

1984

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David P. Currie

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### Recommended Citation

David P. Currie, "On Blazing Trials: Judge Friendly and Federal Jurisdiction," 133 University of Pennsylvania Law Review 5 (1984).

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## ON BLAZING TRAILS: JUDGE FRIENDLY AND FEDERAL JURISDICTION

DAVID P. CURRIE†

*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. . . . [T]he 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.*

—Judge Friendly, in *Nolan v. Transocean Air Lines* (1960)

“Captain Corcoran,” remarked that revered sage Sir Joseph Porter (K.C.B.), “it is one of the happiest characteristics of this glorious country that official utterances are invariably regarded as unanswerable.”<sup>1</sup> In introducing my former captain nearly twenty years ago, I took the occasion to observe that, although we did not go quite so far as Sir Joseph in *this* glorious country, Judge Friendly’s official utterances appeared more often to be unanswerable than those of practically any other inhabitant of the federal bench. Now that we have the benefit of a full quarter-century of his opinions, I remain firmly committed to that position.

Having worked for him and loved him, I do not pretend to be an impartial observer. Nor, since he writes faster than I read, can I claim to have read anywhere near all of his opinions. I have kept up with his work in my pet field of federal jurisdiction, and I should like to say a little about that.

It is not every circuit judge, given the other demands on his time and the constraints of Supreme Court review, who has produced a dozen or so opinions that have become casebook staples of this abstruse and intricate field. It is rumored that some opinions make their way into casebooks in order to provide easy targets for teachers who prefer not to tangle with people their own size. Judge Friendly’s opinions are chosen for a different reason. They tend to be the most thoughtful and provocative opinions available.<sup>2</sup>

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† Harry N. Wyatt Professor of Law, University of Chicago. A.B. 1957, University of Chicago; LL.B. 1960, Harvard University. Law Clerk to Judge Friendly, 1960-61.

<sup>1</sup> W. GILBERT & A. SULLIVAN, *H.M.S. PINAFORE*, act II (1878).

<sup>2</sup> I can say this without undue immodesty because, though I was working for him when several of these cases were decided, they were in all important respects his own

In *Nolan v. Transocean Air Lines*, which I have quoted above,<sup>3</sup> he gave us in a few words a telling description of the peculiar posture of a federal judge under the rules of *Erie Railroad v. Tompkins*<sup>4</sup> and *Klaxon v. Stentor*<sup>5</sup>—not only tickling the reader far beyond the national average but challenging us to consider whether, after all, this was the best of all possible worlds. In *Eisen v. Eastman*<sup>6</sup> he marshalled the decisions effectively to demonstrate, notwithstanding the Supreme Court's later and different assessment,<sup>7</sup> that despite first appearances the precedents did not rule out the doctrine of exhaustion of administrative remedies in the civil rights cases. His opinion in *Pepsico, Inc. v. FTC*<sup>8</sup> contains valuable insights into the relation between that doctrine and the statutory final-order requirement. His opinion in *NLRB v. Marcus Trucking Co.*<sup>9</sup> remains one of the most perceptive statements on the perplexing question of the standard for reviewing an agency's application of the law to the facts. His opinion in *Movietone Ltd. v. Eastman Kodak Co.*<sup>10</sup> demonstrated that a principal reason for deferring to state statutes of limitation in federal question cases was inapplicable to the question of tolling such statutes for fraudulent concealment.

At least three of Judge Friendly's decisions, each over ten years old, stand as the principal authorities on one side of important and disputed questions of federal jurisdiction that the Supreme Court has yet to resolve. Though no advocate of diversity jurisdiction,<sup>11</sup> in *Colonial Realty Corp. v. Bache & Co.*<sup>12</sup> he recognized that the fact that a limited partnership was not itself a "citizen" did not require dismissal of a suit in which there was no diversity between the limited partners and the opposing party, since only the general partners were party to the litigation. Though as concerned as anyone about the increasing burden of the federal dockets,<sup>13</sup> in *Leather's Best, Inc. v. Steamship Mormaclynx*<sup>14</sup> he showed that the logic of the Supreme Court's debatable pendent jurisdiction doctrine was equally applicable when the state

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doing.

