

# Judging the Flood of Litigation

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*The Supreme Court has increasingly considered a particular kind of argument: that it should avoid reaching decisions that would “open the floodgates of litigation.” Despite its frequent invocation, there has been little scholarly exploration of what a floodgates argument truly means, and even less discussion of its normative basis. This Article addresses both subjects, demonstrating for the first time the scope and surprising variation of floodgates arguments, as well as uncovering their sometimes-shaky foundations. Relying on in-depth case studies from a wide array of issue areas, the Article shows that floodgates arguments primarily have been used to protect three institutions: coordinate branches of government, the state courts, and the federal courts themselves. In the former two instances, the Court’s desire to avoid floods is supported by independent constitutional principles and doctrine, including separation of powers and federalism, lending these kinds of arguments a prima facie legitimacy. With regard to the final instance, however, the Court has relied on floodgates arguments solely to protect itself and the rest of the federal judiciary from what it sees as an excessive workload, raising difficult questions about separation of powers and the measures courts can take to ensure their ability to administer justice. The Article concludes by arguing for a presumption against court-centered floodgates arguments—positing that the Court should let the lower courts rely on alternative mechanisms, such as procedural rules and case-management techniques, to handle new claims instead of closing the courthouse doors to stave them off altogether.*

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## INTRODUCTION

Over the past several decades, the Supreme Court has increasingly considered a particular kind of argument: that it should avoid reaching decisions that would “open the floodgates of litigation.”<sup>1</sup> Of the sixty or so cases in which the justices explicitly raised or addressed a so-called floodgates argument,<sup>2</sup> fourteen came between 2010 and 2013 alone.<sup>3</sup> And yet, despite

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<sup>1</sup> Although a floodgates argument appears in the Supreme Court as early as 1908 in *Ex parte Young*, 209 US 123, 166–67 (1908), the Court does not appear to consider this kind of argument consistently until the mid-1940s. See, for example, *De Beers Consolidated Mines, Ltd v United States*, 325 US 212, 225 (1945) (Douglas dissenting); *United States v South-Eastern Underwriters Association*, 322 US 533, 583 (1944) (Stone dissenting). That said, floodgates arguments have existed outside the Court for far longer. Within the United States, the earliest recorded use of the phrase “the floodgates of litigation” comes from *Whitbeck v Cook*, 15 Johnson Cas 483, 491 (NY Sup Ct 1818). See also Adam Freedman, *The Party of the First Part: The Curious World of Legalese* 73 (Henry Holt 2007). Outside the United States, this kind of argument can be found in judicial opinions as early as the late 1700s. See *Governor and Company of the British Cast Plate Manufacturers v Meredith*, 100 Eng Rep 1306, 1307 (1792) (Kenyon) (“If this action could be maintained, every Turnpike Act, Paving Act and Navigation Act, would give rise to an infinity of actions.”).

<sup>2</sup> For a brief discussion of how I determined the relevant set of cases, see note 31.

<sup>3</sup> See *McQuiggin v Perkins*, 133 S Ct 1924, 1943 (2013) (Scalia dissenting); *Johnson v Williams*, 133 S Ct 1088, 1097 (2013); id at 1102 (Scalia concurring); *Henderson v United States*, 133 S Ct 1121, 1130 (2013); *Arkansas Game and Fish Commission v United States*, 133 S Ct 511, 521 (2012); *Mohamad v Palestinian Authority*, 132 S Ct 1702, 1711 (2012) (Breyer concurring); *Lafler v Cooper*, 132 S Ct 1376, 1389–90 (2012); *Mims v Arrow Financial Services, LLC*, 132 S Ct 740, 753 (2012); *Perry v New Hampshire*, 132 S Ct 716, 737–38 (2012) (Sotomayor dissenting); *Connick v Thompson*, 131 S Ct 1350, 1382 n 17 (2011) (Ginsburg dissenting); *Skinner v Switzer*, 131 S Ct 1289, 1299–1300 (2011);

the increased prominence of this line of reasoning, its normative justification has been highly contested. Indeed, recent cases show the justices vacillating between providing assurances that their decision will not result in a deluge of new claims,<sup>4</sup> and accusing each other of being driven by an improper desire to stave off such a deluge.<sup>5</sup> In the words of Justice Ginsburg from her dissent in the 2007 case *Wilkie v Robbins*,<sup>6</sup> “The ‘floodgates’ argument the Court today embraces has been rehearsed and rejected before.”<sup>7</sup>

