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## Some Kind of Judge: Henry Friendly and the Law of Federal Courts

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## BOOK NOTICE

### SOME KIND OF JUDGE: HENRY FRIENDLY AND THE LAW OF FEDERAL COURTS

Aaron P. Brecher\*

HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA. By *David M. Dorsen*. Foreword by *Richard A. Posner*. Cambridge and London: The Belknap Press of Harvard University Press. 2012. Pp. xiii, 498. \$35.

#### INTRODUCTION

Überfans of the federal judiciary owe a lot to David Dorsen.<sup>1</sup> His illuminating biography of Judge Henry Friendly is a fitting tribute to the contributions of a jurist that many consider to be among the finest judges never to sit on the U.S. Supreme Court. Judicial biography is a difficult genre to do well,<sup>2</sup> and most authors choose to focus on Supreme Court justices.<sup>3</sup> But *Henry Friendly, Greatest Judge of His Era* is an excellent source of information on Friendly's life and, far more important, his views on the law and his relationships with some of the most fascinating figures in twentieth-century legal history.

Dorsen not only provides a detailed study of Friendly's life and career but he also uses the biography as a vehicle to explore the ways judges decide cases, the work of intermediate appellate courts, and Friendly's particular influence across many legal fields (p. 2). Dorsen devotes much of the book to demonstrating that Friendly was a "great" judge along a number of dimensions: his intelligence, productivity, professional accomplishments, approach to legal questions, and influence on the law (pp. 2–3). Dorsen contends that the "influence of a circuit judge on the development of federal law depends largely on whether other federal judges view his work as worth

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\* Law Clerk, Honorable Alicemarie H. Stotler, U.S. District Court for the Central District of California. I thank the entire staff of the *Michigan Law Review*, especially Jeff Edwards, Julian Kleinbrodt, and Dayna Zolle, for their thoughtful and diligent editing. Professor Eve Brensike Primus and Varun Behl provided invaluable comments on earlier drafts. As always, I am grateful to my family. This Notice is dedicated to all those members of the federal judiciary whose service, like Judge Friendly's, merits the designation "honorable."

1. Of Counsel, Sedgwick LLP, Washington, D.C.  
2. See Richard A. Posner, *Judicial Biography*, 70 N.Y.U. L. REV. 502, 510–19 (1995) (arguing that judicial biographies are not only difficult to write effectively but also rarely worth the effort of having done so).

3. For some of the best of these, see ANDREW L. KAUFMAN, *CARDOZO* (2000); SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN* (2010); and MELVIN I. UROFSKY, *LOUIS D. BRANDEIS* (2009). Prominent biographies of lower court judges include GERALD GUNTHER, *LEARNED HAND* (2d ed. 2011), and POLLY J. PRICE, *JUDGE RICHARD S. ARNOLD* (2009).

emulating. On that criterion, as well as others, Friendly demands attention” (p. 2).

Part I of this Notice briefly summarizes Dorsen’s work, recounting the key facts of Friendly’s life, his approach to judging, and those areas of the law most affected by Friendly’s ideas. It concludes that Dorsen has indeed demonstrated Friendly’s “greatness” to a certain degree. Part II explores Dorsen’s notion of influence on the law by examining Friendly’s impact on an area of law in which he was widely considered expert: federal jurisdiction. It expands Dorsen’s conception of influence to include not only the extent to which subsequent judges have emulated Friendly but also the extent to which Friendly was a clear and forceful expounder of ideas that shaped the terms of the debate on issues of federal jurisdiction, even if his vision did not ultimately carry the day. Moreover, the relevant evaluators of influence should include Congress and academics in addition to other judges.

#### I. “MAN FOR ALL SEASONS IN THE LAW”<sup>4</sup>

Henry Jacob Friendly was born in 1903 to a comfortably middle-class Jewish family in Elmira, New York (p. 6). In New York City in 1986, losing his sight and still mourning his wife Sophie’s death a year earlier, he committed suicide (p. 343). The years between these two events were marked by superlative academic and professional achievements juxtaposed against chronic bouts of melancholy, difficult relationships in his family life, and the cultivation of a famously gruff demeanor with subordinates and the lawyers who appeared before him. This Part focuses on Friendly’s academic life and work as a judge.

Friendly’s pre-judicial career would have been something to be proud of even if he had never ascended to the bench. After studying history at Harvard College, he attended Harvard Law School where he compiled one of the best, possibly the best, academic records in the school’s history<sup>5</sup> and served as president of the *Harvard Law Review* (pp. 12–27). Afterward, Friendly worked for Justice Brandeis as a clerk—a position for which

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4. The third edition of the leading casebook on federal jurisdiction was dedicated to Friendly, calling him “man for all seasons in the law; master of this subject.” PAUL M. BATOR ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* xix (3d ed. 1988). Apparently the admiration was mutual. Friendly cited the Hart and Wechsler casebook twenty-seven times as a judge. P. 78. In an episode that might elicit a chuckle from students who have taken a course in Federal Courts, Friendly read the first edition while awaiting his confirmation in 1959 and later wrote that “[t]he book, while not exactly summer reading, proved to be the most stimulating and exciting law book [he] had encountered since Wigmore’s *Evidence*.” P. 78 (quoting Henry J. Friendly, *In Praise of Herbert Wechsler*, 78 *COLUM. L. REV.* 974, 974 (1978)) (internal quotation marks omitted). One doubts that many outside the federal jurisdiction professoriate—or indeed, within it—have read Hart and Wechsler from cover to cover and found it “exciting.”

