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Hon. Henry J. Friendly: *Federal Jurisdiction: A General View.* New York, Columbia University Press, 1973. 199 pp. $10.00.

For the past decade or more the federal judiciary has been subjected to particularly intense scrutiny and reevaluation as an institution, from within and without, in an effort to define its proper role in relation to the other branches of the federal government and to the judicial systems of the several states. A comprehensive proposal for revision of the jurisdiction of the federal courts, promulgated by the American Law Institute,[1] is now before the Congress in the form of a bill introduced by Senator Burdick of North Dakota.[2] A special commission of highly respected lawyers and academics has proposed a National Court of Appeals to act as a screening device for the U.S. Supreme Court, to relieve the latter's burgeoning caseload.[3] Another panel of legislators, judges, lawyers and teachers is at work on a geographical reorganization of the 11 Circuit Courts of Appeals.[4] The recent periodical literature has produced a rash of extra-judicial statements by lower court judges on the state of the judiciary,[5] complementing (though not inevitably

1. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). *See* Currie, *The Federal Courts and The American Law Institute,* 36 U. CHI. L. REV. 1, 268 (1968-69); Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals,* 26 WASH. & LEE L. REV. 185 (1969).

2. S. 1876, 92d Cong., 1st Sess. (1971).

3. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, REPORT 9, (1972), 57 F.R.D. 573 (1973). *See,* from a mass of literature on these proposals: BICKEL, THE CASELOAD OF THE SUPREME COURT, AND WHAT, IF ANYTHING, TO DO ABOUT IT (American Enterprise Institute for Public Policy Research, Domestic Affairs Study 21, Nov. 1973); Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill-Advised",* 59 A.B.A.J. 835 (1973); Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal,* 59 A.B.A.J. 721 (1973); Gressman, *The Constitution vs. The Freund Report,* 41 GEO. WASH. L. REV. 951 (1973); Stokes, *National Court of Appeals: An Alternative Proposal,* 60 A.B.A.J. 179 (1974); Note, *The National Court of Appeals: A Constitutional 'inferior Court'?,* 72 MICH. L. REV. 290 (1973).

4. *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, PRELIMINARY REPORT: THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: ALTERNATIVE PROPOSALS (1973).

5. *See, e.g.,* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1973 L. & S.O. 557 (1973); Coffin, *Justice and Workability: Un Essai,* 5 SUFFOLK L. REV. 567 (1971); Friendly, *Averting the Flood by Lessening the Flow,* 59 CORNELL L. REV. 634 (1974); Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System,* 59 CORNELL L. REV. 597 (1974); Haynsworth, *A New Court to Improve the Administration of Justice,* 59 A.B.A.J. 841 (1973); Hufstedler, *Courtship and Other Legal Arts,* 60 A.B.A.J. 545 (1974); Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary,* 47 N.Y.U. L. REV. 841 (1972); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System,* 44 So. CAL. L. REV. 901 (1971); Lay, *Modern Administrative*

complimenting) those of the Chief Justice.[6] In this volume one of our most respected federal judges, a student of the subject since long before his elevation to the bench,[7] brings together his views on these problems in forceful, readable style.

Those who might be misled by the somewhat innocent sound of the title should be forewarned: this is not a reference work on the Law of Federal Jurisdiction for scholars or practitioners, nor yet a primer on the subject for the neophyte. The lack of an index would disqualify the book for these jobs in any case. The consignment of these James S. Carpentier Lectures to the printer less than one month after their delivery at Columbia University betrays a more urgent purpose, which is to influence the immediate course of reform. Nonetheless, while Judge Friendly's intended audience is doubtless the expert and decision-maker, he manages to make the nature of the problems and the main lines of his argument readily accessible to the non-expert. Since the work of the federal courts now helps shape the professional life of virtually every lawyer, as well as the public and private life of every citizen, no lawyer can afford to be unaware of the problems to which Judge Friendly addresses himself. This book is as good as any now available for heightening that awareness.

