THE LIFE AND AFTER-LIFE OF FEDERAL COMMON LAW UNDER *ERIE*

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This article begins by summarizing the theoretical arguments for and against recognizing the new federal common law. It then proceeds to identify the goals that a segmented approach could be expected to achieve. The article then enumerates the several of the recognize categories of federal common law, focusing on maritime law, private rights of action, and preclusion by federal judgments. The article concludes with a discussion of "diversity, equity, and inclusion" (DEI) and how it intersects with federal common law.

INTRODUCTION

The theory of federal common law after *Erie Railroad Co. v. Tompkins*[1] reduces to a single proposition: where a federal statute or the Constitution addresses a general issue but does not lay down a rule of decision necessary to implement it, federal courts have the power to devise common law to do so. The resulting judicial decisions have the same force and effect as the underlying statutory or constitutional provision, specifically insofar as they preempt conflicting state law. Decisions with this effect prompt questions about the need for a federal rule of decision in the first place. In particular, if the need for federal law was so great, why wasn't it addressed by Congress? Congress is, after all, the source of most forms of federal law, and Congress has had several decades, if not centuries, to address any blind spots in the law. The usual answer is that the inertia in the federal lawmaking process—requiring passage by both houses of Congress and the approval of the President, or failing that, overriding a Presidential veto by a two-thirds majority in each house—stands in the way of even plainly necessary legislation. Diversity, equity, and inclusion (DEI) surpasses the threshold for congressional power after the civil rights era. It therefore becomes a possible vehicle for federal common law.

The paradoxes surrounding federal common law derive from the laconic declaration in *Erie* that "[t]here is no federal general common law."[2] Twenty-six years after *Erie*, Judge Henry Friendly made an influential argument for what he called "specialized federal common law": judge-made federal law based on, but not strictly required by, the provisions of a federal statute or the Constitution.[3] The terms in which Friendly framed the basis for the new federal common law reveal plainly enough the problems that it poses: How is federal common law any different from statutory

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[1] *See generally* 304 U.S. 64 (1938).
[2] *Id.* at 78.
[3] Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

interpretation, which can also be superseded by subsequent congressional enactments? And if it is different, is it legitimate? Federal common law contrasts starkly with textualism, which gives nearly decisive weight to the text of a statute in matters of interpretation. Whereas textualism gives priority to what the statute itself says, federal common law looks to the implementation of enacted statutes. The former is restrictive, while the latter is expansive.

Friendly himself took an expansive view of the legitimacy of specialized federal common law, finding a federal interest in regulating commerce based on statutes enacted under the Commerce Clause.[4] Later commentators urged a more restrained approach,[5] but they could not erase the tension between protecting a federal interest based on a federal statute or the Constitution, and the potential for federal common law to expand to encompass the full scope of congressional power, becoming effectively as broad as the common law itself. Federal common law embodies this tension to this day. Judge-made federal law cannot be easily distinguished from the federal general common law condemned in *Erie*. At the high level of abstraction that applies to all forms of federal common law, we appear to be stuck with the contradictory implications of pure theory: too much generality pushes it towards federal general common law, while too little leaves it without a justification in terms of the allocation of lawmaking power within the federal government.

In answering this question of legitimacy, legal theorists have taken a variety of positions answering. Some require a more explicit basis in the enacted federal law at issue, assimilating the legitimacy concern into the question of whether federal common law is just statutory interpretation by another name. (We will put to one side claims based only on implied rights of action under the Constitution, although the Constitution in the form of the Supremacy Clause figures in any argument for displacing state law by federal law. However, implied rights of action under the Constitution have faded in significance in recent years.[6]) Other theorists require a greater showing of the need for federal law, assimilating that showing into an inquiry about the need for preempting state law. But some other theorists would defer in some fashion to state law, either by adopting the law of a specific state or by following the law generally adopted by the states, either in judicial decisions or by statute. Still, other theorists emphasize the inability of the drafters of federal statutes to anticipate every issue that might arise in the administration or enforcement of federal law. The variety of theoretical approaches—seemingly one for every theorist—virtually guarantees inconsistent or indeterminate implications for concrete

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[4] *Id.* at 417-18.

[5] *E.g.*, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 47 (1985).

[6] Ziglar v. Abbasi, 582 U.S. 120, 135-36 (2017).

cases.[7] Furthermore, the dependence of the analysis upon the particular facts and legal context of a given case only increases the likelihood of indeterminate results.

The theoretical approach has a distinguished pedigree in the writings. Notable established voices include Henry Friendly, Henry Hart, Herbert Wechsler, and Paul Mishkin--[8] not to mention a multiplicity of more recent scholars. After over half a century, however, theory has exhausted its potential to generate and legitimize new forms of federal common law. The very generality of the arguments invites deployment in almost any case in which federal common law is at issue. Several competing arguments inevitably come into play: the reservation of most lawmaking power to Congress, not to the federal courts; the existence of some federal interest found in the multiplying abundance of federal statutes covering virtually the entire range of state common law; and the perceived need for either uniform federal law on the one hand, or restraint in federal judicial lawmaking on the other hand. Some additional argument, usually by way of the specificity of the claimed federal interest, has to be invoked. The choices are either an approach confining it to enclaves recognized by existing precedent, or one that resembles statutory interpretation.

The advantage of the enclave approach lies in its focus upon narrowly defined areas of subject matter, often circumscribed by decisions dating from the middle of the twentieth century which approved of federal common law. The presence of both subject-matter and temporal limits might be thought to tilt this approach too far, so that it simply describes existing legal doctrine. Critics of the enclave approach could contend it merely generalizes from accepted enclaves of federal common law and then accepts their common features as the theory of federal common law. Criticism along these lines has merit. The more pertinent question is whether the enclave approach might go further in unifying the disparate subject areas of federal common law and perhaps indicate whether these enclaves should expand or contract. On examination, when scholars have offered such an approach, it usually reduces to arguments for or against some particular category of federal common law. A number of these categories, such as maritime law, have simply been accepted as legitimate.[9] Theoretical approaches often concede the force of precedent, recognizing the futility of displacing federal law and practice which frequently stretches back well over two centuries.

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[7] CURTIS A. BRADLEY ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 140-41, 167, 196-97, 201-04. (10th ed. 2024) (summarizing various theories of federal common law).

[8] Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682 (1974).