5. Brandeis’s average at Harvard Law was somewhat higher than Friendly’s, but scholars disagree over who had the best academic record in the school’s history because the grading system changed between Brandeis’s graduation in 1877 and Friendly’s attendance fifty years later. P. 27.

Friendly's teacher Felix Frankfurter had selected him (pp. 26–27). Upon completing his clerkship, Friendly practiced law at Root, Clark, Buckner & Ballantine before leaving to found his own firm in 1946 with a number of other partners (pp. 1, 31–33, 50–51). That firm evolved into Cleary, Gottlieb, Steen & Hamilton, which remains a Wall Street powerhouse today.<sup>6</sup> Friendly's successful practice prompted his ascent as one of the most respected lawyers in the country as he developed an impressive portfolio of clients. This portfolio included Pan American Global Airways, for which he served as a vice president and general counsel while in practice (p. 60).

Dorsen covers all of this in fewer than eighty pages. The heart of the biography describes Friendly's contributions as a judge on the U.S. Court of Appeals for the Second Circuit. President Eisenhower appointed Friendly to the bench in 1959, and over the next twenty-seven years, Friendly wrote over 1,000 opinions, as well as dozens of book reviews and scholarly articles (pp. 1–3). Dorsen devotes chapters to specific time periods or themes, describing, for example, Friendly's relationships with his fellow judges (Chapter Seven) and his clerks (Chapter Six), and he later covers Friendly's death (Chapter Twenty-four) and legacy (Chapter Twenty-five). But Dorsen organizes the bulk of the book by area of law rather than chronologically, detailing Friendly's most significant opinions and other writings in a number of fields. Friendly was particularly famous for his contributions to administrative law,<sup>7</sup> federal jurisdiction,<sup>8</sup> securities law,<sup>9</sup> and criminal procedure.<sup>10</sup>

Readers less concerned with particular doctrinal areas might be interested in Dorsen's description of the judge's interactions with some of the most important people in American legal history. In addition to formative encounters with Frankfurter and Brandeis early in his career, Friendly also worked closely with John Marshall Harlan II, who was a partner at Root, Clark (pp. 38–41) and later became the great dissenter of the Warren Court. And Learned Hand was among those who urged Eisenhower to appoint Friendly to the Second Circuit.<sup>11</sup>

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6. See *Firm Profiles: Cleary Gottlieb Steen & Hamilton*, AM.LAW., <http://www.americanlawyer.com/firmProfile.jsp?name=Cleary+Gottlieb+Steen+%26+Hamilton> (last updated Jan. 1, 2012). Unfortunately, the same cannot be said for Root, Clark. The firm went through a number of name changes and mergers before eventually becoming Dewey & Leboeuf, p. 1, whose 2012 dissolution was the largest law firm collapse in U.S. history, see Jennifer Smith, *Dewey Defied 'Law of Jungle'*, WALL ST. J., Oct. 15, 2012, at B6, available at <http://online.wsj.com/article/SB10000872396390443624204578056664157840752.html>.

7. See A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. REV. 1, 4–5 (1999).

8. See David P. Currie, *On Blazing Trails: Judge Friendly and Federal Jurisdiction*, 133 U. PA. L. REV. 5, 5 (1984); see also *infra* Part II.

9. See Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777, 780–81 (1997).

10. See Frank I. Goodman, *Judge Friendly's Contributions to Securities Law and Criminal Procedure: "Moderation Is All"*, 133 U. PA. L. REV. 10, 23–25 (1984).

11. P. 75; see also GUNTHER, *supra* note 3, at 558–60. Frankfurter had introduced Friendly to Hand when Friendly was still a law student. P. 25. Later, Friendly's first few years

During his career, Friendly won the respect of colleagues, academics, and Supreme Court justices for his judicial work (pp. 354–57). Friendly’s opinions demonstrated excellent writing, command of the facts, moderation, and creativity in advancing the law while still respecting statutory and constitutional language and controlling precedents.<sup>12</sup> The judge was certainly more restrained and respectful of precedent than some of his famous judicial contemporaries.<sup>13</sup> This approach apparently earned him many admirers, evidenced by the accolades that poured in from many quarters of the legal world when he died (pp. 344, 354–56).

