Winter 2022

28 U.S.C. § 1331 Jurisdiction in the Roberts Court: A Rights-Inclusive Approach

Lumen N. Mulligan

28 U.S.C. § 1331 JURISDICTION IN THE ROBERTS COURT: A RIGHTS-INCLUSIVE APPROACH

Lumen N. Mulligan*

I. INTRODUCTION

In this Article, I aim to sketch out the claim that the Roberts Court[1] quietly—and perhaps not entirely intentionally—is pushing 28 U.S.C. § 1331 federal question subject matter jurisdiction doctrine toward a more rights-inclusive approach that fosters a greater doctrinal focus upon congressional intent. I have noted this movement toward more focus upon congressional intent in prior work in the context of one Roberts Court case, *Mims v. Arrow Financial Services, LLC*.[2] In this Article, I point to a similar shift in five other cases: *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*,[3] *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*,[4] *Gunn v. Minton*,[5] *Arbaugh v. Y&H Corp.*,[6] and *Empire Healthchoice Assurance, Inc. v. McVeigh*.[7] I consider this move, even if modest, a positive outcome and one that, perhaps, points to legal process school underpinnings for the Roberts Court's procedural rulings.

By way of background, most consider that the Madisonian compromise vests Congress with the constitutional authority to control

---

 Earl B. Shurtz Research Professor, University of Kansas School of Law. J.D., *magna cum laude*, University of Michigan Law School, 2002; M.A., University of Colorado, 1999; B.A., University of Kansas, 1995. I extend my most sincere thanks to the members of the *Stetson Law Review* and Professor "Rocky" Rhodes for organizing such a great event during the COVID-19 pandemic. I also thank all the other participants in the symposium for their feedback and support; these include: Professors Scott Dodson, Robin Effron, Richard Freer, Tom Metzloff, Zoe Niesel, Jeffrey Parness, and Howard Wasserman.

1. In this Article, I am focusing upon the pre-Justice Barrett Court. During that period, Chief Justice Roberts held the fifth conservative vote plus the power of assignment. After Justice Barrett's elevation to the Court, the conservative wing of the Court holds five votes without Chief Justice Roberts' assent, which changes dynamics meaningfully. I use the term "the Roberts Court," then, to mean the pre-Justice Barrett tenure of Chief Justice Roberts.

2. 565 U.S. 368 (2012); *see also* Lumen N. Mulligan, *You Can't Go Holmes Again*, 107 NW. U. L. REV. 237 (2012) [hereinafter Mulligan, *Holmes Again*].

3. 137 S. Ct. 1312 (2017).

4. 136 S. Ct. 1562 (2016).

5. 568 U.S. 251 (2013).

6. 546 U.S. 500 (2006).

7. 547 U.S. 677 (2006).

lower federal court subject matter jurisdiction.[8] The Madisonian compromise takes its name from events at the Constitutional Convention of 1787.[9] Many members of the Constitutional Convention found the creation of a federal judiciary so controversial that the entire constitutional project was threatened.[10] James Madison, attempting to save the convention, offered his now-famous compromise, unanimously supported by the delegates.[11] He proposed that the Constitution mandate only the creation of the Supreme Court, leaving the creation of lower federal courts entirely to the discretion of Congress.[12] In line with this history, the blackletter doctrinal story tells us that lower federal court subject matter jurisdiction is not self-enacting; rather, Congress retains near[13] plenary control over the jurisdiction of these courts.[14]

---

8. *See, e.g.*, Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982).

9. *See generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 7–9 (6th ed. 2009) (describing Convention debates leading to the Madisonian Compromise).

10. *See* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 79–80 (1913) ("The most serious question was that of the inferior courts. The difficulty lay in the fact that they were regarded as an encroachment upon the rights of the individual states. . . . [T]he matter was compromised: inferior courts were not required, but the national legislature was *permitted* to establish them.").

11. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1620 (2008) ("This was the compromise, orchestrated by James Madison, between those who wanted to establish lower federal courts and those who thought they were unnecessary. The two camps split the difference by leaving the creation of the lower federal courts to Congress' discretion."); FALLON, JR. ET AL., *supra* note 9, at 8 ("[T]he vote accepting the compromise was unanimous.").

12. Frost, *supra* note 11, at 1620.

13. Even under this majority view, most agree that Congress cannot violate other constitutional provisions during the task of creating lower federal court jurisdiction. As such, many argue that there are non-Article III limits on Congress' power, such as the Due Process or Equal Protection Clauses. *See* Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (holding that although "Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation"); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 6 n.27 (1990) (contending that nearly all commentators agree that Congress may not employ jurisdictional limits as means of disfavoring traditionally suspect classes); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 141–46 (1981) (arguing that there are non–Article III limits to Congress' discretion in vesting inferior federal courts with subject matter jurisdiction over congressionally preferred rights yet withholding it for congressionally disfavored rights).

14. *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"); Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("All [lower] federal courts . . . derive their jurisdiction wholly from . . . Congress. . . . It could have declined to create any such courts. . . . [As a result, Congress has] the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees . . . [it deems] proper.") (cleaned up); *see also* Yakus v. United States, 321 U.S. 414, 429–430 (1944) (similar); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) (similar); Kline v. Burke Constr. Co.,

Nevertheless, a focus upon congressional intent in § 1331 cases, by most accounts, honors the Madisonian compromise only in the breach. Indeed, Barry Friedman concludes that "Congress's intent [in enacting § 1331] has had little or nothing to do with the Court's decisions concerning what constitutes a federal question."[15] Friedman's position is not an isolated conclusion, as most commentators contend that the Court's statutory federal question jurisdiction canon has little to do with congressional intent.[16] Rather, jurists and commentators focus upon several factors that can be loosely characterized as federalism and docket-control concerns that the Court itself, not Congress, establishes

260 U.S. 226, 233–34 (1922) (similar); Sheldon v. Sill, 49 U.S. 441, 448–49 (1850) (similar). Scholars generally echo this position as the received, blackletter view, even if they question the veracity of the claim. *See, e.g.*, Friedman, *supra* note 13, 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."); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 912 (1984) (contending that Congress' near plenary control over lower federal courts' jurisdiction is "widely supported"); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Court*, 95 HARV. L. REV. 17, 24–27 (1981) (similar); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030 (1981–1982) ("One of the clearest [provisions in the Constitution] is the [one granting power to] Congress to regulate the jurisdiction of [lower federal courts]."); *see also* Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 536, 536–38 (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). *But see* Akhil Reed Amar, *A Neo-federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206 (1985) (providing Article III textualist and historical arguments that while Framers did not require creation of lower federal courts, they intended for *some* federal court to be open to resolve all federal questions); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749–50 (1984) (similar).