<sup>3</sup> *Nolan v. Transocean Air Lines*, 276 F.2d 280 (2d Cir. 1960).

<sup>4</sup> 304 U.S. 64 (1938).

<sup>5</sup> 313 U.S. 487 (1941).

<sup>6</sup> 421 F.2d 560 (2d Cir. 1969).

<sup>7</sup> See *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

<sup>8</sup> 472 F.2d 179 (2d Cir. 1972).

<sup>9</sup> 286 F.2d 583 (2d Cir. 1961).

<sup>10</sup> 288 F.2d 80 (2d Cir. 1961).

<sup>11</sup> See H. FRIENDLY, *FEDERAL JURISDICTION* 139-52 (1973).

<sup>12</sup> 358 F.2d 178 (2d Cir. 1966). For the contrary view, see *Resources Corp. v. Cambria Sav. & Loan Ass'n.*, 554 F.2d 1254 (3d Cir. 1977).

<sup>13</sup> See H. FRIENDLY, *supra* note 11, at 31-46.

<sup>14</sup> 451 F.2d 800, 809-11 (2d Cir. 1971). For the contrary view, see *Hymer v. Chai*, 407 F.2d 136 (9th Cir. 1969).

claim was against an additional party—a conclusion the Supreme Court has gone to extreme lengths to avoid either approving or rejecting<sup>15</sup> despite a confusing set of analogies.<sup>16</sup> Though a proponent of the “new federal common law”<sup>17</sup> developed since *Clearfield Trust Co. v. United States*,<sup>18</sup> in *Khedivial Line v. Seafarers’ International Union*<sup>19</sup> he construed Justice Frankfurter’s ambiguous opinion in *Romero v. International Terminal Operating Co.*<sup>20</sup> to hold that no action based on general maritime law arose “under the . . . laws of the United States” for federal question purposes—candidly conceding that “the gap in admiralty jurisdiction” when the relief sought was an injunction unavailable in admiralty was “more important than” that posed by the absence of jury trial in *Romero*. In most of these decisions he managed to suggest in a few words about everything anybody has found to say about the matter since.

His opinion in *T.B. Harms Co. v. Eliscu*<sup>21</sup> stands unchallenged after two decades as the leading judicial discussion of the intractable problem of defining cases arising under federal law. Lucidly explaining the practical reasons that have led the courts, despite Marshall’s broad interpretation of the comparable words in article III,<sup>22</sup> to decline to find that every case involving a copyright or patent satisfies the jurisdictional statute, Judge Friendly surveyed the whole field in short compass and—refusing to take the easier route of despairing of an answer<sup>23</sup>—tentatively proposed a general test:

Mindful of the hazards of formulation in this treacherous area, we think that an action “arises under” the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction, . . . or asserts a

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<sup>15</sup> See *Aldinger v. Howard*, 427 U.S. 1 (1976) (holding, by misconstruing the Court’s own precedents, that the then perceived refusal of Congress to make local governments liable under 42 U.S.C. § 1983 (1982) precluded pendent jurisdiction of state-law claims against counties); *Moor v. Alameda County*, 411 U.S. 693, 716 (1973) (finding pendent jurisdiction improper on the facts on the narrower grounds of “unsettled . . . state law and the likelihood of jury confusion”).

<sup>16</sup> See *Currie, Pendent Parties*, 45 U. CHI. L. REV. 753 (1978).

<sup>17</sup> See Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

<sup>18</sup> 318 U.S. 363 (1943).

<sup>19</sup> 278 F.2d 49, 53 (2d Cir. 1960). For the contrary view, see *Marine Cooks & Stewards v. Panama S.S. Co.*, 265 F.2d 780, 784 (9th Cir. 1959).

<sup>20</sup> 358 U.S. 354 (1959).

<sup>21</sup> 339 F.2d 823 (2d Cir. 1964).

<sup>22</sup> *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

<sup>23</sup> See *Cohen, The Broken Compass: The Requirement that a Case Arise “Directly” Under Federal Law*, 115 U. PA. L. REV. 890 (1967).

claim requiring construction of the Act, . . . or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.<sup>24</sup>

Congenital caution—I am reminded of James Thurber's parable of the man who was struck by a flying stove because his lineman's gloves prevented him from removing the bee veil that obscured his vision—precludes me from embracing any such positive if qualified statement. But in twenty years of attention to the subject I have yet to see it either refuted or improved upon.

