 F.2d 33 (2d Cir.), *cert. denied*, 382 U.S. 840 (1965)).

Of course, it is entirely conceivable that Judge Friendly wrote longer than average voting memoranda regardless of the subject area. This possibility was not explored.

314. *See supra* text accompanying note 158.

315. *See supra* text accompanying note 164.

316. *See supra* text accompanying notes 159, 165.

317. *See supra* text accompanying notes 244-83.

And finally there was Judge Friendly's seniority on the court. While those who study federal appeals courts mention seniority as a factor in opinion assignments,[318] they do not articulate the underlying rationale for its use.[319] Perhaps seniority is simply a proxy for experience. Alternatively, it may reflect and express deference to the subject-matter preferences of those with long years of service. Whatever the rationale, seniority worked in Judge Friendly's favor. When he joined the Second Circuit in 1959, he had eight senior colleagues.[320] By 1966, he had lost four of them[321] and gained six new (and thus junior) colleagues,[322] thereby acquiring seniority over a majority of the members of the Second Circuit before the critical period was even a third over.[323]

Judge Friendly's seniority, coupled with his interest and expertise in securities regulation, probably also brought him a disproportionate share of securities opinions that broke important new ground. Indeed, it is with respect to important opinions that the call for his expertise would have been greatest. Moreover, important opinions would probably heighten the relevance of his interest, since interest breeds the effort and attention that important opinions require.

To appreciate the significance of these factors, contemplate how a few changes might have altered the allocation of securities opinions among Second Circuit judges during the critical period. Suppose, for example, that another judge besides Friendly had worked on the Code and approximated him in seniority. That judge would probably have been assigned some significant portion of the major securities opinions that went instead to Judge Friendly. At least in the area of securities regulation, Judge Friendly's name might today be less well known.

## VI. CONCLUSION

This Article shows that Judge Friendly did not acquire his reputation in securities regulation solely by doing excellent work. Like George Orwell, Charles Darwin, and other leading writers and scientists, he benefited from contingencies—fortuitous features of the social context. These con-

318. *See supra* text accompanying note 307.

319. *See id.*

320. The eight were Judges Clark, L. Hand, Hincks, Lumbard, Medina, Moore, Swan, and Waterman. 268 F.2d XII & n.3. While Chase was also listed, *id.*, he wrote his last published opinion in 1957. *See* United States v. Johnson, 247 F.2d 5, 6 (2d Cir.), *cert. denied*, 355 U.S. 867 (1957).

321. The four were Judge L. Hand, who died Aug. 18, 1961, 290 F.2d VII & n.1; Judge Clark, who died Dec. 13, 1963, 323 F.2d VIII & n.1; Judge Hincks, who died Sept. 30, 1964, 334 F.2d VIII & n.2; and Judge Swan, whose last published opinion was Carrier Corp. v. J.E. Schecter Corp., 347 F.2d 153 (2d Cir.), *cert. denied*, 382 U.S. 904 (1965).

322. They were Judge Smith, sworn in on Sept. 14, 1960, 279 F.2d VIII & n.1; Judge Kaufman, sworn in on Sept. 29, 1961, 292 F.2d VIII & n.1; Judge Marshall, sworn in on Oct. 23, 1961, 293 F.2d VIII & n.1; Judge Hays, sworn in on Nov. 2, 1961, *id.* at n.2; Judge Anderson, sworn in on Aug. 20, 1964, 332 F.2d VIII & n.1; Judge Feinberg, sworn in on Mar. 18, 1966, 355 F.2d VIII & n.1.

323. The critical period runs from Nov. 8, 1961 to Mar. 23, 1977. *See supra* text accompanying notes 76-77.

tingencies included the interplay between his work and his era, the particular court on which he served, the support provided him by a leading law professor, and the sheer quantity of his securities opinions.

To acknowledge that Judge Friendly's reputation in securities regulation was to some extent contingent does not diminish his accomplishments. Rather, it aids in understanding how his formidable talents received the recognition they enjoyed.

