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You Can't Go Holmes Again

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YOU CAN'T GO HOLMES AGAIN

Lumen N. Mulligan

ABSTRACT—Under the standard interpretation of 28 U.S.C. § 1331, the so-called Holmes test, pleading a federal cause of action is sufficient for finding federal question jurisdiction. In January 2012, the Supreme Court, in *Mims v. Arrow Financial Services, LLC*, recharacterized this standard test for § 1331 jurisdiction as one that considers whether "federal law creates [both] a private right of action and furnishes the substantive rules of decision." In this first piece to address the *Mims* Court's significant change to the § 1331 canon, I applaud its rights-inclusive holding. I contend that this rights-inclusive view rests upon a firmer jurisprudential framework than does the Holmes test, as the latter is intertwined with an anachronistic pairing of causes of action and rights with Justice Holmes's overall "bad man" approach to the law. I argue further that *Mims*'s rights-inclusive approach more accurately describes § 1331 doctrine as a whole, helping to illuminate that—contrary to the Holmes test—merely pleading a federal cause of action is neither necessary nor sufficient for taking statutory federal question jurisdiction. I also demonstrate that this rights-inclusive view is more solicitous of the intent of the 1875 Congress, which passed § 1331, and of the intentions of later-in-time Congresses, which passed legislation against the presumption that federal rights provide grounds for taking federal question jurisdiction, than is the Holmes test.

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INTRODUCTION

Statutory federal question jurisdiction forms the bedrock of federal court authority[1]—the vesting of which raises several doctrinally[2] and pragmatically[3] significant issues. In *Mims v. Arrow Financial Services, LLC*,[4] the United States Supreme Court again ventured into this substantial body of law, holding that private enforcement suits brought under the Telephone Consumer Protection Act of 1991[5] (TCPA) take subject matter jurisdiction as federal questions under 28 U.S.C. § 1331. Section 1331 grants federal district courts original subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United

[1] Indeed, the federal courts hear the majority of their civil suits in federal question jurisdiction. From March 2010 to March 2011, 294,336 civil cases were filed in the federal courts. OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2011, at 46 tbl.C-2 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf. Of these, 45,370 cases took subject matter jurisdiction by virtue of the United States being a party. *Id.* Of the 248,966 cases not involving the federal government, 140,889 were filed as federal question cases while only 108,072 took jurisdiction due to the diversity of the parties. *Id.*

[2] *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1868) (holding that without subject matter jurisdiction a federal court is only empowered to dismiss the case before it).

[3] *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593–94 & n.42 (1998) (finding through empirical study that the removal of a case from the state court system to the federal court system reduced plaintiffs' statistical likelihood of winning from 53% to 33%).

[4] 132 S. Ct. 740 (2012).

[5] Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 (2006)).

States."[6] Despite the prior circuit court split on the matter,[7] the resolution of this TCPA-specific question is not overly surprising.[8] The lasting impact of *Mims*, I contend, will be the Court's recasting of the standard § 1331 interpretation away from the Holmes test and toward a rights-inclusive view of statutory federal question jurisdiction.

Since he delivered it in 1916, Justice Holmes's formulation of the standard § 1331 test, which finds that "[a] suit arises under the law that creates the cause of action,"[9] has come to dominate discussions of statutory federal question jurisdiction, even as the contours of the test have evolved. When Justice Holmes delivered the classic formulation of his test, he intended the presence of a federal cause of action to be both the necessary and sufficient condition for the taking of § 1331 jurisdiction. Nevertheless, in cases like *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,[10] where the Justices found § 1331 jurisdiction over a suit that paired a state law cause of action with a federal right,[11] the Court effectively rejected this classic presentation of the Holmes test. Despite this rejection of the necessary-condition reading of the Holmes test, the Court continues to treat such deviations from the classic statement of the test as special and small exceptions to an otherwise generally applicable rule. Moreover, the Court continues to assert, under a modern incarnation of the Holmes test, that the presence of a federal cause of action is a near universally sufficient, even if not always necessary, condition for the taking of § 1331 jurisdiction.[12]

Mims, in a break with this cause-of-action-centric tradition, recasts the standard § 1331 test as one that looks to whether "federal law creates [both] a private right of action and furnishes the substantive rules of decision."[13] In this first piece to address *Mims*'s holding, I laud the Court's move as more

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[6] 28 U.S.C. § 1331 (2006).

[7] *See Mims*, 132 S. Ct. at 747 (noting the circuit split).

[8] *See* Ronald Mann, *Opinion Recap: Court Requires Federal Hearing in Telemarketing Case*, SCOTUSBLOG (Jan. 19, 2012, 12:41 PM), http://www.scotusblog.com/2012/01/opinion-recap-court-requires-federal-hearing-in-telemarketing-case ("[T]he Court stuck with the well-settled rules for federal-question jurisdiction, rejecting the conclusion of most of the courts of appeals that the odd language of the federal [TCPA] relegated suits under that statute to state courts.").

[9] Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.).

[10] 545 U.S. 308 (2005).

[11] I have previously argued that the Holmes test poorly describes a host of circumstances in which the state law causes of action are merged with federal rights and vice versa. *See* Lumen N. Mulligan, *Jurisdiction by Cross-Reference*, 88 WASH. U. L. REV. 1177, 1180 (2011) [hereinafter Mulligan, *Cross-Reference*] (arguing that the federal courts take federal question jurisdiction not based upon the Holmes test but upon finding that they maintain declaratory power over the substantive law).

[12] In the remainder of this Article, I will use "Holmes test" to mean this modern sufficiency-only incantation. I will deploy "classic Holmes test" to mean Justice Holmes's stronger original view that a federal cause of action was both a sufficient and necessary condition for § 1331 jurisdiction.

[13] Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 748–49 (2012); *see also infra* notes 83–87 and accompanying text (listing other rights-inclusive quotations from *Mims*).

jurisprudentially sound than the Holmes test, more descriptively accurate of § 1331 doctrine, and more solicitous of congressional intent.

I proceed as follows. In Part I, I consider the jurisprudential underpinnings of the Holmes test and the rights-inclusive view forwarded by *Mims*. I begin by defining the relevant analytic units of this jurisdictional discussion: cause of action (i.e., the determination that a person falls into a class of litigants empowered to vindicate a specified right in court) and rules of decision (i.e., clearly stated, mandatory, judicially enforceable obligations, which I will style as "rights"). I then turn to a presentation of the Holmes test and its jurisprudential foundations. Despite the fact that early federal question jurisdictional practice took a rights-inclusive view, Justice Holmes specifically eschewed rights, unadorned with causes of action, as a meaningful, stand-alone legal category. His position on this score flows from his famous "bad man" theory of law—the view that law is best understood not from a moral vantage point, but from that of the bad man who cares only to know the predictable judicial responses to his conduct. That is to say, Justice Holmes, generally speaking, focused solely upon the enforcement aspect of law, which in the civil context corresponds to causes of action and not rights per se. The Court, however, has since accepted that rights are meaningfully severable concepts from causes of action, leaving the Holmes test out of step with current jurisprudential norms. I end Part I with a discussion of the *Mims* opinion. Here I highlight the two § 1331 innovations crafted by the decision: namely, a presumption in favor of § 1331 jurisdiction and a rights-inclusive formulation of the standard § 1331 test.

In Part II, I turn to a descriptive claim that the *Mims* opinion's inclusion of both federal causes of action and rights as components of the default § 1331 jurisdictional analysis is more accurate of the statutory federal question canon than the Holmes test. Here I argue that the rhetoric of the Holmes test creates more confusion than clarity, and that while this muddled approach to § 1331 is often good enough for government work,[14] both jurists[15] and commentators[16] desire greater coherence. I contend that

[14] *See* 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562, at 177 (3d ed. 2008) ("This lack of clarity in an important jurisdictional statute would be intolerable were it not for the fact that the cases raising a serious question whether jurisdiction exists are comparatively rare.").

[15] *See, e.g.*, *Grable*, 545 U.S. at 320–22 (Thomas, J., concurring) (lamenting the lack of clear-cut rules for § 1331 jurisdiction); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) (arguing that uncertain jurisdictional rules have the regrettable effect of allowing "[p]arties [to] spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction"); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 822 n.1 (1986) (Brennan, J., dissenting) (stating a view, held by many, that § 1331 doctrine as it now stands is "infinitely malleable").

[16] *See, e.g.*, Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1225 (2004) ("One ought not make a fetish of bright line rules, but they have their place, and one place in particular is the law of jurisdiction."); John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 190–92 (2006)

when the language of the Holmes test is pushed aside, it is clear that the Court consistently holds that the existence of a federal cause of action is neither a necessary nor sufficient condition for the vesting of § 1331 jurisdiction. I do so in three steps: First, I look to four categories of suits in which the courts refuse § 1331 jurisdiction even though the plaintiff presents a federal cause of action—contrary to the dictates of the modern incarnation of the Holmes test. I next contrast these four sets of cases with suits where the Court will take federal question jurisdiction over claims featuring federal causes of action over state law rights, noting that only a rights-inclusive jurisdictional theory can meaningfully distinguish between them. Finally, I end with a discussion of the opinions that take § 1331 jurisdiction over state law causes of action with embedded federal rights, in conflict with the terms of the classic iteration of the Holmes test. On clarity grounds alone, then, the *Mims* opinion's recasting of the standard § 1331 test in rights-inclusive terms is a step in the right direction.

In Part III, I consider the role for congressional intent in § 1331 cases. As one prominent commentator has described the consensus view, "Congress's intent [in enacting § 1331] has had little or nothing to do with the Court's decisions concerning what constitutes a federal question."[17] The *Mims* reformulation of the standard § 1331 test, I contend, blunts this line of commentary by increasing the role for congressional intent in two ways. First, basing § 1331 jurisdiction, as the *Mims* Court did, in part upon the federal nature of the right comports more with the intention of the 1875 Congress that passed the statute[18] than does the Holmes test.[19] Second, the

(calling for the adoption of a rule, as opposed to a standard, in *Smith*-style cases); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1794 (1992) (arguing that "jurisdictional uncertainty can surely lead to both a waste of judicial time and added expense to the litigants").

[17] Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 24 (1990).

[18] The general federal question jurisdictional statute has not always been codified at 28 U.S.C. § 1331. Nevertheless, I do not employ the cumbersome "predecessor statute to § 1331" locution when referring to cases dealing with the Act as codified in a different location. Instead, I simply refer to this Act as § 1331, even if at a previous time it was codified at a different location. This approach is sound because, excepting statutory amounts in controversy, the Act has been essentially unchanged since 1875. *See, e.g.*, Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (striking out the minimum amount in controversy requirement of $10,000); Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (raising the minimum amount in controversy requirement from $3,000 to $10,000); Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (stating that federal trial courts "shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . five hundred dollars, and arising under the Constitution or law of the United States, or treaties made"). Finally, following most scholars, I exclude the short-lived general grant of federal question jurisdiction passed at the end of President John Adams's term and treat the 1875 Act as the first general federal question grant. *See, e.g.*, *Mims*, 132 S. Ct. at 747 n.6 (discounting the federal question jurisdictional act passed in the Adams Administration).

[19] *See* Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2171–73 (2009); *see also infra* Part III.A.

Mims Court's focus upon both the federal cause of action and the federal right asserted brings greater insight into the intentions of later-in-time Congresses, which passed legislation against the presumption that federal rights provide grounds for taking federal question jurisdiction, than does the Holmes test. As such, I conclude that the Court should continue on the path it blazes in *Mims* and eschew the Holmes test in favor of a standard § 1331 theory that looks to both causes of action and rights.

I. CAUSES OF ACTION AND RIGHTS IN § 1331 JURISPRUDENCE

I turn my attention first to the elements of § 1331 analysis and the jurisprudential notions supporting their use. First, I lay out the technical meanings of the terms "cause of action" and "right"—or, as the *Mims* Court refers to it, "the rule of decision." Next, I explore the role that these notions play in the formulation of the Holmes test and its philosophical underpinnings. I end this Part by contrasting the Holmes test's federal-cause-of-action-centered approach to § 1331 jurisdiction with the *Mims* Court's rights-inclusive approach.

A. Cause of Action and Right Defined

To understand the distinction between the classic formulation of the Holmes test and the approach taken in *Mims*, one must take in the technical distinctions between the concepts of right, which the *Mims* opinion styles as rule of decision,[20] and cause of action, which the Court uses as the basic analytic units of its § 1331 analysis. Under the now-prevailing view, a right is an obligation owed by the defendant to the plaintiff as an intended beneficiary.[21] Further, to qualify as a right, an obligation must be

[20] For the last twenty years, the Court has regularly treated "rule of decision" as synonymous with "right." *See, e.g.*, Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (equating the Rules Enabling Act's use of "right" with "rule of decision"); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 284–85 (2009) (Souter, J., dissenting) (same in regard to the Age Discrimination in Employment Act); Sanchez-Llamas v. Oregon, 548 U.S. 331, 373 (2006) (Breyer, J., dissenting) (same in regard to treaties); Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 691–92 (2006) (same in regard to a discussion of federal common law); Norfolk & W. Ry. v. Ayers, 538 U.S. 135, 177 (2003) (Kennedy, J., concurring in part and dissenting in part) (same in regard to FELA); Atherton v. FDIC, 519 U.S. 213, 226 (1997) (same in regard to federal common law); Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 (1996) (same in regard to *Erie*); Holder v. Hall, 512 U.S. 874, 937 (1994) (Thomas, J., concurring) (same in regard to the Voting Rights Act); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) (same in regard to federal common law). In line with this practice, I treat the terms as synonyms as well.

[21] *See* Davis v. Passman, 442 U.S. 228, 238–39 (1979) (distinguishing rights from causes of action and noting that status as an intended beneficiary of a statute may create rights without creating a cause of action); *id.* at 241 (construing rights as obligations designed to benefit individuals, even if the right holder lacks a cause of action to enforce them).

mandatory, not merely hortatory,[22] and the language at issue must not be "too vague and amorphous" or "beyond the competence of the judiciary to enforce."[23] This three-part test—mandatory obligation, clear statement, and enforceability[24]—remains the standard by which the Court determines when a right exists.[25]

This notion of obligation can be thought of in Hohfeldian vernacular in that the obligation imposes a correlative duty upon the defendant to either refrain from interfering with, or to assist, the plaintiff.[26] Similarly, deploying the terminology of the legal process school, which itself followed Hohfeld closely here,[27] the concept of a right is one that imposes a correlative, authoritative duty that the defendant owes to the plaintiff to do an action or to refrain from an action.[28]

A cause of action is the distinct determination of whether the plaintiff falls into a class of litigants empowered to enforce a specified right in court.[29] Or as the Court alternatively put the notion, a "*cause of action* is a question of whether a particular plaintiff is a member of the class of

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[22] *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (finding that provisions of the Developmentally Disabled Assistance and Bill of Rights Act "were intended to be hortatory, not mandatory").

[23] Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 431–32 (1987).

[24] This last prong is, or nearly is, identical to the concept of remedy. But whether a court can issue an effective remedy is best understood as a matter of standing. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992) (discussing redressability). Including redressability in the rights analysis is double counting at best. A more troubling result could be the collapse of the distinction between rights and remedy, as this final statement appears to incorporate redressability as part of the rights analysis. Given that the Court has consistently striven since the 1970s to distinguish between rights and remedies, *see* Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 83–104 (2001) (criticizing this jurisprudential move), however, it would be a disservice to read this collapse of rights and remedies into this Article's jurisdictional analysis unless it is absolutely necessary. I will thus focus on the notions of mandatory obligation and clear statement.

[25] *See* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989); *see also* Blessing v. Freestone, 520 U.S. 329, 340–41 (1997) (discussing the three-part test); Livadas v. Bradshaw, 512 U.S. 107, 132–33 (1994) (applying the three-part test to a § 1983 claim); Suter v. Artist M., 503 U.S. 347, 363 (1992) (applying the three-part test to find that the Adoption Assistance and Child Welfare Act of 1980 "does not unambiguously confer an enforceable right upon the Act's beneficiaries"); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509–10 (1990) (applying the three-part test to the Boren Amendment).

[26] *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (critiquing legal analysis for imprecise use of terminology and introducing the idea that rights are best understood as obligations coupled with correlative duties); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (critiquing the same).

[27] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 127–28 & n.4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (importing Hohfeld's theory of jural opposites).

[28] *Id.* at 130 (concluding that a primary duty is "an authoritatively recognized obligation . . . not to do something, or to do it, or to do it if at all only in a prescribed way"); *see also* Woolhandler & Collins, *supra* note 19, at 2154–55 (discussing Hart and Sacks's views on primary and remedial rights).

[29] *See* Davis v. Passman, 442 U.S. 228, 239 & n.18 (1979).

litigants that may, as a matter of law, appropriately invoke the power of the court."[30] Cause of action corresponds to the legal process school's concept of remedial rights. That is, a right of action, as Hart and Sacks style it, is the power to invoke the defendant's duty to provide a remedy for the violation of a primary right.[31]

The concept of cause of action, then, is necessarily related to the concept of a right insofar as plaintiffs must have rights before they can be persons empowered to enforce them. But the concept of a cause of action is not the equivalent of a right itself. As Hart and Sacks noted,[32] one may have a right yet lack the power to enforce the right by way of a cause of action. For example, an individual's rights under certain statutory schemes may only be vindicated by an administrative agency—not by the individuals themselves.[33] As such, Congress may vest individuals with rights but not vest them with causes of action to enforce those rights by way of private suit.