Dorsen’s book as a whole highlights Friendly’s ability to succeed as a private attorney, a judge, and a scholar<sup>14</sup>—three fields that are rarely all mastered by one person. In recent decades, a number of federal judges have lamented “the alienation of the elite law professor from legal practice, including judging.”<sup>15</sup> Friendly was an exception. The academy took his articles and opinions seriously, and Friendly displayed an appreciation for academic contributions to legal thought.<sup>16</sup>

Dorsen contends that Friendly’s greatest legacy might be the accomplishments of his law clerks (p. 357). Although Friendly was notoriously demanding of his clerks (indeed, he was often remarkably insensitive),<sup>17</sup> there is little doubt that the clerkship experience deeply enriched many of his clerks’ professional lives.<sup>18</sup> An appendix to Dorsen’s book contains a complete list of Friendly’s former clerks, and their credentials are impressive

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on the Second Circuit coincided with Hand’s last years, and Friendly had the opportunity to sit on a panel with Hand early in the former’s first year as a judge. Pp. 82–83, 100.

12. See pp. 347–48; Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975, 981–82 (2007).

13. Compare Michael Boudin, *Judge Henry Friendly and the Craft of Judging*, 159 U. PA. L. REV. 1, 3–4 (2010) (observing that Friendly “took precedent extremely seriously” and noting Friendly’s views on the differences between the role of supreme courts and intermediate appellate courts), with G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 246 (3d ed. 2007) (“[California Supreme Court Justice Traynor’s] model assumed that judges were lawmakers and found activist, innovative judging compatible with that assumption.”). This apparent difference in opinion did not prevent Friendly from expressing deep admiration for Traynor. See Henry J. Friendly, *Ablest Judge of His Generation*, 71 CALIF. L. REV. 1039 (1983). Moreover, Friendly himself was not always opposed to judicial lawmaking. See *infra* Section II.A.

14. There is certainly value in a lawyer’s ability to master different roles within the profession. Cf. Wade H. McCree, Jr., *Partners in a Process: The Academy and the Courts*, 37 WASH. & LEE L. REV. 1041 (1980) (contending that lawyers, judges, and academics are partners in the process of shaping law).

15. RICHARD A. POSNER, *HOW JUDGES THINK* 205 (2008); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34–38 (1992).

16. See POSNER, *supra* note 15, at 208.

17. Dorsen recounts incidents of this tendency. For example, Friendly once insisted that someone hand John Roberts some briefs while the latter was stuck in the court elevator so that he would not waste time. Friendly apparently expected another clerk to report for work the day after the clerk’s wife gave birth. Pp. 107–09.

18. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 202–03

to say the least. Many, including Bruce Ackerman, Philip Bobbitt, and Larry Kramer, entered the legal academy.<sup>19</sup> Seven became federal judges, including Chief Justice John Roberts (p. 357).

Dorsen successfully makes his case that Friendly was a great judge—whether measured in terms of intellectual ability, accomplishments, or the evaluation of mentors, peers, and capable law clerks. But he also explores Friendly’s influence, suggesting that it rests in large part on the extent to which other judges have emulated him. The next Part looks at this issue more closely, examining Friendly’s influence on the law of federal courts.

## II. “MASTER OF THIS SUBJECT”<sup>20</sup>

Friendly was renowned for his expertise on the law of federal jurisdiction,<sup>21</sup> an interest that may have been sparked by early mentors like Frankfurter<sup>22</sup> and Brandeis.<sup>23</sup> Dorsen devotes a chapter to Friendly’s views on each of the following subjects: jurisdiction, federal common law, and habeas corpus. This Part looks at these three areas through a different lens to propose a broader view of Friendly’s influence that is measured less in emulation by other judges and more in the respect that judges and legislators give to Friendly’s ideas, even when they disagree. With this expanded conception, Friendly appears even more influential than Dorsen suggests. This Part begins with a discussion of federal common law in Section II.A. Section II.B considers the reception to Friendly’s thoughts on the role of federal courts in collateral review of state criminal convictions. Finally, Section II.C discusses Friendly’s lack of success in advocating for the virtual elimination of diversity as a source of federal jurisdiction.

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(2005) (statement of John G. Roberts, Jr.) (“[Friendly] had such a total commitment to excellence in his craft at every stage of the process, just a total devotion to the rule of law . . . . He was an absolute genius. . . . To this day, lawyers will say, when they get into an area of the law and they pick up one of his opinions, that you can look at it and it’s like having a guide to the whole area of the law.”); Bruce A. Ackerman, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709 (1986). Judge Michael Boudin, Friendly’s favorite clerk, p. 109, has written a number of articles celebrating his former boss. See, e.g., Michael Boudin, *Friendly, J., Dissenting*, 61 DUKE L.J. 881 (2012); Boudin, *supra* note 13.

19. Appendix A, pp. 362–66. See generally p. 357.

20. See *supra* note 4 (noting that the third edition of Hart and Wechsler’s casebook on federal jurisdiction called Friendly “master of this subject”). This was also the phrase Friendly used to describe Henry Hart’s relationship to the field. HENRY J. FRIENDLY, *FEDERAL JURISDICTION* 4 (1973).