15. Friedman, *supra* note 13, at 24.

16. *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).

and evaluates.[17] Further still, many others—such as, Ann Althouse,[18] Jack Beemann,[19] and David Shapiro[20]—conclude, not only descriptively but normatively, that the federal courts themselves should iron out the scope of § 1331 subject matter jurisdiction without a focus on congressional intent. The consensus view, then, is that the Constitution assigns control over lower federal court jurisdiction to Congress, but that the Court itself regularly flouts this constitutional norm, which many conclude is the normatively correct outcome.

Given this consensus view, the Roberts Court's movement toward an increased focus on congressional intent in § 1331-jurisdiction cases is noteworthy and, perhaps, not surprising. Chief Justice Roberts, as Jonathan Adler noted recently, is readily conceived of as a judicial minimalist.[21] Of course, no perfect description exists as any could readily pick our most galling Supreme Court power plays during Chief Justice Roberts' tenure from any number of perspectives: construing the Affordable Care Act as valid under Congress' taxation power[22] or overturning the pre-clearance requirements of the Voting Rights Act of

17. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 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.").

18. 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").

19. 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, 1065–66 (1990) (suggesting that judicial discretion helps federal courts avoid overload).

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

21. Jonathan H. Adler, *This Is the Real John Roberts*, N.Y. TIMES (July 7, 2020), https://www.nytimes.com/2020/07/07/opinion/john-roberts-supreme-court.html.

22. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 663 (2012) (Roberts, C.J., concurring) ("The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below."); Josh Blackman, *The Saving Construction at Five Years*, 11 U. ST. THOMAS J.L. & PUB. POL'Y 72, 83–84 (2017) (critiquing Chief Justice Roberts' approach).

1965.[23] Nonetheless, the Roberts Era § 1331-jurisdictional opinions do support the view that the Roberts Court, at least sometimes, takes an approach that could be described as "judicially minimalist," to use Adler's vernacular, or better yet, as indicative of a legal process school jurisprudence.[24]

In making this argument, I first introduce the analytical units used in my § 1331 discussion: rights and causes of action. Second, I present a quick primer on the Holmes test and the legal positivist jurisprudential tradition from whence it arises (*i.e.*, Justice Holmes' "bad man" view of the law).[25] Third, I provide an overview of the six Roberts Court cases that address § 1331-jurisdiction in a meaningful way, all of which back away from the traditional Holmes test and toward a rights-inclusive approach that invites a greater focus on congressional intent.[26] And finally, I place the Robert Court's treatment of § 1331 jurisdiction as more indicative of a legal process school jurisprudence than Justice Holmes' nineteenth century brand of legal positivism.[27]

II. SECTION 1331'S BUILDING BLOCKS: RIGHTS AND CAUSES OF ACTION

To understand the distinction between the classic formulation of the § 1331 jurisdictional test (*i.e.*, the Holmes test) and the approach the Roberts Court is leaning toward, one must first take in the distinctions between the concepts of right, which the Court at times styles as "rule of decision,"[28] and cause of action, which the Court uses as the basic

23. *See* Shelby County v. Holder, 570 U.S. 529, 535 (2013) (Roberts, C.J.) ("There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."); Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J. FORUM 799, 812–13 (2018) (critiquing Chief Justice Roberts' rationale).

24. Adler, *supra* note 21.

25. *See infra* note 70.

26. *See* Mims v. Arrow Financial Services, LLC, 565 U.S. 368 (2012); Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562 (2016); Gunn v. Minton, 568 U.S. 251 (2013); Arbaugh v. Y&H Corp., 546 U.S. 500 (2006); Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006).

27. *See infra* note 85.

28. 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

analytic units of its § 1331 analysis.[29] In this Part, I quickly review these notions, before turning to a more in-depth conversation about the Holmes test and its jurisprudential foundations.

I turn first to the concept of a "right." A right is an obligation owed by the defendant to the plaintiff as an intended beneficiary.[30] To qualify as a right, the obligation at hand must be mandatory, not merely hortatory,[31] and the language at issue must not be "too vague and amorphous" or "beyond the competence of the judiciary to enforce."[32] This three-part test—mandatory obligation, clear statement, and enforceability[33]—remains the standard by which the Court determines when a right exists.[34]

As I will circle back to the legal process school at the end of this Article, it is worth noting that the notion of obligation can be thought of

---

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.

29. Simona Grossi, following the 1930s *Gully* decision, argues that the focus should be on "claim" as a third and controlling concept. *See* Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising Under Jurisdiction*, 88 WASH. L. REV. 961, 963, 973 (2013). I think her approach is inconsistent with the overwhelming bulk of the Court's decisions. *See* Lumen N. Mulligan, Gully *and the Failure to Stake a 28 U.S.C. § 1331 Claim*, 89 WASH. L. REV. 441 (2014).

30. *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).

31. *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.").

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

33. 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), 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.

34. *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, 340–42 (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).

in Hohfeldian argot.[35] From this perspective, an obligation imposes a correlative duty upon the defendant to either refrain from interfering with, or to assist, the plaintiff.[36] Similarly, deploying the terminology of the legal process school, which itself followed Hohfeld closely here,[37] the concept of a right—often styled a "primary liberty" or primary right—is one that imposes a correlative, authoritative duty that the defendant owes to the plaintiff to take an action or refrain from an action.[38]

A cause of action, then, is the distinct determination of whether the plaintiff falls into a class of litigants empowered to enforce a specified right in court.[39] As the Court has put it, a "cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court."[40] Cause of action corresponds to the legal process school's concept of primary rights. Stated differently, 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.[41]

The concept of cause of action, then, correlates 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, one may have a right yet lack the power to enforce the right by way of a cause of action.[42] For example, an individual can only vindicate their rights under certain statutory schemes through an administrative agency—not by the

35. *See* Walter Wheeler Cook, *Introduction* to WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 3, 3 (Walter Wheeler Cook ed., 1923) [hereinafter HOHELD'S COLLECTED WORKS] ("In the opinion of the present writer one of the greatest messages which the late Wesley Newcomb Hohfeld . . . gave to the legal profession was this, that an adequate analytical jurisprudence is an absolutely indispensable tool in the equipment of the properly trained lawyer or judge—indispensable, that is, for the highest efficiency in the discharge of the daily duties of his profession.")

36. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917), *reprinted in* HOHFELD'S COLLECTED WORKS, *supra* note 35, at 65 (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, 21–22 (1913), *reprinted in* HOHFELD'S COLLECTED WORKS, *supra* note 35, at 23 (critiquing the same).

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

38. *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* Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2154–55 (2009) (discussing Hart and Sacks' views on primary and remedial rights).

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

40. *Id.* at 239 n.18.

41. *See* HART & SACKS, *supra* note 37, at 137.

42. *Id.* at 138.

individuals themselves.[43] As such, Congress may vest individuals with rights without vesting them with causes of action to enforce those rights.[44] With these concepts at hand, I turn to a fuller discussion of vesting § 1331 jurisdiction and the Holmes test.

III. THE HOLMES TEST IS THE BAD GUY, (DUH)[45]

In this Part, I turn to a discussion of the Holmes test, the traditional § 1331 jurisdictional test, to fully understand the Roberts Court's deviation from this traditional approach in Part III. Here, I aim to discuss the Holmes test using our nuanced understandings of the concepts of right and cause of action. Also, I will sketch out Justice Holmes' jurisprudential commitment to a nineteenth century brand of legal positivism that undergirds the Holmes test.

To begin, federal courts regard all assertions of § 1331 jurisdiction as subject to the well-pleaded complaint rule.[46] Following this rule, only federal issues raised in a plaintiff's complaint, not anticipated defenses, establish federal question jurisdiction.[47] The well-pleaded complaint rule, however, only answers the question of *where* to look to find a federal issue; it does not answer the further question of *what* to look for.[48] The majority of federal question cases, according to the standard view, answer this *what* by looking to a federal law that creates the plaintiff's cause of action.[49] Indeed, this linguistic understanding of § 1331, which places great importance upon the "law that creates the cause of action,"[50] has traditionally dominated all discussion of statutory

43. *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.") (internal citations omitted).

44. *See Davis*, 442 U.S. at 239–242.

45. All apologies to Billie Eilish for the pun. Indeed, "Bad Guy" won the Grammy for Song of the Year in 2020 and is assuredly deserving of a better parody—Does Weird Al Yankovic read law reviews? *See Bad Guy Billie Eilish Song*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bad_Guy_(Billie_Eilish_song) (last visited July 12, 2021). Listen to "Bad Guy" here: Darkroom/Interscope Records, *Billie Eilish – Bad Guy*, YOUTUBE (Mar. 29, 2019), https://www.youtube.com/watch?v=DyDfgMOUjCI.

46. *See* Donald L. Doernberg, *supra* note 16, at 598–99.

47. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (establishing the well-pleaded complaint rule).

48. *See* LUMEN N. MULLIGAN, FEDERAL CIVIL JURISDICTION 42–45 (2d ed. West Acad. Publ'g 2019) (discussing the "where" versus "what" questions in more detail).

49. 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.").

50. *Id.*

federal question jurisdiction.[51] This position is generally referred to as the Holmes test, after Justice Holmes, who originally formulated the view.

Justice Holmes delivered his classic presentation of his test for § 1331 jurisdiction in 1916 in *American Well Works Co. v. Layne & Bowler Co.*[52] In *American Well Works*, the plaintiff held the patent for, manufactured, and sold what was then considered the best water pump on the market.[53] According to the plaintiff, 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.[54] The defendant removed the case to federal court.[55] Removal to federal court in *American Well Works* raised the issue of federal question jurisdiction for the Supreme Court.[56] While recognizing that the suit implicated matters of federal patent *rights*, Justice Holmes focused on the state law origin of *causes of action* and opined for the Court that a "suit arises under the law that creates the cause of action."[57]

Both the concepts of right and cause of action—two older common law concepts, discussed above—are critical in understanding Justice Holmes' ruling. The concepts of right (often referred to as the "primary right" or the "rule of decision") and cause of action (sometimes referred to as "remedial right" or a "right of action") were thought to be immutably linked—one did not exist without the other.[58] This is to say, the occurrence of analytically separating rights from causes of action is a relatively new one—at least from the temporal vantage point of the entire history of Anglo-American common law. I offer just a few

51. The classic presentation of the Holmes test was made in 1916. *See id.* A Westlaw search for citations to the "headnote" corresponding to this quote returned 740 citations on July 2, 2021. *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) ("'This provision for federal question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law . . . .'"); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988) ("A district court's federal-question jurisdiction, we recently explained, extends over only those cases in which a well-pleaded complaint establishes . . . that federal law creates the cause of action." (internal quotation marks omitted)); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (same); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 27–28 (1983) (same).

52. 241 U.S. 257, 260 (1916).

53. *Id.* at 258.

54. *Id.* at 257–58.

55. *Id.* at 258–59.

56. *Id.*

57. *Id.* at 260.

58. *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 33, at 71–83 (describing the traditional approach to rights, causes of action, and remedies).

exemplars here to illustrate this point. *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 legal remedy by suit or action at law, whenever that right is invaded."[59] Similarly, the Court in *McFaul v. Ramsey*,[60] 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."[61] Commenting upon this history in the 1970s, the younger Justice Harlan noted that the then "contemporary modes of jurisprudential thought . . . appeared to link 'rights' and 'remedies' in a 1:1 correlation."[62]

For Justice Holmes, this linked understanding of rights and causes of action, with its focus on enforcing posited orders, arises in the jurisprudential milieu of the legal positivist tradition.[63] Under this 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."[64] Indeed, nineteenth century legal positivist reformers, such as John Austin, saw the distinction between "primary rights" and causes of action (which he styled as "secondary rights") as useful for taxonomical purposes only.[65] Austin fully embraced the idea that right and cause of action must always work in tandem.[66]

Professors Woolhandler and Collins demonstrate that Justice Holmes, noting the beginnings of the anti-legal positivist jurisprudential movement that embraced *inter alia* rights and causes of action as distinct concepts, purposefully chose to focus upon cause of action as the key jurisdictional predicate under § 1331.[67] Even though by the 1920s much of the legal positivist tradition came under withering attack from the

59. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting WILLIAM BLACKSTONE, COMMENTARIES 23 (Robert Malcom Kerr, ed., J. Murray 4th ed. 1876)).

60. McFaul v. Ramsey, 61 U.S. (20 How.) 523, 524–25 (1857).

61. *Id.*

62. 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 33, at 72.