B. The Philosophy of the Holmes Test

While contemporary doctrine views causes of action and rights as distinct concepts, the common law tended to treat these as necessarily linked. Justice Holmes's formulation of his jurisdictional test was delivered at a time when jurists were just beginning to challenge the inevitability of this congruity. Holmes's focus on cause of action—the ability to enforce a right—is in large part a reaction, based upon his "bad man" approach to the law, to the separating of the analytic concept of cause of action from right.

At common law, the concepts of right (or what is often referred to as the "primary right" or the "rule of decision") and cause of action (or what is sometimes referred to as "remedial right" or a "right of action") were thought to be immutably linked—one did not exist without the other.[34] Examples abound. *Marbury v. Madison*, for instance, held that "it is a general and indisputable rule, that where there is a legal right, there is also a

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[30] *Id.* at 240 n.18.

[31] *See* HART & SACKS, *supra* note 27, at 137.

[32] *Id.* at 138.

[33] *See, e.g.*, Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 457 (1974) (holding that power to vindicate rights rests with the Attorney General); *see also Davis*, 442 U.S. at 241 ("For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions, or other public causes of actions." (citation omitted)).

[34] *See, e.g.*, Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 783 (2004) ("At the time of the American Founding, the question whether a plaintiff had a cause of action was generally inseparable from the question whether the forms of proceeding at law and in equity afforded the plaintiff a remedy for an asserted grievance."); Zeigler, *supra* note 24, at 71–83 (describing the traditional approach to rights, causes of action, and remedies).

legal remedy by suit or action at law, whenever that right is invaded."[35] Similarly, the Court in *McFaul v. Ramsey*,[36] lamenting that many states had "ruthlessly abolished" writ pleading, reasoned that "[t]he distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common-law courts."[37] Under this earlier jurisprudence, "courts did not view a cause of action as a separate procedural entity, independent of a right and remedy, that had to be present for an action to go forward."[38] Even nineteenth-century reformers, such as John Austin, who saw a distinction between "primary rights" and causes of action (which he styled as "secondary rights") as useful for taxonomical purposes,[39] accepted that for pragmatic purposes the two notions must work in tandem.[40] Commenting upon this history, Justice Harlan noted that "contemporary modes of jurisprudential thought . . . appeared to link 'rights' and 'remedies' in a 1:1 correlation."[41]

Justice Holmes's classic presentation of his test for § 1331 jurisdiction, delivered in 1916 in his *American Well Works Co. v. Layne & Bowler Co.* opinion, was delivered against this traditional common law backdrop.[42] In *American Well Works*, the plaintiff held the patent for, manufactured, and sold what was then considered the best pump on the market. The plaintiff contended that the defendant stated that plaintiff's pump infringed the defendant's patent. Instead of bringing an infringement case, however, the plaintiff brought libel and slander (i.e., state law) causes of action in Arkansas state court. The defendant removed to federal court.[43] This removal raised the federal question jurisdictional issue for the Supreme Court. While recognizing that the suit implicated matters of federal patent rights, Justice Holmes focused on the state law origin of the causes of action and held for the Court that a "suit arises under the law that creates the cause of action."[44]

As Woolhandler and Collins convincingly argue, Justice Holmes, noting the beginnings of the jurisprudential movement to embrace rights

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[35] 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

[36] 61 U.S. (20 How.) 523, 525 (1857).

[37] *Id.*

[38] Zeigler, *supra* note 24, at 72.

[39] *See* 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 770–71 (Robert Campbell ed., London, John Murray 5th ed. 1885); *see also* Woolhandler & Collins, *supra* note 19, at 2155–56 (discussing Austin's views on primary and secondary rights).

[40] *See* 2 AUSTIN, *supra* note 39, at 768 ("For a primary right or duty is not of itself a right or duty, without the secondary right or duty by which it is sustained; and *e converso*.").

[41] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring); *see also* Zeigler, *supra* note 24, at 72.

[42] 241 U.S. 257 (1916).

[43] *Id.* at 258–59.

[44] *Id.* at 260.

and causes of action as distinct concepts, purposefully chose to focus upon causes of action as the key jurisdictional predicate under § 1331.[45] Justice Holmes favored the traditional pairing of rights and causes of action (which, following Austin, he styled as primary and secondary rights) as inseparable notions.[46] This position flowed from his general jurisprudential perspective that the law should be conceived from the point of view of the "bad man" who cares not for duties and rights *simpliciter*, but only for predictable consequences to his actions that will lead to imprisonment or compulsory monetary payments.[47]

Justice Holmes made this point often. For example, in a letter to Sir Frederick Pollock, Holmes stated:

> I become less and less inclined to make much use of the distinction between primary rights duties [sic] and consequences or sanctioning rights or whatever you may call them. The primary duty is little more than a convenient index to, or mode of predicting the point of incidence of the public force.[48]

He again expounded upon this philosophy in *The Path of the Law*, arguing that:

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.[49]

Given this overarching focus on enforceability in Justice Holmes's approach to the law, it is little wonder that he chose to focus on the cause of action (i.e., the determination that the plaintiff is entitled to enforce a right) over unadorned rights (i.e., mandatory, enforceable, clear obligations) in concluding whether a suit arose under federal law.

Justice Holmes's dissent in *Smith v. Kansas City Title & Trust Co.*[50] further proves this point. In *Smith*, a stockholder plaintiff brought a breach of fiduciary duty cause of action under state law, alleging that bonds issued by a federal agency and purchased by the company were unconstitutionally

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[45] *See* Woolhandler & Collins, *supra* note 19, at 2178–83. I am entirely indebted to Woolhandler and Collins for this point.

[46] *Id.* at 2179 ("Holmes eschewed the concept of primary rights as distinct from remedial rights.").

[47] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) [hereinafter Holmes, *The Path of the Law*]; *see also* Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918) ("But for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things to contravene it . . . .").

[48] Letter from Oliver W. Holmes to Frederick Pollock (Mar. 25, 1883), *in* 1 HOLMES-POLLOCK LETTERS 20–21 (Mark DeWolfe Howe ed., 1941).

[49] Holmes, *The Path of the Law*, *supra* note 47, at 462.

[50] 255 U.S. 180 (1921).

created.[51] Thus, this case would not satisfy the Holmes test as presented in *American Well Works* because the plaintiff had not brought a federal cause of action. Nevertheless, the Court held that federal question jurisdiction arose under § 1331 because the plaintiff's state law claim required adjudication of constitutional rights.[52] In his dissent, Justice Holmes stressed the importance of enforceability—which is expressed doctrinally by the cause of action, not rights unadorned—to the jurisdictional question. He reasoned that:

> The mere adoption by a state law of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore*, does not cause a case under the state law to be also a case under the law of the United States, and so it has been decided by this Court again and again.[53]

Reiterating this point, he argued that the constitutional right at issue here "depends for its relevance and effect not on its own force but upon the law that took it up, so I repeat once more the cause of action arises wholly from the law of the State."[54]

The classic Holmes test, the view that § 1331 jurisdiction only arises if federal law creates the cause of action, was conceived in large part as an attempt to retain the traditional one-to-one relationship between causes of action and rights that was beginning to disintegrate in the early twentieth century. Under the Holmesian view, any other focus would incoherently conflate mere moral duties (i.e., rights per se) with law (i.e., predictable applications of force). It is a view, then, most jurisprudentially at home in the traditional common law context of a one-to-one correspondence between rights and causes of action.

Justice Holmes's rearguard action against the disentangling of causes of action from rights did not succeed, however. The traditional view was entirely wiped away in the 1970s when the Court fully adopted the new regime.[55] Starting with *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*,[56] *Securities Investor Protection Corp. v.*

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[51] *Id.* at 195–98.

[52] *Id.* at 199; *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312–13 (2005) (discussing the *Smith* test); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808–09 (1986) (discussing federal question jurisdiction where the state law right turned on "some construction of federal law"); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (citing Flournoy v. Wiener, 321 U.S. 253, 270–72 (1944) (Frankfurter, J., dissenting); T. B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.)) (finding the Holmes test as a rule of inclusion).

[53] *Smith*, 255 U.S. at 215 (Holmes, J., dissenting).

[54] *Id.* at 214.

[55] *See* Zeigler, *supra* note 24, at 83–104. Zeigler notes this as a sea change. *But see* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1241–45 (2001) (noting how the two-track approach has developed over many decades).

[56] 414 U.S. 453, 457 (1974) (acknowledging the existence of rights and duties under the Amtrak Act but questioning whether the respondent had a cause of action to enforce them).

Barbour,[57] and *Cort v. Ash*,[58] the Court explicitly differentiated rights from the ability to enforce them by way of a cause of action.[59] By the end of the decade, the Court in *Davis v. Passman*[60] squarely held that the notions of right and cause of action constituted distinct analytic concepts. The Court continues to adhere to this basic framework established in *Passman*.[61] Thus, Justice Holmes's jurisdictional theory, which is predicated upon the linking of rights to causes of action, is no longer in step with the Court's jurisprudential commitments.

Despite the collapse of the jurisprudential underpinnings of the Holmes test, the Holmes test's cause-of-action-centered approach to § 1331 jurisdiction continues to define the default federal question jurisdictional test.[62] Indeed, prior to *Mims*, the dominant § 1331 rhetoric presented the Holmes test as providing the basis for taking jurisdiction in the vast majority of federal question cases.[63] Of course, as the discussion of *Smith* illustrates, the federal courts have not universally embraced the Holmes

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[57] 421 U.S. 412, 420–23 (1975) (acknowledging that the Securities Investor Protection Act grants plaintiffs beneficial rights but questioning whether they have a cause of action to force the agency to enforce them).

[58] 422 U.S. 66, 74–85 (1975) (noting that the corporate action in question was in violation of a federal criminal statute but questioning whether plaintiffs had a cause of action to privately enforce the prohibition).

[59] Zeigler, *supra* note 24, at 85–86.

[60] 442 U.S. 228, 238–39 (1979).

[61] *See supra* Part I.A (discussing the contemporary view of rights and causes of action).

[62] The classic presentation of the Holmes test was made in 1916. *See* Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.) ("A suit arises under the law that creates the cause of action."). A Westlaw search for citations to the "headnote" corresponding to this quote returned 510 judicial citations on January 29, 2012. Such a count, of course, does not track invocations of the Holmes test that do not cite *American Well Works Co.* A Westlaw search in the "allfeds" database of the string ("cause of action" /s arise /s "federal law") brought a return of 2765 hits on January 29, 2012. This search likely overcounts, given that this string may well return discussions of bodies of law beyond § 1331 jurisdiction. In any event, the Court itself invokes the Holmes test as the standard § 1331 rule regularly. *See, e.g.*, Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) ("The determination of who can seek a remedy has significant consequences for the reach of federal power."); Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 706 (2006) (Breyer, J., dissenting); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005); Jones v. R. R. Donnelley & Sons Co., 541 U.S. 369, 377 (2004); Nebraska v. Wyoming, 515 U.S. 1, 25 (1995) (Thomas, J., concurring in part and dissenting in part); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27–28 (1983); Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 409 (1981); Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972); Int'l Ass'n of Machinists, AFL-CIO v. Cent. Airlines, Inc., 372 U.S. 682, 696 (1963); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 393 (1959) (Brennan, J., dissenting in part and concurring in part); Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205, 217 (1934); Missouri *ex rel.* St. Louis, B. & M. Ry. Co. v. Taylor, 266 U.S. 200, 207–08 (1924); Lambert Run Coal Co. v. Balt. & Ohio R.R., 258 U.S. 377, 382 (1922); *see also* 13D WRIGHT ET AL., *supra* note 14, § 3562, at 183 (noting that the Holmes test is the "starting point," even if not the whole story, for § 1331 analysis).

[63] Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986).

test[64]—that is, the Court does recognize, on occasion, that § 1331 jurisdiction vests based solely upon the pleading of a substantial federal right without pleading a federal cause of action.[65] Yet, but six years prior to *Mims*, the Court held that *Smith*'s rights-centric jurisdictional view belonged to a "special and small category" of § 1331 authority,[66] a point that the courts of appeals uniformly mimic.[67] Moreover, even when the Court acknowledges that pleading a federal cause of action is not a necessary condition for § 1331 jurisdiction,[68] it stresses that the presence of a federal cause of action, subject to one rare exception,[69] is "a sufficient condition for federal-question jurisdiction."[70] Thus, under the contemporary

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[64] *See, e.g.*, *Empire Healthchoice*, 547 U.S. at 699 (confirming the general availability of § 1331 jurisdiction under a *Grable & Sons* theory, even though a *Grable & Sons* theory did not adhere under the facts of the case); *Grable*, 545 U.S. at 315 (holding that § 1331 jurisdiction arose over a federal statutory right created by the Internal Revenue Code that was embedded in a state law quiet title claim); Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting) (noting that the Holmes test is not always necessary for § 1331 jurisdiction); Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 597 (1949) (Jackson, J., plurality) (questioning the need to strictly adhere to the Holmes test).

[65] *See, e.g.*, T. B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.) (Holmes test is a rule of inclusion); *see also Merrell Dow*, 478 U.S. at 809 n.5 (quoting *T. B. Harms*, 339 F.2d at 827); *Franchise Tax Bd.*, 463 U.S. at 9 (quoting *T. B. Harms*, 339 F.2d at 827, and holding that § 1331 jurisdiction can arise over state law causes of action); Fitzgerald, *supra* note 55, at 1241–45 (describing the Court's "two-track" approach to § 1331 jurisdiction); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 324–28 (2007) (arguing that the *Smith v. Kansas City Title & Trust Co.* line of cases employs a different test than the Holmes line of cases); John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1837–43 (1998) (describing the distinction between Category I and Category II jurisdiction).

[66] *Empire Healthchoice*, 547 U.S. at 699, 701 (describing *Grable*-style jurisdiction as a slim category).

[67] Every circuit to address the matter since *Empire Healthchoice* has described jurisdiction under *Grable & Sons* as a limited exception to the primary Holmes test approach to § 1331 jurisdiction. *See, e.g.*, Bender v. Jordan, 623 F.3d 1128, 1130 (D.C. Cir. 2010) (holding that the present case fits into the narrow circumstances in which *Grable & Sons* jurisdiction may apply); Kalick v. Nw. Airlines Corp., 372 F. App'x 317, 320 (3d Cir. 2010) (describing *Grable & Sons* jurisdiction as a slim category); Adventure Outdoors, Inc. v. Bloomberg, 552 F.3d 1290, 1296 (11th Cir. 2008) (finding *Grable & Sons* jurisdiction to be a special, small category); Morgan Cnty. War Mem'l Hosp. *ex rel.* Bd. of Dirs. of War Mem'l Hosp. v. Baker, 314 F. App'x 529, 535 (4th Cir. 2008) (describing *Grable & Sons* jurisdiction as a slim category); Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262, 1271–72 (Fed. Cir. 2007) (holding that the Court's opinions in *Grable & Sons* and *Empire Healthchoice* effectuate a retreat from a broad reading of *Smith*); Mikulski v. Centerior Energy Corp., 501 F.3d 555, 574 (6th Cir. 2007) (allowing *Grable & Sons* jurisdiction only if it will have a "microscopic effect" on the balance of state versus federal jurisdiction); Bennett v. Sw. Airlines Co., 484 F.3d 907, 910 (7th Cir. 2007) (noting defendant's argument that a broadly applicable reading of *Grable & Sons* was "squelched" by *Empire Healthchoice*).

[68] *See supra* note 65.

[69] *See Grable & Sons*, 545 U.S. at 317 n.5 (citing Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900)); *see also* Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 748 n.8 (2012) (similarly citing to *Shoshone*).

[70] *Grable & Sons*, 545 U.S. at 317; *accord Mims*, 132 S. Ct. at 748.

prevailing view, meeting the Holmes test is a sufficient condition for obtaining § 1331 jurisdiction, with deviations to this cause-of-action-centered approach constituting "rare exceptions" or "special and small categories" diverging from this generally applicable norm.

C. Mims's *Rights-Inclusive Theory*

Mims's incorporation of rights into the standard jurisdictional analysis, then, presents a substantial shift in § 1331 doctrine. Accordingly, I turn to a brief discussion of the *Mims* decision. I review the Court's two substantial § 1331 innovations: the creation of a presumption of federal question jurisdiction and the move toward a rights-inclusive standard view of § 1331 jurisdiction, arguing that the rights-inclusive view constitutes the holding of the Court.