Judge Friendly's premise is succinctly stated: "[T]he inferior federal courts, and indeed the Supreme Court as well, are faced with the prospect of a breakdown."[8] District court actions filed in the fiscal year 1972 were 40% higher than in 1968, whereas they had increased only 17% in the seven years between 1961 and 1968.[9] This "explosion of federal litigation," he points out, results not merely from population increases, but principally from expansion of judicial responsibility in several specific areas, most notably civil rights actions and petitions for post-conviction review by state and federal prisoners.[10] The growth of complex administrative responsibilities in the adjudication of cases under the revised class-action rule, among others, makes the rise in mere numbers of filings itself an inadequate index of the increased burden. Responsibility for these expansions is placed on the one hand with the Supreme Court's liberal decisions and on the other with Congressional fondness for remedies without machinery and for federalization of interstate crime.

Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved, 21 DEPAUL L. REV. 701 (1972); Wright, *The Federal Courts and the Nature and Quality of State Law,* 13 WAYNE L. REV. 317 (1967); Haynsworth, Book Review, 87 HARV. L. REV. 1082 (1974).

6. *See* Burger, *Report on the Federal Judicial Branch–1973,* 59 A.B.A.J. 1125 (1973); Burger, *The State of the Federal Judiciary–1972,* 58 A.B.A.J. 1049 (1972).

7. Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 HARV. L. REV. 483 (1928).

8. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 3 (1973) [hereinafter referred to as FRIENDLY].

9. There is some evidence in the most recent statistics that the flood may be slackening somewhat. Although civil filings are still increasing, a reduction of criminal filings has brought about an overall reduction in the number of cases filed in the first 6 months of fiscal 1974. *See* 60 A.B.A.J. 566 (1974).

10. FRIENDLY, at 19, 27.

This breakdown cannot be avoided merely by adding more judges, since that would tend to dilute the high quality and prestige which are, in Judge Friendly's view, "the very values the federal court system is meant to attain."[11] The most promising solution, rather, is to contain the caseload of the federal courts within manageable limits, which in turn requires a substantial curtailment of some jurisdictional categories to allow for normal expansion in others. The foundation of such a reform must be an understanding of what the federal courts can do which other agencies—either state courts or administrative bodies—can't do just as well. To establish the perimeters of his discussion, Judge Friendly posits two models of federal jurisdiction—the "minimum" and the "maximum" model—and, on the assumption that "no one in his senses would advocate either,"[12] argues for a number of compromises essentially along pragmatic lines.

The "minimum model" consists of those categories of cases in which "everything is to be gained and nothing is to be lost" by placing jurisdiction in lower federal courts. Judge Friendly lists five such categories: actions by the United States, either criminal (exclusive) or civil (concurrent with the states); actions against the United States or against its officers or agencies under federal law (exclusive); admiralty and maritime cases; bankruptcy cases (exclusive); and patent and copyright cases (exclusive). He considers that the lower courts would have plenty to do even under this minimum model, which would eliminate both general diversity and general federal question jurisdiction.

The "maximum model" would extend the current scope by eliminating the "complete diversity" requirement, eliminating most of the current restrictions on removal, eliminating the jurisdictional amount requirement in federal question cases and reducing it in diversity cases, and making all federal question jurisdiction exclusive. The principal argument in favor of this approach would be that the federal courts provide a "juster justice."[13]

While Judge Friendly does not advocate restriction of the federal courts to the minimum model, he does urge some restraint even in those cases. In the criminal area, the principal problem has been Congress' urge to make everything a federal crime; the courts can do little to mitigate the burden thus imposed on them, and the author can only support a proposal to give federal law enforcement authorities discretionary power to withhold enforcement efforts where nonfederal agencies can act effectively and there is no substantial federal interest in further prosecution.[14] With respect to actions by the United States to enforce federal regulatory statutes, Judge Friendly believes that the recent tendency in such legislation to bypass administrative agencies and to place the initial fact-finding burden on the courts should be reversed. Too frequently the courts are no better qualified to make such factual investigations than are expert administrative agencies.[15]

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11. FRIENDLY at 31.
12. FRIENDLY at 13.
13. FRIENDLY at 12, quoting from Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954).
14. FRIENDLY at 60-61.
15. FRIENDLY at 62-68.