63. *See* Leslie Green & Thomas Adams, *Legal Positivism*, STAN. ENCYC. PHIL. https://plato.stanford.edu/archives/win2019/entries/legal-positivism/ (last updated Dec. 17, 2019) (providing a general overview of legal positivism).

64. Zeigler, *supra* note 33, at 72.

65. *See* 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 770–71 (Robert Campbell ed., London, John Murray 5th ed. 1885); *see also* Woolhandler & Collins, *supra* note 38, at 2155–56 (discussing Austin's views on primary and secondary rights).

66. *See* 2 AUSTIN, *supra* note 65, 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*.").

67. *See* Woolhandler & Collins, *supra* note 38, at 2178–83. I am entirely indebted to Woolhandler and Collins for this point.

legal realist school of thought,[68] in the 1916 *American Well Works* opinion, Justice Holmes clung to his legal positivist-inspired roots, favoring the traditional coupling of rights and causes of action (which, following Austin, he styled as primary and secondary rights) as properly inseparable notions.[69]

Justice Holmes' jurisdictional 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 as a moral question, but only for predictable consequences of his actions that will lead to imprisonment or compulsory monetary payments.[70] That is, Justice Holmes was a legal positivist who saw law not as having moral dimensions, but as only the predictable infliction of pain upon rule breakers. Justice Holmes was not shy about making this point. In a letter to Sir Frederick Pollock, Justice 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.[71]

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.[72]

---

68. For the foundations of the 1920s legal realism movement and its break from formalism and focus upon empirical results, see generally ROSCOE POUND, THE SPIRIT OF THE COMMON LAW (Routledge Press 1998) (1921); JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. Macmillan Co. 1921); BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Yale University Press 1921).

69. Woolhandler & Collins, *supra* note 38, at 2179 ("Holmes eschewed the concept of primary rights as distinct from remedial rights.").

70. *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 said to contravene it . . . .").

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

72. Holmes, *The Path of the Law*, *supra* note 70, at 462.

Justice Holmes' dissent in *Smith v. Kansas City Title & Trust Co.* further illustrates his commitments.[73] In *Smith*, a stockholder-plaintiff brought a breach of fiduciary duty cause of action under state law, alleging the federal agency unconstitutionally created the bonds later purchased by the company.[74] Thus, this case did not satisfy the Holmes test as presented in *American Well Works* because the plaintiff had not brought a federal cause of action.[75] Nevertheless, the Court found § 1331 jurisdiction because the plaintiff's state law claim required adjudication of federal constitutional rights.[76] Dissenting, Justice Holmes stressed the importance of enforceability—expressed doctrinally by the cause of action, not rights unadorned—to the § 1331 question.[77]

> 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.[78]

Hammering the point home, Justice Holmes argued that the constitutional right 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."[79]

The classic Holmes test was conceived predominantly 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."[80] "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)."[81] "It is a view, then, most jurisprudentially at home" with John Austin's brand of legal positivism.[82]

---

73. *See* 255 U.S. 180, 213 (1921).
74. *Id.* at 195–98.
75. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916).
76. *Smith*, 255 U.S. 180 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 Tr., 463 U.S. 1, 9 (1983) (first citing Flournoy v. Wiener, 321 U.S. 253, 270–72 (1944) (Frankfurter, J., dissenting); then citing 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).
77. *Smith*, 255 U.S. 180 at 215 (Holmes, J., dissenting).
78. *Id.*
79. *Id.* at 214.
80. Mulligan, *Holmes Again*, *supra* note 2, at 247.
81. *Id.*
82. *Id.*

Indeed, Justice Holmes' views regarding the rights-cause of action distinction follow Austin's almost to the letter.[83] Given Justice Holmes' focus on enforceability, it makes sense 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.[84]

Nonetheless, Justice Holmes' focus on the predictable infliction of pain as the core component of law, and the instantiation of this fundamental principle in the jurisdictional Holmes test, raises concerns. First, few if any contemporary commentators or jurists espouse early nineteenth century-style, legal-positivist views similar to that of Justice Holmes.[85] This disconnect diminishes the efficacy of his jurisdictional test in a legal world now mostly viewed through different jurisprudential lenses. Second, following the legal process school's commitment to ensuring the correct entities decide legal issues,[86] not just the predictable infliction of pain, the Holmes test seems to miss the most doctrinally relevant question. Namely, given that pursuant to the Madisonian compromise the vesting of lower federal court jurisdiction rests under congressional control, does cause of action or right better express Congress' intent to have cases heard in federal court? Justice Holmes' focus upon infliction of force simply does speak especially well to this doctrinal concern one way or the other.

IV. SIX ROBERTS COURT CASES PUSHING § 1331 JURISDICTION TOWARD MORE CONGRESSIONAL CONTROL

Armed with this jurisprudentially informed understanding of the Holmes test, with its focus on cause of action as a proxy for the predictable infliction of pain, I turn in this Part to a review of the Roberts Court's § 1331 cases. I review all six cases in which the Roberts Court engages with § 1331 jurisdiction in a meaningful manner. I aim to show that the Roberts Court gives the analytic notion of federal right, not just federal cause of action, much more attention than the traditional Holmes test would countenance. I review these cases starting with the most recent.

---

83. *Compare id.*, *with supra* notes 65–66 and accompanying text (outlining Austin's view).

84. Mulligan, *Holmes Again*, *supra* note 2, at 247.

85. *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958) (Hart, himself a leading mid-century legal positivist, critiques the Austinian law as infliction of pain as a poor brand of formalism).

86. *See infra* pt. IV.B (discussing the legal process school).