Mims is a TCPA case. The TCPA renders certain aggressive interstate telephonic communications illegal as overly intrusive of privacy or otherwise a nuisance.[71] The plaintiff in *Mims* alleged that the defendant, a debt collection company, repeatedly used automatic dialing systems and artificial voice systems to call his phone in violation of the TCPA.[72] He filed for declaratory relief, an injunction, and damages in federal court.[73] The district court, following Eleventh Circuit precedent, dismissed for lack of federal question subject matter jurisdiction,[74] a decision affirmed by the court of appeals.[75] Reversing, the Supreme Court held that claims brought under the TCPA do arise under § 1331.[76]

The Eleventh Circuit, and those courts following its approach, had reasoned that the TCPA itself prohibited § 1331 jurisdiction. The TCPA, as codified at 47 U.S.C. § 227(b)(3) in a provision entitled "Private Right of Action," states:

> A person or entity may, if otherwise permitted by the law or rules of court of a State, bring in an appropriate court of that State . . . an action based on a violation of this subsection . . . .

Looking to this language with its focus on state courts, as well as legislative history and the structure of the act, several courts of appeals held that Congress had excluded § 1331 jurisdiction over private TCPA suits.[77] The

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[71] *See* 47 U.S.C. § 227(b)(1)(A)–(D) (2006) (outlawing four types of interstate telephonic communications).

[72] *Mims*, 132 S. Ct. at 746.

[73] *Id.* at 746–47.

[74] *Id.* at 747.

[75] *Id.*

[76] *Id.* at 745 ("We hold, therefore, that federal and state courts have concurrent jurisdiction over private suits arising under the TCPA.").

[77] *See, e.g.*, Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287, 1288–89 (11th Cir. 1998), *abrogated by Mims*, 132 S. Ct. 740; *see also Mims*, 132 S. Ct. at 747 (noting the circuit split).

Supreme Court disagreed, holding that "[n]othing in the text, structure, purpose, or legislative history of the TCPA calls for displacement of the federal-question jurisdiction U.S. district courts ordinarily have under 28 U.S.C. § 1331."[78] While much of the Court's opinion examines congressional intent as expressed in the TCPA to vest federal question jurisdiction over private claims,[79] I will focus on the Court's § 1331-centered discussion.

The *Mims* Court made two significant moves with regard to § 1331 doctrine. First, the Court held that there is a strong presumption that a congressionally created federal cause of action coupled with a federal right will take jurisdiction under § 1331. The Court stated this presumption as:

> [W]hen federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under § 1331 . . . unless Congress divests federal courts of their § 1331 adjudicatory authority.[80]

The Court itself defended this presumption by arguing that it is the mirror image of the previously accepted rule recognizing a presumption that suits arising in federal question jurisdiction can concurrently be heard in state courts.[81] As I discuss in more detail later, this presumption in favor of § 1331 jurisdiction is also well-founded upon congressional intent grounds.[82]

Second, the *Mims* Court, contrary to the rhetoric of the Holmes test, presented a rights- and cause-of-action-inclusive standard formulation of the § 1331 analysis. The Court looked to both of these components in its presentation of the default § 1331 analysis no fewer than five times in the opinion, reasoning that:

- Section 1331 jurisdiction arises here because "federal law [both] creates a private right of action and furnishes the substantive rules of decision."[83]
- Section 1331 jurisdiction arises here because "the TCPA is a federal law that both creates the claim Mims has brought and supplies the substantive rules that will govern the case."[84]
- "Because federal law creates the right of action and provides the rules of decision, Mims's TCPA claim" arises under § 1331.[85]

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[78] *Mims*, 132 S. Ct. at 753.

[79] *Id.* at 749–53 (discussing congressional intent regarding the TCPA).

[80] *Id.* at 748–49.

[81] *Id.* at 748 (citing Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)) (noting the presumption of concurrent state court jurisdiction).

[82] *See infra* Part III.B.

[83] *Mims*, 132 S. Ct. at 748–49.

[84] *Id.* at 745.

[85] *Id.* at 748.

- Section 1331 jurisdiction arises "[h]ere, by contrast, [because] the TCPA not only creates the claim for relief and designates the remedy; critically, the Act and regulations thereunder supply the governing substantive law."[86]
- "Because federal law gives rise to the claim for relief . . . and specifies the substantive rules of decision" the federal courts have § 1331 jurisdiction.[87]

The Court here uses "claim" and "claim for relief" as synonymous with "cause of action." While this use of synonyms is far from ideal,[88] it is clear from the context that the Court intends "cause of action," as defined in this Article, in the quotations above. For example, in the second quotation above, immediately before this selected text, the Court quotes *American Well Works*' use of the term "cause of action," the meaning of which it intends to import into the term "claim" in the quoted sentence above. Thus, the Court stated:

> We have long recognized that "[a] suit arises under the law that creates the cause of action." Beyond doubt, the TCPA is a federal law that both creates the claim Mims has brought and supplies the substantive rules that will govern the case.[89]

Similarly, the fourth quotation's use of "claim for relief," when read in context, means "cause of action."[90] Here, the Court is discussing *Shoshone Mining Co. v. Rutter*,[91] a case where Congress created a federal cause of action to remedy state law property rights, yet the Court held that § 1331 jurisdiction did not arise.[92] Thus, the *Mims* Court's contrasting of the TCPA with the statute at issue in *Shoshone Mining Co.* intends to invoke the concept of "cause of action." Additionally, the Court's use of the terms "claim" and "claim for relief" in sentences with nearly identical content as when it uses the term "cause of action" further highlights the Court's

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[86] *Id.* at 748 n.8.

[87] *Id.* at 753.

[88] Slipshod use of differing terms plagues the Court's statutory federal question jurisprudence. *See, e.g.*, LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 91 (1994) (lamenting Supreme Court doctrine that "needlessly confuse[s] matters with outdated jargon and misleading generalizations," and advocating "jurisdictional rules that can easily be applied at the outset of litigation"); Oakley, *supra* note 65, at 1853 (noting various uses of the terms "claim" and "theory"). Often the Court inaptly imports terms originating from discussions of appellate jurisdiction into the § 1331 analysis. *See* William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 904 (1967) (noting that phrases had been "uncritically transferred" from earlier cases involving appellate jurisdiction); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 160–63 (1953).

[89] *Mims*, 132 S. Ct. at 744–45 (citation omitted).

[90] *Id.* at 748 n.8.

[91] 177 U.S. 505 (1900); *see infra* Part II.A.1 (discussing this case).

[92] *See infra* notes 123–27 and accompanying text (discussing *Shoshone Mining Co.*).

intention to use the terms synonymously. Given that the Court intended "cause of action" as defined in this Article, I will consistently use cause of action to describe the Court's *Mims* analysis.[93] Similarly, the Court's use of "rule of decision" may be fairly read as synonymous with "right."[94]

The *Mims* Court's rights-inclusive approach to the standard formulation of § 1331 jurisdiction is a significant shift. Justice Holmes crafted his cause-of-action-centered approach to § 1331 jurisdiction intentionally to exclude unadorned rights as a meaningful factor in the jurisdictional analysis.[95] Further, to say that the Holmes test has since come to frame the default presentation of § 1331 jurisprudence would be quite the understatement.[96] The *Mims* decision's focus upon both causes of action and rights, then, is a substantial doctrinal shift.

Nevertheless, I do not mean to overstate *Mims*'s effect, as this is not the first break with the Holmes test for the Court. The Court has questioned the validity of the classic Holmes test from time to time.[97] Also, it has affirmed, at least in certain cases, the taking of § 1331 jurisdiction over state law causes of action with embedded federal rights—contrary to the dictates of the classic Holmes test.[98] Finally, the *Mims* Court itself twice invokes the Holmes test by quoting *American Well Works Co.*[99]

One could well argue that *Mims*, given the opinion's recitation of the classic Holmes test, is best read not as a significant reformulation of the test but as a standard application of it. I contend, however, that this more modest reading of *Mims* is not the best interpretation. *Mims* marks a departure from standard § 1331 formulations by treating this rights-inclusive focus not as a quirky exception to the default (i.e., classic Holmes test) view, but as an essential element of the standard presentation of the § 1331 test. The key to understanding this point is that in both instances where the *Mims* Court invokes the Holmes test, it couples the classic statement of the test with a statement that § 1331 jurisdiction arises in *Mims* because federal law creates both the cause of action and the substantive rights at issue. Thus, the Court first states:

> We have long recognized that "[a] suit arises under the law that creates the cause of action." Beyond doubt, the TCPA is a federal law that both creates the claim Mims has brought and supplies the substantive rules that will govern the

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[93] *See* Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1682–83 (2008) [hereinafter Mulligan, *A Unified Theory*] (adopting and defending a similar position in describing the Court's § 1331 jurisprudence).

[94] *See* sources cited *supra* note 20.

[95] *See supra* Part I.B.

[96] *See supra* notes 62–70 and accompanying text (discussing the dominance of Holmes test rhetoric).

[97] *See* cases cited *supra* note 64.

[98] *See* sources cited *supra* note 65.

[99] Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 744, 748 (2012).

case.[100]

It follows this reformed presentation of the Holmes test with similar reasoning a few pages later, arguing that:

> Because federal law creates the right of action and provides the rules of decision, Mims's TCPA claim, in 28 U.S.C. § 1331's words, plainly "aris[es] under" the "laws . . . of the United States." As already noted, "[a] suit arises under the law that creates the cause of action."[101]

This coupling of the classic statement of the Holmes test with the *Mims* Court's rights-inclusive approach differs greatly from most past hedging about the strength of the Holmes test. Instead of listing a rights-inclusive approach to § 1331 jurisdiction as a "special and small category"[102] or "an extremely rare exception"[103] to the Holmes test, as has been the Court's phraseology to date, the *Mims* opinion's coupling of the classic presentation of the Holmes test with its rights-inclusive approach appears as an attempt to rehabilitate the Holmes test. That is to say, despite the origins and history of the Holmes test as a cause-of-action-centered conception of § 1331 jurisdiction, *Mims* appears to recast the Holmes test as solicitous of both causes of action and rights in the standard § 1331 analysis. This recharacterization of the Holmes test, then, is a momentous shift in § 1331 doctrine.

This doctrinal shift appears to be a purposeful course correction by the Court. *Mims*'s rights-inclusive formulation of the standard § 1331 test comes as a part of the Court's crafting of a presumption favoring § 1331 jurisdiction.[104] This presumption was key to the Court's holding that TCPA suits arise under § 1331.[105] This presumption, however, arises when only federal law creates both the right and the cause of action.[106] Indeed, the Court describes the presence of federal rights in the TCPA as "critically" important to its jurisdictional analysis.[107] Hence, there is little reason to think that the Court's rhetorical shift to a rights-inclusive view in *Mims* was mere verbiage. Moreover, even if this shift in rhetoric was not intended to

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[100] *Id.* at 744–45 (quoting Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)).

[101] *Id.* at 748 (quoting *Am. Well Works*, 241 U.S. at 260).

[102] Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006).

[103] Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 317 n.5 (2005).

[104] *See, e.g.*, *Mims*, 132 S. Ct. at 748–49 ("[W]hen federal law creates a private right of action and furnishes the substantive rules of decision, . . . district courts possess federal-question jurisdiction under § 1331 . . . unless Congress divests federal courts of their § 1331 adjudicatory authority.").

[105] *Id.* at 749 ("[D]ivestment of district court jurisdiction should be found no more readily than divestmen[t] of state court jurisdiction, given the longstanding and explicit grant of . . . jurisdiction in . . . § 1331. Accordingly, the District Court retains § 1331 jurisdiction over Mims's complaint unless the TCPA . . . excludes [it]." (first and second alterations in original) (internal quotation marks omitted)).

[106] *Id.* at 748–49.

[107] *Id.* at 748 n.8.

signal a shift in doctrinal focus, the courts should read it as a shift, given the gains in jurisprudential and doctrinal coherence and focus upon congressional intent that flow from such an approach.

II. *MIMS* AND A COHERENT § 1331 CANON

One overarching reason to praise the *Mims* Court's shift in § 1331 doctrine—or to read the case as if it intends such a jurisprudential shift—is that a rights-inclusive presentation of the default § 1331 test renders the case law more coherent. Past incantations of the Holmes test by the Court as that central element of § 1331 doctrine have not brought clarity. Indeed, the federal courts themselves have failed to embrace fully a strict Holmes-test-only conception of § 1331 jurisdiction.[108] This confusion has led some courts to complain that § 1331 jurisdiction is more of a "Serbonian Bog"[109] than an easily applied rule, while others lament that "[a]ttempting to define an all inclusive test which will determine if a case 'arises under' the Constitution, laws, or treaties of the United States is like the exercise performed by the daughters of Danaus, condemned for eternity, as they were, to draw water with a sieve."[110] Academics have similarly failed to settle on a generally agreed-upon approach to § 1331 doctrine,[111] noting that

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[108] *See, e.g.*, *Grable & Sons*, 545 U.S. at 314 ("These considerations have kept us from stating a 'single, precise, all-embracing' test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties."); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998) ("Jurisdiction . . . is a word of many, too many, meanings . . . ." (quoting United States v. Vanness, 85 F.3d 661, 663 n.2 (D.C. Cir 1996)) (internal quotation marks omitted)); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8 (1983) ("Since the first version of § 1331 was enacted the statutory phrase 'arising under the Constitution, laws, or treaties of the United States' has resisted all attempts to frame a single, precise definition . . . ." (citation omitted)); Willy v. Coastal Corp., 855 F.2d 1160, 1165 (5th Cir. 1988) ("Defining when a claim arises under federal law has drawn much attention but no simple solutions."), *aff'd*, 503 U.S. 131 (1992); Div. 587, Amalgamated Transit Union, AFL-CIO v. Municipality of Metro. Seattle, 663 F.2d 875, 877 (9th Cir. 1981) ("Commentators on the issue of the proper scope of federal question jurisdiction seem agreed on only one proposition: no completely satisfactory analytical framework has yet been devised."); First Nat'l Bank of Aberdeen v. Aberdeen Nat'l Bank, 627 F.2d 843, 849 (8th Cir. 1980) ("Formulation of a general test for determining when an action 'arises under' federal law has eluded the courts for more than a century . . . .").

[109] Amoco Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1205 (5th Cir. 1988).

[110] Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323, 328 n.4 (2d Cir. 1982), *aff'd mem. sub nom.* Arcudi v. Stone & Webster Eng'g Corp., 463 U.S. 1220 (1983).

[111] *See, e.g.*, Cohen, *supra* note 88, at 916 (noting that without the well-pleaded complaint rule, more careful thought about federal question jurisdiction would be required); Freer, *supra* note 65, at 340 (suggesting that "federal question jurisdiction might be more compelling for questions of law rather than application of clearly established law to fact"); Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17, 22 (1984) ("[C]ourts may make sensible judgments about both what is necessary and what is sufficient to support federal jurisdiction by returning to the [Holmes] standard . . . of 'the law that creates the cause of action.'"); Ernest J. London, *"Federal Question" Jurisdiction—A Snare and a Delusion*, 57 MICH. L. REV. 835, 835 (1959) (arguing that the federal question criterion is an unsuitable test for original jurisdiction); Mishkin, *supra* note 88, at 168 ("[T]he criterion for original federal jurisdiction [is] a substantial claim founded 'directly' upon federal law . . . ."); Oakley, *supra* note 65, at

the courts offer competing rubrics for the vesting of federal question jurisdiction.[112] Some go so far as to reject the notion that § 1331 can be, "or should be, [understood in terms of] a single, all-purpose, neutral analytical concept which marks out federal question jurisdiction."[113]

As I have argued in prior work, the rhetorical prominence of the Holmes test causes much of this confusion.[114] If the rhetoric of the Holmes test is stripped away, however, the Court's actual practice in § 1331 cases demonstrates that the existence of a federal cause of action is neither a necessary,[115] per the classic formulation of the Holmes test, nor sufficient,[116] per the modern restatement of the Holmes test, condition for the vesting of § 1331 jurisdiction.[117] Rather, as the *Mims* Court's rights-inclusive recasting of the § 1331 test suggests, the Court takes § 1331 jurisdiction based upon an analysis of both the federal origin of the right asserted and the cause of action.[118]

I turn in this Part, then, to a descriptive claim. Namely, that the *Mims* rights-inclusive approach to the jurisdictional default rule more accurately describes the federal courts' § 1331 decisions than does the Holmes test. First, I contend that the *Mims* approach better accounts for the number of cases in which the courts refuse to take § 1331 jurisdiction over federal causes of action that are paired with state law rights than does the Holmes test. Second, I note that the *Mims* rights-inclusive approach also offers

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1832 (suggesting that the claim is the "fundamental unit of litigation for purposes of federal jurisdiction"); Note, *Mr.* Smith *Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post*-Merrell Dow, 115 HARV. L. REV. 2272, 2273 (2002) [hereinafter *Mr.* Smith] ("[S]haping the doctrine on the basis of the competencies of and the comity between the federal and state systems may best serve the values of federal question jurisdiction while allowing for relatively clear jurisdictional rules.").

[112] *See* sources cited *supra* note 65 (discussing the Court's two-track approach to § 1331 jurisdiction).

[113] Cohen, *supra* note 88, at 907; *see also Grable & Sons*, 545 U.S. at 314 (admitting that the Court has consistently refused to "stat[e] a single, precise, all-embracing test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties" (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 821 (1988)) (internal quotation marks omitted)).