It is no wonder that members of the Court have wrestled with questions of whether and when to rely upon floodgates reasoning. In its most distilled form, a floodgates argument is an argument against a particular decision on the ground that it will lead to a large number of new claims.<sup>8</sup> At first blush, that the

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*McDonald v City of Chicago, Illinois*, 130 S Ct 3020, 3115 (2010) (Stevens dissenting); *Jerman v Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S Ct 1605, 1620 (2010); *Shady Grove Orthopedic Associates, PA v Allstate Insurance Co*, 130 S Ct 1431, 1472 n 14 (2010) (Ginsburg dissenting); *Padilla v Kentucky*, 130 S Ct 1473, 1484–85 (2010).

<sup>4</sup> See, for example, *Mims*, 132 S Ct at 753 (“Arrow’s floodgates argument assumes a shocking degree of noncompliance with the [Telephone Consumer Protection] Act and seems to us more imaginary than real.”) (quotation marks and citation omitted); *Lafler*, 132 S Ct at 1389 (“Petitioner argues that implementing a remedy here will open the floodgates to litigation by defendants seeking to unsettle their convictions. Petitioner’s concern is misplaced.”); *Padilla*, 130 S Ct at 1484–85 (“We confronted a similar ‘floodgates’ concern in *Hill* . . . A flood did not follow in that decision’s wake.”), citing *Hill v Lockhart*, 474 US 52, 58 (1985).

<sup>5</sup> See, for example, *Wilkie v Robbins*, 551 US 537, 569 (2007) (Ginsburg concurring in part and dissenting in part) (“[T]he Court rejects his claim, for it fears the consequences. Allowing Robbins to pursue this suit, the Court maintains, would open the floodgates to a host of unworthy suits ‘in every sphere of legitimate governmental action affecting property interests.’”); *Schriro v Landrigan*, 550 US 465, 499 (2007) (Stevens dissenting) (“In the end, the Court’s decision can only be explained by its increasingly familiar effort to guard the floodgates of litigation.”); *Vieth v Jubelirer*, 541 US 267, 326 n 14 (2004) (Stevens dissenting) (“The plurality’s reluctance to recognize the justiciability of partisan gerrymanders seems driven in part by a fear that recognizing such claims will give rise to a flood of litigation.”).

<sup>6</sup> 551 US 537 (2007).

<sup>7</sup> *Id.* at 577 (Ginsburg concurring in part and dissenting in part).

<sup>8</sup> See, for example, Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 Mont L Rev 59, 73 (2001) (defining a “‘floodgates of litigation’ argument” as one that “asserts that a proposed rule, if adopted, will inundate the court with lawsuits”).

To be clear, the Court of course routinely considers arguments that touch on concerns about future litigation, such as parade of horrors and slippery slope arguments. See notes 36–37. For my own part, I see the consideration of these arguments often as attempts by the justices to test their legal principles through a kind of reflective equilibrium—seeing whether they can support the same principle when faced with a different set of facts. In this way, unlike floodgates arguments, these other arguments are not consequentialist. Regardless, a full examination of all Supreme Court arguments regarding

Court would try to hold back a flood of litigation seems reasonable, particularly in an era in which the lower courts have been said to face “a crisis in volume.”<sup>9</sup> And yet, as one plumbs deeper, the argument becomes increasingly problematic. Taken directly, this line of reasoning would have the Court consider *as part of its substantive analysis* the volume of litigation its decision might create. Members of the Court often repeat the famed phrase that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>10</sup> Granting a floodgates argument implies that one’s “protection of the laws” depends, at least in part, on a speculation about how many others intend to claim that same protection.