[9] BRADLEY ET AL., *supra* note 7, at 196-97.

More generally, few would object to an enclave approach to statutory interpretation, in the sense of limiting the inquiry to the categories used by the statute to be interpreted. For instance, the federal regulation of secondary boycotts in the National Labor Relations Act,[10] difficult to parse though it may be, has to focus on strikes, picketing, and other forms of economic pressure that unions and workers can bring to bear on employers: these are the categories enumerated by the statute. Federal common law based on a statute must be narrowly focused in the same way if it is to achieve any kind of continuity with statutory interpretation more generally. One set of rules should not be confined to statutory interpretation while another set is applied to federal common law. The more clearly the categories of federal common law delineate its limits, the easier it will be to apply and to lend legitimacy to the existing forms of federal common law, which would be defined mainly by precedent and previously enacted statutes. The enclave approach naturally counsels against attempts to expand the scope of federal common law. It also, in the current political climate, ratifies prevalent conservative trends in determining the content of federal law. If most of that law derives from acts of Congress, then most of it will also take on the conservative cast of the law so enacted.

Another advantage of the enclave approach lies in the constraints that it imposes on individual federal judges. Judges have to respect the force of precedent within the enclave in which the parties argue for or against federal common law. In the words of Justice Holmes, "A common-law judge could not say, 'I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.'"[11] Narrowly defined federal common law does not carry with it the same risk of general disruption because it is less likely to threaten to displace state law, either on its own or as a precedent for making further federal common law outside its range of immediate application. It poses less risk, in a word, to the allocation of power within our federal system, which leaves most of the burden of obtaining favorable federal law to those who have to overcome the inertia in the congressional lawmaking process. Inside the boundaries of a recognized enclave of federal common law, judicial decisions move only in incremental steps, and outside those bounds, they do not move at all. In recent decades, the course of decisions has not been favorable to federal common law, especially as it might be favorable to plaintiffs, who have obtained few, if any, expanded grounds of recovery as a matter purely of federal common law.

For example, in the early years of the republic, when maritime common law first took its current form, Congress did have the opportunity to fill out all the dimensions of maritime law, but over the course of the twentieth century, most of the judge-made maritime law was supplemented by

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[10] § 8(b)(4), 29 U.S.C. § 158(b)(4).

[11] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

statute. To take the most notorious case, after *Southern Pacific Railroad v. Jensen*,[12] the application of workers' compensation law has been entirely displaced by the Longshore and Harbor Workers' Compensation Act (LHWCA).[13] From the beginning, the LHWCA furnished the rule of decision on the facts of *Jensen*, supplanting the state remedy with a federal remedy. Other statutes, such as the Jones Act[14] and the Death on the High Seas Act, also added federal remedies which displaced state law. So, too, federal common law has been largely displaced by statutory law, although it still plays a residual role, as in claims for unseaworthiness, in filling out the remedies available to maritime workers.[15]

This article begins in Part I by summarizing the theoretical arguments for and against recognizing federal common law. It then proceeds in Part II to identify the goals that an enclave approach could be expected to achieve. Part III enumerates several of the recognized categories of federal common law and analyzes the reasoning that has prevailed within these categories, emphasizing developments in recent decades, focusing on maritime law, private rights of action, and preclusion by federal judgments. The article concludes with a discussion of how DEI intersects with federal common law. The uncertain contours of DEI parallel those of federal common law. This article will show DEI is most forcefully under attack, only when it is reduced to programs that benefit select racial or ethnic minorities. Both DEI and federal common law draw on a plurality of legal sources to identify either permissible practices or legitimate sources of authority. The article then ends with a brief summary of where we find ourselves at the present moment in the evolution of federal common law.

I. THE THEORY OF FEDERAL COMMON LAW

The fundamental prerequisite for finding federal common law depends upon the existence of a federal interest, as Henry Friendly would have it. In Friendly's terms, "state courts must follow federal decisions on subjects within national legislative power where Congress has so directed."[16] This basic requirement goes beyond simply the existence of lawmaking power at the federal level. That power must have been actually exercised, either by Congress or, less frequently, through constitutional lawmaking. As Herbert Wechsler pointed out, in these processes, the states participate directly: "the national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."[17] Henry Hart

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[12] *See generally* 244 U.S. 205 (1917).
[13] 33 U.S.C. §§ 901-950.
[14] 46 U.S.C. §§ 30104-30105.
[15] Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960).
[16] Friendly, *supra* note 3, 422.
[17] Wechsler, *supra* note 8, at 558.

seconded this endorsement of the central role of the states, and particularly state courts: "In the structure of state-wide institutions, the state courts have served historically as the initial agency of official settlement for most of the problems of private behavior which have failed of satisfactory adjustment at either the private or the local level."[18]

Two decades later, Paul Mishkin applied the insights of Hart and Wechsler specifically to the *Erie* doctrine. He found "the thread of the unified myth of Erie" in the "constitutional principles which restrain the power of the federal courts to intrude upon the states' determination of substantive policy in areas which the Constitution and Congress have left to state competence."[19] He had to, of course, acknowledge the broad power exercised by Congress in the decades after World War II. Hence his principal conclusion "[t]hat Congress … hav[ing] [the] constitutional power to make federal law displacing state substantive policy does *not* imply an equal range of power for federal judges."[20] What Mishkin emphasized was the importance of finding a federal interest endorsed by an affirmative act of Congress. The problem created by the current accumulation of federal statutes is that they gradually transform federal law from interstitial to pervasive.