The role of contingencies in creating judicial reputations remains largely unexplored. Exploration promises not only to yield new insights about individual judges but also to highlight important questions concerning the judicial system itself. Are alliances between leading judges and law professors useful in explaining doctrinal shifts in the law? What constraints should govern those alliances? Does a judge who writes a disproportionate share of opinions in a particular subject area acquire more power to shape the law in that area than one judge should have? Dispassionate analysis of both the genesis and role of reputation in our judicial system has scarcely begun.

## APPENDIX I

This Appendix lists opinions of Judge Friendly that appear as "principal cases" in current securities regulation casebooks or have previously so appeared in the predecessor editions of those casebooks. "Principal cases" are opinions reprinted largely in full. They may include concurring, dissenting, and *en banc* opinions, as well as majority opinions of three-judge panels.

Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971), *aff'd sub nom.* Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1287 (3d ed. 1972).

SEC v. Aqua-Sonic Products Corp., 687 F.2d 577 (2d Cir.), *cert. denied*, 459 U.S. 1086 (1982), *reprinted in* DAVID L. RATNER & THOMAS L. HAZEN, SECURITIES REGULATION 36 (5th ed. 1996); DAVID L. RATNER & THOMAS L. HAZEN, SECURITIES REGULATION 247 (4th ed. 1991); DAVID L. RATNER, SECURITIES REGULATION 243 (3d ed. 1986).

Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967), *reprinted in* RICHARD W. JENNINGS ET AL., SECURITIES REGULATION 1056 (7th ed. 1992); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1093 (6th ed. 1987); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1013 (3d ed. 1972); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 803 (2d ed. 1968); DAVID L. RATNER & THOMAS L. HAZEN, SECURITIES REGULATION 252 (5th ed. 1996); SECURITIES REGULATION 164 (4th ed. 1991); DAVID L. RATNER & THOMAS L. HAZEN, SECURITIES REGULATION 162 (3d ed. 1986); SECURITIES REGULATION 157 (2d ed. 1980); DAVID L. RATNER, SECURITIES REGULATION 151 (1st ed. 1975); LARRY D. SODERQUIST, SECURITIES REGULATION 385 (1st ed. 1982).

Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975), *reprinted in* JAMES D. COX ET AL., SECURITIES REGULATION 1343 (1991); RICHARD W. JENNINGS ET AL., SECURITIES REGULATION 1540 (7th ed. 1992); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1572 (6th ed. 1987); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1279 (5th ed. 1982); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1224 (4th ed. 1977).

Brown v. Bullock, 294 F.2d 415 (2d Cir. 1961) (en banc), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1383 (4th ed. 1977); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1522 (3d ed. 1972); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1215 (2d ed. 1968); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 942 (1st ed. 1963).

Chasins v. Smith, Barney & Co., 438 F.2d 1167, 1174 (2d Cir. 1970) (Friendly, J., dissenting from the denial of reconsideration en banc), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 648 (6th ed. 1987); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 576 (5th ed. 1982); DAVID L. RATNER, SECURITIES REGULATION 844 (2d ed. 1980); DAVID L. RATNER, SECURITIES REGULATION 775 (1st ed. 1975); LARRY D. SODERQUIST, SECURITIES REGULATION 778 (1st ed. 1982).

Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.) *cert. denied*, 385 U.S. 817 (1966), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 851 (5th ed. 1982); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 882 (4th ed. 1977); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1377 (3d ed. 1972); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1003 (2d ed. 1968); DAVID L. RATNER, SECURITIES REGULATION 924 (2d ed. 1980); DAVID L. RATNER, SECURITIES REGULATION 854 (1st ed. 1975).

Diskin v. Lomasney & Co., 452 F.2d 871 (2d Cir. 1971), *reprinted in* RICHARD W. JENNINGS ET AL., SECURITIES REGULATION 139 (7th ed. 1992); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 67 (6th ed. 1987); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 74 (5th ed. 1982); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 98 (4th ed. 1977); LARRY D. SODERQUIST, SECURITIES REGULATION 277 (3d ed. 1996); LARRY D. SODERQUIST, SECURITIES REGULATION 261 (2d ed. 1988); LARRY D. SODERQUIST, SECURITIES REGULATION 392 (1st ed. 1982).