What therefore appears as a straightforward argument in fact brings with it a host of normative questions—questions that legal scholars for the most part have not answered, and indeed have not asked,<sup>11</sup> even as some floodgates arguments have shaped substantive law.<sup>12</sup> Is it ever appropriate for courts to consider the effect their decision will have on the volume of litigation?

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future litigation is outside the scope of this Article; rather, the focus here is on those arguments that appear to be particularly concerned with volume—namely, over the number of cases that any one decision might cause.

<sup>9</sup> Scholars have used this particular phrase from the mid-1970s to today. See Daniel J. Meador, *Appellate Courts: Staff and Process in the Crisis of Volume* 7–9 (West 1974); Bert I. Huang, *Lightened Scrutiny*, 124 Harv L Rev 1109, 1112 (2011).

<sup>10</sup> This phrase originated with Chief Justice Marshall. See *Marbury v Madison*, 5 US (1 Cranch) 137, 163 (1803). Although *Marbury* itself presented an instance of a legal injury that did not result in a remedy from the Court, justices have frequently invoked the phrase in a literal way. See, for example, *Alden v Maine*, 527 US 706, 812 (1999) (Souter dissenting); *Lujan v Defenders of Wildlife*, 504 US 555, 606 (1992) (Blackmun dissenting); *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388, 397 (1971); *Baker v Carr*, 369 US 186, 208 (1962).

<sup>11</sup> The discussion of floodgates has received surprisingly little attention from legal academics. A limited number of scholars have discussed this line of argumentation in articles on other topics or in practical guides. See, for example, Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich L Rev 2271, 2326–30 (1990) (discussing the floodgates argument in the context of affirmative and negative constitutional duties); Margolis, 62 Mont L Rev at 73 (cited in note 8) (including information on floodgates arguments in a guide on writing appellate briefs). However, the only scholarship completely devoted to the topic of which I am aware is a thoughtful student comment. See generally Toby J. Stern, Comment, *Federal Judges and Fearing the “Floodgates of Litigation”*, 6 U Pa J Con L 377 (2003).

<sup>12</sup> To be clear, I am not claiming that floodgates arguments have been dispositive in all or even most of the cases in which they have been raised. Rather, I am asserting that this kind of reasoning has directly impacted the outcome of at least a few key cases. See, for example, *Grable & Sons Metal Products, Inc v Darue Engineering & Manufacturing*, 545 US 308, 319–20 (2005); *Wilkie*, 551 US at 562. And it has at least been a relevant factor in many of the cases discussed in Parts I, II, and III.

If so, what number of forecasted filings is sufficient to justify, say, deciding against the creation of a new private right of action or against reviewing a set of cases? Does it matter whether a high percentage of the anticipated claims would be frivolous? Does it matter just how inundated the courts, or other governmental institutions, are with other cases?

Yet to begin to have purchase on these questions, one first needs to understand how floodgates arguments are made and to what end. Despite the fact that the Court refers to the “floodgates argument” as if it had a singular meaning<sup>13</sup> and uses consistent imagery to invoke it—a flood,<sup>14</sup> a deluge,<sup>15</sup> a rainfall,<sup>16</sup> or even an avalanche<sup>17</sup>—not all such arguments are the same. A careful exposition of floodgates arguments reveals that they are in fact quite varied, depending largely upon the government institution—and the dynamic between the judiciary and that institution—that would be affected by an increase in litigation.

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<sup>13</sup> See, for example, *Wilkie*, 551 US at 577 (Ginsburg concurring in part and dissenting in part) (“The ‘floodgates’ argument the Court today embraces has been rehearsed and rejected before.”). It is worth noting that on at least one occasion, the Court has used the phrase to mean something akin to a slippery slope argument. See *Morris v Gressette*, 432 US 491, 506 n 23 (1977):

Mr. Justice Marshall’s dissent opens with a “floodgates” argument: If there is no judicial review when the Attorney General misunderstands his legal duty, there also will be no judicial review when at sometime in the future the Attorney General bargains acquiescence in a discriminatory change in a covered State’s voting laws in return for that State’s electoral votes.