As an account of the constitutional obstacles to the enactment of any particular federal statute, Hart and Wechsler could hardly be improved upon. If we substitute finding law rather making law, the same end result emerges: law found by federal judges has the same binding effect in federal and state courts as the law that they self-consciously make, even if they might do so less frequently for law that is found rather than made. As an account of the cumulative effects of federal legislation, which undoubtedly is made, Hart and Wechsler's account has been belied by history. In making his argument, Wechsler relied primarily upon the make-up of Congress and the Electoral College: the equal representation of states in the Senate, the power of the states to control districts for election to the House of Representatives, and the composition of the Electoral College based on representation of the states both in the Senate and the House. Neither the first nor third of the grounds for Wechsler's argument have changed since he published his article in 1954, nor are they likely ever to change: the first because of Article V of the Constitution, which prohibits a state from being denied equal representation in the Senate without its consent, and the third because of the combined interest of states with lesser populations in opposing any amendment that would dilute their representation in the Electoral College. The second ground for Wechsler's argument, however, has been much diluted by voting rights decisions that require congressional districts to be of equal population, which has otherwise limited state

[18] Hart, *supra* note 8, at 492.
[19] Mishkin, *supra* note 8, at 1688.
[20] Mishkin, *supra* note 8, at 1683.

attempts to gerrymander congressional districts in favor of incumbent legislators.[21]

More generally, Wechsler wrote in an era in which senior southern legislators played a disproportionate role as committee chairs and in which a filibuster could be ended in the Senate only by a two-thirds vote for cloture. In the decades since his article appeared, seniority has diminished as a decisive factor in selecting committee chairs.[22] National politics, through the party system and media coverage, has also accentuated the role of national issues, as opposed to those peculiar to a particular state. In the House, the implicit model of control by representatives from malapportioned rural districts has been overthrown by reapportionment and the increased power of national political parties. The model of congressional representation in favor of state interests no longer holds true. Senior southern legislators no longer hold safe seats that permit them to be reelected with ever increasing seniority. Moreover, national and federal issues play an increasing role, compared to state issues, in Congress.

The numbers, even in very approximate fashion, bear out this conclusion. In the 148 years between the First Congress and the decision in *Erie*, Congress enacted laws that spanned nearly 76,000 pages of the Statutes at Large. Since then, in less than half the time (from 1938 to 2016), the enacted laws span over 203,000 pages. The average yearly printed volume of legislation before *Erie* amounted to approximately 514 pages, while post-*Erie*, the average yearly legislative volume amounts to nearly 3,000 pages. As anyone acquainted with the New Deal, the national security state, the Great Society, and subsequent legislation would surmise, the political safeguards of federalism have done nothing to slow down the aggregate pace of federal legislation. Towards the end of his article, Wechsler attempted to minimize the expanded scope of the federal government, merely citing it as evidence of "the magnitude of unavoidable responsibility under the circumstances of our time."[23] If so, the unavoidable responsibility of the federal government has only grown since then.

What Hart and Wechsler's articles did diminish, drastically on almost any view of constitutional law, are the judicial safeguards of federalism, which have not quite disappeared but have remained at the margin. In the abstract, the Supreme Court has recognized constitutional limits on congressional power but has defined those limits so broadly that they have minimal practical impact. Thus, In *United States v. Lopez*,[24] the Court held that Congress could not prohibit the possession of guns near primary and secondary schools based on the hypothetical effect on interstate commerce. In *United States v. Morrison*,[25] the Court rejected the argument that

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[21] Wesberry v. Sanders, 376 U.S. 1, 7-9 (1964).
[22] LEROY N. RIESELBACH, CONGRESSIONAL POLITICS: THE EVOLVING LEGISLATIVE SYSTEM 93 (Lawrence C. Dodd ed., 2d ed. 2018).
[23] Wechsler, *supra* note 8, at 558.
[24] 514 U.S. 549, 567 (1995).
[25] 529 U.S. 598, 617 (2000).

"Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Nor could Congress regulate the same private criminal conduct under the Fourteenth Amendment on the ground that it involved state *inaction* in failing to punish it.[26] Most recently, in *National Federation of Independent Business v. Sebelius*,[27] the majority held that Congress could not regulate by ordering a business to engage in commerce. They also held that the Affordable Care Act was permissible under Congress's taxation power pursuant to.[28] As *Sebelius* indicates, restraints on congressional power under the Commerce Clause can be circumvented by relying upon other powers of Congress or by modestly amending legislation to explicitly refer to commerce. Judicial review might win a few isolated battles, but it has lost the war to restrict congressional attempts to regulate commerce in the same terms as before the New Deal.

In the *Erie* era, judicial review suffered a general retrenchment as substantive due process and the Commerce Clause subsided as grounds for review of economic regulation. A bellwether can be found in *United States v. Carolene Products Co.*,[29] decided the same day as *Erie*, which reoriented judicial review to protecting "discrete and insular minorities." Bracketing this decision were two others that greatly diminished judicial review of economic legislation: *West Coast Hotel Co. v. Parrish*,[30] which limited review of state legislation under the Contract Clause, and *Wickard v. Filburn*,[31] which upheld the nearly unlimited power of Congress to regulate under the Commerce Clause. Civil procedure professors with a focus only on their own subject regard 1938 as a turning point because *Erie* coincided with the adoption of the Federal Rules of Civil Procedure. A look beyond the boundaries of their subject reveals a constitutional revolution.

Between the diminished scope of judicial review and the proliferation of federal legislation since the New Deal, the existence of federal common law has been left in an uneasy limbo: searching for a sound basis in federal legislation but cognizant of the need for some limiting principle so that it does not become, in effect, federal general common law based on pervasive federal legislation. Navigating between this Scylla and Charybdis has proved to be a daunting challenge. A narrow course across these troubled waters naturally requires a degree of zigzagging, resulting in categories of federal common law that share much of the same ad hoc scope as the statutes on which they are based. The ragged edges of these categories reflect more than the vicissitudes of existing decisions; they also reflect the inherent difficulty of reducing competing principles of federalism to workable rules.

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[26] *Id.* at 625-26.
[27] 567 U.S. 519, 550 (2012).
[28] *Id.* at 550, 564-68.
[29] 304 U.S. 144, 152-53, 152 n.4 (1938).
[30] 300 U.S. 379, 396-97 (1937).
[31] 317 U.S. 111, 129 (1942).

Federal common law is a creature of necessity in two respects, even putting aside the need for federal common law to implement constitutional requirements. Federal common law fills the need to devise means of enforcing federal statutes and in formulating specific rules to do so. The existence of arbitrary features of categorical common law, not tied to the inherent nature of the category of law in question, might lead some to question the legitimacy of federal common law in the first place. This article leaves that question to one side, presuming that the existing enclaves of common law will not soon be abolished. The Supreme Court decisions has limited the scope of these enclaves, often enhancing the ad hoc nature of their purported limits. The enclaves themselves, the Court seems to assume, must persist to preserve accepted features of the enforcement of federal statutory law, and to a lesser degree, constitutional law. Perhaps federal common law resists the compatibility of theoretical generalizations with workable rules as much as any other example of judge-made law. If so, that feature enhances the argument for the necessity of tolerating its fragmentary character.