[114] *See, e.g.*, Mulligan, *A Unified Theory*, *supra* note 93 (arguing that § 1331 is better understood, not via the Holmes test, but as a set of three standards that seek indicia of congressional intent by weighing both causes of action and substantive rights); Mulligan, *Cross-Reference*, *supra* note 11 (arguing that the federal courts take federal question jurisdiction, not based upon the Holmes test, but finding that they maintain declaratory power over the substantive law); Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175, 192–208 (2010) (arguing that the Court's faulty anti-inferred cause of action jurisprudence is based upon a reading of the Holmes test).

[115] *See, e.g.*, *Grable & Sons*, 545 U.S. at 314; Smith v. Kan. City Title & Trust Co., 255 U.S. 180, 201–02 (1921).

[116] *See, e.g.*, Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 605, 607–12 (1979); Baker v. Carr, 369 U.S. 186, 218–29 (1962); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507, 513 (1900).

[117] *See* Mulligan, *A Unified Theory*, *supra* note 93, at 1724–25 (providing a summary of this view).

[118] *See generally id.* (arguing across numerous categories of suits that the Holmes test does not describe the Court's § 1331 practice).

greater explanatory power over instances where the courts take § 1331 jurisdiction over federal causes of action coupled with state law rights than does the Holmes test. Third, I note that the *Mims* approach offers a more satisfactory explanation of the courts' practice of taking § 1331 jurisdiction over state law causes of action when coupled with substantial federal rights. I contend, therefore, that these many decisions illustrate that the *Mims* approach brings greater descriptive coherence to § 1331 decisions than does the Holmes test, which provides a key motivation for the federal courts to embrace it.

A. No Jurisdiction over Federal Causes of Action

The Court does acknowledge that the Holmes test is best viewed as a rule of inclusion for § 1331 jurisdiction.[119] In so doing, it stresses that the presence of a federal cause of action is a "sufficient condition for federal-question jurisdiction,"[120] while recognizing that there are a few rare exceptions to this rule.[121] In this section, I argue that the Court's practice does not support the view that failure to take § 1331 jurisdiction in the face of a federal cause of action is anomalous. Indeed, within the set of cases in which a federal cause of action is paired with a mandatory application of a state law right, the courts uniformly decline § 1331 jurisdiction. First, I address the *Shoshone Mining Co.* line of cases. Second, I review the courts' practice under the Miller Act, where § 1331 jurisdiction does not vest over federal causes of action coupled with state law contractual rights. Third, I review the courts' treatment of Federal Tort Claims Act (FTCA) cases under § 1331. Finally, I note that the courts will not take § 1331 jurisdiction over federal causes of action coupled with procedural, as opposed to substantive, rights. As such, the *Mims* approach to § 1331, which looks to both causes of action and rights to vest jurisdiction, more readily describes these cases than does the Holmes test.

1. The Shoshone Mining Co. *Line of Cases.*—Contrary to its "rare exception" rhetoric, the Court consistently refuses to take § 1331 jurisdiction over cases involving mandatory application of state law rights when Congress creates a federal cause of action to enforce them.[122] The lead case is *Shoshone Mining Co. v. Rutter*.[123] There, the Court refused § 1331 jurisdiction over a suit in which Congress had created a cause of action to adjudicate state law property rights to mines.[124] Of importance, the Court

[119] *See, e.g.*, Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 809 n.5 (1986) (quoting T. B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964)).

[120] *Grable & Sons*, 545 U.S. at 317; *see also* Mims v. Arrow Fin. Servs., 132 S. Ct. 740, 748 (2012).

[121] *See Mims*, 132 S. Ct. at 748 n.8; *Grable & Sons*, 545 U.S. at 317 n.5.

[122] *See* Mulligan, *Cross-Reference*, *supra* note 11, at 1196–1200.

[123] 177 U.S. 505 (1900).

[124] *Id.* at 513.

found that because the statute mandated that state or territorial law would provide the rule of decision in these cases, § 1331 jurisdiction did not arise.[125] This result followed from the state law status of the substantive law at issue because "the right of possession may not involve any question under the . . . laws of the United States, but simply a determination of local rules . . . or state statutes, or . . . a mere matter of fact."[126] That is to say, the Court declined statutory federal question jurisdiction because it lacked the power to construct definitively the state law at issue[127] and refused to be deployed as a mere fact finder, even though, contrary to the Holmes test, Congress created the cause of action.

Shoshone is not a lone case, despite the Court's statements to that effect.[128] For example, in *Puerto Rico v. Russell & Co.*,[129] the Court clearly held that, despite the Holmes test, the focus for § 1331 jurisdiction is the assertion of a federal right—not a federal cause of action.[130] There Puerto Rico sought to collect a tax debt in court because a federal statute required the collection of such claims by a suit at law, as opposed to an attachment proceeding, and it created a federal cause of action to do so.[131] Puerto Rico began a suit at law in the Puerto Rican courts to collect the tax.[132] The defendant removed to federal district court, relying upon the Holmes test, contending that the case arose under § 1331.[133] Declining federal question jurisdiction, the Court held that § 1331 may only be "invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law . . . ."[134] The Court further reasoned that "[t]he federal nature of the right to be established is decisive [for jurisdictional purposes]—not the source of the authority to establish it."[135]

The Court has relied upon this same anti-Holmes-test theory of § 1331 jurisdiction in at least three other cases. In *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*,[136] the Court considered whether claims brought under the Urban Mass Transportation Act, which

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[125] *Id.* at 508.

[126] *Id.*

[127] *See, e.g.*, Johnson v. Fankell, 520 U.S. 911, 914–16 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.").

[128] *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 317 n.5 (2005) (recognizing *Shoshone* as an exception, though a limited one, to the Holmes test).

[129] 288 U.S. 476 (1933).

[130] *Id.* at 483–84.

[131] *Id.*

[132] *Id.* at 477.

[133] *Id.* at 477–78.

[134] *Id.* at 483.

[135] *Id.*

[136] 457 U.S. 15 (1982).

creates a federal cause of action, arise under § 1331. The Court held they do not because the statute mandated that the rule of decision in these suits was to be determined by state law.[137] Similarly, in *Gully v. First National Bank*,[138] the Court refused statutory federal question jurisdiction over a suit to collect state taxes from a nationally chartered bank, despite the existence of a federal statute allowing the levy of such a tax, reasoning that "the federal nature of the right to be established is decisive—not the source of the authority to establish it."[139] And earlier, in *Shulthis v. McDougal*,[140] the Court held that a congressionally created equitable quiet title cause of action lacked statutory federal question jurisdiction because the right to the land in question was controlled by state law.[141] The courts of appeals have also relied upon this rights-focused § 1331 analysis.[142]

The *Mims* theory of § 1331 jurisdiction, with its dual focus on rights and causes of action, can incorporate such cases into the jurisprudential canon better than the Holmes test. From the Holmes test perspective, these cases simply must stand as exceptions to the default rule.[143] Looking to both rights and causes of action to divine statutory federal question jurisdiction, as the *Mims* opinion instructs, demonstrates the lack of a substantial issue of federal law in such cases. As *Shoshone Mining Co.* held, mere "recognition by Congress of local customs and statutory provisions as at times controlling . . . does not incorporate them into the body of Federal law."[144]

2. The Miller Act Cases.—The courts provide a similar jurisdictional treatment for suits brought under the Miller Act, where courts refuse to take § 1331 jurisdiction over federal causes of action when coupled with state law rights.[145] Because sovereign immunity bars the placing of a mechanic's lien upon federal construction projects,[146] Congress passed the Miller Act,

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[137] *Id.* at 29.

[138] 299 U.S. 109 (1936).

[139] *Id.* at 114 (quoting *Puerto Rico*, 288 U.S. at 483).

[140] 225 U.S. 561 (1912).

[141] *Id.* at 569–70.

[142] *See, e.g.*, Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 735 (2d Cir. 2007) (holding that the federal courts lacked § 1331 jurisdiction because the Individuals with Disabilities Education Act empowered the plaintiff to sue but the rights at issue were entirely a matter of state law); City Nat'l Bank v. Edmisten, 681 F.2d 942, 945–46 (4th Cir. 1982) (holding that the National Bank Act "is not a sufficient basis for federal question jurisdiction simply because it incorporates state law" when the Act makes usury, as defined by local state law, illegal, and the nondiverse parties were only contesting the meaning of North Carolina's usury law); Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974) (holding no federal question arises where "the real substance of the controversy . . . turns entirely upon disputed questions of law and fact relating to compliance with state law, and not at all upon the meaning or effect of the federal statute itself").

[143] *See supra* note 128 and accompanying text.

[144] 177 U.S. 505, 508 (1900).

[145] This section builds on prior research. *See* Mulligan, *Cross Reference*, *supra* note 11, at 1215–18.

[146] *See, e.g.*, United States *ex rel.* Hill v. Am. Sur. Co., 200 U.S. 197, 203 (1906) ("As against the United States, no lien can be provided upon its public buildings or grounds, and it was the purpose of

which requires general contractors to post a payment bond at the beginning of construction to satisfy unpaid claims to suppliers and subcontractors[147] as a substitute remedy for subcontractors to effectuate relief for breaches of contract by general contractors.[148] Under the Act, subcontractors may sue the general contractor for breach and, because of the bond, be assured that the general contractor will not become judgment proof. The Miller Act directs that the federal district courts retain exclusive jurisdiction of these cases with the United States serving as the nominal plaintiff for the benefit of the injured subcontractor.[149]

Like the *Shoshone Mining Co.* line of cases, the Miller Act creates a statutory federal cause of action.[150] The nature of the underlying contract right in Miller Act suits remains the source of some confusion. Before 1974, the courts consistently held that the Miller Act mandated that state law supply contract rights in such actions.[151] Following the anti-Holmes approach of the *Shoshone Mining Co.* cases, the federal courts did not take § 1331 jurisdiction over Miller Act cases at that time, but rather found jurisdiction because the United States was a party plaintiff.[152]

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this act to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual.").

[147] Ch. 642, 49 Stat. 793 (codified as amended at 40 U.S.C. §§ 3131–3134 (2006)).

[148] *See, e.g.*, § 3131(b)(2) (requiring posting of payment bond); United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947) ("But nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation. They cannot acquire a lien on public buildings, and as a substitute for that more customary protection, the various statutes were passed which require that a surety guarantee their payment." (citations omitted)).

[149] § 3133(b)(3)(A); Blanchard v. Terry & Wright, Inc., 331 F.2d 467, 469 (6th Cir. 1964) ("Exclusive jurisdiction in the District Court was expressly conferred by the Miller Act.").

[150] § 3133(b)(1) ("Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished . . . and that has not been paid in full . . . may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.").

[151] *See, e.g.*, United States *ex rel.* Shields, Inc. v. Citizens & S. Nat'l Bank, 367 F.2d 473, 477 (4th Cir. 1966) ("We agree that the substantive law of North Carolina must be applied in determining the respective rights of the parties. Even though jurisdiction is conferred by the Miller Act, the construction of that statute is not at issue and all acts relevant to the subcontract in question and its performance occurred in North Carolina."); Wells Benz, Inc. v. United States *ex rel.* Mercury Elec. Co., 333 F.2d 89, 92 n.3 (9th Cir. 1964) (applying California law in a Miller Act case); United States *ex rel.* Ascher Corp. v. Bradley-Dodson Co., 281 F.2d 676, 681 (8th Cir. 1960) (applying Nebraska law in a Miller Act case); Am. Auto Ins. Co. v. United States *ex rel.* Luce, 269 F.2d 406, 411–12 (1st Cir. 1959) (applying Maine law in a Miller Act case).

[152] *See, e.g.*, Cont'l Cas. Co. v. Allsop Lumber Co., 336 F.2d 445, 449 (8th Cir. 1964) (holding that amount in controversy requirement of $10,000 then required under both 28 U.S.C. §§ 1331 and 1332 was inapplicable because "the Miller Act provides another and different basis for federal court jurisdiction because it requires that the action be brought in the name of the United States"); United States *ex rel.* Sligh v. Fullerton Constr. Co., 296 F. Supp. 518, 522 (D.S.C. 1968) (finding the Miller Act provided a basis for jurisdiction), *aff'd*, 407 F.2d 1339 (4th Cir. 1969); United States *ex rel.* Betts v. Cont'l Cas. Co., 224 F. Supp. 857, 860 (W.D. Pa. 1964); 6A WRIGHT ET AL., *supra* note 14, § 1551, at

In *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*,[153] the Court held that the Miller Act provides for attorney's fees.[154] In so ruling, the Court stated that "[t]he Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law."[155] As a result of this language, some lower courts now hold that federal common law governs contractual rights under the Miller Act as opposed to mandatory application of state law.[156] Other lower courts limit the *F. D. Rich* federal common law interpretation of the Miller Act to procedural issues, while continuing to view the contractual rights as governed by mandatory application of state law.[157] Finding § 1331 jurisdiction, as opposed to mere United-States-as-a-party jurisdiction, often matters for purposes of supplemental jurisdiction and the like.[158]

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542 n.8 (2010) (citing pre-*F. D. Rich* cases for the proposition that Miller Act suits take federal jurisdiction because the United States is a party).

[153] 417 U.S. 116 (1974).

[154] *Id.* at 121.

[155] *Id.* at 127.

[156] *See, e.g.*, United States *ex rel.* Lighting & Power Servs., Inc. v. Interface Constr. Corp., 553 F.3d 1150, 1153 (8th Cir. 2009) (quoting *F. D. Rich*, 417 U.S. at 127, and holding that federal law governs the substantive contractual rights at issue in a Miller Act case); *id.* at 1155 (exclusively citing Missouri contract law on contractual interpretation issue in a Miller Act case); Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758, 764 (10th Cir. 1997) (noting, after applying state law as a matter of discretion, that "we clearly, and repeatedly, [have] stated prejudgment interest awards on Miller Act claims are governed by federal law, not state law"); United States *ex rel.* A. V. DeBlasio Constr., Inc. v. Mountain States Constr. Co., 588 F.2d 259, 262 n.1 (9th Cir. 1978) ("[T]he Court has also held that when no such [federal–state] policy conflict exists, the federal courts may look to state law in fashioning substantive federal rules.").

[157] *See, e.g.*, United States *ex rel.* Pertun Constr. Co. v. Harvesters Grp., Inc., 918 F.2d 915, 919 (11th Cir. 1990) ("Although this action was brought under the Miller Act, the effect and validity of the contractual clause purportedly limiting the subcontractor's remedy for delay is governed by the law of Florida, the state in which the agreement was executed and was to be performed."); United States *ex rel.* M-CO Constr., Inc. v. Shipco Gen., Inc., 814 F.2d 1011, 1015 (5th Cir. 1987) ("In a Miller Act case, state law determines the amount of damages a subcontractor may receive."); United States *ex rel.* Aucoin Elec. Supply Co. v. Safeco Ins. Co. of Am., 555 F.2d 535, 541 (5th Cir. 1977) ("In this aspect [whether there was a material breach], Texas law would be applicable. The issue does not involve any construction of the Miller Act, to which federal law would apply, but involves performance in Texas of a contract made in Texas."); United States *ex rel.* Greenmoor, Inc. v. Travelers Cas. & Sur. Co. of Am., Civ. No. 06-234, 2007 WL 2071651, at *3 (W.D. Pa. July 13, 2007) ("Congress provided that the United States district courts have 'exclusive federal question jurisdiction' for actions under the Miller Act. . . . [H]owever, the underlying breach of contract claims that form the basis of the Miller Act claim will be determined on the basis of state law."); United States *ex rel.* Endicott Enters. Inc. v. Star Brite Constr. Co., 848 F. Supp. 1161, 1168 (D. Del. 1994) ("In actions brought under the Miller Act, issues not involving the construction of the [Miller] Act [itself], such as ordinary contract issues, will be resolved by the law of the state where the contract is performed.").

[158] *See, e.g.*, Arena v. Graybar Elec. Co., 669 F.3d 214, 221 (5th Cir. 2012) (treating the Miller Act as arising under § 1331 jurisdiction and using the same as the foundation for a supplemental jurisdiction analysis); Cont'l Cas. Co. v. Anderson Excavating & Wrecking Co., 189 F.3d 512, 515 (7th Cir. 1999) (Posner, J.) (accepting that Miller Act claims arise under § 1331 for purposes of determining whether procedural rules unique to admiralty law apply); *see also* Katz v. Cisneros, 16 F.3d 1204, 1207 (Fed.