United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976), *reprinted in* JAMES D. COX ET AL., SECURITIES REGULATION 1053 (1991); RICHARD W. JENNINGS ET AL., SECURITIES REGULATION 1483 (7th ed. 1992).

Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1360 (3d ed. 1972); DAVID L. RATNER, SECURITIES REGULATION 599 (1st ed. 1975).

Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 244 (6th ed. 1987); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 201 (5th ed. 1982).

Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 865, 1011, 1093 (5th ed. 1982); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 892, 1018 (4th ed. 1977); DAVID L. RATNER & THOMAS L. HAZEN, SECURITIES REGULATION 724 (5th ed. 1996); DAVID L. RATNER, SECURITIES REGULATION 729 (4th ed. 1991); DAVID L. RATNER, SECURITIES REGULATION 685 (3d ed. 1986); DAVID L. RATNER, SECURITIES

REGULATION 635, 707 (2d ed. 1980); DAVID L. RATNER, SECURITIES REGULATION 574, 641 (1st ed. 1975); LARRY D. SODERQUIST, SECURITIES REGULATION 354 (3d ed. 1996); LARRY D. SODERQUIST, SECURITIES REGULATION 307 (2d ed. 1988); LARRY D. SODERQUIST, SECURITIES REGULATION 456 (1st ed. 1982).

Goldberg v. Meridor, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978), *reprinted in* JAMES D. COX ET AL., SECURITIES REGULATION 754 (1991); RICHARD W. JENNINGS ET AL., SECURITIES REGULATION 1030 (7th ed. 1992); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1066 (6th ed. 1987); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 933 (5th ed. 1982); DAVID L. RATNER & THOMAS L. HAZEN, SECURITIES REGULATION 745 (5th ed. 1996); DAVID L. RATNER, SECURITIES REGULATION 700 (4th ed. 1991); DAVID L. RATNER, SECURITIES REGULATION 666 (3d ed. 1986); DAVID L. RATNER, SECURITIES REGULATION 604 (2d ed 1980).

Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972), *reprinted in* RICHARD W. JENNINGS ET AL., SECURITIES REGULATION 1533 (7th ed. 1992); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1564 (6th ed. 1987); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1271 (5th ed. 1982); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1215 (4th ed. 1977).

Pearlstein v. Scudder & German, 429 F.2d 1136, 1145 (2d Cir. 1970) (Friendly, J., dissenting), *cert. denied*, 401 U.S. 1013 (1971), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 880 (4th ed. 1977); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1399 (3d ed. 1972).

Prudent Real Estate Trust v. Johncamp Realty, Inc., 599 F.2d 1140 (2d Cir. 1979), *reprinted in* DAVID L. RATNER & THOMAS L. HAZEN, SECURITIES REGULATION 790 (5th ed. 1996); DAVID L. RATNER, SECURITIES REGULATION 778 (4th ed. 1991); DAVID L. RATNER, SECURITIES REGULATION 398 (3d ed. 1986); DAVID L. RATNER, SECURITIES REGULATION 680 (2d ed. 1980).

Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971), *cert. dismissed*, 409 U.S. 802 (1972), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1402 (5th ed. 1982); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1399 (4th ed. 1977); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1545 (3d ed. 1972).

SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1100 (3d ed. 1972); DAVID L. RATNER, SECURITIES REGULATION 500 (2d ed. 1980); DAVID L. RATNER, SECURITIES REGULATION 479 (1st ed. 1975).

Willheim v. Murchison, 342 F.2d 33 (2d Cir.), *cert. denied*, 382 U.S. 840 (1965), *reprinted in* RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1539 (3d ed. 1972); RICHARD W. JENNINGS & HAROLD MARSH, JR., SECURITIES REGULATION 1229 (2d ed. 1968).

## APPENDIX II

This Appendix lists securities opinions written by Judge Friendly during the activist era in securities regulation referred to in this Article as the "critical period." This Appendix contains majority opinions written on behalf of three-judge panels only—concurring opinions, dissenting opinions, and en banc opinions are not included.

The critical period is deemed to start on November 8, 1961 and to end on March 23, 1977. For a discussion of the critical period and the rationale for selecting these dates, see *supra* Part I.