II. THE AMBITIONS AND PROSPECTS OF A CATEGORICAL APPROACH

An enclave approach generally favors a restrictive view of federal common law, which reflects the trend of decisions in the Supreme Court since the early 1980s. To be sure, this trend appears most strongly in cases of "pure federal common law," in which judge-made federal law preempts state law and in which federal judges rely predominantly on federal legislation and federal judicial decisions whose force is augmented by the Supremacy Clause.[32] Judicial reliance, on the other hand, on "general law" is both pervasive and inevitable, as Congress cannot feasibly legislate on all the issues that come up in the implementation of any significant federal statute. General law takes account of trends in state decisions and state statutes and does not preempt their application by state courts.[33] It also recognizes the fact that judicial decisions in this country reflect a common law tradition adopted from England that predates the Constitution. A categorical approach to pure federal common law does not transform this tradition into plenary lawmaking authority by the federal courts, or as Justice Scalia put it, a return to the "heady days," when implied private rights of action were readily inferred to enforce federal statutes.[34] Instead, it confirms the transition to a more restrictive regime.

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[32] Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 507 (2006) (identifying "the purest enclaves of 'federal common law'").
[33] *Id.* at 537-67 (relying on "policy bundles" to demarcate proper reliance on general law by federal courts).
[34] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

An enclave approach confines judicial lawmaking to identified categories which, to be sure, can be more or less narrowly defined. Few scholars in the field deny that these categories exist, at least as applied to the strongest forms of pure federal common law. An enclave approach presupposes a need for limits without predetermining what they are. Its aim is to use the theoretical reasons for recognizing and limiting federal common law. If this approach preserves the essence of federal common law, it leaves sufficient latitude to protect federal interests while not allowing them to overwhelm state common law. Without the concrete rules provided by the enclave approach, each federal judge would be left with enormous discretion about how to devise federal common law and whether it would take the pure form that displaces state law. The variability in the individual exercise of discretion would defeat any attempt to achieve uniform federal law. It would also defeat any attempt to construct a workable system of precedent that defined the scope of federal common law.

An enclave approach therefore offers little support to theories that seek only a federal interest to justify the creation of federal common law. Federal interests can be found anywhere in the U.S. Code and, indeed, have to be found if the legislation is to be within the power of Congress.[35] An enclave approach drastically limits the range of relevant federal interests to only those which justify the enclave in question.

So, for instance, the federal interests that support federal common law come from deference to the jurisdiction where the judgment was rendered. These federal interests also protect the right to notice and opportunity to be heard by anyone adversely affected by said judgment. The first interest comes from the Full Faith and Credit Clause and the federal statute enacted under its authority.[36] Under both sources of law, the courts of another jurisdiction, state or federal, must give the same effect to a judgment as would the courts of the state in which it was rendered.[37] Neither the constitutional clause nor the statutes, however, addresses the effect of a federal judgment. Hence, the need for federal common law. The second interest derives from the Due Process Clauses in the Constitution. These prevent a judgment from having preclusive effect upon the interests of any person who did not receive adequate notice and opportunity to be heard.[38] Both of the relevant interests are familiar, and both cabin the inquiry into federal common law to a narrow range of issues.

Preclusion also has inherent limits. Its application depends upon the existence of a pre-existing federal judgment. Cases lacking this

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[35] Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

[36] U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738.

[37] Fauntleroy v. Lum, 210 U.S. 230, 236 (1908).

[38] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950).

prerequisite fall outside this category of common law.[39] Reliance upon federal law within this enclave is often taken for granted. Outside it, the presumption returns in favor of state law. The limits on preclusion do not depart too far, if at all, from the content of the common law that it endorses. They simply adopt recognized principles on the force and effect of judgments. They transform abstract restrictions on federal common law, in terms of respect for judgments, into concrete and administrable rules for judgments already rendered.

The Supreme Court has gone to great lengths to find limits on other categories of federal common law. Implying private rights of action from federal statutes has to be done through ordinary statutory interpretation unless a precedent can be found from before the early 1980s that recognizes such a claim.[40] Similarly, private rights of action implied directly from the Constitution cannot be "different in a meaningful way from previous *Bivens* cases decided by this Court,"[41] referring to *Bivens v. Six Unknown Named Agents*,[42] the first case recognizing an implied claim for damages as a consequence of violating the Constitution. Federal common law in these categories, which began by treating federal statutes as if they were precedents and deriving implications based on their purpose, now treats precedents as if they were statutes whose force and effect has no legal consequences beyond their enactment. They do not serve as precedents for similar exercises of lawmaking beyond the terms in which they were handed down.

As even this brief survey reveals, the force of principles and limits on federal common law varies greatly across different enclaves. That leaves abstract theory beholden to the terms and rationale of decisions recognizing or limiting different categories of federal common law. Instead of inferring the forms and limits of federal common law from general principles, the implications proceed in the opposite direction: from specific cases that define those forms and limits for different enclaves. This approach is promising for analyzing cases framed in terms of recognizing categories of federal common law but comes at the risk of fragmenting this source of law into separate enclaves isolated from one another. That risk remains manageable, so long as the categories in question have the effect of limiting federal common law to areas in which Congress has acted, or the states have no power to act.

The states have no power to act on interstate boundary disputes or to determine the rights to interstate waters. None of the states involved in such disputes can be counted on to offer an impartial perspective, whether reflected in its laws or in its courts. The Supreme Court initially expanded

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[39] Taylor v. Sturgell, 553 U.S. 880 (2008); Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507-08 (2001).
[40] BRADLEY, ET AL., *supra* note 7, at 149-52.
[41] Ziglar v. Abbasi, 582 U.S. 120, 140 (2017).
[42] 403 U.S. 388, 395-97 (1971).

this category of federal common law to include abatement of a nuisance caused by interstate water pollution,[43] but then deferred to Congress after it had enacted legislation addressing the same issues.[44] As the Court observed, "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."[45] With respect to nuisance claims, the passage of a federal statute also restored the category of interstate boundary disputes to its narrow scope, limited to opposing claims by different states to the same land or water.

It follows that another task for an enclave approach revolves around connecting particular enclaves to the general principles that justify and limit federal common law. This connection need not be an ironclad deduction of concrete rules from abstract principles. Such a connection might prove to be impossible. The various categories of federal common law, which mirror the variety of federal statutes themselves, turn out to be a necessary feature of this form of law. In the same vein, the categorical approach is heuristic rather than algorithmic. It is a useful, not infallible, guide for judges, lawyers, scholars, and students.