Importantly, this circuit split regarding whether the federal courts are to use state law or federal common law to supply the rule of decision under the Miller Act coincides with the courts' taking of jurisdiction under § 1331 in Miller Act cases.[159] That is, contrary to the Holmes test, the federal courts did not take § 1331 jurisdiction over Miller Act claims before 1974—when they were conceived of as federal causes of action coupled with a mandatory application of state law rules of decision—yet now that such claims are thought to invoke federal common law rules of decision the courts often take § 1331 jurisdiction. Only a theory of § 1331 jurisdiction that considers the nature of the substantive rights at issue, such as is advanced by the *Mims* Court, adequately explains this state of affairs.[160]

3. Federal Tort Claims Act Cases.—The FTCA[161] presents another set of cases in which, contrary to the Holmes test, the federal courts often refuse § 1331 jurisdiction even though Congress has created a federal cause of action.[162] The FTCA waives the federal government's sovereign immunity for certain vicarious liability tort claims resulting from federal

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Cir. 1994) ("Even where a case is contractual . . . the presence of issues which require the interpretation of federal law and regulation necessarily give rise to federal questions." (citing Conille v. Sec'y of Hous. & Urban Dev., 840 F.2d 105, 109 (1st Cir. 1988))); N. Side Lumber Co. v. Block, 753 F.2d 1482, 1484 (9th Cir. 1985) (noting that a claim that enforcing a contract would violate a federal statute arises under federal law for purposes of § 1331).

[159] *See, e.g.*, United States *ex rel.* Balzer Pac. Equip. Co. v. Fid. & Deposit Co. of Md., 895 F.2d 546, 547 (9th Cir. 1990) (holding, in a circuit that takes a federal common law approach to Miller Act claims, that jurisdiction arises under § 1331); United States *ex rel.* LVI Envtl. Servs., Inc. v. Hunt Bldg. Co., No. 09-cv-02532-WYD-BNB, 2009 WL 4730488, at *1 (D. Colo. Dec. 8, 2009) (same); United States *ex rel.* Sheet Metal Eng'g, Inc. v. Job Shops Co., No. 4:05-cv-00080-RAW, 2006 WL 4005634, at *1 (S.D. Iowa Dec. 14, 2006).

[160] *See supra* note 11 and accompanying text (outlining that federal question jurisdiction requires that the federal courts be vested with declaratory power of the substantive law invoked, not mere interpretive power).

[161] Ch. 171, 62 Stat. 982 (1948) (codified as amended in scattered sections of 28 U.S.C.).

[162] The presence of the United States as defendant in FTCA actions would appear to moot the need for federal question jurisdiction. *See* U.S. CONST. art. III, § 2 (providing, as enacted by statute, subject matter jurisdiction over "Controversies to which the United States shall be a Party"). But the Court for several decades held that this provision only applied to the United States as a plaintiff party, requiring jurisdiction over the United States as a party defendant to arise as federal questions. *See* Williams v. United States, 289 U.S. 553, 577 (1933) (holding on original intent grounds, as further expressed in the Judiciary Act of 1789, that U.S. party jurisdiction only extends to the United States as a plaintiff). Most courts and commentators find this portion of *Williams* overturned by the plurality opinion in *Glidden Co. v. Zdanok*, 370 U.S. 530, 564 (1962) (Harlan, J., plurality opinion). *See, e.g.*, Kanar v. United States, 118 F.3d 527, 529 (7th Cir. 1997) ("No one today doubts that Article III courts may entertain suits against the United States seeking money damages. . . . *Williams* . . . [was] repudiated in *Glidden* . . . ." (citations omitted)). "Despite the fact that *Glidden* overturned *Williams*, for the thirty years that it remained good law, *Williams* pushed jurists to find another basis for constitutional jurisdiction over cases, like FTCA suits, in which the United States was a party defendant—a path that led many to conclude that jurisdiction for such cases arises as federal questions" post-*Glidden*. Mulligan, *Cross-Reference*, *supra* note 11, at 1207.

employees' actions.[163] As a result, when immunity is not extended, the FTCA renders the government defendant subject to liability as if it were a private entity.[164] Furthering the goal of treating the government like a private entity, the Act requires the application of state law as the rule of decision.[165] In applying this provision, the Court holds that the FTCA "requires application of the whole law of the State where the act or omission occurred."[166] As such, the Court holds "that federal courts should not create interstitial federal common law [in FTCA suits]."[167] Under the FTCA, then, the federal courts are strictly bound to apply state law[168] as the controlling rule of decision[169] as a matter of statutory command. At the same time, the Court has twice ruled that the FTCA creates a federal cause of action over these state law rights.[170] Thus, FTCA suits, like *Shoshone*

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[163] *See* Richards v. United States, 369 U.S. 1, 6 (1962) (holding that the FTCA removes sovereign immunity).

[164] 28 U.S.C. § 1346(b) (2006).

[165] The Supreme Court has been remarkably consistent in holding that § 1346(b)'s reference to the "law of the place" means the law of the State. *See, e.g.*, Miree v. DeKalb Cnty., 433 U.S. 25, 29 n.4 (1977); United States v. Muniz, 374 U.S. 150, 153 (1963); *Richards*, 369 U.S. at 6–7, 11; Rayonier Inc. v. United States, 352 U.S. 315, 318 (1957). I am putting aside complicated questions of which law applies under the FTCA if a tort occurs in Indian Country or in a federal enclave. *See, e.g.*, J. Matthew Martin, *Federal Malpractice in Indian Country and the "Law of the Place": A Re-Examination of* Williams v. United States *Under Existing Law of the Eastern Band of Cherokee Indians*, 29 CAMPBELL L. REV. 483 (2007) (arguing that tribal law should apply in FTCA cases when torts occur in Indian Country). The Court has only once contemplated the application of federal common law as the rule of decision in an FTCA case. *See* Smith v. United States, 507 U.S. 197, 201–02 (1993). *Smith* is unique, however, in that the alleged torts occurred in Antarctica, where state law does not govern and, arguably, no sovereign's law applies. *Id.* The Court, however, avoided this difficulty by holding that Antarctica was a foreign country within the meaning of the FTCA's foreign-country exception to tort liability. *Id.* at 203–04.

[166] *Richards*, 369 U.S. at 11 (holding that state law controls choice of law issues, as well as substantive tort law, in FTCA cases).

[167] Chevron Oil Co. v. Huson, 404 U.S. 97, 105 n.8 (1971); *see also* Birnbaum v. United States, 588 F.2d 319, 327–28 (2d Cir. 1978) ("Congress expressly negated any possible inference that federal courts were to exercise any 'common law-making' power to fashion torts under the Act in the interest of national uniformity."). One district court decision holds to the contrary, but the vast weight of authority suggests this holding is in error. *See* S. Pac. Transp. Co. v. United States, 462 F. Supp. 1193, 1210 (E.D. Cal. 1978) (holding that the view that "the FTCA requires the application of state law operative of its own force . . . is erroneous; instead, the Act provides for the application of state law incorporated into federal law as the federal rule of decision").

[168] *See, e.g.*, Bravo v. United States, 532 F.3d 1154, 1164 (11th Cir. 2008) ("[W]e are bound to decide the issue the way the Florida courts would have . . . ."); Arpin v. United States, 521 F.3d 769, 776 (7th Cir. 2008) (applying state law to determine damages); Goodman v. United States, 2 F.3d 291, 292 (8th Cir. 1993) (applying the state law of the state in which the acts occurred).

[169] *See* FDIC v. Meyer, 510 U.S. 471, 478 (1994) (holding that claims of federal constitutional violations are not cognizable under the FTCA because under the FTCA, state law provides the sole font of substantive law).

[170] *See* Loeffler v. Frank, 486 U.S. 549, 562 (1988) (explaining that § 2679(a) limits the scope of waivers "in the context of suits for which [Congress] provided a *cause of action* under the FTCA" (emphasis added)); *Meyer*, 510 U.S. at 477 (quoting this language from *Loeffler* and speaking in terms

Mining Co. and pre-1974 Miller Act cases, present the § 1331 jurisdictional question against the backdrop of federal causes of action coupled with mandatory applications of state law rights.[171]

Despite the clear case that FTCA claims should arise under § 1331 jurisdiction pursuant to the Holmes test, confusion reigns in regard to the statutory basis for jurisdiction under the FTCA.[172] Some lower federal courts, for example, hold that FTCA cases take jurisdiction under both § 1346(b), the FTCA's jurisdictional statute, and § 1331.[173] While these opinions tend to take § 1331 jurisdiction without much discussion, given the ubiquity of Holmes test rhetoric, the assumption that these courts are deploying the test *sub silentio* is not without merit.[174] Other courts hold that jurisdiction to hear FTCA claims, because the government is a party, does "*not* come from the general grant of federal-question jurisdiction of 28 U.S.C. § 1331."[175]

Significantly, those courts that decline § 1331 jurisdiction over FTCA cases do so by focusing, as the *Mims* decision instructs, upon the nature of

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of statutory elements of an FTCA claim); *see also* Tri-State Hosp. Supply Corp. v. United States, 341 F.3d 571, 576 (D.C. Cir. 2003) (similar); Dorking Genetics v. United States, 76 F.3d 1261, 1264 (2d Cir. 1996) (similar); Fred Blanton, *Jurisdictional Problems of the Federal Tort Claims Act*, 13 U. PITT. L. REV. 511, 513–15 (1952) (arguing that federal law creates the plaintiffs' cause of action in FTCA cases). Not all courts of appeals, however, accept the Supreme Court's characterization of the FTCA. *See, e.g.*, CNA v. United States, 535 F.3d 132, 143 n.7 (3d Cir. 2008) ("[Section] 1346(b)(1) grants federal courts jurisdiction and also allows plaintiffs to bring state-law causes of action . . . ."); *Dorking Genetics*, 76 F.3d at 1266 (similar); Johnson v. Sawyer, 47 F.3d 716, 725 (5th Cir. 1995) (similar).

[171] FTCA suits do differ, however, from the *Shoshone Mining Co.* cases in that FTCA suits have an alternative ground for federal jurisdiction in that the United States is a party to FTCA suits. *See infra* note 172. In this regard, FTCA suits mirror Miller Act suits.

[172] *See generally* 13D WRIGHT ET AL., *supra* note 14, § 3563, at 225 n.26 ("There is debate about whether suits under the Federal Tort Claims Act . . . are federal question cases or whether . . . they come under the constitutional grant of judicial power to 'Controversies to which the United States shall be a party.'").

[173] *See, e.g.*, Luna v. United States, 454 F.3d 631, 635 (7th Cir. 2006) ("The Navy characterizes this as a question of subject-matter jurisdiction. It is not. The district court had subject-matter jurisdiction because Luna brought her claim under the FTCA, which is to say she presented the district court with a federal question." (citing 28 U.S.C. § 1331 (2006))); Nationwide Mut. Ins. Co. v. Liberatore, 408 F.3d 1158, 1161–62 (9th Cir. 2005) (finding jurisdiction under both the FTCA and § 1331); Fla. E. Coast Ry. Co. v. United States, 519 F.2d 1184, 1194 (5th Cir. 1975) (holding that raising an FTCA claim also raises a "substantial federal question"); U.S. Marine, Inc. v. United States, Civ. No. 08-2571, 2010 WL 1403958, at *4 (E.D. La. Apr. 1, 2010) ("The Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 2671 et seq. (Federal Tort Claims Act)."); *see also* Hankes v. United States, No. 08-CV-333-JHP-TLW, 2010 WL 2196561, at *1 (N.D. Okla. May 27, 2010) ("Plaintiff brings this action pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., invoking federal question jurisdiction.").

[174] *See supra* note 96 and accompanying text (discussing the prevalence of the Holmes test).

[175] CNA v. United States, 535 F.3d 132, 140 (3d Cir. 2008); *see also* Gilberg v. Stepan Co., 24 F. Supp. 2d 325, 346 (D.N.J. 1998) ("When Congress granted the federal courts original (and exclusive) jurisdiction over Federal Tort Claims Act ("FTCA") actions, it did so under 28 U.S.C. § 1346(b)(1), *not* section 1331.").

the federal right at issue in FTCA suits. Such a rights-based focus demonstrates that standard application of the well-pleaded complaint rule bars § 1331 jurisdiction over FTCA suits.[176] The FTCA is merely a limited waiver of sovereign immunity to state law rights.[177] Although the waiver of immunity is of a jurisdictional dimension, it is, as a procedural matter, a defense.[178] As a result, the existence of a federal sovereign immunity defense, following the well-pleaded complaint rule, will not vest § 1331 jurisdiction.[179] As a result, a claim that the FTCA bars or allows a suit should not survive a well-pleaded complaint rule challenge to § 1331 jurisdiction.[180] The *Mims* approach, with its inclusion of both federal causes of action and rights into the default § 1331 analysis, therefore, offers greater explanatory power to FTCA jurisdictional disputes than does a strict application of the Holmes test because *Mims* aides in the illustration that FTCA cases only substantively raise federal law as a defense. The Holmes test's myopic focus on the federal cause of action, however, overlooks this

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[176] *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (establishing the well-pleaded complaint rule, which holds that only matters in the complaint, not defenses, may give rise to § 1331 federal questions).

[177] United States v. Orleans, 425 U.S. 807, 813 (1976) ("The Federal Tort Claims Act is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment.").

[178] The Court regularly treats federal sovereign immunity as a defense. *See, e.g.*, United States v. Interstate Commerce Comm'n, 337 U.S. 426, 462 (1949) ("The *defense* of sovereign immunity, moreover, cannot be avoided by directing that the suit proceed only against the Interstate Commerce Commission." (emphasis added)); United States v. Sherwood, 312 U.S. 584, 586 (1941) (discussing the sovereign immunity defense and jurisdiction). The courts of appeals have aptly labeled these jurisdictional defenses. *See, e.g.*, Hydrogen Tech. Corp. v. United States, 831 F.2d 1155, 1162 n.6 (1st Cir. 1987) ("It is well-established law that . . . jurisdictional defenses cannot be waived by the parties and may be raised for the first time on appeal or even raised by a court sua sponte."); *see also* Roberts v. United States, 887 F.2d 899, 900 (9th Cir. 1989) (similar).

[179] Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 10–11 (1983) (holding that the presence of a federal immunity defense, even if pleaded on the face of the complaint, is not sufficient to bring a claim within § 1331 jurisdiction).

[180] *See, e.g.*, *Gilberg*, 24 F. Supp. 2d at 346–47 (holding that under the well-pleaded complaint rule, "such a claim [would not] fall within 28 U.S.C. § 1331's grant of jurisdiction . . . because the federal agency or employee could raise an immunity defense under the FTCA's exclusive remedy provision"); *see also* Sanchez v. Beacon Info. Tech. & Staffing & Serv., LLC, No. EP-08-CV-332-KC, 2009 WL 4877705, at *3 (W.D. Tex. Dec. 10, 2009) (similar). There is some confusion regarding whether the exceptions to the FTCA's waiver of immunity, codified at 28 U.S.C. § 2680, constitute jurisdictional issues or affirmative defenses for the government. Two circuits view this as a defense. *See* Prescott v. United States, 973 F.2d 696, 702 (9th Cir. 1992) ("Because an exception to the FTCA's general waiver of immunity, although jurisdictional on its face, is analogous to an affirmative defense . . . ."); Stewart v. United States, 199 F.2d 517, 520 (7th Cir. 1952) (similar). Three circuits have adopted a contrary holding. *See* Sharp v. United States, 401 F.3d 440, 443 n.1 (6th Cir. 2005) (noting that *Prescott* may conflict with *United States v. Gaubert*, 499 U.S. 315 (1991), and declining to address whether the plaintiff or the Government has the burden of proving the FTCA's discretionary function exception); Autery v. United States, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993) (same); Kiehn v. United States, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993) (same).

nuance because it takes jurisdiction merely on a federal cause of action that raises no substantive federal law in the complaint.

4. Suits to Enforce Procedural Rights.—Further reinforcing my descriptive thesis that the *Mims* approach better describes § 1331 jurisdiction than does the Holmes test, I turn now to a brief review of cases where the Court refuses to take § 1331 jurisdiction over claims that couple procedural federal rights with a federal cause of action such as 42 U.S.C § 1983.[181] Section 1983 creates a federal statutory cause of action for the violation of federal rights by state officials, but it does not create rights themselves.[182] Thus, § 1983 cases present instances where only the validity of the federal right asserted is at issue—not the existence of a congressionally created cause of action. A straightforward application of the Holmes test, of course, should take jurisdiction over any federal cause of action, even to enforce procedural rights. These cases again show the weakness of the Holmes test as an explanatory device.

The federal courts, deploying a rights-focused theory of § 1331 jurisdiction akin to the *Mims* approach, consistently decline § 1331 jurisdiction when plaintiffs couple procedural federal rights with a § 1983 cause of action. For instance, when a plaintiff attempts to use the All Writs Act,[183] a choice of law statute,[184] or a rule of procedure[185] to vest federal question jurisdiction, the federal courts will not find that § 1331 jurisdiction arises. Similarly, the Court holds that suits to enforce the Full Faith and Credit Clause of the Constitution do not arise under § 1331[186] because the

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[181] *See* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 34 (2002) ("The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that [§ 1331] requirement."); Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 618 (1979) (finding that § 1983 can be used to show that an action is "authorized by law," but that the act itself does not "provide any rights at all"); *see also* Mulligan, *A Unified Theory*, *supra* note 93, at 1686, 1725–26 (outlining my rights-focused, unified approach to § 1331 jurisdiction).