21. See *supra* note 8 and accompanying text.

22. Friendly wrote that Frankfurter had “revealed the fascinations of federal jurisdiction” to him. FRIENDLY, *supra* note 20, at Acknowledgments.

23. Brandeis, author of the Court’s landmark jurisdiction opinion in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), had long been considered an expert on the subject. “A Solicitor General once told the lawyer George Farnum that ‘when Mr. Justice Brandeis writes an opinion dealing with a question of federal practice, the law is settled for fifty years to come.’” UROFSKY, *supra* note 3, at 610 (quoting GEORGE R. FARNUM, *SOME MEN OF THE LAW* 28 (1941)).

## A. Federal Common Law

In 1938, the Supreme Court held in *Erie Railroad Co. v. Tompkins* that federal courts must apply the substantive decisional law of state courts when deciding issues of state law.<sup>24</sup> Brandeis's opinion famously concluded that "[t]here is no federal general common law."<sup>25</sup> In a lecture defending Brandeis's decision, Friendly "craft[ed] the template for the modern view of federal common law."<sup>26</sup> *In Praise of Erie—And of the New Federal Common Law*,<sup>27</sup> Friendly's lecture, which was subsequently published as an article by the *New York University Law Review*, is one of the most cited<sup>28</sup> and most important law review articles ever written.<sup>29</sup> Friendly claimed that in addition to its generally sound legal reasoning, *Erie* had usefully paved the way for specialized pockets of federal common law that would be binding on the states via the Supremacy Clause.<sup>30</sup>

Friendly's lecture provided a vigorous defense of the underpinnings of *Erie*, which had faced substantial criticism over the years. It also celebrated the openings that *Erie* and subsequent cases left for creating binding federal common law—a "tool incalculably useful to our federal system."<sup>31</sup> In particular, Friendly noted the emergence of federal judicial lawmaking with regard to the obligations of the United States,<sup>32</sup> interpretation of federal labor contracts,<sup>33</sup> unfair competition affecting interstate commerce,<sup>34</sup> regulation of interstate carriers,<sup>35</sup> and implied private rights of action.<sup>36</sup> Friendly praised these doctrinal developments<sup>37</sup> and suggested that creating federal common law was appropriate whenever Congress or constitutional structure indicated

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24. 304 U.S. at 78.

25. *Id.* The same day, the Court, again speaking through Brandeis, decided that questions of rights in interstate streams were governed by federal common law binding on the states. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). Thus *Erie* did not kill federal common law but merely limited the scope of its application.

26. Boudin, *supra* note 12, at 995.

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

28. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1491 tbl.1 (2012) (ranking Friendly's article as the seventy-seventh most cited law review article).

29. *See Seventy-Fifth Anniversary Retrospective: Most Influential Articles*, 75 N.Y.U. L. REV. 1517, 1534–35 (2000) (reviewing Friendly, *supra* note 27) (John E. Sexton describing the *Erie* article as "one of the classics of American legal scholarship").

30. Friendly, *supra* note 27, at 405.

31. *Id.* at 383–405, 421.

32. *Id.* at 409.

33. *Id.* at 412–14.

34. *Id.* at 414.

35. *Id.* at 416–17.

36. *Id.* at 421.

37. *Id.* at 405, 421–22.

that the matter was one of national concern,<sup>38</sup> such as foreign affairs.<sup>39</sup> Friendly won plaudits for the clarity of his ideas, which, while not entirely original, usefully and persuasively framed the issue of federal common law (p. 303). His views provided tremendous value to other judges confronting the issue.<sup>40</sup>

But Friendly's views also proved controversial within the academy.<sup>41</sup> Many scholars have questioned the propriety of judicial lawmaking in the face of a constitutional structure that grants Congress primary lawmaking authority.<sup>42</sup> In addition to scholars who are solely concerned with separation of powers itself, scholars who view the separation of powers as a constitutional feature that serves to protect federalism<sup>43</sup> may also feel squeamish about a freewheeling approach to federal judges making law. But to the extent that Friendly's position has inspired scholarly debate, that debate, and not just the acceptance of Friendly's approach, is a measure of his influence.

Several decades ago, the Supreme Court seemed fairly open to citing Friendly in support of a holding that federal common law governed an issue.<sup>44</sup> But more recently, the justices have been less receptive to such claims.<sup>45</sup> For example, although Friendly noted that finding an implied private right of action in a federal statute is a useful application of federal common law,<sup>46</sup> the Court has moved from a position fairly solicitous of private rights of action<sup>47</sup> to one that is more restrictive; today, the Court will

38. See *id.* at 405, 407–08, 408 n.119.

39. *Id.* at 408 n.119. Friendly suggested in a later update of his *Erie* lecture that the use of federal common law in foreign affairs matters was likely to be expansive. HENRY J. FRIENDLY, *In Praise of Erie—And of the New Federal Common Law*, in BENCHMARKS 155, 181 n.119 (1967).