More strategically, critics of current restrictions on federal common law should reflect on what would happen if those restrictions were relaxed. It is not likely the moderate to liberal slant of federal common law would spring back to life, instead far more likely would be that decidedly more conservative decisions would fill out the content. We would see decisions more favorable to defendants rather than to plaintiffs. Current advocates for federal common law should be careful what they wish for. The shifting consequences of recognizing federal common make it even more contextual than previously recognized.

III. EXEMPLARY CASES

This section examines a selection of salient cases of "pure federal common law" that displace inconsistent state law. It does not attempt to be comprehensive since the occasions for making federal common law, especially when derived from "general law," are as broad and multifarious as the current accumulation of federal statutes. An enclave approach can co-exist with a more-open-ended approach, that admits a wider range of issues to be governed by federal common law. Undoubtedly, more statutes will be enacted in the future that endorse federal interests and require implementation in subsidiary rules, such as when a statute of limitations begins to accrue for a particular cause of action. Moreover, federal common law that displaces state law, without being influenced by it, constitutes only a subset of federal judicial lawmaking or judicial recognition of preexisting law, which can easily blend into statutory or constitutional

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[43] Illinois v. Milwaukee, 406 U.S. 91, 103-04 (1972).
[44] Milwaukee v. Illinois, 451 U.S. 304 (1981).
[45] *Id.* at 314.

interpretation.[46] This discussion does not attempt to set definite boundaries, but instead, to illustrate common themes.

The topics discussed proceed from accepted examples of federal common law to those that have been severely restricted. The most readily accepted, indeed on the same day as *Erie* was decided, is federal common law over interstate boundaries.[47] As discussed in the previous section, this category of federal common law now has taken on formalistic restrictions confining it to disputes over control of land or water. Moreover, on some issues within this category, Congress has legislated, or interstate compacts have been adopted, removing the need to resort to federal common law. Restrictions on this form of federal common law spring either from legislative action or the inherent nature of the controversies it covers. Federal common law serves its proper role as a supplement to federal legislation without any contrived or ad hoc limits.

The same could be said of the federal common law of preclusion by federal judgments. This form of federal common law can be invoked only if a case concerns a prior federal judgment; and it has the effect of preempting state law only if the prior judgment was on a federal claim. As with interstate boundaries, the occasions on which this category of federal common law can be invoked are limited by the very nature of the category itself. Perhaps litigants could more frequently raise the issue of preclusion,[48] but the prerequisites for doing so are clear: a final judgment, and in this category of cases, on a federal claim. Another feature of this category of federal common law reduces the extent of any controversy surrounding it. Sometimes preclusion favors defendants, who want to avoid further litigation, but sometimes it favors plaintiffs who, for instance, might want to invoke non-mutual offensive issue preclusion on issues that they did not themselves previously litigate.[49] In addition, the Supreme Court has held that a federal judgment rendered in a diversity case should, in the absence of a supervening federal interest, follow the law of preclusion in the state in which the federal court that rendered the judgment sits. This rule assures that the federal common law of judgments has a reduced effect on state law.[50]

Federal maritime law has also served as a traditionally recognized form of federal judge-made law. Perhaps the full extent and force of this source of federal law might be questioned. The decision in *Southern Pacific v. Jensen*,[51] preempting application of a state workers compensation

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[46] *E.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 754-55 (1998).
[47] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).
[48] David Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978).
[49] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-33 (1979).
[50] Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506-09 (2001).
[51] 244 U.S. 205 (1917).

statute, has been criticized by leading admiralty scholars,[52] losing some of the force it originally had. Yet the logic of this form of federal common law is based in the inherent nature of the law created. Federal maritime law must arise from admiralty jurisdiction.

For instance, Justice Thomas departed from his general skepticism of federal judicial lawmaking to object that the Court did not go far enough in recognizing the preemptive effect of federal maritime law.[53] The pedigree of federal maritime law extends back to the beginning of the republic and has been attributed to a variety of different sources: the grant of jurisdiction over admiralty and maritime cases in the Constitution and in the First Judiciary Act, absorbing the law applied by the colonial vice-admiralty courts; the need for the United States to speak with one voice on cases with implications for international relations; and the existence of maritime law as a form of 'general law.'[54] A more persuasive justification might be found in the history of this form of special form of federal common law. For more than two centuries, we have seen numerous statutes passed that presuppose the existence of this body of law rather than an act that displaces it in its entirety. Whether any of these justifications sustain this category of federal common law remains an open question. What cannot be doubted is that a category framed in jurisdictional terms remains hemmed in by them. Apart from the narrow exception for "maritime and local" cases, which favors application of state law,[55] the established rules for admiralty jurisdiction determine the court's power to make federal maritime law.

To be sure, in recent decades judge-made federal maritime law has been more frequently invoked to limit plaintiff's remedies than to expand them. Often this takes the form of statutory interpretation or, what amounts to virtually the same thing, federal common law heavily influenced by statutory provisions. Thus, in wrongful death claims arising from admiralty jurisdiction, the Supreme Court has applied the limitation to pecuniary damages in the Death on the High Seas Act[56] or in interpretation of the Jones Act.[57] This limited recovery plainly favors defendants. Where

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[52] GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 405-06 (2d ed. 1975).

[53] Great Lakes Ins. SE v. Raiders Retreat Reality Corp., LLC, 601 U.S. 65, 79-86 (2024) (Thomas, J., concurring).

[54] RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 14-15, 256-57 (7th ed. 2015) [hereafter Hart & Wechsler].

[55] Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 207 (1996) (applying state law to determine remedies for wrongful death of nonseafarer in state territorial waters).

[56] 46 U.S.C. §§ 30301-08.

[57] 46 U.S.C. § 30302; 46 U.S.C. § 30104; Miles v. Apex Marine Corp., 498 U.S. 19, 30-33 (1990); Dooley v. Korean Air Lines Co., 524 U.S. 116, 123- 24 (1998).

the Court has found these limits too draconian, it has adopted the expedient of finding no admiralty jurisdiction. For instance, under the "maritime and local" exception when the death occurs in territorial waters.[58] The avoidance of restrictive maritime law was accomplished through a recognized limit on admiralty jurisdiction. Some might find this outcome artificial and driven only by the result on the merits. Even so, it remains consistent with the enclave approach to federal common law, with its focus on the special character of maritime claims and the jurisdictional limits upon them.