In two areas encompassed within the "minimum model", Judge Friendly proposes substantially increased roles for specialized courts. For patent cases, current law permits action in the regular district courts as an alternative to appeal before the Court of Customs and Patent Appeals regarding denial of applications and rulings on priority; in addition, exclusive jurisdiction is placed in the regular federal courts over claims for infringement and for declarations of invalidity. Instead, a Patent Court is proposed for all cases arising under the patent laws, subject only to discretionary Supreme Court review, with cases in other courts into which a patent question enters other than by the original complaint subject to removal to the Patent Court.[16] In tax cases current law gives the taxpayer three alternative fora for initial judicial review of administrative decision: the Tax Court, the Court of Claims, and the regular district courts, each with a different avenue of appellate review. Here Judge Friendly first espouses Dean Erwin Griswold's 30-year-old proposal for a Court of Tax Appeals, to which all appeals from trial court determinations in tax cases would be directed.[17] The author then advocates consolidation of all original jurisdiction in tax cases in the Tax Court, reorganized on a regional basis.[18] In both of these areas, in his opinion, the need for expertise and for uniformity of decision overrides any objection to judicial specialization.

Outside the "minimum model", Judge Friendly proposes to eliminate from the regular federal court dockets three types of cases, two now coming under the heading of federal question jurisdiction and one under the heading of diversity of citizenship. The first two—work-related injury claims of railroad workers and of seamen—would be handled administratively in the manner of other workmen's compensation cases, subject presumably to judicial review of administrative action. The third, motor vehicle accident cases, would be expressly excepted from diversity jurisdiction, thereby leaving them to the state courts; Judge Friendly hopes, however, that the states themselves will come to some non-judicial solution such as the various no-fault or first-party insurance plans.[19]

Beyond these relatively manageable constrictions based upon subject matter categories lie more byzantine complexities of jurisdictional doctrine, toward the unraveling of which Judge Friendly shows an ambivalence that will disappoint many reformers. Prominent among the deadends and detours thrown up by two centuries of doctrinal and legislative tinkering are: the complete diversity rule;[20] the jurisdictional amount;[21] removal based on a separate and independent cause of action;[22] the abstention doctrines;[23] the

16. FRIENDLY at 153.
17. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944).
18. FRIENDLY at 168.
19. FRIENDLY at 133-37.
20. Strawbridge v. Curtiss, 3 Cranch 267 (1806), a maddeningly cryptic opinion which has been understood to be statutory interpretation, rather than constitutional principle. *See* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967).
21. 28 U.S.C. §§ 1331, 1332 (1970).
22. 28 U.S.C. § 1441(c) (1970).
23. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 52 (2d ed. 1970).

so-called well-pleaded complaint rule;[24] the limitation of removal to defendants, and of removability to the well-pleaded complaint or petition;[25] the exhaustion of remedies requirements.[26] The principal concern evidenced by these devices has been the allocation of judicial business between the state and federal court systems, in cases in which the two have essentially concurrent jurisdiction. Judge Friendly singles out for discussion in this regard two broad categories of cases now burdening the federal courts: claims for relief from civil rights violations under the general civil rights statute, 42 U.S.C. §1983, and diversity of citizenship cases.

Section 1983, liberally interpreted by the Supreme Court,[27] has become a vehicle for immediate review in the lower federal courts of the constitutionality of a bewildering variety of state legislation and administrative acts, far beyond the issues of personal liberty which were surely the intended targets of the Civil Rights Act of 1871. Judge Friendly's professed unhappiness with this trend stems not from the extended protection thus afforded civil rights, but from the undue displacement of the state courts from their essential responsibility for enforcement of the constitution. He discusses three principles of accommodation to the role of state courts in protecting civil rights—abstention, comity (the so-called anti-injunction statute)[28] and the exhaustion requirement—and counsels greater restraint by the federal courts, without being able to find a satisfactory formula for limiting their power to act. He believes that the abstention doctrines should remain uncodified,[29] and that while exhaustion of state *administrative* remedies should be stringently required, a general requirement that state *judicial* avenues be first pursued would be inappropriate.[30] On the other hand, he does consider that the Supreme Court was mistaken in determining that the Civil Rights Act constitutes an exception to the anti-injunction act;[31] he considers it more appropriate to amend the latter provision to allow injunctions in the rare cases in which they are truly necessary to prevent irreparable harm.[32]

For federal question cases in general, he would abolish the jurisdictional amount, if for no other reason than that it is now so riddled with express exceptions as to have only capricious application.[33] He would also allow removal from state court based on the assertion of a federal-question defense; but, again because he believes that the federal constitution is not