[182] Nevada v. Hicks, 533 U.S. 353, 404 (2001) (Stevens, J., concurring) ("Section 1983 creates no new substantive rights; it merely provides a federal cause of action for the violation of federal rights that are independently established either in the Federal Constitution or in federal statutory law." (citation omitted)).

[183] *See, e.g.*, *Syngenta*, 537 U.S. at 32–34.

[184] *See, e.g.*, Rogers v. Platt, 814 F.2d 683, 689 (D.C. Cir. 1987) (holding that the Parental Kidnapping Prevention Act does not create colorable rights but rather provides a choice of law rule and as such the court lacks jurisdiction).

[185] *See, e.g.*, Palkow v. CSX Transp., Inc., 431 F.3d 543, 555 (6th Cir. 2005) ("Merely invoking the Federal Rules of Civil Procedure [Rule 60(b)] is not sufficient grounds to establish federal question jurisdiction."); Milan Express, Inc. v. Averitt Express, Inc., 208 F.3d 975, 979 (11th Cir. 2000) (holding in regard to Rule 65.1 that a "federal rule cannot be the basis of original jurisdiction"); Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 70 (2d Cir. 1990) ("The Rules do not provide an independent ground for subject matter jurisdiction over an action for which there is no other basis for jurisdiction."); Port Drum Co. v. Umphrey, 852 F.2d 148, 150 (5th Cir. 1988) (holding that the court lacks jurisdiction to hear a suit directly under Rule 11).

[186] *See* Thompson v. Thompson, 484 U.S. 174, 182 (1988); Minnesota v. N. Sec. Co., 194 U.S. 48, 72 (1904).

Clause does not create substantive rights, but rather provides a res judicata rule (i.e., a procedural rule) for state courts.[187] Similarly, the Court holds that suits brought to enforce the Supremacy Clause of the Constitution do not arise under § 1331, even when Congress supplies a federal cause of action.[188] As the Court reasoned, the "Clause is not a source of any federal rights," but rather a choice of law rule for cases of conflict between state and federal law.[189] Again, the Holmes test simply cannot account for such rulings, while the *Mims* approach, with its rights-inclusive focus, accommodates these suits and their rights-based discussions into the standard § 1331 canon readily.

B. Explaining the Taking of Jurisdiction over Federal Causes of Action Paired with State Law Rights

In addition to offering a justificatory backdrop for the many suits in which the existence of a federal cause of action does not vest § 1331 jurisdiction, the *Mims* rights-inclusive approach offers a platform to coherently explain suits in which the courts do take statutory federal question jurisdiction over federal causes of action coupled with state law rules of decision. In this section, I look to two scenarios where such a combination occurs: Tucker Act cases and enclave jurisdiction cases. A strict Holmes test approach, focusing only upon the federal cause of action, cannot divine a meaningful distinction between these cases and the *Shoshone Mining Co.*, Miller Act, FTCA, and procedural rights cases. The *Mims* approach, with its inclusion of the nature of federal rights into the § 1331 analysis, provides the doctrinal space to distinguish these sets of cases based upon the force with which these applications of state law rights are made.

1. Tucker Acts Cases.—I begin with the Tucker Act[190] and the so-called Little Tucker Act[191] where the Holmes test, once again, fails to adequately account for the jurisdictional practice of the courts. Under the Tucker Act, the Court of Federal Claims has original jurisdiction of any

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[187] *Thompson*, 484 U.S. at 182–83 ("Rather, the Clause only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting." (internal quotation marks omitted)).

[188] *See, e.g.*, Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 612–15 (1979) (holding that there is no federal question jurisdiction under 28 U.S.C. § 1343(a)(3) for a 42 U.S.C. § 1983 claim alleging a violation of the Supremacy Clause); Virgin v. Cnty. of San Luis Obispo, 201 F.3d 1141, 1144–45 (9th Cir. 2000) (holding that a plaintiff does not have a cause of action directly under the Supremacy Clause and that the court lacks subject matter jurisdiction under 28 U.S.C. § 1331 as a result).

[189] *Chapman*, 441 U.S. at 613.

[190] Ch. 359, 24 Stat. 505 (1887) (codified as amended at 28 U.S.C. § 1491 (2006)).

[191] § 1346(a)(2).

civil action or claim against the United States, exceeding $10,000, founded either upon federal law, contract, or tort.[192] Under the Little Tucker Act, the federal district courts have original jurisdiction, concurrent with the Court of Federal Claims, for similar claims of less than $10,000.[193] (I will refer to the Tucker and Little Tucker Acts collectively as the Tucker Acts.)

The Tucker Acts present cases in which federal causes of action are coupled with state law causes of action. The Tucker Acts are jurisdictional provisions that waive sovereign immunity.[194] Unlike the FTCA, the Tucker Acts do not provide that the United States is to be dealt with as if it were a "private person."[195] In line with their statutory directives,[196] contract claims brought under the Tucker Acts are governed by federal common law rules of decision,[197] contrary to practice under the FTCA and the Miller Act. Although these contract claims brought under the Tucker Acts are governed by federal common law, the federal courts uniformly choose state law contract rights as the rule of decision in such cases.[198]

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[192] § 1491. The Little Tucker Act set the $10,000 amount-in-controversy requirement by reserving concurrent district court jurisdiction for cases under that threshold.

[193] § 1346(a)(2).

[194] *See, e.g.*, United States v. Testan, 424 U.S. 392, 400–02 (1976); Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1554 (Fed. Cir. 1994).

[195] *Compare* § 1346(b) (employing private person language), *with* § 1346(a) (lacking private person language). *See also* Malman v. United States, 207 F.2d 897, 898 (2d Cir. 1953) (making this distinction).

[196] *See* Woodbury v. United States, 313 F.2d 291, 295 (9th Cir. 1963) (noting that lack of the "private person" language in the Tucker Acts supports the application of federal common law to contract claims under the Tucker Act).

[197] *See* Nat'l Presto Indus., Inc. v. United States, 338 F.2d 99, 111 (Ct. Cl. 1964) (en banc) ("[F]ederal courts can and should proceed under the Tucker Act . . . to develop and establish just and practical principles of contract law for the Federal Government."); *see also* XTRA Lease, Inc. v. United States, 50 Fed. Cl. 612, 621 (2001) (similar); Cegers v. United States, 7 Cl. Ct. 615, 621 n.10 (1985) (similar). The Court has made similar pronouncements regarding government contracts often, but not in the context of Tucker Act cases. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988); United States v. Little Lake Misere Land Co., 412 U.S. 580, 592–94 (1973); United States v. Seckinger, 397 U.S. 203, 209–10 (1970); Nat'l Metro. Bank v. United States, 323 U.S. 454, 456 (1945); United States v. Cnty. of Allegheny, 322 U.S. 174, 183 (1944); Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943).

[198] *See, e.g.*, Mobil Oil Exploration & Producing Se., Inc. v. United States, 530 U.S. 604, 607 (2000) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); United States v. Winstar Corp., 518 U.S. 839, 895 (1996) (plurality opinion) (making the same statement in a Tucker Act suit in which the Court refused to apply sovereign-only rules to a government contract); United States v. Bostwick, 94 U.S. 53, 66 (1876) ("The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf."); Ginsberg v. Austin, 968 F.2d 1198, 1200 (Fed. Cir. 1992) (similar); Cal. Or. Broad., Inc. v. United States, 74 Fed. Cl. 394, 399 (2006) (same in a Tucker Act suit). The Court takes this view of contract enforcement, that state law provides the rule of decision, in non-Tucker Act cases as well. *See* Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 691–92 (2006) ("In post-*Clearfield* decisions . . . we have recognized, [it] is often [prudent] to adopt the readymade body of state law as the federal rule of decision . . . ." (internal quotation marks

Contrary to the practice under the *Shoshone Mining Co.*, Miller Act, and FTCA lines of cases, however, many federal courts take § 1331 jurisdiction over cases brought pursuant to the Tucker Acts.[199] Not only does this practice under the Tucker Acts appear at odds with our previously reviewed cases, but also the Holmes test offers no coherent means of accounting for this distinction. The *Mims* approach, with its rights-inclusive analysis, provides the conceptual space to account for this difference in practice.

Both the Tucker Acts cases and the *Shoshone Mining Co.* lines of cases feature federal causes of action paired with state law rights. Nevertheless, inclusion of a state law rule of decision in the Tucker Acts is accomplished discretionarily as a matter of federal common law.[200] State law rules of decision are mandated by Congress in the *Shoshone Mining Co.* et al.[201] It is this difference in the strength of force—mandatory versus discretionary—by which the state law right applies that explains the different jurisdictional treatment here.[202] It is only with a focus upon the nature of the rule of decision in the § 1331 analysis, as is forwarded in the *Mims* decision, that *Shoshone Mining Co.* and the line of cases involving the Miller Act, FTCA,

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omitted)); United States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979); *Clearfield Trust*, 318 U.S. at 369.

[199] *See* C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co., 903 F.2d 114, 119 (2d Cir. 1990) ("We hold that an action (regardless of the amount sought) may be commenced under § 1331 in the district court provided there is an independent waiver of sovereign immunity outside the Tucker Act."); *see also* W. Sec. Co. v. Derwinski, 937 F.2d 1276, 1280–81 (7th Cir. 1991) (similar); Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174, 182 n.14 (8th Cir. 1978) (similar). Other circuits disagree. *See* Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 986 n.6 (9th Cir. 2006), *modified on other grounds*, 540 F.3d 916 (9th Cir. 2008); A.E. Finley & Assocs., Inc. v. United States, 898 F.2d 1165, 1167 (6th Cir. 1990) (per curiam) ("[I]f an action rests within the exclusive jurisdiction of the Claims Court under the Tucker Act . . . the district court does not have jurisdiction regardless of other possible statutory bases."); New Mexico v. Regan, 745 F.2d 1318, 1321–22 (10th Cir. 1984); Graham v. Henegar, 640 F.2d 732, 734 & n.6 (5th Cir. Unit A Mar. 1981) (similar). The D.C. Circuit has noted the split but has declined to comment. *See* Md. Dep't of Human Res. v. Dep't of Health & Human Servs., 763 F.2d 1441, 1448 n.4 (D.C. Cir. 1985). There seems little doubt that the Tucker Acts present constitutional federal questions. *See* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 610 (1949) (Rutledge, J., concurring) ("Suffice it to say that, if such suits are not 'Controversies to which the United States shall be a Party,' they are presumptively within the purview of the [constitutional] federal-question jurisdiction . . . . This is, at least, the conventional view of district court jurisdiction under the Tucker Act.").

[200] *See, e.g.*, *Winstar Corp.*, 518 U.S. at 860 (plurality opinion) (stating that the issue in this Tucker Act suit was whether to apply special rules not available to private parties at state law, thus illustrating that the Court had the authority to deviate if it so chose); *id.* at 919 (Scalia, J., concurring) (noting that he would keep the special sovereign defenses, further illustrating the authority of the Court to diverge from state law here); *id.* at 924, 937 (Rehnquist, C.J., dissenting) (noting he would apply special contract rules in this instance, again illustrating the Court's authority to deviate from state law); *see also supra* notes 197–98 and accompanying text (discussing the application of state law rules of decision as a matter of federal common law).

[201] *See supra* Part II.A (discussing the mandatory nature of a state law rule of decision).

[202] *See* Mulligan, *Cross-Reference*, *supra* note 11, at 1212–14 (discussing the discretionary application of state law rights and federal question jurisdiction in the context of the Tucker Acts).

and Tucker Acts can be coherently incorporated into one standard § 1331 canon—a distinction that even the contemporary iteration of the Holmes test cannot address.

2. Federal Enclaves Cases.—Next, I look to § 1331 jurisdiction over civil claims arising in federal enclaves. Here, federal courts take jurisdiction over suits that nominally appear similar to the *Shoshone Mining Co.* line of cases because they feature federal causes of action coupled with state law rights. Like Tucker Acts suits, however, only a rights-inclusive view of § 1331 jurisdiction, as is deployed in *Mims*, can adequately account for the courts' differing treatments.

Congress possesses exclusive legislative jurisdiction over federal enclaves—land ceded by states to the federal government for the construction of federal installations.[203] Given that balance of power, state law does not survive cessation to the federal government.[204] Nevertheless, Congress seldom passes comprehensive codes of contract or tort law that would apply to suits arising in federal enclaves.

As a result, civil law[205] in these enclaves is typically found by a constitutional presumption that the law of the state in which the federal enclave sits applies.[206] While the Court has announced three competing theories regarding the scope of this constitutional presumption applying state civil law in federal enclaves,[207] the leading view holds that, absent congressional action to the contrary, all law of the state in which the federal

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[203] U.S. CONST. art. I, § 8, cl. 17 (permitting the federal government to set up enclaves within states if the relevant state legislature grants consent). Due to the circumstances of the cessation of the land at issue, federal enclaves come in four varieties. The federal government may hold (1) exclusive authority over the area, (2) authority concurrently with the state, (3) authority limited to particular subjects, or (4) no authority, but rather hold property as a normal proprietor. *See* Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 554 n.73 (1983).

[204] *See* Goldberg-Ambrose, *supra* note 203.

[205] Congress has incorporated state criminal law by statute. *See* 18 U.S.C. § 13(a) (2006) (cross-referencing state criminal law as the operative law in federal enclaves).

[206] *See* James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99 (1940) ("The Constitution does not command that every vestige of the laws of the former sovereignty [in federal enclaves] must vanish. . . . [It] has long been interpreted so as to permit the continuance until abrogated of those rules . . . ."). There are, however, several areas of civil law where Congress has passed specific statutory regulation. *See, e.g.*, 16 U.S.C. § 457 (2006) (cross-referencing state wrongful death law as operative in federal enclaves); Stephen E. Castlen & Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 123–24 (1997) (providing a comprehensive set of examples). In this section, however, I am not focusing on those instances of statutory cases, but rather on those instances where Congress has not acted and the federal courts cross-reference state law by constitutional presumption. *See* Goldberg-Ambrose, *supra* note 203, at 555–56 (discussing statutory incorporation of state civil law in federal enclaves).

[207] *See* Kelly v. Lockheed Martin Servs. Grp., 25 F. Supp. 2d 1, 4 (D.P.R. 1998) (noting that the Supreme Court has not reconciled these competing holdings); Michael J. Malinowski, Note, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Legislative Jurisdiction*, 100 YALE L.J. 189, 193–96 (1990) (providing an overview of the Court's three theories of enclave jurisdiction).

enclave resides is applicable within the enclave unless it interferes with the federal government's constitutional legislative jurisdiction.[208]

Civil actions arising in federal enclaves are treated, jurisdictionally speaking, similarly to Tucker Acts cases. First, the courts treat the cause of action in such suits as a federal one.[209] State law, however, provides the rules of decision in such cases.[210] Like Tucker Acts cases, the courts universally take § 1331 jurisdiction over these claims.[211] Again, like the Tucker Acts suits, the inclusion of a state law rule of decision in the enclave cases is accomplished discretionarily as a matter of federal common law,[212] while state law rules of decision are mandated by Congress in *Shoshone Mining Co.* et al.[213] Again, it is this difference in the strength of force by which the state law right applies that explains the different jurisdictional treatment here.[214] Unlike the *Mims* rights-inclusive analysis, the Holmes test's cause-of-action-centered view is incapable of accounting for the courts' disparate treatment of the enclave cases as compared to the *Shoshone Mining Co.* line of cases.

C. Jurisdiction Without a Federal Cause of Action

Invoking a tradition dating to the nineteenth century,[215] the federal courts will take § 1331 jurisdiction over cases in which state law causes of action are coupled with federal rights.[216] State law causes of action are frequently conjoined with federal rights.[217] State statutes often create state law causes of action that mandatorily deploy federal law as the rule of

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[208] *See* Howard v. Comm'rs of the Sinking Fund of Louisville, 344 U.S. 624, 626–27 (1953).

[209] *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 99 (1972) (characterizing causes of action in enclave cases as arising out of federal common law); Mater v. Holley, 200 F.2d 123, 124 (5th Cir. 1952) (holding that because state law rules of decision apply only at the discretion of federal authority, the cause of action in enclave cases is federal in origin).

[210] *See supra* notes 205–08 and accompanying text (discussing the applicability of state law in federal enclaves).

[211] *See, e.g.*, *City of Milwaukee*, 406 U.S. at 99 (citing with approval *Mater v. Holley*'s taking of § 1331 jurisdiction over an enclave case); Durham v. Lockheed Martin Corp., 445 F.3d 1247, 1250–51 (9th Cir. 2006) (holding that, because the alleged tort of exposure to asbestos occurred on a federal enclave, it invoked federal question jurisdiction under § 1331); Celli v. Shoell, 40 F.3d 324, 328 & n.4 (10th Cir. 1994) (similar).

[212] *See supra* notes 206–08 and accompanying text (discussing the application of state law by rebuttable presumption).

[213] *See supra* Part II.A (discussing the mandatory nature of state law rules of decision).

[214] *See* Mulligan, *Cross-Reference*, *supra* note 11, at 1224–26 (discussing the discretionary application of state law rights and federal question jurisdiction in the context of the enclave cases).