Obligations of the United States generate federal common law in much the same way as litigation over state borders. The resulting federal law typically applies only to claims directly involving the United States. This category of federal common law almost always remains subject to formalistic restrictions. The exception that proves the rule comes from *Boyle v. United Technologies Corp.*[59] In a wrongful death case arising from a helicopter accident, the Supreme Court recognized a federal defense to a state tort claim against the manufacturer. The exception took the following form:

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[60]

Like most of the recent innovations in federal common law, this standard plainly favors defendants, in the specified cases, relieving them of liability under state law.

By its own terms, however, the defense is quite narrow. It is applicable only to military contractors who meet the reasonably precise requirements of their contracts with the United States and have given notice of problems with those requirements. Whether this defense actually leads to more efficient contracting practices and allocation of tort liability has been disputed,[61] but these policy issues are endemic to most exercises of making common law. Courts must regard these decisions as binding. The opinion in *Boyle* devotes little space to such issues, concentrating instead on the preliminary question of the power of federal courts to make common law. In this respect, the Court follows a consistent enclave approach, analogizing the newly recognized defense to the obligations of the federal government, the defense available to federal employees acting within the scope of their employment, and the discretionary function exception to

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[58] *See* note 50 *supra*.
[59] 487 U.S. 500 (1988).
[60] *Id.* at 512-13.
[61] Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257 (1991).

government liability under the Federal Tort Claims Act.[62] The particular enclave that it creates might have been a new one, but it results in a well-defined federal defense. These analogies appeal directly to the categorical similarity between recognized forms of federal common law or valid statutory law and the newly recognized defense.

The enclave approach proved unsuccessful in subsequent cases at expanding the scope of the federal contractor defense.[63] The reason is easy to see. Where the obligations of the federal government or the duties of federal employees can be easily identified in categorical terms, the range of actions by federal contractors that might give rise to liability under state law extends exponentially. With federal contracts amounting to billions, if not trillions, of dollars, federal contracts amount to a significant share of the economy. Federal common law that covered their liability to third parties would go far beyond the analogies which *Boyle* sought to draw upon. The opinion, if extended to its logical end point, would compromise the formal limits of the defense focused on obligations of the United States.

The same absence of any limiting principle eventually led the Supreme Court to limit implied private rights of action based on substantive prohibitions in federal statutes or the Constitution. Those decisions went in the opposite direction of *Boyle*, expanding rather than restricting liability under federal law. Indeed, the expansive tendency of decisions recognizing implied rights of action seems to have gone in reverse, as more recent decisions have recognized new defenses, as in *Boyle*, rather than new claims. An example is *Burlington Industries, Inc. v. Ellerth*,[64] where the Court recognized a defense to claims of sexual harassment. Furthermore, for the past several decades, claims for violation of civil rights regularly have been subject to the defense of qualified immunity, which applies to actions undertaken in the reasonable belief that they are consistent with the Constitution.

Federal legislation, in the latter half of the twentieth century and its continued growth in the twenty-first, created the potential for implying private rights of action in virtually limitless circumstances. Starting in the early 1970s, the Supreme Court simply stopped adding to the list of recognized rights of action. It did not disavow precedents, even from the lower federal courts, that established implied rights of action, such as the decisions doing so under section 10(b) of the Securities and Exchange Act of 1934.[65] New claims for securities fraud under other statutes, however, remained unrecognized.[66] Existing precedents defined the outer limits of such claims.

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[62] 28 U.S.C. § 2680(a) (2006).
[63] BRADLEY, ET AL., *supra* note 7, at 150-54.
[64] *Burlington Indus.*, 524 U.S. at 764-65.
[65] BRADLEY, ET AL., *supra* note 7, at 168.
[66] *Id.* at 167.

Implied rights of action to enforce the Constitution fared no better. As one leading casebook puts it, the Supreme Court has not approved a new claim directly under the Constitution since 1980.[67] The initial test, and typically the only test, for such claims is whether they present a "new context" distinct from previously recognized claims. Only if they do not can the claim usually proceed.[68] The constraint on implied rights of action has now acquired a purely chronological character. A current claim has to trace its pedigree back to a precedent dating from the relevant time period.

Ironically, this approach first appeared in an opinion finding an implied private right of action. In *Cannon v. University of Chicago*,[69] the Court implied a private right of action to enforce Title IX of the Education Amendments of 1972.[70] That statute was modeled on Title VI of the Civil Rights Act of 1964.[71] Title IX prohibited sex discrimination by educational institutions that received federal funds, while Title VI prohibited racial discrimination by recipients of federal funds generally. The Court reasoned that Congress legislated in both statutes against the background of the Court's decisions implying private rights of action. The opinion presupposed that private rights of action were more readily implied during the period of 1964 to 1972 than in 1979 when *Cannon* was decided. Subsequent decisions have turned this reasoning around by refusing to imply private rights of action from the early 1980s onward.

The justification for this chronological limit on implied rights of action might appear elusive. If reasons of principle had force in the earlier period, why not in the later period? The answer appears to be in the Court's dawning realization, articulated by Justice Powell's dissent in *Cannon*,[72] that the multitude of federal statutes that do not enact a private right of action, but from which one might be implied, imposed no limit on this form of federal common law. Experience had shown that this category of federal common law had expanded too far too fast.

These cases mainly concerned private claims for damages and other forms of compensatory relief. Heightening the arbitrariness of the chronological limit, the Court has been much less eager to limit prospective injunctive relief to prevent government action in violation of federal law, particularly federal constitutional law. That tendency dates back to *Ex parte Young*,[73] a decision from the early twentieth century, which just assumed that an action to enjoin enforcement of an unconstitutional state statute was available under the Fourteenth Amendment. The tradition of a separate body of federal equity jurisprudence survived the outcome-

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[67] *Id.* at 194.
[68] *Ziglar*, 582 U.S. at 140-41.
[69] Cannon v. Univ. of Chi., 441 U.S. 677, 694-701 (1979).
[70] 20 U.S.C. § 1681.
[71] 42 U.S.C. § 2000d.
[72] *Cannon*, 441 U.S. at 730-31 (Powell, J., dissenting).
[73] Ex parte Young, 209 U.S. 123, 143-44 (1908).

determinative test of *Guaranty Trust Co. v. York*,[74] where wholly judge-made federal law had to yield to state law if it would lead the case to a different outcome. Federal equity was then spliced with the civil rights injunction for prospective relief.