I do not say—this is the fun part—that all of the aforementioned utterances were unanswerable. It may be, for instance, that the “gap” represented by admiralty's anachronistic incapacity to issue injunctions<sup>25</sup> was sufficiently yawning to satisfy Justice Frankfurter's insistence that federal question jurisdiction was “designed to give a new content of jurisdiction to the federal courts, not to reaffirm one long-established, smoothly functioning since 1789.”<sup>26</sup> It may be that, notwithstanding the fact that tolling principles are less inherently legislative to devise than are periods of limitation, the use of state tolling rules is compelled even in federal question cases by the statutory requirement that “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.”<sup>27</sup> It may even

<sup>24</sup> *T.B. Harms*, 339 F.2d at 828.

<sup>25</sup> See the refreshing and delightful words of Judge John Brown in doing his bit to whittle away this unfortunate old rule: “The Chancellor is no longer fixed to the woosack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience compels.” *Compania Anonima Venezolana de Nav. v. A.J. Perez Export Co.*, 303 F.2d 692, 699 (5th Cir. 1962).

<sup>26</sup> *Romero*, 358 U.S. at 368. It may be, in other words, that *Romero* held, not that general maritime law was not a law of the United States, but that the grant of admiralty jurisdiction, 28 U.S.C. § 1333 (1982), impliedly created an exception for cases in which there was an adequate maritime remedy. Yet in the next breath Justice Frankfurter arguably conflated these two possibilities by adding the painfully overloaded dictum that “[t]he federal admiralty courts had been completely adequate to the task of protecting maritime rights rooted in federal law.” *Id.*

<sup>27</sup> 28 U.S.C. § 1652 (1982). Contrary to popular rumor, there is nothing in this statute or in its purposes to suggest that it applies only to diversity cases. There remain, as Judge Friendly argued, both the argument that Congress implicitly provided otherwise in enacting the substantive right in question and that nagging phrase, “in cases where they apply,” which has never been satisfactorily explained. There remains also the question whether, in light of the long history of separate provisions governing choice of law in procedural matters, tolling provisions qualify as “rules of decision.” Nor do I recall having pressed this counterargument when it was my job to bring such

be, as the Supreme Court later held despite its scarcely consistent conclusion that civil rights litigants may be denied a federal trial forum altogether under the *Younger* doctrine,<sup>28</sup> that the policy of section 1983 forbids the mere postponement of federal litigation pending exhaustion of administrative remedies.<sup>29</sup> But Judge Friendly has an uncanny knack of anticipating counterpunches like these, as in the *Khedivial* and *Movicolor* cases, and reducing the matter to one on which reasonable souls might easily differ.

I am rapidly exhausting my allotted space, if not the reader's indulgence. I must add, however, that it is not every judge whose scholarly writings, quite apart from his judicial opinions, have made him one of the leading commentators in such a technical field. Judge Friendly's article on the *Erie* doctrine and the new federal common law,<sup>30</sup> twenty years later, is the best synthesis and analysis of a still refractory problem. His book-length study of the entire subject of federal jurisdiction,<sup>31</sup> in which, with irreplaceable inside knowledge, he explored ways to protect the central functions of the federal courts by pruning away relatively nonessential cases, remains after more than a decade required reading for the serious student. Those who would protest that the federal courts should do more than Judge Friendly would have them do must reckon with the old Chicago adage that there is no such thing as a free lunch, and with the lesson of Aesop's dog that tried to double its goodies by acquiring the reflection of its bone.

Let us come to a close. In his integrity, his intelligence, his thoroughness, and his humanity Henry Friendly has been for twenty-five years the true embodiment of a judge. Not only through the thicket of federal jurisdiction but to the more general goal of defining what it means to be a judge he has indeed blazed a trail we should all be proud to follow.

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things to his attention and the case was decided.

<sup>28</sup> See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-05 (1975) (extending *Younger* to a civil case despite the fact that res judicata would bar any return to federal district court).

<sup>29</sup> *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

<sup>30</sup> See *supra* note 17.

<sup>31</sup> See *supra* note 11.