40. John Minor Wisdom, *Views of a Friendly Observer*, 133 U. PA. L. REV. 63, 64 (1984).

41. Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 263–64 (1992).

42. See, e.g., John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 196–97, 200–01 (2007) (noting that the difficulty of enacting legislation ensures broad democratic support for those laws that are enacted); Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 332 (1992) (arguing that the judicial power cannot include the power to legislate because the legislative power belongs to Congress).

43. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1323, 1403 (2001).

44. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 & n.17, 727 (1979) (citing Friendly, *supra* note 27, and holding that federal law must govern the priority of liens that stem from federal lending programs). In total, the Court has cited *In Praise of Erie* in ten of its decisions (as of a March 25, 2013, Westlaw search), most recently in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535–37 (2011) (acknowledging courts' power to create specialized federal common law but holding that the Clean Air Act has displaced any equitable remedy against carbon emitters created by federal common law).

45. See, e.g., *Am. Elec. Power Co.*, 131 S. Ct. at 2535–37.

46. See *supra* note 36 and accompanying text.

47. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689–709 (1979) (reviewing several available private rights of action).



only find such a right in the face of the clearest evidence of legislative intent.<sup>48</sup>

Another example of judicial reluctance to overreach in crafting federal common law is in the field of foreign affairs, traditionally an uncontroversial domain of judicial lawmaking even absent a legislative delegation.<sup>49</sup> Friendly's views implied a broad judicial lawmaking power in foreign affairs,<sup>50</sup> and for a time, it appeared that the Court had reached similar conclusions.<sup>51</sup> But in recent years, both the Court and academic commentators have pushed back. Because of the preeminence of the elected branches in foreign affairs, the Court now appears reluctant to create substantive rules without some clear indication from Congress that it is appropriate.<sup>52</sup> In *Sosa v. Alvarez-Machain*, the Court cited Friendly's article in noting its authority to create common law in areas of traditional federal concern, but it reasoned that the general practice was not to exercise "innovative authority over substantive law" without legislative guidance.<sup>53</sup> The *Sosa* Court declined to incorporate less than clearly established customary international law into those claims that can serve as a private cause of action under the Alien Tort Statute.<sup>54</sup>

If Friendly's influence were only a measure of the extent to which judges have emulated him, regard for federal common law might seem a counterexample to Dorsen's underlying thesis. Judges and academics, however, continue to cite and wrestle with Friendly, which demonstrates his lasting influence.

### B. *Habeas Corpus*

Federal habeas corpus for state prisoners is a means of challenging in federal court the lawfulness of detention based on state court criminal convictions.<sup>55</sup> The Supreme Court doctrine that prevailed during Friendly's career allowed for the fairly wide availability of federal habeas corpus review

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48. See *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (applying a more stringent test for finding an implied private right of action in statutory language).

49. See Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 507 (2006).

50. See *supra* note 39 and accompanying text; see also *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 50 (2d Cir. 1965) (Friendly, J.) ("It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice.").

51. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426–28 (1964).

52. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004) (noting that even in foreign relations, the Court has generally looked for congressional guidance before crafting substantive rules); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 861 (1997) (arguing that separation of powers cautions against broad judicial lawmaking power in the foreign affairs field).

53. *Sosa*, 542 U.S. at 726 & n.17.

54. *Id.* at 724–25.

55. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.1 (6th ed. 2012).

for state prisoners.<sup>56</sup> Those worried about proper respect for state processes at the federal level might understandably be anxious about federal habeas corpus review.

In an influential article published in 1970, Friendly laid out his own concerns, which grew out of both this wide availability of review as well as the Warren Court's expansions of constitutional protections for state criminal defendants.<sup>57</sup> Building on an article on the importance of finality by Professor Bator,<sup>58</sup> Friendly proposed a path for reform: a refocus on innocence as the major criterion for determining the appropriateness of habeas review. Friendly's argument, that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence,"<sup>59</sup> has had a significant impact on the subsequent development of the law, and habeas corpus scholarship has discussed this idea ever since.<sup>60</sup> Indeed, habeas corpus may be the area of federal courts law in which the current doctrine most closely resembles Friendly's views, although both court decisions and federal legislation have modified his ideas in important ways.

Friendly reasoned that heavy-handed review of issues already litigated in the state courts when an individual has not presented a colorable claim of innocence drained federal resources, prejudiced meritorious petitions (because of the vast number of frivolous ones), and did violence to the value of finality and to respect for state courts.<sup>61</sup> Friendly readily conceded the existence of violations of fair process so severe that no independent evidence of innocence was necessary for federal habeas corpus review. Among these violations were breakdowns in the criminal process itself, such as racial discrimination in jury selection; the existence of facts not in the record reviewed on appeal; instances in which the state had failed to provide fair procedures for presenting a defense; and the emergence of new rules of constitutional law made retroactive by the Supreme Court.<sup>62</sup> Except in these circumstances, Friendly would have required the petitioner to affirmatively "show a fair probability that, in light of all the evidence, including . . . evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt."<sup>63</sup>

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56. See *Brown v. Allen*, 344 U.S. 443 (1953).

57. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 155–57 (1970).

58. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

59. Friendly, *supra* note 57, at 142.

60. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1813–14 (1991) (calling innocence theory one of three paradigms that dominate the habeas literature).

61. Friendly, *supra* note 57, at 144–50.

62. *Id.* at 151–54.

63. *Id.* at 160.

Dorsen provides a brief survey of Friendly's influence on subsequent Supreme Court case law, which took up Friendly's concern about innocence (pp. 218–19). While discussing decisions that rejected the availability of habeas corpus review for convictions based on unlawful seizures and that held that successive habeas corpus petitions should only be entertained when a constitutional claim is coupled with a colorable showing of innocence, Dorsen notes the Court's explicit invocations of Friendly.<sup>64</sup> One notable case that Dorsen neglects is *Schlup v. Delo*.<sup>65</sup> *Schlup* dealt with the issue of procedural default, whereby a habeas corpus petitioner loses his right to have his claim heard in federal court because his failure to comply with a state procedural rule prevented him from raising the issue in state court.<sup>66</sup> The *Schlup* Court held that when a death row inmate shows that the alleged constitutional error probably resulted in the conviction of an innocent person, a federal court will excuse the default.<sup>67</sup>

*Schlup* is one of several cases that nod toward Friendly and innocence theory, but its significance should not be overstated. Neither *Schlup* nor any other Supreme Court case has explicitly recognized denying habeas corpus review for an innocent person as itself a constitutional violation; the Court has only recognized that such a claim *may* permit habeas corpus review even in the face of some procedural bars.<sup>68</sup> On several occasions, the Court has assumed without deciding that there exists a constitutional right for an innocent person not to be imprisoned for a crime she did not commit.<sup>69</sup> Although it is not necessarily inconsistent, Friendly's argument at least seems to imply that continued detention under such circumstances would be unlawful.<sup>70</sup> Moreover, the subsequent statutory developments discussed below have both embraced aspects of innocence theory and arguably limited the availability of habeas corpus review beyond what Friendly would have prescribed.

It is impossible to discuss the modern law of habeas corpus without mentioning the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),<sup>71</sup> which seems to gesture toward some of Friendly's ideas while

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64. Pp. 218–19. Friendly pointed out that unlawful seizures have nothing to do with innocence and that indeed the exclusionary rule protects the guilty. Friendly, *supra* note 57, at 161–62. The Supreme Court later held, citing Friendly, that habeas corpus does not provide a remedy for convictions based on illegal seizures. *Stone v. Powell*, 428 U.S. 465, 480 & n.13, 481 (1976) (citing Friendly, *supra* note 57).

65. 513 U.S. 298 (1995).

66. *Schlup*, 513 U.S. at 306.

67. *Id.* at 326–28.

68. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1630–31 (2008) (observing that the Supreme Court has still not recognized a freestanding constitutional claim of innocence).

69. See, e.g., *Dist. Att'y's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71–72 (2009) (Roberts, C.J.).

70. See p. 215 (quoting Friendly, *supra* note 57, at 150).

71. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18 and 28 U.S.C.).

rejecting their full implementation in favor of a more restrictive approach to habeas corpus review. Although Friendly was mentioned in some of the congressional hearings leading up to AEDPA's passage,<sup>72</sup> the final bill restricts the availability and scope of habeas review beyond what Friendly had recommended. An early analysis of the statute argues that it abandoned the "guilt matters" framework that Friendly championed, a conclusion with which Dorsen largely agrees, although he notes that the statute left in place some case law that had incorporated Friendly's views.<sup>73</sup>

Dorsen may concede too much, as indeed certain AEDPA restrictions on habeas corpus relief contain "innocence exceptions" that could be due to Friendly's influence. For example, provisions barring evidentiary hearings on a factual claim that the petitioner had not previously brought in state court contain an exception: such a hearing may be held if the claim either relies on a new constitutional rule made retroactive by the Supreme Court or is based on facts the petitioner could not have previously discovered through due diligence, and the claim establishes by clear and convincing evidence that absent the constitutional error, no reasonable jury would have convicted the petitioner.<sup>74</sup> Provisions barring successive habeas corpus petitions contain an identical exception for claims not brought in the earlier petitions.<sup>75</sup> And the Supreme Court has held that other procedural hurdles besides the explicit exceptions regarding successive claims and evidentiary hearings can still be overcome under AEDPA by an actual innocence claim that meets the *Schlup* standard.<sup>76</sup>

Despite the text's gestures toward innocence theory, one should not overstate AEDPA's adoption of a Friendlyesque position. On the one hand, an innocence-based approach remains important even post-AEDPA because the Supreme Court has allowed Friendly-influenced exceptions to procedural hurdles to survive, and because the statutory text itself carves out some exceptions to procedural rules when claims of actual innocence are involved. On the other hand, the statutory exceptions' requirement that the facts underlying the new claim show by clear and convincing evidence that no reasonable jury would have convicted is a markedly higher threshold than the

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72. See, e.g., *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 31 (1995) (statement of Daniel E. Lungren, Att'y Gen., State of California).