A. *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*[87]

In *Republic of Venezuela*, the Roberts Court looks to federal rights, not merely causes of action, in considering federal jurisdiction.[88] Here, American parent corporations of Venezuelan subsidiaries sought compensation in the federal courts from the government of Venezuela for the nationalization of oil rigs.[89] Venezuela sought to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunity Act of 1976 ("FSIA"), which generally renders foreign governments immune from civil suit in the federal and state courts.[90] The oil rig owners contended that an exception to the FSIA immunity applied, namely that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and that property . . . is owned or operated by an agency or instrumentality of the foreign state . . . engaged in a commercial activity in the United States.[91]

By the time *Republic of Venezuela* was heard by the Supreme Court, it faced a purely jurisdictional question.[92] The Court adjudicated the question of whether the statutory exception for "case[s] . . . in which rights in property taken in violation of international law are in issue" requires the plaintiff to prove the exception actually applies on the merits, or merely make a non-frivolous argument that the exception applies, in order to establish subject matter jurisdiction.[93] Ultimately, the Court held that under the FSIA a plaintiff must prove an exception applies on the merits, not merely make a non-frivolous argument, to vest the federal courts with subject matter jurisdiction.[94]

The Court contrasted this FSIA holding with its § 1331 doctrine.[95] Notably, the *Republic of Venezuela* opinion points to *Bell v. Hood*[96] as key

87. 137 S. Ct. 1312 (2017).
88. *Id.* at 1316.
89. *Id.* at 1317.
90. *Id.*; *see also* 28 U.S.C. § 1604 (A "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States.").
91. 28 U.S.C. § 1605(a)(3).
92. *Republic of Venezuela*, 137 S. Ct. at 1318.
93. *Id.* at 1316.
94. *Id.*
95. *Id.* at 1322.
96. Bell v. Hood, 327 U.S. 678, 685 (1946).

to the application of § 1331 jurisdiction.[97] In *Bell*, a pre-*Bivens*[98] case, the plaintiffs brought suit against several FBI agents for illegal arrest, false imprisonment, and unlawful searches and seizures.[99] The plaintiffs asserted that these acts violated Fourth and Fifth Amendment rights and asked the Court to infer a cause of action directly from the Constitution.[100] The Court assumed, based upon the complaint, that the plaintiffs alleged viable constitutional rights violations.[101] The only question for the Court was whether it had jurisdiction to infer a cause of action for monetary damages.[102] The Court held that it did have jurisdiction, stating that "where the complaint . . . is so drawn as to seek recovery directly under the Constitution . . . the federal court . . . must entertain the suit" regardless of whether the cause of action is actually inferred.[103] Indeed, it held that the taking of jurisdiction necessarily occurred prior to the question of whether to infer a cause of action.[104] This jurisdictional rule follows, in the Court's view, even without a legally viable cause of action. Recall, it would take another twenty-five years for the Court in *Bivens* to hold that such a cause of action exists—to the great jurisdictional consternation of the dissenters in *Bell*.[105]

The *Bell* holding, which decoupled jurisdiction from an exclusive focus on cause of action to look to the existence of a federal right as well, runs contrary to the Holmes test. Moreover, the Court has regularly applied the *Bell* holding.[106] Yet, *Bell* has never held the rhetorical high

97. *Id.*; *Republic of Venezuela*, 137 S. Ct. at 1322.

98. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (inferring for the first time that the courts may infer, without statutory authority, a cause of action for monetary damages for the violation of constitutional rights, in this case the Fourth Amendment).

99. *Bell*, 327 U.S. at 679.

100. *Id.*

101. *Id.* at 683.

102. *Id.* at 684.

103. *Id.* at 681–82.

104. *Id.* at 682 ("The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.").

105. *Id.* at 685–86 (Stone, C.J., dissenting) ("But where as here, neither the constitutional provision nor any act of Congress affords a remedy to any person, the mere assertion by a plaintiff that he is entitled to such a remedy cannot be said to satisfy jurisdictional requirements.").

106. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, i.e., the courts' statutory or constitutional *power* to adjudicate the case."); Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional."); Air Courier Conf. v. Postal Workers, 498 U.S. 517, 523 n.3 (1991) ("Whether a cause of action exists is not a question of jurisdiction, and may be assumed without being decided."); Thompson v. Thompson, 484 U.S. 174, 178 (1988) (affirming court of appeals' dismissal under FED. R. CIV. P. 12(b)(6) because there is no implied private right of action under the Parental Kidnapping Prevention Act); Burks v. Lasker, 441

ground that the Holmes test has.[107] It is telling, then, that the Roberts Court in *Republic of Venezuela* chose to call attention to *Bell* and thus eschew the traditional cause-of-action-centered Holmes test.[108] Perhaps harkening to the "welcome mat" metaphor of *Grable & Sons*,[109] another § 1331 case focusing on federal rights as opposed to causes of action exclusively, the *Republic of Venezuela* opinion summed up "[s]ection 1331 [doctrine as] often simply determin[ing] which court's doors are open (federal or state)."[110] A far cry from the standard Holmes test rhetoric.

B. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*[111]

In *Manning*, the Roberts Court also refused to reflexively apply the cause-of-action-only Holmes test for vesting § 1331 jurisdiction. In *Manning*, a shareholder-plaintiff brought a variety of state-law causes of action against defendant Merrill Lynch, alleging naked short selling of a company's stock that plaintiff owned, thereby artificially lowering the value of the stock.[112] Although the plaintiff avoided bringing federal causes of action, his state-law complaint specifically referenced federal S.E.C. Regulation SHO, 17 CFR §§ 242.203–242.204 (2015).[113] Relying upon this reference to federal regulation, the defendant removed the

---

U.S. 471, 476 n.5 (1979) (holding existence of implied cause of action under the Investment Company Act is not jurisdictional); Duke Power Co. v. Carolina Env't Study Grp., Inc. 438 U.S. 59, 71–72 (1978) (holding existence of implied cause of action directly under the Constitution is not a jurisdictional question); Mt. Healthy City Sch. Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977) (holding existence of implied cause of action directly under the Constitution is not a jurisdictional question); Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963) (same); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 359 (1959) ("As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action."); Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 249 (1951) (holding existence of implied cause of action under the Federal Power Act is not jurisdictional); Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n, 306 U.S. 56, 60 (1939) (holding existence of implied cause of action under the Bituminous Coal Act is not jurisdictional); Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("[W]hen the plaintiff bases his cause of action upon an act of Congress jurisdiction cannot be defeated by a plea denying the merits of the claim.").

107. *Compare supra* note 51 (noting that *American Well Works* has been cited some 740 times), *with* the equivalent Westlaw "headnote" query for *Bell*, which returned 447 citations on July 2, 2021.

108. Bolivarian Republic of Venezuela v. Helmerich, 137 S. Ct. 1312, 1322 (2017).

109. *See* Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 318 (2005) ("The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues.").

110. *Republic of Venezuela*, 137 S. Ct. at 1322.

111. 136 S. Ct. 1562 (2016).

112. *Id.* at 1566.