On its facts, the holding in *Ex parte Young* can be justified on an alternative rationale, recognized more than 50 years later, supporting claims under section 1983[75] and targeting actions under color of state law in violation of federal law as held in *Monroe v. Pape*. The Court, however, has applied the same rule to claims against the federal government not supported by that statute, apparently on the ground that the government, state or federal, cannot continue to act in violation of the Constitution.[76] The presumptive availability of a prospective injunction contrasts strikingly with the severe limits on implied claims for damages based directly on the Constitution, but the presumption in favor of injunctive relief survives to this day.[77] An independent rationale has to do with the need for immediate prospective relief against the government for actions taken in violation of the Constitution.

The injunction, of course, remains subject to the restrictions on equitable relief generally, particularly the inadequacy of damages to fully compensate the plaintiff. Prospective injunctive relief also must be sought within a narrow window of opportunity—when harm from a constitutional violation is imminent, but not before it has resulted in harm compensable in an action at law. Whether or not limits on injunctive relief furnish persuasive limits on implied rights of action, they do not detract from, but reinforce, the enclave approach in this identifiable range of cases. The existence of federal common law supporting a prospective injunction obviously depends upon the nature of the relief sought.

Interpretations of the Alien Tort Statute (ATS) partake in the same preoccupation with finding limits to federal causes of action. While decisions under the act might be regarded as pure instances of statutory interpretation, they could instead be cast as federal common law based on a jurisdictional grant of power to the federal courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[78] With the expansion of international law after World War II to encompass more claims by individuals against sovereign states, whether foreign or domestic, the potential scope of torts "committed in violation of the law of nations" has expanded accordingly.[79]

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[74] Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945).
[75] Monroe v. Pape, 365 U.S. 167, 171-87 (1961).
[76] Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 395-97 (1971).
[77] HART & WECHSLER, *supra* note 54, at 933-34.
[78] 28 U.S.C. § 1350.
[79] *Id.*

This development in international law apparently led the Supreme Court to drastically restrict the range of claims subject to the ATS. Under *Sosa v. Alvarez-Machain*,[80] claims based on customary international law cannot have "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 [the ATS] was enacted."[81] The Court has followed this general restriction with others that are more specific. Claims under the ATS cannot arise within the territorial boundaries of a foreign state[82] or be brought against foreign corporations.[83] Just as the chronological restrictions on implying private rights of action, these restrictions might be regarded as arbitrary. They do not follow directly from the terms of the ATS, or for that matter, current conceptions of international law. Congressional endorsement of claims under the ATS has been spotty, to say the least. Congress has enacted narrowly defined statutes that recognize a limited set of claims, such as those under the Torture Victim Protection Act of 1991.[84] Only claims for torture or extrajudicial killing are covered by this act.

The most key feature of the enclave approach is that it fragments federal common law into enclaves disconnected from one another and then leaves abstractions at different levels of generality to provide unifying themes. Precedents, for instance, on judge-made maritime law have little influence on the law governing the effect of federal judgments. The independence of these forms of federal law might be laid at the feet of the disparate federal statutes and constitutional provisions that generate the interests served by federal common law. That explanation seems to forsake any attempt to unify federal common law. This section offers a more ambitious account, focusing on the preservative role that enclaves play in maintaining federal common law as a generative influence on the form and content of federal law. As the expansive tendencies of federal common law narrowed in the 1980s, the promise of this source of law seemed to dissipate. But subsequent developments still reveal the significant role it can play in the development of federal law.

First of all, the enclave approach preserves federal common law within the enclave itself. To the extent a need exists for federal law, the enclave fills this gap. Second, it protects subsidiary issues of federal common law, such as what constitutes a final judgment on the merits in the federal law of preclusion. Only a judgment that meets specified requirements retains full preclusive effect. Third, it preserves the influence of federal common law over issues of statutory interpretation. Indeed, as federal common law gives way to statutory interpretation, it provides

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[80] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[81] *Id.* at 732.
[82] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116-17 (2013).
[83] Jesner v. Arab Bank, 584 U.S. 241, 260-70 (2018).
[84] Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350, *supra* note 78).

continuity between one form of federal law and another. Application of federal common law blends seamlessly with the interpretation of the Full Faith and Credit clause and the statutes enacted pursuant to it. Fourth, it offers the possibility of extension to new issues. In recent decades, for instance, it has allowed for the recognition of federal defenses rather than the creation of implied federal causes of action. The question of judicial power to define a federal claim also extends to power to recognize a federal defense. On all these topics, federal common law maintains the flexibility to address new issues, even if with different outcomes than Judge Friendly would have welcomed in the middle of the twentieth century.

To fill this gap, some appeal must be made to the underlying theoretical arguments. In jurisprudential terms, the "local priority" of concrete rules must leave open the possibility of "justificatory ascent" to abstract principles.[85] The established categories of federal common law do acknowledge the need for limits on federal judicial lawmaking. Some of these limits, like the chronological limits on implied rights of action, have little relationship to the federal interests that might be protected by private litigation. In those instances, the two theoretical bases for this form of law—limited judicial power and protection of articulated federal interests—come apart from one another. The chronological limits on implied private rights of action have little to do with the federal interests at stake. In other instances, as with the federal law governing interstate borders, the limits on judicial lawmaking arise directly from the federal interests protected. The law governs only litigation over interstate borders rather than over interstate relations generally.

The unity achieved at the abstract level must be reflected in concrete rules that give effect to underlying principles of federalism. Reorienting the analysis of federal common law toward a categorical approach that protects its well-defined enclaves draws the question of power to make law closer to the content of the law that is made. It is the latter that provides rules that limit the former, even if these principles inevitably operate in an approximate fashion. Just because they are rules, they do not always precisely follow the principles that animate them. By the same token, the categories themselves do not follow from one another. Some variation should come as no surprise; it is simply the cost of devising rules that can be more or less easily applied. Efficiency in application introduces subsidiary concrete rules different from general principles of federalism.