73. See p. 219 (quoting Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997)).

74. 28 U.S.C. § 2254(e)(2) (2012).

75. *Id.* § 2244(b)(2).

76. See *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931–32, 1935 (2013) (holding that innocence claims can overcome procedural bars to habeas corpus review even after AEDPA and that an innocence claim meeting the *Schlup* standard can overcome AEDPA's statute of limitations). The Court has explained that equitable principles have traditionally governed habeas corpus law, that Congress was aware of this when AEDPA was enacted, and that the Court will not construe AEDPA to eliminate courts' equitable authority absent the clearest statutory language. *Holland v. Florida*, 130 S. Ct. 2549, 2560–61 (2010). One is hard-pressed to imagine a more fundamental equitable interest in habeas corpus jurisprudence than actual innocence.

“fair probability” standard that Friendly advocated.<sup>77</sup> Moreover, the innocence claim to obtain an evidentiary hearing or file successive petitions under AEDPA must accompany either a new constitutional rule or facts previously unavailable to the petitioner. Friendly’s theory would have permitted habeas corpus review under either of these circumstances even without a showing of innocence.<sup>78</sup> Dorsen’s discussion of AEDPA does not explore these aspects of the statutory text.

Although the relevant decisionmakers may not have adopted wholesale Friendly’s perspective on habeas, expanding Dorsen’s inquiry to include congressional receptiveness to Friendly’s ideas reveals just how influential these ideas have been in the development of this area of law.

### C. Diversity Jurisdiction

Judge Friendly was not a big fan of diversity jurisdiction.<sup>79</sup> The thought of state law claims finding their way into federal courts for no reason other than that the litigants hailed from different states was inconsistent with his notion of the purpose federal courts served. Having hinted at diversity’s problems in his first published article,<sup>80</sup> Friendly became perhaps the most forceful advocate for the virtual abolition of federal court access as a result of diversity.<sup>81</sup>

The traditional view on the original purpose of diversity jurisdiction, “and the one most often cited by federal judges,” is that federal court access was needed to assuage fears that state courts would be biased against the interests of out-of-state litigants.<sup>82</sup> After an extensive survey of the historical

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77. See *supra* note 63 and accompanying text.

78. See *supra* note 62 and accompanying text.

79. Of course, even when sitting in diversity cases, Friendly acquitted himself well. Federal courts sitting in diversity are required to apply the decisional law of the appropriate state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Determining which state’s law to apply requires applying the choice of law rules of the state in which the federal court is located. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941). This can sometimes yield quirky choice of law results, such as the following:

Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought. They have had no occasion to do so. But life, here coupled with death, casts up new problems, and the court seised of the case is obliged, as best it can, itself to blaze the trail of the foreign law that it has been directed to follow.

*Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.), *vacated and remanded in light of change in state law*, 365 U.S. 293 (1961). Some, including Friendly himself, considered these lines to be among the best in a very large body of eloquent writing, as they simultaneously followed the law and pointed out its absurdities. See p. 315; Currie, *supra* note 8, at 6.

80. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928).

81. P. 320; RICHARD A. POSNER, *THE FEDERAL COURTS* 212 n.24 (rev. ed. 1996).

82. 13E CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3601, at 13–14 (3d ed. 2009); see also CHEMERINSKY, *supra* note 55, § 5.3.2.

materials, however, Friendly concluded that there was virtually no evidence of state court bias against out-of-state litigants, and that a more likely explanation for the grant of diversity jurisdiction was the reasonable anxiety that state courts would systematically favor debtors over creditors and other business interests.<sup>83</sup> While Friendly's theory and the traditional view are not necessarily mutually exclusive, and Friendly's position has gained some adherents, his view does not appear to have attracted the support of most commentators.<sup>84</sup>

Friendly displayed a deep respect for state judges during his career, which may have made the idea of bias unseemly to him.<sup>85</sup> Doubts about the original justifications for diversity may have combined with Friendly's respect for state courts to later convince him that the federal courts were no place for diversity actions. Friendly's biggest concern was the difficulty that diversity cases may present when federal judges are called on to clarify a complex body of state law.<sup>86</sup> He believed that among a judge's most important duties was the duty to bring order and clarity to doctrine, and it was a waste to use judicial resources to resolve state issues while delaying an authoritative decision on the matter by state courts.<sup>87</sup> Friendly thought that federal jurisdiction should be limited to "tasks which are appropriate to courts, which are best handled by courts of general rather than specialized jurisdiction, and where the knowledge, tenure and other qualities of federal judges can make a distinctive contribution."<sup>88</sup> Allowing federal courts, based on diversity jurisdiction, to decide issues of state law that state judges were presumably more competent to adjudicate fits poorly within that framework, particularly for someone who doubts the existence of the type of bias thought to justify diversity in the first place.<sup>89</sup>

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83. Friendly, *supra* note 80, at 493–99; *see also* FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 8–10 (Transaction Publishers ed. 2007) (1928).