24. *E.g.*, Louisville & N. RR. Co. v. Mottley, 211 U.S. 149 (1908).
25. 28 U.S.C. § 1441(a); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); C. WRIGHT, LAW OF FEDERAL COURTS § 37 (2d ed. 1970).
26. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Bacon v. Rutland R.R., 232 U.S. 134 (1914); C. WRIGHT, LAW OF FEDERAL COURTS § 49 (2d ed. 1970).
27. *E.g.*, Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchum v. Foster, 407 U.S. 225 (1972).
28. 28 U.S.C. § 2283 (1970).
29. FRIENDLY at 94.
30. FRIENDLY at 101.
31. Mitchum v. Foster, 407 U.S. 225.
32. FRIENDLY at 99-100.
33. FRIENDLY at 120-24.

the exclusive province of the federal courts, he would allow removal only if the defense were based on a federal *statute*.[34]

When it comes to diversity-of-citizenship jurisdiction, Judge Friendly's negative views have not changed in 45 years.[35] He regards the entire category as a "prime candidate" for elimination from the federal courts,[36] and, if he had his druthers, would see only two fragments retained: alienage diversity and interpleader, both subcategories having special federal interest.[37] As already noted, he believes that the federal courts do or should provide a "juster justice"; he rejects the conclusion, however, that the federal courts should therefore be opened to more state cases. First and foremost, the quality of federal judging depends in large part on the maintenance of a manageable caseload; second, in diversity cases, the *Erie* doctrine (which Judge Friendly considers correctly decided)[38] deprives the federal courts of one of their principal tools, the power to declare the law; and third, diversity cases are the "dullest" of the civil category and thus do not contribute to the federal judges' professional development.[39] On the other hand, returning diversity cases to the state courts would not hurt *them*, because their caseload is too far gone as it is.[40]

The wholesale elimination of diversity jurisdiction, however, is not in the cards, as the American Law Institute recognized and Judge Friendly fears. That being so, Judge Friendly would base all partial reforms not on logic or ease of application, but on the principle of maximum discouragement of diversity cases. In particular, he embraces the complete diversity rule and rejects even the modest refinements proposed by the A.L.I., because the effect of such reform would be to increase the federal caseload.[41] Here, indeed, the Judge's frustration surely clouds his judgment. As a last resort, he "sees no reason why" the trial judges cannot assign all other cases priority for trial over diversity cases.[42] We may hope, however, that the courts will decline this last invitation to a sit-down strike; one could as easily justify refusing to read briefs, hear closing argument, or spend more than 15 minutes per trial in any case which the judges deem "dull".

Finally, we may note Judge Friendly's opposition to the so-called Freund Report's controversial recommendation for the establishment of a "National Court of Appeals" to help control the Supreme Court's caseload. Under that proposal, the National Court would be composed of seven circuit judges, serving on a rotating basis. It would receive all applications for appellate review to the Supreme Court, and would dispose of all but perhaps 10% of them either by denying review or by undertaking such review itself. Judge Friendly's objections may be summarized as follows: it is not obvious that

34. FRIENDLY at 125-26.
35. *See* note 7 *supra*.
36. FRIENDLY at 142.
37. FRIENDLY at 149.
38. *See* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 83 (1964).
39. FRIENDLY at 144.
40. FRIENDLY at 149.
41. FRIENDLY at 152.
42. *Id.*

a rotating panel of circuit judges would do any better job than the Supreme Court does now; the composition of the National Court precludes expertise and ensures "average" manpower; the National Court would lack the prestige and respect which enables circuit judges now to accept Supreme Court review of their product; the introduction of a fourth judicial level would increase the delay in deciding those cases which are deemed worthy of Supreme Court review; and the proposal would rob the Supreme Court of control over its own docket. The cure for the problem, in his view, lies in more efficient procedures within the Court itself (more division of labor on petitions for certiorari, for example), and in control of the flow of litigation into the system at the lower levels.[43]

There can be no doubt that this book is among the most important statements in the current debate over the proper role of the federal juidiciary. It combines uniquely the conciseness and pragmatism of the working judge with the thoroughness and documentation of the scholar. If it fails to achieve a wholly rational and consistent approach to the subject, we are entitled to doubt that such a goal can be achieved, short of eliminating the dual court hierarchies which other more recently constructed federal systems (such as Canada, Australia and West Germany) have wisely avoided. Short of that, we need to escape from regional, inter-governmental and interdepartmental jealousies and focus on what the federal courts as such can effectively do. It is Judge Friendly's service to urge that focus upon us.

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43. FRIENDLY at 49-54. *See also* Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

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