113. *Id.*

case under 15 U.S.C. § 78aa(a).[114] The Supreme Court held that the jurisdictional scope of § 78aa(a) "is the same as" the scope of § 1331.[115]

Having found that the two statutes have the same scope, the Court turned to the jurisdictional scope of § 1331 (and by extension § 78aa(a)). Here, the Court specifically rejected a strict, Holmes-test-only view. The Court found the plaintiff's position, which was that "everything depends (as Justice Holmes famously said in another jurisdictional context) on which law 'creates the cause of action.' . . . , veers too far in the opposite direction."[116] The Roberts Court then went on to extol the merits of its various rights-inclusive approaches to taking § 1331 jurisdiction.[117]

C. *Gunn v. Minton*[118]

In *Gunn*, Chief Justice Roberts writing for the Court again embraced a rights-inclusive, as opposed to a cause-of-action-only Holmes test, approach to § 1331 jurisdiction.[119] The issue in *Gunn* was whether an attorney malpractice state-law cause of action should arise in federal court when the underlying malpractice occurred in a patent matter, over which the federal courts have exclusive jurisdiction under 28 U.S.C. § 1338(a).[120] Because the Court has long construed the scopes of § 1331 and § 1338(a) "identically," the Court resolved this matter using § 1331 precedent.[121]

While the Court ultimately declined to take jurisdiction in *Gunn*, it similarly declined to invoke a cause-of-action-only approach to § 1331.[122] First, the *Gunn* opinion noted that the Holmes test was but "a rule of inclusion."[123] Second, even this cause-of-action-focused rule of inclusion, wrote Chief Justice Roberts, is subject to rights-based exceptions, because the federal courts decline § 1331 jurisdiction when a federal cause of action is used to enforce a state-law right.[124] Third, the

114. *Id.* at 1567.
115. *Id.* at 1566.
116. *Id.* at 1569.
117. *Id.* at 1569–70.
118. 568 U.S. 251 (2013).
119. *Id.* at 258.
120. *Id.* at 253–56.
121. *Id.* at 257.
122. *Id.* at 264.
123. *Id.* at 257.
124. *Id.* (citing Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900)). *See also* Jackson Transit Auth. v. Transit Union, 457 U.S. 15, 22–24 (1982) (holding that the federal courts lack § 1331 jurisdiction over claims under the Urban Mass Transportation Act because Congress instructed that these rights are to be determined by state law); Puerto Rico v. Russell & Co., 288 U.S. 476, 483

Gunn Court reiterated its commitment to hearing, within limitations, state-law causes of action that necessarily raise contested issues of federal rights.[125] Thus, again, the Roberts Court embraced a more rights-inclusive approach to § 1331 jurisdiction than the traditional Holmes test.

D. *Mims v. Arrow Financial Services, LLC*[126]

As I have noted in prior work,[127] the *Mims* case is perhaps the Roberts Court's most full-throated embrace of a rights-inclusive approach to § 1331 jurisdiction. *Mims* is a Telephone Consumer Protection Act of 1991 ("TCPA") case.[128] The TCPA renders certain aggressive interstate telephonic communications illegal as overly intrusive of privacy or otherwise a nuisance.[129] 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.[130] He filed for declaratory relief, an injunction, and damages in federal court.[131] The district court, following Eleventh Circuit precedent, dismissed the case for lack of federal question subject matter jurisdiction,[132] a decision affirmed by the court of appeals.[133] Reversing, the Supreme Court held that claims brought under the TCPA do arise under § 1331.[134]

(1933); Joy v. City of Saint Louis, 201 U.S. 332, 341 (1906) ("The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises."); 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 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 (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 non-diverse 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) (deeming no federal question to exist 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").

125. *Gunn*, 568 U.S. at 258 (citing Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) and Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006)).

126. 565 U.S. 368 (2012).

127. *See* Mulligan, *Holmes Again*, *supra* note 2.

128. *Mims*, 565 U.S. at 370.

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

130. *Mims*, 565 U.S. at 375.

131. *Id.*

132. *Id.*

133. *Id.* at 375–76.

134. *Id.* at 372 ("We hold, therefore, that federal and state courts have concurrent jurisdiction over private suits arising under the TCPA.").

The *Mims* Court, eschewing the standard rhetoric of the Holmes test, presented a rights-inclusive formulation of the § 1331 analysis.[135] The Court focused often upon the existence of federal rights, not just causes of action, in its holding. For example, the Court stated:

- Section 1331 jurisdiction arises here because "federal law [both] creates a private right of action and furnishes the substantive rules of decision."[136]
- 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."[137]
- "Because federal law creates the right of action and provides the rules of decision, Mims's TCPA claim" arises under § 1331.[138]
- 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."[139]
- "Because federal law gives rise to the claim for relief . . . and specifies the substantive rules of decision" the federal courts have § 1331 jurisdiction.[140]

Here again, the Roberts Court walks away from the Court's traditional parroting of a cause-of-action-only Holmes test approach to § 1331 jurisdiction.

E. *Arbaugh v. Y&H Corp.*[141]

In *Arbaugh*, the Roberts Court provides a much briefer look into the nature of § 1331 jurisdiction, but one still worthy of note.[142] The issue here was whether Title VII's fifteen-person employee requirement goes to the Court's subject matter jurisdiction or to the merits.[143] The Court held that this is a merits, not a jurisdictional, requirement.[144] In so

135. *Id.* at 378–79.

136. *Id. See also* Mulligan, *Holmes Again*, *supra* note 2, at 252–53 (explaining that "rule of decision" is a synonym for right and similarly that in this context "claim" and "claim for relief" are synonyms for cause of action).

137. *Mims*, 565 U.S. at 372.

138. *Id.* at 377.

139. *Id.* at 377 n.8.

140. *Id.* at 387.

141. 546 U.S. 500 (2006).

142. *Id.* at 505–06.

143. *Id.* at 503; *see also* Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175, 194 (2010) (discussing error of confusing merits with jurisdiction in § 1331 cases more generally).