Arthur Lipper Corp. v. SEC, 547 F.2d 171 (2d Cir. 1976), *cert. denied*, 434 U.S. 1009 (1978).

Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976).

Gruss v. Curtis Publishing Co., 534 F.2d 1396 (2d Cir.), *cert. denied*, 429 U.S. 887 (1976).

United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976).

SEC v. Geon Indus., 531 F.2d 39 (2d Cir. 1976).

Fogel v. Chestnutt, 533 F.2d 731 (2d Cir. 1975), *cert. denied*, 429 U.S. 824 (1976).

Finley v. Parvin/Dohrmann Co., 520 F.2d 386 (2d Cir. 1975).

Jacobi v. Bache & Co., 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).

Exchange Nat'l Bank v. Wyatt, 517 F.2d 453 (2d Cir. 1975).

SEC v. Capital Counsellors, Inc., 512 F.2d 654 (2d Cir. 1975).

United States v. Solomon, 509 F.2d 863 (2d Cir. 1975).

Missouri Portland Cement Co. v. Cargill, 498 F.2d 851 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974).

Kavit v. A.L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974).

Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973).

Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973).

Sack v. Low, 478 F.2d 360 (2d Cir. 1973).

Zeller v. Bogue Elec. Mfg. Corp., 476 F.2d 795 (2d Cir.), *cert. denied*, 414 U.S. 908 (1973).

Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

Newman v. Stein, 464 F.2d 689 (2d Cir.), *cert. denied*, 409 U.S. 1039 (1972).

Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072 (2d Cir. 1972).

Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972).

Diskin v. Lomasney & Co., 452 F.2d 871 (2d Cir. 1971).

Fershtman v. Schectman, 450 F.2d 1357 (2d Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

Abrams v. Occidental Petroleum Corp., 450 F.2d 157 (2d Cir. 1971), *aff'd sub nom.* Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1972).
Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971), *cert. dismissed*, 409 U.S. 802 (1972).
Levine v. Seilon, Inc., 439 F.2d 328 (2d Cir. 1971).
La Morte v. Mansfield, 438 F.2d 448 (2d Cir. 1971).
Rosenblatt v. Northwest Airlines, Inc., 435 F.2d 1121 (2d Cir. 1970).
United States v. Peltz, 433 F.2d 48 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971).
Butler Aviation Int'l, Inc. v. Comprehensive Designers, Inc., 425 F.2d 842 (2d Cir. 1970).
United States v. Simon, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970).
Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir. 1969).
Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969).
SEC v. General Time Corp., 407 F.2d 65 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969).
General Time Corp. v. Talley Indus., 403 F.2d 159 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969).
Donlon Indus. v. Forte, 402 F.2d 935 (2d Cir. 1968).
SEC v. Talley Indus., 399 F.2d 396 (2d Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969).
Bruns, Nordeman & Co. v American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968).
SEC v. Sterling Precision Corp., 393 F.2d 214 (2d Cir. 1968).
SEC v. Frank, 388 F.2d 486 (2d Cir. 1968).
Phillips v. SEC, 388 F.2d 964 (2d Cir. 1968).
Barnes v. Osofsky, 373 F.2d 269 (2d Cir. 1967).
Studebaker Corp. v. Gittlin, 360 F.2d 692 (2d Cir. 1966).
Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).
Fox v. Glickman Corp., 355 F.2d 161 (2d Cir. 1965), *cert. denied*, 384 U.S. 960 (1966).
United States v. Doyle, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).
Wolf v. Barkes, 348 F.2d 994 (2d Cir.), *cert. denied*, 382 U.S. 941 (1965).
Willheim v. Murchison, 342 F.2d 33 (2d Cir.), *cert. denied*, 382 U.S. 840 (1965).
SEC v. Canandaigua Enters. Corp., 339 F.2d 14 (2d Cir. 1964).
United States v. Benjamin, 328 F.2d 854 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).
Phelps v. Burnham, 327 F.2d 812 (2d Cir. 1964).
Katz v. Kilsheimer, 327 F.2d 633 (2d Cir. 1964).
United States v. Ross, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963).

United States v. Crosby, 314 F.2d 654 (2d Cir.), *cert. denied*, 373 U.S. 923 (1963).