Freezing the status quo of existing categories presents a greater practical risk than theoretical incoherence. Under a categorical regime, the range of decision making remains largely focused on the margins of each category. Courts seldom are faced with the question of whether to create or to abandon an entire category of law. They are far more likely to

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[85] RONALD DWORKIN, LAW'S EMPIRE 250-54 (1986); RONALD DWORKIN, JUSTICE IN ROBES 52-53 (2006).

confront questions like that in *Illinois v. Milwaukee*,[86] over the need for federal common law after Congress has passed legislation addressing the same issue. The facility of adapting federal common law to new statutes and new federal interests remains hemmed in by existing categories.

By the same token, the stakes in theoretical disputes over the legitimacy of federal common law come down to interpretation of prior precedents and the categories they establish. Much of the same practical consequences follow from disputes over whether judges make pure federal common law or follow general law, as they are brought to bear on concrete questions, such as the scope of issue preclusion from federal judgments. As noted, the legitimacy of federal common law at this level blends in with questions of its content, assuming state law cannot supply a workable rule of decision. Both issues depend heavily on the context and merits of the ultimate question of what the rule of decision should be. De-escalating a dispute from theory to practice gives it a very different complexion and structure.

IV. DEI

Diversity, equity, and inclusion ("DEI") has had a brief but troubled career at the forefront of the culture war in the United States. It took center stage after the killing of George Floyd in 2020, resulting in widespread adoption by colleges and universities, employers, and other institutions seeking to promote racial justice. These organizations seemed to assume they had little to lose, and much to gain, by adopting DEI policies as a general endorsement of progressive trends in race relations. They could signal their receptivity to minority applicants without fear of incurring the costs of losing ground to competitors. Instead, they apparently worried that failure to adopt such measures would leave them at a competitive disadvantage in recruiting a diverse work force or student body.

That all changed starting in 2023 when the Supreme Court decided *SFFA*, effectively scaling back the status quo of affirmative action. The Court specifically singled out "racial balancing" as a forbidden goal in increasing minority representation.[87] This all could have been foreseen over a decade earlier in *Ricci v. DeStefano*,[88] where the Court emphasized Title VII's prohibition against "race norming" in the form of altering test scores to eliminate their disparate impact by making adjustments on the basis of race, color, religion, sex or national origin.[89] The climate of public opinion in the wake of George Floyd's murder minimized these concerns. The election of Donald Trump in 2024 caused a complete reversal of course, exposing advocates of DEI to the full hostility of the executive

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[86] *See supra* note 43 and accompanying text.
[87] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206 (2023).
[88] Ricci v. DeStefano, 557 U.S. 557, 593 (2009).
[89] 42 U.S.C. § 2000e-2(*l*).

branch. As a result, the DEI surge rapidly reversed course to become a wave of departures from its requirements.[90]

The key to understanding DEI and its opposition is to recognize that it is not one thing but a variety of different things. In this respect, it bears a striking resemblance to federal common law, which also has its sources, insofar as it is derived from federal statutory law, in a wide variety of statutes on different subjects.[91] Both depend heavily on context and the purposes they purport to serve. DEI can range across the various steps institutions can take to attract minority candidates, many falling short of engaging in the racial balancing rejected in *SFFA*. Much less aggressive measures, such as funding financial aid for all financially needy students, encouraging applications from members of minority groups (along with other applicants), and assisting underrepresented applicants with their applications can easily fall under the wide umbrella of DEI. It serves, in its broad scope, the same function as Justice Jackson's appeal to the effects of race on applicants' race-neutral qualifications for admission. The point of this open-ended appeal to equality is not to promote some bright-line advantage to be conferred on minority applicants, but its opposite: to assure that they will not be treated any better, or any worse, than other applicants.

Federal common law has no such ultimate overriding goal. It does, however, have a wide range of means at its disposal, in the form of federal interests identified by federal statutes. At one time or another, many such statutes have been invoked to support features of DEI. Federal common law therefore provides wide latitude for different forms of DEI. Race-neutral forms of DEI can comfortably fit within the boundaries of the term: from routine enforcement of prohibitions against discrimination, to establishing liaisons with minority groups in the community, to creating study groups open to all students. DEI can easily avoid racial balancing while fostering fruitful exchanges of ideas and experiences. Nothing in federal common law forbids such steps, and only identifiable federal interests are needed to support them. So, for instance, under Title VII, consideration of an applicant's personal qualities need not be confined to race alone but can extend to other individual qualities, such as national origin, sex, and religion. When DEI, like federal common law, is disaggregated into its component parts, it becomes more resistant to criticism and attack.

This step has become all the more necessary as DEI has moved from a signal of support for racial progress to an invitation to see it as a disguised form of prohibited discrimination. Reliance on federal common law blocks the transformation of separate components of DEI from an asset into a liability. It does not, to be sure, make the concept of DEI any

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[90] Emma Goldberg, et al., *How Corporate America Is Retreating From D.E.I.*, N.Y. TIMES (Mar. 13, 2025), https://www.nytimes.com/interactive/2025/03/13/business/corporate-america-dei-policy-shifts.html.

[91] Todd J. Clark, *Reversing DEI: The Consequence— "IED" Indoctrination and Elimination of Diversity*, 55 U. TOL. L. REV. 169, 170-79 (2024).

clearer, but that is not the point. The point is to diffuse and diversify the goals it seeks to accomplish.

CONCLUSION

This essay has addressed the question of where we stand now in the development of federal common law. That question has both static and dynamic elements; static in describing existing law, and dynamic in guessing where current trends might lead. This essay has taken a snapshot, more firmly rooted in recent precedents than in speculation about future trends. It might soon go out of focus if the landscape of federal common law undergoes radical change, as it did when *Erie* was decided. But whether likely or unlikely, such a change can be assessed only from the baseline of where we are now. The course of future decisions will take care of itself. The cumulative effect of past decisions on present law offers challenges enough in discerning the current legitimacy and content of federal common law. The seeming approval of affirmative action in *Grutter* and *Gratz* led to equivocal decisions on affirmative action in higher education in two opinions by the Supreme Court in *Fisher v. University of Texas*.[92] The opinions were put on a firmer footing in *SFFA.* In that case, the Court recognized two possible exceptions to consideration of race in admissions: universities can take account of experiences related to race, but those experiences must yield qualifications independent of race; racial preferences in the military academies might also take account or race in admissions, presumably for reasons based on national security. These exceptions have yet to be fully explored in the decisions after *SFFA*.

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[92] Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297 (2013).