144. *Arbaugh*, 546 U.S. at 516.

holding, the Court again cited *Bell*, the case holding that the existence of a cause of action need not even be legally viable, as the fundamental explanatory case for § 1331 jurisdiction—not Justice Holmes' *American Well Works* opinion.[145] As discussed above, the Roberts Court's centering of § 1331 doctrine on *Bell* is a move worthy of note.[146]

F. *Empire Healthchoice Assur., Inc. v. McVeigh*[147]

Lastly, I mention *McVeigh* briefly, as scholars have well tilled the *Grable & Sons* line of cases.[148] Here the plaintiff, a private administrator of a health insurance plan for federal employees, sued an insured's estate for reimbursement of benefits paid after the insured's estate won a state-law tort suit.[149] The insurer argued that federal common law should govern its claim and thereby secure § 1331 jurisdiction.[150] The Court disagreed and refused to fashion a federal common law rule.[151] In the alternative, the plaintiff sought § 1331 jurisdiction under *Grable & Sons*, arguing that its state-law reimbursement cause of action necessarily raised questions of federal rights.[152] While the Court declined to apply *Grable & Sons* in this instance, it re-committed itself to the existence of this rights-inclusive alterative to the traditional Holmes test.[153]

* * *

The Roberts Court, quietly perhaps, continues to push aside the old norm of parroting the Holmes test as *the* key to § 1331 jurisdiction. Whether in broader strokes as in *Mims* or smaller strokes as in *Arbaugh*, the Roberts Court has consistently deployed a rights-inclusive view of § 1331 jurisdiction in its opinions to date.

---

145. *Id.* at 513 ("A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim 'arising under' the Constitution or laws of the United States.") (citing Bell v. Hood, 327 U.S. 678, 681–85 (1946)).

146. *See supra* pt. III.A.

147. 547 U.S. 677 (2006).

148. As have I. *See* Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1717–21 (2008) [hereinafter Mulligan, *Unified Theory*] (discussing *McVeigh*).

149. *McVeigh*, 547 U.S. at 682.

150. *Id.* at 688.

151. *Id.* at 692–93.

152. *Id.* at 699.

153. *Id.* at 699–700.

V. LEGAL PROCESS SCHOOL JURISPRUDENCE AS A FOUNDATION

I end this Article with a brief discussion of why the Roberts Court's adoption of a rights-inclusive approach to § 1331 jurisdiction matters. In this last Part, I outline, first, that the shift matters because it turns § 1331's doctrine's focus more towards congressional intent than is found in the standard Holmes test approach. And second, this change in approach matters, as it suggests commitments by the Roberts Court, even if nascent, to legal process school principles over legal positivist ones.

A. Congressional Intent and a Rights-Inclusive § 1331 Doctrine

The Roberts Court's movement toward a more rights-inclusive § 1331 doctrine matters because it increases congressional intent as the touchstone for § 1331 doctrine. As discussed above, following the Madisonian compromise, blackletter constitutional law vests control of lower federal court jurisdiction in the hands of Congress.[154] Thus, while some will disagree, it follows from the Madisonian compromise that an increased focus upon congressional intent in § 1331 doctrine is normatively attractive.[155] Looking to rights as well as causes of action does just that: it increases, although imperfectly, the focus of § 1331 doctrine on congressional intent across two dimensions.

First, a rights-inclusive § 1331 doctrine comports more with original congressional intent than the traditional Holmes test.[156] Most agree that the original intent of the 1875 Congress that passed § 1331 was to vest the lower federal courts with the full scope of the Article III font of federal-question authority.[157] Such an approach to federal question jurisdiction, of course, could well swallow many suits that are

154. *See supra* notes 9–14 and accompanying text (discussing the Madisonian compromise).

155. *See* Mulligan, *Holmes Again*, *supra* note 2, at 278–80 (discussing the normative value of increased focus on congressional intent in § 1331 jurisdiction); Mulligan, *Unified Theory*, *supra* note 148, at 1726–28 & n.338 (similar).

156. *See* Mulligan, *Holmes Again*, *supra* note 2, at 278–79 (discussing the intent of the 1875 Congress relating to § 1331 and a rights-inclusive approach).

157. *See, e.g.*, Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 n.8 (1983) (legislative history indicates Congress may have meant to confer all jurisdiction that the Constitution allows); 43 CONG. REC. 4986 (1874) (statement of Sen. Carpenter) (equating the statutory and constitutional grants of federal question jurisdiction); Friedman, *supra* note 13, at 21 (same); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 723 (1986) (same).

currently considered exclusive state-court territory[158] and contravene fundamental federalism principles, which the Court imputes to Congress as a default legislative intention.[159] Nevertheless, hewing closer to, if not entirely adopting, the 1875 Congress' intent furthers important institutional norms.

As Woolhandler and Collins demonstrate, the federal courts regularly took federal question jurisdiction over state-law causes of action with embedded federal rights (*i.e.,* a rights-inclusive approach) under any number of pre-1875 federal question statutes.[160] This practice created Congress' expectation that such a practice would continue with the passage of § 1331.[161] Indeed, immediately after the passage of § 1331, it "almost seamlessly became a vehicle for [state-law] non-statutory equity and damages actions containing [federal] constitutional elements."[162] The Roberts Court's rights-inclusive perspective, therefore, more closely maps the intent of the Congress that enacted § 1331 than does the Holmes test.

Second, a rights-inclusive model takes into account the intent of post-1875 Congresses as well.[163] In *Mims*, the Roberts Court held that a strong presumption exists that a congressionally created federal cause of action coupled with a federal right will take jurisdiction under § 1331.[164] This presumption of congressional intent to vest jurisdiction under § 1331 by post-1875 congressional action is key in that it avoids the critique that any congressional intent model of § 1331 doctrine is necessarily static and incapable of accounting for the changing roles of

158. *See* Osborn v. United States, 22 U.S. (9 Wheat.) 738, 823 (1824) (holding 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, *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 264 (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.

159. 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) (observing "we have long presumed that Congress does not cavalierly pre-empt state-law causes of action").

160. *See* Woolhandler & Collins, *supra* note 38, at 2158–78.

161. *Id.*

162. *Id.* at 2173 (discussing the vesting of § 1331 jurisdiction in the 1880s and 1890s).

163. *See* Mulligan, *Holmes Again*, *supra* note 2, at 279–84 (discussing the role for post-1875 congressional intent).

164. *See* Mims v. Arrow Fin. Servs., LLC., 565 U.S. 368, 378 (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 similar presumption of concurrent state court jurisdiction).

the federal and state courts since 1875.[165] Expanding upon this concept, we see that Congress controls federal question jurisdiction not only by creating jurisdictional statutes, such as § 1331, but also by creating rights and causes of action themselves.[166] Each component, the right and the cause of action, lends strength to a plaintiff's assertion that congressional intent supports taking jurisdiction in a given case. Thus, a congressional creation of rights, in most cases, constitutes evidence of legislative intent to vest the federal courts with § 1331 jurisdiction over suits seeking to vindicate such rights. This determination of legislative intent to vest follows from the creation of rights because Congress both intends that its clearly stated, mandatory obligations will be enforced, and legislates against a historical backdrop in which the federal courts have been essential to the enforcement of such federal rights.[167]

---

165. *See, e.g.*, Friedman, *supra* note 13, 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).