84. *See* CHEMERINSKY, *supra* note 55, § 5.3.2.

85. Dorsen contends that Friendly's confidence may have been based in part on the fact that Friendly's greatest exposure to the state courts was to elite New York judges, as opposed to state judges in the South during the civil rights era, when many could reasonably have questioned the fairness of state judges. P. 325; *see also* Friendly, *supra* note 57, at 165 n.125 (describing his exposure to the work of "the excellent state courts of New York, Connecticut, and Vermont").

86. *See* FRIENDLY, *supra* note 20, at 142–43.

87. *See id.* Moreover, Friendly argued that diversity cases strained the federal docket. *Id.* at 141. To this day, diversity cases make up a significant proportion of the work of lower federal courts. *See* STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 125 tbl.C-2 (2012) (showing that over 100,000 of the 289,252 civil filings in the federal district courts in 2011 were predicated on diversity of citizenship). Interestingly, the number of diversity cases declined by fifteen percent from 2011 to 2012. JOHN G. ROBERTS, JR., 2012 YEAR-END REPORT ON THE FEDERAL JUDICIARY 14 (2012), *available at* <http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf>.

88. FRIENDLY, *supra* note 20, at 13–14.

89. *See id.* at 142 (noting that Friendly joins the chorus of voices against diversity jurisdiction). Importantly, Friendly did not call for *total* abolition of diversity jurisdiction. Rather, he thought that courts should maintain alienage jurisdiction to provide a federal forum for

Friendly's position remains a point of sharp contention in the academic literature. Often commentators concede some of Friendly's concerns but prefer other, more modest reforms. For example, Professor Shapiro contends that diversity may be more or less useful in different judicial districts and that each district should independently determine whether to continue, abolish, or otherwise modify the jurisdiction.<sup>90</sup> And Judge Posner argues that abolishing diversity jurisdiction might overburden the state courts and suggests instead that it be limited to those few cases where state court bias might be a legitimate concern. He also recommends that federal courts raise their fees.<sup>91</sup>

Not only have Friendly's proposals for reform been tempered by academics but they have also failed to gain traction in Congress. Congress has never accepted Friendly's advice to limit significantly the reach of diversity jurisdiction, although it has raised the amount-in-controversy necessary for federal jurisdiction a number of times to the current requirement of more than \$75,000.<sup>92</sup> Friendly's failure to prevail on this issue may reflect a general lack of effective communication between Congress and the courts,<sup>93</sup> or it may just reflect Congress's differing judgment.<sup>94</sup>

Friendly's mixed record of success in having his views adopted by courts, legislatures, and academics does not suggest that his work was any less influential than Dorsen thinks. On the contrary, by paying more careful attention to Friendly's impact on congressional and academic views than Dorsen does, one may view Friendly as even more influential than Dorsen argues. Federal jurisdiction, like many fields of law, continues to bear the stamp of Friendly's ideas, even if these ideas do not now hold sway. As another reviewer points out, Friendly did not have an easily digestible approach to the law.<sup>95</sup> The fact that his influence is still being felt over twenty-five years after his death is a testament to the grace and persuasive power with which he reasoned.

#### CONCLUSION

*Henry Friendly* is an engaging look at the life of one of the federal judiciary's best; it is also a valuable introduction to the many areas of law that the judge affected. This Notice suggests that Friendly may have been more influential than Dorsen contends, as judges, legislators, and academics have

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claims that might affect foreign relations. He also thought that courts should maintain the interpleader rule, presumably because of the complexity of such litigation. *See id.* at 149–50.

90. David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 339–40 (1977).

91. POSNER, *supra* note 81, at 291–92.

92. WRIGHT ET AL., *supra* note 82, § 3601, at 7.

93. Robert A. Katzmann, *The Underlying Concerns*, in JUDGES AND LEGISLATORS 7, 7–11 (Robert A. Katzmann ed., 1988).

94. *See* Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111, 111 (2012).

95. *See* Adrian Vermeule, *Local Wisdom*, NEW REPUBLIC (Mar. 22, 2012), <http://www.tnr.com/book/review/henry-friendly-supreme-court-david-dorsen> (reviewing HENRY FRIENDLY).

grappled with his ideas in ways that go beyond emulating him in his decisions and judicial style. Dorsen should nevertheless be commended for his superlative study of the life and labor of Henry Jacob Friendly, the greatest judge of his era.