[215] *See infra* Part III.A (discussing federal question jurisdiction doctrine at the time § 1331 was passed in 1875).

[216] *See supra* note 65.

[217] *See* Mulligan, *Cross-Reference*, *supra* note 11, at 1221–23.

decision.[218] Similarly, state common law causes of action often rely upon federal statutory[219] and constitutional[220] rights as the rule of decision. Taking § 1331 jurisdiction over such suits, of course, runs contrary to the dictates of the classic presentation of the Holmes test.[221] I turn now to a brief discussion of when such cases will arise under § 1331 jurisdiction, focusing upon the Court's post-*American Well Works* cases.

I begin with *Smith v. Kansas City Title & Trust Co.*,[222] where, as discussed above,[223] a stockholder sued in federal court to enjoin his corporation from purchasing bonds issued pursuant to the Federal Farm Loan Act.[224] The plaintiff argued that such a purchase constituted a state law breach of fiduciary duty cause of action because the corporation could only purchase bonds "authorized to be issued by a valid law" and that the Federal Farm Loan Act was unconstitutional.[225] Although the plaintiff pursued a state law cause of action, the Court held, over Justice Holmes's strong dissent,[226] that:

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[218] *See, e.g.*, CAL. CIV. CODE § 54.1(d) (West 2007) (cross-referencing rights created by the Americans with Disabilities Act); CONN. GEN. STAT. ANN. § 31-51q (West 2011) (creating a cause of action against employers who discipline or discharge an employee for exercising First Amendment rights); S.C. CODE ANN. § 16-17-560 (2003) (similar cross-reference to federal constitutional rights); *see also* GA. CODE. ANN. § 16-14-3(9)(A) (West Supp. 2011) (defining racketeering by cross-reference to federal statutes); TENN. CODE ANN. § 53-10-101(a) (2008) (defining prohibited narcotics by cross-reference to federal law).

[219] *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 311–12 (2005) (applying IRS standard in a state law quiet title action); Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 805–07 (1986) (seeking to use federal FDCA standards in a state law negligence per se action); Vinnick v. Delta Airlines, Inc., 113 Cal. Rptr. 2d 471, 481 (Ct. App. 2001) ("[The] negligence per se standard can be applied to a violation of federal standards . . . ."); Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774, 776, 778 (Fla. Dist. Ct. App. 1994) (holding that a violation of the federal Gun Control Act can amount to negligence per se); Lohmann *ex rel.* Lohmann v. Norfolk & W. Ry. Co., 948 S.W.2d 659, 672 (Mo. Ct. App. 1997) (noting that the plaintiff could amend the petition to include "negligence per se in failing to comply with federal regulations").

[220] *See, e.g.*, *Ex parte* Duvall, 782 So. 2d 244, 246, 248 (Ala. 2000) (holding that state law torts of assault, unlawful arrest, false imprisonment, and conspiracy were barred as a matter of law because the police officer met the Fourth Amendment's probable cause standard when detaining the plaintiff); Susag v. City of Lake Forest, 115 Cal. Rptr. 2d 269, 278 (Ct. App. 2002) (holding that the plaintiff's state law claims of battery, intentional infliction of emotional distress, and false imprisonment failed as a matter of law because the plaintiff "did not meet his burden of producing evidence showing [the defendants] used physical force against or exerted authority over him that resulted in a 'seizure' under the Fourth Amendment"); Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994) (noting that a plaintiff alleging false imprisonment must show that a defendant's actions were unlawful, which often amounts to whether a defendant acting under color of law had probable cause).

[221] *See supra* notes 50–54 and accompanying text (discussing Justice Holmes's dissent in *Smith*).

[222] 255 U.S. 180 (1921).

[223] *See supra* notes 50–54 and accompanying text.

[224] *See* 255 U.S. at 195.

[225] *Id.* at 198.

[226] *See supra* notes 50–54 and accompanying text.

> [W]here it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution . . . and that such federal claim is not merely colorable, . . . the District Court has jurisdiction under this provision.[227]

In so doing, the Court found that a plaintiff could avail himself of a federal forum on a state law theory of recovery under § 1331 because the plaintiff's state law cause of action necessarily required the court to pass upon the constitutionality of a federal act.[228]

The Court engaged with this *Smith*-style approach to § 1331 jurisdiction several times in the ensuing years,[229] culminating with its decision in *Grable & Sons*.[230] Here, the IRS seized real property belonging to Grable & Sons to satisfy a federal tax deficiency and sold the property to Darue Engineering.[231] Five years later, Grable & Sons sued Darue Engineering in state court to quiet title, a state law cause of action.[232] Grable & Sons asserted that Darue Engineering's title was invalid because the IRS had conveyed the seizure notice to Grable & Sons in violation of provisions of the Internal Revenue Code governing such actions.[233] The Supreme Court affirmed § 1331 jurisdiction in the case because the plaintiff's state law cause of action necessarily depended upon a claim of a substantive federal right.[234] The Court elaborated on this holding, ruling that § 1331 jurisdiction will exist if the plaintiff asserts a "substantial" and "serious" claim to a federally created right,[235] the federal right is the central and predominant question in the case,[236] the legal content of the federal right invoked is actually contested by the parties,[237] and taking jurisdiction in the case comports with congressional intent regarding the division of labor between

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[227] *Smith*, 255 U.S. at 199.

[228] *See id.* at 201–02.

[229] *See, e.g.*, Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 805–07 (1986) (seeking to use federal FDCA standards in a negligence per se action); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (discussing *Smith*-style jurisdiction); Wheeldin v. Wheeler, 373 U.S. 647, 659–60 (1963) (Brennan, J., dissenting) (similar); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 318–22 (1936) (taking jurisdiction over a state law fiduciary duty case that presented an embedded constitutional challenge). In prior work, I provided a more detailed account of this line of cases. *See* Mulligan, *A Unified Theory*, *supra* note 93, at 1698–1701, 1710–12, 1721–25.

[230] 545 U.S. 308 (2005).

[231] *Id.* at 310–11.

[232] *Id.* at 311.

[233] *Id.* Grable maintained that the IRS failed to comply with the notice procedures of 26 U.S.C. § 6335(a).

[234] 545 U.S. at 316.

[235] *See, e.g.*, *id.* at 313 ("It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.").

[236] *Id.*

[237] *Id.*

the state and federal courts.[238] The Court reaffirmed the validity of this approach a year later, though noting that *Grable & Sons* jurisdiction constitutes a "special and small" exception to the classic Holmes test view.[239]

* * *

The *Smith* line of cases—along with the *Shoshone Mining Co.*, Miller Act, FTCA, procedural rights, Tucker Acts, and federal enclave cases—illustrate that neither the classic nor the contemporary iterations of the Holmes test are descriptively accurate accounts of significant portions of the Court's § 1331 canon.

[238] *Id.* at 313–14. To be clear, the Court treats the substantial right factor as necessary, but not sufficient, for finding § 1331 jurisdiction. *Id.* at 318–19. It also requires a finding that jurisdiction "is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Id.* at 313–14. For lower court examples of this specific finding of congressional intent, see Broder v. Cablevision Sys. Corp., 418 F.3d 187, 194–96 (2d Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over a state law contract claim that required construction of federal cable television law because taking this jurisdiction would not upset the flow of litigation in state and federal courts), and Municipality of San Juan v. Corporación para el Fomento Económico de la Ciudad Capital, 415 F.3d 145, 148 n.6 (1st Cir. 2005) (applying *Grable & Sons* and taking jurisdiction over state law contract claim that required construction of HUD regulations); see also Redish, *supra* note 16, at 1793 (arguing that federal question jurisdiction over hybrid claims should lie to "increase the level of state-federal judicial interchange in the shaping and development of the relevant federal statute"); *Mr. Smith*, *supra* note 111, at 2292 (arguing that by incorporating federal law, "a state might be understood to have waived its claim to exclusive jurisdiction over a violation of the hybrid law").

[239] Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699–701 (2006) (noting that *Grable & Sons* remains good law, although it was not applicable in that case).

TABLE 1: THE SUPREME COURT'S § 1331 CANON

	State Law Right	**Federal Right**
State Law Cause of Action	(a) No § 1331 jurisdiction; this would be so-called protective jurisdiction.[240]	(b) Possible § 1331 jurisdiction if *Grable & Sons* standard met.
Federal Cause of Action	(c) Yes § 1331 jurisdiction if state law right is applied at the discretion of the federal courts.	(d) Yes § 1331 jurisdiction if federal right applied is substantive.
	(e) No § 1331 jurisdiction if state law right is mandatorily applied by the federal courts.	(f) No § 1331 jurisdiction if federal right is procedural.

As the Table 1 illustrates, it is the nature of the right asserted in conjunction with the federal cause of action, not the origin of the cause of action *simpliciter*, that is the key to determining whether a case arises under § 1331—just as the *Mims* test states.[241] The classic presentation of the Holmes test, which finds that a federal cause of action is both a necessary and sufficient condition for § 1331 jurisdiction, is underinclusive in relation to category (b) cases and overinclusive in relation to category (e) and (f) cases. Even the modern incarnation of the Holmes test, which finds that a federal cause of action is at a minimum a sufficient condition for § 1331 jurisdiction, cannot account for the Court's exclusion of cases in categories (e) and (f). *Mims*'s recasting of the Holmes test, moreover, sheds light upon the Court's oft-repeated statement that "the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action."[242] Despite the fact that this statement facially includes cases in categories (c) through (f), it seems clear that the Court was contemplating only category (d) cases; namely, cases pairing federal causes of action with federal substantive

[240] While the idea that state law rights paired with state law causes of action might arise as a matter of Article III federal question jurisdiction has supporters, *see* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948), no one contends that such suits could arise under § 1331, *see* BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270, 1290 (11th Cir. 2003) (Tjoflat, J., dissenting) ("The theory of protective jurisdiction applies only within the context of a special jurisdictional statute; no one has ever argued that section 1331 itself amounts to a grant of jurisdiction to entertain state law claims on particular matters of federal concern.").

[241] *See* Mulligan, *A Unified Theory*, *supra* note 93, at 1725 ("[T]he primary determinate for the vesting of § 1331 jurisdiction is the status of the federal right asserted.").

[242] Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986); *see also* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8–9 (1983) (noting it is "well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction" than those beyond district court jurisdiction).

rights.[243] Only a standard formulation of the § 1331 test that is rights inclusive, as *Mims* is, can coherently exclude category (c), (e), and (f) cases from the vast majority of cases that arise when a federal cause of action is paired with a substantive federal right. Therefore, adopting a rights-inclusive approach, as *Mims* does, provides a single coherent framework to incorporate a fuller § 1331 canon than does the Holmes test.

The *Mims* decision, however, does not resolve every ambiguity in § 1331 doctrine. As I have previously argued, the Court requires that federal common law claims that are crafted without statutory authorization meet a more rigorous jurisdictional standard than other claims.[244] Merely looking to the federal versus state origin of the causes of action and rights, as *Mims* directs, does not capture this practice fully. Rather, the Court should more transparently acknowledge that the legislative versus judicial origin of the rights at issue, not just the federal versus state origin, plays a role in § 1331 doctrine.[245] Nevertheless, the Court's language in *Mims*—looking to both rights and causes of action in the § 1331 analysis—represents the most inclusive and coherent summation of actual § 1331 practice since the Court in *Puerto Rico v. Russell & Co.*, in another thoroughly un-Holmesean moment, held that "[t]he federal nature of the right to be established is decisive [in determining federal question jurisdiction]—not the source of the authority to establish it."[246] For this reason alone, the *Mims* decision is worthy of praise and, most importantly, replication.

III. *MIMS* AND CONGRESSIONAL INTENT

In this final Part, I turn to the increased space for a focus upon congressional intent inherent in the *Mims* rights-inclusive approach to § 1331 jurisdiction. Here I contend that the *Mims* analysis—one that, contrary to the dictates of the Holmes test, includes both causes of action and rights in the standard jurisdictional analysis—not only offers greater jurisprudential coherence and explanatory power over the statutory federal question jurisdictional canon than does the Holmes test, but is also more solicitous of congressional intent. Thus, the *Mims* position maintains a stronger normative claim to be the preferred, standard interpretation of § 1331 than does the Holmes test.

Congressional intent has had an odd relationship with statutory federal question jurisdiction. On the one hand, it is beyond debate that blackletter

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[243] *See* Mulligan, *A Unified Theory*, *supra* note 93, at 1691–92, 1694, 1708–09, 1714–15 (describing such cases as the actual heartland of federal question jurisdiction cases).

[244] *See id.* at 1716–26 (arguing that the Court in "pure" federal common law cases takes § 1331 jurisdiction only when the plaintiff presents a substantial federal common law right coupled with a sufficient showing to support the right).

[245] *Id.*

[246] 288 U.S. 476, 483 (1933).

constitutional law places the control of lower federal court jurisdiction, subject to a few quibbles here and there, squarely within Congress's control.[247] On the other hand, most commentators contend that the Court's statutory federal question jurisdiction canon has had little to do with congressional intent[248] but rather has focused upon several factors that can be loosely characterized as federalism and docket-control concerns that the Court itself, not Congress, evaluates.[249] Moreover, many scholars go on to argue from this descriptive claim to the normative conclusion that jurisdiction is properly a function of judicial discretion in which judges, in conjunction with Congress perhaps, must determine the proper division of labor between the state and federal courts.[250]

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[247] *See, e.g.*, Snyder v. Harris, 394 U.S. 332, 341–42 (1969) (finding that the Constitution places the power to "expand the jurisdiction of [the lower federal] courts . . . specifically . . . in the Congress, not in the courts"); Friedman, *supra* note 17, at 2 ("[C]ommentators mark out their individual lines defining the precise scope of Congress's authority, but no one has challenged the central assumption that Congress bears primary responsibility for defining federal court jurisdiction."); Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535 (2010) [hereinafter Mulligan, *Madisonian Compromise*] (arguing that the Court's *Boumediene* opinion is perhaps unique in that it implicitly requires the existence of at least one lower federal court to hear habeas claims against federal officers).

[248] *See, e.g.*, F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 897–98 (2009) ("[The] Court has developed these [§ 1331] doctrines based principally on its own perception that restricting federal jurisdiction was necessary to avoid overburdening the federal courts . . . [and] without regard to Congressional intent."); *see also* Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 599 (1987) (similar).

[249] *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 8 (1983) (stating that the vesting of § 1331 jurisdiction "masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system"); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 (1981) ("[State and federal courts] will continue to be partners in the task of defining and enforcing federal constitutional principles. The question remains as to where to draw the lines; but line-drawing is the correct enterprise."); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 506 (1928) ("[T]he proper allocation of authority between United States and state courts is but part of the perennial concern over the wise distribution of power between the states and the nation."); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1216 (2004) ("A central task of the law of federal jurisdiction is allocating cases between state and federal courts.").

[250] *See* Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1049 (1990) (contending that judges are in a good position "to fill out some of the details in jurisdictional statutes"); Jack M. Beermann, *"Bad" Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish*, 40 CASE W. RES. L. REV. 1053, 1061–66 (1990) (suggesting that judicial discretion helps federal courts avoid overload); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 588 (1985) ("[T]he responsibility of the federal courts to adjudicate disputes does and should carry with it significant leeway for the exercise of reasoned discretion in matters relating to federal jurisdiction."); David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts,"* 78 VA. L. REV. 1839, 1845 (1992) ("[H]istory, tradition, and policy support the existence of limited judicial discretion to interpret and

While I cannot fully defend the position here, I predicate the remainder of my discussion upon the axiom that an increased focus upon congressional intent in § 1331 jurisprudence is normatively attractive on both separation of powers and process-federalism grounds.[251] From this vantage point, then, *Mims* enhances a congressional-intent focus in § 1331 jurisdiction along two axes. First, the *Mims* decision's rights-inclusive formulation more closely maps onto the intent of the 1875 Congress that passed § 1331 than does the Holmes test. Second, the *Mims* rights-inclusive decision accounts for the jurisdictional intentions of later-in-time Congresses more readily than does the Holmes test.

A. The Intent of the 1875 Congress

I begin with a brief account of the intent of the 1875 Congress, the body that passed § 1331.[252] In this section, I follow Woolhandler and Collins's thorough historical research on late nineteenth-century jurisdictional practice.[253] As they demonstrate, the federal courts' practice of regularly taking federal question jurisdiction over state law causes of action with embedded federal rights under any number of special pre-1875 federal question statutes created Congress's expectation that such a practice would continue with the passage of § 1331. The *Mims* opinion's rights-inclusive view, therefore, more accurately accounts for the intent of the 1875 Congress than does the Holmes test.

Nineteenth-century Congresses regularly relied upon state law (or the general common law)[254] to supply the cause of action to enforce federal statutory rights. Nevertheless, the federal courts—contrary to the dictates of the Holmes test—took federal question jurisdiction under the right-by-right jurisdictional statutes then applicable.[255] For example, in 1833, Congress passed the Force Act in response to the South Carolina nullification crisis.[256] Under the Act, federal courts had statutory federal question jurisdiction over plaintiffs' common law assumpsit claims to recover duties that were levied over the amount specified by federal tariff law.[257] Similarly, the

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apply jurisdictional grants and to refrain from reaching the merits of a controversy even when the existence of jurisdiction is clear.").