166. *See* Mulligan, *Unified Theory*, *supra* note 148, at 1726–31 (discussing this notion in detail). *See also* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 676 (2005) (presenting a similar two-step approach to jurisdictional questions, arguing that "[j]urisdictional grants empower courts to hear and resolve cases brought before them by parties; substantive causes of action grant parties permission to bring those cases before the court").

167. *See, e.g.*, Federal Farmer XV (Jan. 18, 1788), *reprinted in* 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, 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."). Of course, this raises the issue of the so-called "parity" debate between the federal and state courts. The crux of this debate has been to determine which system, state or federal, better protects federal rights. I need not dip into this debate, as it is likely incapable of non-normative resolution. *See* Brett C. Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233, 237 (1999) (noting that the question "whether state courts are doing a good job of interpreting the Federal Constitution . . . inevitably lead[s] to a conclusion influenced by the normative preconceptions of the person who poses the query"). I need only assert that it makes sense to interpret Congress as generally preferring a federal forum for the protection of federal rights. Congress' preference may have no factual foundation, but the lack of a foundation for Congress' intent is neither here nor there when one is focusing upon congressional intent as it is the constitutionally empowered actor here.

B. The Roberts Court and the Legal Process School

To this point, I have aimed to demonstrate that the Roberts Court's § 1331 opinions are more rights inclusive than the traditional Holmes test approach. Further, I have sketched that this approach aligns more closely with congressional intent than does the Holmes test. In this last Part, I will suggest—and I admit I can do little more than that—that this rights-inclusive view is more indicative of a legal process school jurisprudence than Justice Holmes' nineteenth century brand of legal positivism.

The legal process school, birthed at Harvard and Yale Law, became the dominant "mainstream" jurisprudential position from the 1950s to the close of the last century.[168] While a nuanced view, it is fair to reduce the legal process school as embracing six fundamental concepts: (1) a focus upon institutional settlement; (2) a purposive approach to judicial decision-making; (3) a commitment to rule of law; (4) a commitment to reasoned elaboration of enduring legal principles; (5) a special attention to the balancing of neutral principles that transcend the immediate facts of any particular case; and (6) a focus on the structural features of the law—such as federalism and separation of powers in the constitutional context.[169] This contrasts strongly with Justice Holmes' Austinian legal positivism that, at its core, views the law as nothing more than the predictable application of force.[170]

Especially relevant here is the legal process school principle of institutional settlement. Hart and Sacks, leading proponents of the legal process school, characterized this notion as "the central idea of law" that underlies every system of constitutive procedures.[171] This principle "expresses the judgment that decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed."[172] This school of thought, then, focuses on following established procedures so as to create the normative impetus to follow law. When this principle

168. Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1076–77 (1986).

169. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 963–70 (1994).

170. *See supra* notes 65–66 and accompanying text (outlining Austin's view).

171. HART & SACKS, *supra* note 37, at 4; *see also* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 389–91 (2012) (describing the principle of institutional settlement and explaining its importance to Hart and Sack's jurisprudential theory).

172. HART & SACKS, *supra* note 37, at 4.

applies, "we say that the law 'is' thus and so, and brush aside further discussion of what it 'ought' to be."[173] Significantly, however:

> the 'is' is not really an 'is' but a special kind of 'ought'—a statement that, for the reasons just reviewed, a decision which is the duly arrived at result of a duly established procedure for making decisions of that kind 'ought' to be accepted as binding upon the whole society unless and until it has been duly changed.[174]

The key point for present purposes is that legal process theory especially values resolution of legal conflict by the legally correct institution via the legally correct procedure, because it is this proper assignment and process that fosters, in large part, our individual commitments to conform to obligations as a rule-of-law norm.[175]

In other words, merely concluding that a legal outcome, be it a jurisdictional one or otherwise, is "right" does not form the locus of an adherent of the legal process school's commitment. Rather, from the legal process school point of view an outcome is "right" only insofar as the proper institutions, deploying the proper procedures, made the decision. Thus, from this point of view, it matters, deeply, whether congressional intent or judicial discretion control lower federal court jurisdiction. It matters less what the particular doctrinal outcomes are. This approach matters all the more when, as in § 1331 jurisdiction, it is relatively clear that constitutional norms mandate that Congress, not the judiciary, controls this issue.

Of course, none of this "right institution, right process" business matters to Justice Holmes' "bad man," who only cares as to the accuracy of predictions of the infliction of force.[176] But if you are not a Justice Holmes bad guy, it likely matters to you *how* the courts make legal decisions, even with the correct outcomes. And the Roberts Court justices are assuredly not Holmesean bad men and women.

All educated at Harvard and Yale Law from the 1950s to the 1990s, these jurists more likely encountered the law through a legal process school jurisprudence than the Austinian legal positivist one that forms the core of Justice Holmes jurisprudential world view.[177] It is not

173. *Id.* at 5.
174. *Id.*
175. *See* Stack, *supra* note 171, at 390–91.
176. *See supra* note 70 and accompanying text (discussing Justice Holmes' "bad man" view).
177. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2031–33 (1994) (discussing the pervasive impact of this school of thought during this

surprising, then, that the Roberts Court focuses on rights, with its concomitant greater focus on congressional intent, in its § 1331 cases than past restatements of the Holmes test have. Indeed, their turn toward congressional intent suggests their commitments lie with legal process school norms.

VI. CONCLUSION

In this Article, I argue that the Roberts Court has moved, quietly to be sure, from a purely Holmes test (*i.e.,* cause-of-action-only approach) to § 1331 jurisdiction towards a rights-inclusive approach. I tracked this shift across all of the Roberts Court's substantial § 1331 opinions to date. Lastly, I contended that this change of direction more closely aligns with both congressional intent and a broader legal process school jurisprudence approach than the Holmes test does with its roots in early nineteenth century legal positivism. This new approach to § 1331 deserves continued attention and, if I am correct in my legal process school thesis, this insight may be useful as we digest future procedural rulings beyond federal question jurisdiction.

---

timeframe); J.D. Hyman, *Constitutional Jurisprudence and the Teaching of Constitutional Law*, 28 STAN. L. REV. 1271, 1286 n.70 (1976) (describing one of the leading texts of the legal process school movement as "the most influential book not produced in movable type since Gutenberg").