[251] *See* Mulligan, *Unified Theory*, *supra* note 93, at 1726–28 & n.338.

[252] *See supra* note 18 (discussing the legislative history of § 1331).

[253] *See* Woolhandler & Collins, *supra* note 19, at 2158–78.

[254] These were pre-*Erie* days. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (rejecting the idea of a "general" common law distinct from the law of a particular state).

[255] *See* Woolhandler & Collins, *supra* note 19, at 2160–68 (discussing this point in greater detail).

[256] Act of Mar. 2, 1833, ch. 57, 4 Stat. 632.

[257] *Id.* § 2; *see, e.g.*, Rankin v. Hoyt, 45 U.S. (4 How.) 327, 328 (1846) (entertaining an assumpsit action on a writ of error to the Circuit Court of the United States for the Southern District of New York); Swartwout v. Gihon, 44 U.S. (3 How.) 110, 110 (1845) (similar); *see also* Ins. Co. v. Ritchie, 72 U.S. (5 Wall.) 541, 543 (1866) ("Under that act [i.e., the Force Act of 1833] citizens of the same State might sue each other for causes arising under the revenue laws. A citizen injured by the proceedings of a collector

Court recognized that common law mandamus causes of action brought to enforce federal statutory rights arose under statutory federal question jurisdiction.[258] Finally, the Court recognized that common law causes of action could be deployed to enforce postal consumers' rights as federal questions.[259]

The 1875 Congress passed § 1331 against this backdrop, which illustrates their intent, consistent with the *Mims* approach, that federal rights, even when not paired with a federal cause of action, be amenable to § 1331 jurisdiction. First, the legislative history to the 1875 Act strongly suggests that the Congress intended to deploy the entire scope of constitutional federal question jurisdiction when it passed § 1331.[260] Thus, this pre-1875 practice demonstrates, in part, the broad scope of the jurisdictional grant § 1331 was intended to provide. Moreover, jurisdictional practice immediately after passage of § 1331 further demonstrates the strong role that federal rights, unadorned with federal causes of action, played in the original understanding of § 1331. Indeed, § 1331 "almost seamlessly became a vehicle for [state law] nonstatutory equity and damages actions containing [federal] constitutional elements."[261] The *Mims* opinion's reconstruction of the default § 1331 test to a rights-inclusive perspective, therefore, more closely maps traditional statutory-intent principles than does the Holmes test.

B. The Intent of Later-in-Time Congresses

One might well accept that the *Mims* approach comports with the intention of the 1875 Congress yet still conclude, because the twentieth-century Court's § 1331 jurisprudence has not focused on congressional intent pursuant to traditional statutory construction tools,[262] that there is little role for congressional intent to play now. Moreover, one might even contend that this failure to embrace fully the intent of the 1875 Congress is sound because, if § 1331 were read as encompassing the full scope of the Article III font of federal question authority as many have suggested was

might have an action [in assumpsit] against him for the injury, though a citizen of the same State with himself."); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 138 (1836) (recognizing an assumpsit action against a collector for excess duties paid under protest in an action removed from state court).

[258] *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 624–25 (1838) (recognizing that the Circuit Court for Washington County in the District of Columbia had power to issue mandamus to an officer of the federal government); *see also* Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 514–15 (1840) (same).

[259] *See* Woolhandler & Collins, *supra* note 19, at 2167 (discussing Teal v. Felton, 53 U.S. (12 How.) 284 (1851)).

[260] *See infra* note 263 and accompanying text.

[261] Woolhandler & Collins, *supra* note 19, at 2173 (discussing the vesting of § 1331 jurisdiction in the 1880s and 1890s).

[262] *See* Friedman, *supra* note 17, at 24 ("Congress's intent [in enacting § 1331] has had little or nothing to do with the Court's decisions concerning what constitutes a federal question.").

the intent of the 1875 Congress,[263] federal question jurisdiction likely would encroach into vast swathes of presumed exclusive state court jurisdiction.[264] Thus, this congressional-intent reading of § 1331 doctrine, one might conclude, is internally inconsistent as it runs counter to fundamental federalism principles that the Court imputes to Congress as a default legislative intention.[265]

Nevertheless, the *Mims* view, even if construed not to invoke fully the intent of the 1875 Congress, creates an intellectual space for the jurisdictional intentions of later-in-time Congresses in the § 1331 discussion. This room for legislative intent results because the courts find that federal rights, as well as federal causes of action, create indicia of congressional intent that such issues be heard in federal court. Therefore, the *Mims* opinion more accurately reflects the jurisdictional intentions of later-in-time Congresses than does the Holmes test, thereby avoiding the critique that a congressional intent model of § 1331 is necessarily static and incapable of accounting for the changing roles of the federal and state courts since 1875.[266]

In line with this approach to congressional intent, the *Mims* Court held that there is a strong presumption that a congressionally created federal cause of action coupled with a federal rule of decision will take jurisdiction under § 1331. The Court itself defended this presumption by arguing that it is the complementary interpretation to the previously accepted rule recognizing a presumption that suits arising in federal question jurisdiction can concurrently be heard in state courts.[267]

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[263] *See, e.g.*, Franchise Tax Bd. v. Const. Laborers Vacation Trust, 463 U.S. 1, 8 n.8 (legislative history indicates Congress may have meant to confer all jurisdiction that the Constitution allows); 2 CONG. REC. 4986 (1874) (statement of Sen. Carpenter) (equating the statutory and constitutional grants of federal question jurisdiction); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 723 (1986) (same); Friedman, *supra* note 17, at 21 (same).

[264] *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824) (holding that a case arises under federal law for purposes of Article III if federal law "forms an ingredient of the original cause"). *But see* Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 270 (2007) (arguing that in light of English jurisdictional principles, the *Osborn* Court interpreted Article III "arising under" to mean that a federal court could hear cases in which a federal law was determinative of a right asserted in the proceeding before it). Bellia's reading would very much limit the scope of Article III to those cases I argue pertain to § 1331.

[265] The Court's treatment of preemption cases expresses this sentiment well. Here the starting point for analyzing the preemptive effect of any federal law that operates "in a field which the States have traditionally occupied" is with a presumption against preemption. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action.").

[266] *See, e.g.*, Friedman, *supra* note 17, at 3 (discussing the need for an approach to federal jurisdiction that is "flexible enough to take into account changing conceptions of the roles" of various courts).

[267] *See* Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 748 (2012) (citing Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)) (noting the presumption of concurrent state court jurisdiction).

More germane to this discussion, the *Mims* presumption of § 1331 jurisdiction garners support on congressional-intent grounds.[268] Even without the parallel to the concurrent-state-court-jurisdiction argument, a presumption in favor of § 1331 jurisdiction follows because each component of the jurisdictional analysis deployed by the *Mims* Court, the cause of action and the right, lends strength to the assertion that congressional intent supports taking jurisdiction.[269] Thus, a plaintiff's presentation of a congressionally created cause of action is strong evidence that Congress desires cases of that type be heard in federal court because this amounts to a finding that Congress has determined that the plaintiff is "an appropriate party to invoke the power of the [federal] courts" in the matter at hand.[270] Similarly, congressional creation of rights, in the vast majority of cases,[271] also constitutes strong evidence of legislative intent to vest the federal courts with § 1331 jurisdiction over suits seeking to vindicate such rights because Congress intends that its clearly stated, mandatory obligations will be enforced, and it legislates against a historical backdrop in which the federal courts have been essential to the enforcement of such federal rights.[272] As a result, the *Mims* presentation of the default

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[268] *See, e.g.*, Mulligan, *Unified Theory*, *supra* note 93, at 1730; Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 677–78 (2005) ("The significance of statutory general federal question jurisdiction is that when Congress enacts a substantive law, federal district courts immediately and necessarily attain jurisdiction to hear claims under that statute, without Congress having to do anything more." (footnote omitted)). Of course, this only follows when one discusses statutory, not constitutional, federal question jurisdiction. If there were not a well-established series of lower federal courts, such a presumption may well be unsound. *See* Mulligan, *Madisonian Compromise*, *supra* note 247, at 539–40 (outlining the Madisonian Compromise view, which finds that the Constitution does not require the existence of the lower federal courts).

[269] *See, e.g.*, Mulligan, *Unified Theory*, *supra* note 93, at 1726 ("[W]hen there are other strong indicia of congressional intent to vest § 1331 jurisdiction such as the existence of a statutory cause of action, the plaintiff's assertion of a federal right may be quite weak. Conversely, when there are few other congressional indicia of an intent to vest § 1331 jurisdiction, the plaintiff must make a stronger allegation of a federal right in order for § 1331 jurisdiction to lie.").

[270] Davis v. Passman, 442 U.S. 228, 239 (1979).

[271] There are a few instances where Congress creates federal rights without a concurrent intent to vest the federal courts with § 1331 jurisdiction. *See, e.g.*, 15 U.S.C. § 2310(d) (2006) (limiting most Magnuson–Moss Warranty Act claims to state court).

[272] *See, e.g.*, Letters from the Federal Farmer XV (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315 (Herbert J. Storing ed., 1981) ("It is true, the laws are made by the legislature; but the judges and juries, in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government."); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1397 (1953) ("Remember the *Federalist* papers. Were the framers wholly mistaken in thinking that, as a matter of the hard facts of power, a government needs courts to vindicate its decisions?"); *id.* at 1372–73 (discussing the role of enforcement courts and the constitutional constraints that come into play when Congress confers jurisdiction to enforce federal law); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 712 n.163 (1997) ("[A]ny effort to pare back federal jurisdiction would deny Congress an important and historically effective forum for the implementation of its laws."); Ernest A. Young, *Constitutional Avoidance,*

§ 1331 test, with its focus upon both rights and causes of action, provides a richer vein for congressional-intent analysis than does the Holmes test.

A similar presumption of § 1331 jurisdiction over constitutional claims is justifiable upon congressional-intent grounds. The Court regularly engages in a strong presumption, similar to the statutory one crafted in *Mims*, that Congress intends for the federal courts to hear actions to enforce constitutional rights.[273] This finding of intent to enforce constitutional rights in federal courts, when joined with a congressionally created cause of action to enforce the constitutional right, demonstrates strong indicia of legislative intent to vest § 1331 jurisdiction.[274]

Mims's rights-inclusive view also affords a congressional-intent justification for the Court's use of a stiffer jurisdictional standard when taking § 1331 jurisdiction over cases coupling state law causes of action with federal rights.[275] In *Grable & Sons*, the Court distinguished the "substantial" and "serious" claim to a federally created right, which is necessary to establish § 1331 jurisdiction when a state law cause of action is asserted, from mere colorable assertions of a congressionally created right which typically ground § 1331 jurisdiction.[276] The Court stressed that in such cases the federal right at issue must be the central and predominant question in the case.[277] Further, the Court emphasized that the legal content

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Resistance Norms, and the Preservation of Judicial Review, 78 TEX. L. REV. 1549, 1611 (2000) ("Congress generally cannot ensure enforcement of its legislative mandates without providing a federal judicial forum where violators of those mandates can be prosecuted.").

[273] *See, e.g.*, Demore v. Kim, 538 U.S. 510, 517 (2003) (requiring a clear statement of legislative intent to bar habeas corpus review of constitutional violations); INS v. St. Cyr, 533 U.S. 289, 308–09 (2001) (same); Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 12 (1990) (requiring a clear statement in the Tucker Act to withdraw jurisdiction); Webster v. Doe, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (requiring a heightened showing of legislative intent in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 112 (1982) (White, J., dissenting) ("[W]e cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." (alteration in original) (internal quotation marks omitted)); Johnson v. Robison, 415 U.S. 361, 373–74 (1974) (holding that a federal statute will not be construed to preclude judicial review of constitutional challenges absent clear and convincing evidence of congressional intent).

[274] *See, e.g.*, 42 U.S.C. § 1983 (2006) (creating a statutory cause of action to enforce constitutional rights against state actors); Mulligan, *Unified Theory*, *supra* note 93, at 1708–10 (discussing the Court's practice of taking § 1331 jurisdiction over constitutional claims coupled with statutory causes of action).

[275] *See supra* Part II.C (discussing *Smith*-style cases and the more rigorous jurisdictional test deployed).

[276] *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313 (2005) ("It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.").

[277] *Id.*

of the right invoked must be actually contested by the parties.[278] Finally, the Court specifically considered whether taking jurisdiction in the case comported with congressional intent regarding the division of labor between the state and federal courts.[279]

This restrictive view makes sense from a congressional-intent perspective. Because a congressionally created cause of action is not pleaded in such cases, these plaintiffs concede, in essence, that they lack an explicit congressional judgment that they are "appropriate part[ies] to invoke the power of the [federal] courts."[280] Or as Justice Souter in *Grable & Sons* described it, plaintiffs missing a federal cause of action are not "missing [a] federal door key, always required, but . . . [rather are] missing [a] welcome mat."[281] Under the classic Holmes test, this lack of a cause of action would be outcome determinative, mandating a lack of § 1331 jurisdiction.[282] The Holmesean view, however, ignores the fact that the presence of federal rights—not just causes of action—also signifies congressional intent to vest § 1331 jurisdiction.[283] In suits that present state law causes of action coupled with federal rights, then, the existence of federal rights constitutes some indicia of congressional intent to vest § 1331, but not as much as those cases in which a congressionally created cause of action is pleaded as well. As a result, the Court's more rigorous jurisdictional standard comports with this lesser showing of congressional intent.[284] Conversely, when a plaintiff pleads both a federal cause of action and a right, this greater indicia of congressional intent to vest § 1331 jurisdiction supports the normal, colorable assertion standard for vesting § 1331 jurisdiction.[285] The Holmes test, with its cause-of-action-centered approach, cannot account for this more nuanced approach to congressional intent with the felicity that the *Mims* decision can, which again demonstrates the superiority of the *Mims* approach.

The *Mims* decision, however, does not resolve all difficulties concerning the lack of congressional intent in jurisdictional analyses. The

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[278] *Id.*

[279] *See supra* note 238 and accompanying text (discussing this prong of the *Grable & Sons* test).

[280] Davis v. Passman, 442 U.S. 228, 239 (1979) (defining cause of action).

[281] *Grable & Sons*, 545 U.S. at 318.

[282] *See supra* Part I.B (discussing the Holmes test).

[283] *See supra* notes 271–73 and accompanying text (discussing congressional intent to vest jurisdiction over statutory and constitutional rights).

[284] *See* Mulligan, *Unified Theory*, *supra* note 93, at 1734–35 (discussing the role for congressional intent in *Smith*-style cases).

[285] *Id.* at 1726 ("These two components—the federal right and cause of action—work in a teeter-totter manner in relation to congressional intent. That is to say, when there are other strong indicia of congressional intent to vest § 1331 jurisdiction such as the existence of a statutory cause of action, the plaintiff's assertion of a federal right may be quite weak. Conversely, when there are few other congressional indicia of an intent to vest § 1331 jurisdiction, the plaintiff must make a stronger allegation of a federal right in order for § 1331 jurisdiction to lie.").

well-pleaded complaint rule, for one, does not seem amenable to such a reinterpretation under *Mims* as the inclusion of rights into the § 1331 analysis simply does not supply a congressional-intent justification for the rule.[286] Similarly, *Mims*'s rights-inclusive approach does not fully justify why federal common law cases, which lack strong indicia of congressional intent to vest § 1331 jurisdiction, arise under statutory federal question jurisdiction.[287] Even if it is not a panacea, *Mims* does offer an avenue for an increased focus upon congressional intent in the default § 1331 analysis, which is a vast normative improvement over the Holmes test.

CONCLUSION

The rhetoric of the Holmes test "has earned its retirement."[288] In this piece, I argue that the jurisprudential foundation for the Holmes test has crumbled, that it lacks explanatory power over the full canon of § 1331 decisions, and that it is divorced from a more meaningful use of congressional intent in statutory jurisdictional analyses. Given these failures, the *Mims* Court's recasting of standard § 1331 doctrine away from the Holmes test and toward a theory of § 1331 jurisdiction that looks to whether "federal law creates [both] a private right of action and furnishes the substantive rules of decision"[289] should kick off a new standard rhetoric. The *Mims* decision brings a coherence to the whole of § 1331 doctrine and a focus upon congressional intent that is long overdue.

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[286] *See, e.g.*, Doernberg, *supra* note 248, at 601–07 (arguing that the well-pleaded complaint rule does not comport with the intent of the 1875 Congress that originally passed § 1331).

[287] *See* Mulligan, *Unified Theory*, *supra* note 93, at 1716–26 (discussing the Court's heightened jurisdictional standard over pure federal common law cases).

[288] *Cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007) ("[*Conley v. Gibson*'s] no set of facts [language] has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.").

[289] Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 748–49 (2012); *see also supra* notes 83–87 and accompanying text (listing other rights-inclusive quotations from *Mims*).