The discussion here includes only those arguments centered on the potential for increased litigation. Additionally, at least among lower courts, there have been instances in which a floodgates argument is invoked in a positive manner, with the court welcoming a potential increase in litigation on a particular subject (with thanks to Professor Richard Lazarus for this point). See, for example, *Calvert Cliffs’ Coordinating Commission v United States Atomic Energy Commission*, 449 F2d 1109, 1111 (DC Cir 1971). In the Supreme Court, I only found cases in which a flood was perceived to be a threat; as such, the discussion here only focuses on the concerns—and not the promise—of potential litigation.

<sup>14</sup> See, for example, *Bowen v Michigan Academy of Family Physicians*, 476 US 667, 680 n 11 (1986) (“We do not believe that our decision will open the floodgates to millions of Part B Medicare claims. . . . We observed no flood of litigation in the first 20 years of operation of Part B of the Medicare program, and we seriously doubt that we will be inundated in the future.”).

<sup>15</sup> See, for example, *Davis v Passman*, 442 US 228, 248 (1979) (dismissing the lower court’s concern of “deluging federal courts with claims”).

<sup>16</sup> See, for example, *Skinner*, 131 S Ct at 1299 (“[N]o evidence . . . shows any litigation flood or even rainfall.”).

<sup>17</sup> See, for example, *Bivens*, 403 US at 430 (Blackmun dissenting) (criticizing the Court’s decision for “open[ing] the door for another avalanche of new federal cases”).

To begin, the Court has consistently considered floodgates arguments in the context of interbranch concerns. With regard to the executive branch, justices have suggested that their decisions must take into account the ways in which an increase in certain kinds of litigation would impinge upon the ability of federal agents<sup>18</sup> or even the President<sup>19</sup> to perform official obligations. With regard to the legislative branch, justices have raised concerns that a particular statutory reading might lead to a deluge of new claims, a result that would suggest the Court had disregarded congressional intent<sup>20</sup> or even usurped the legislative function by expanding its own jurisdiction.<sup>21</sup> In both sets of cases, the primary concern is not that the federal courts will be inundated with an increase in claims but rather that an increase in claims would cause, or be evidence of, a problem for a coordinate branch of government.

Similarly, the Court has considered floodgates arguments that are part of larger “intersystemic”<sup>22</sup> concerns—those regarding the balance between the federal and state court systems. In these cases, the threat of a flood is problematic because it would signal federal aggrandizement—that the Court had taken cases from the state courts that belong in state court<sup>23</sup> or that the state courts would be burdened with a host of new claims and attendant obligations.<sup>24</sup> As in the interbranch context, the concern here is not over the volume of cases per se but rather how an increase in cases would affect another set of government institutions and the federal courts’ dynamic with those institutions.

In the majority of cases, however, the justices have considered floodgates arguments that are animated by volume-related concerns for the federal judiciary, so that they may keep their *own* heads (and those of other federal judges) above water. In this set of cases, members of the Court argue for a particular decision to avoid creating or contributing to what they see to be an excessive workload in what might best be understood as a form

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<sup>18</sup> See *id.* (Blackmun dissenting).

<sup>19</sup> See *Clinton v. Jones*, 520 US 681, 722–23 (1997) (Breyer concurring).

<sup>20</sup> See *De Beers Consolidated Mines*, 325 US at 223–25 (Douglas dissenting).

<sup>21</sup> See *Solem v. Helm*, 463 US 277, 314–15 (1983) (Burger dissenting).

<sup>22</sup> Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 *Yale L.J.* 1898, 1990–97 (2011).

<sup>23</sup> See *United States v. Maze*, 414 US 395, 407 (1974) (Burger dissenting).

<sup>24</sup> *M.L.B. v. S.L.J.*, 519 US 102, 129–30 (1996) (Thomas dissenting) (describing how, as a result of the Court’s decision, state courts would be required to furnish free trial transcripts in numerous kinds of cases).

of “court-centered prudentialism.”<sup>25</sup> Specifically, the justices occasionally suggest or even hold that a cause of action must go unrecognized,<sup>26</sup> or a case unreviewed,<sup>27</sup> because to do otherwise would invite too many new filings into the federal courts. More frequently, the majority asserts that its holding is sound because it will not lead to an increase in claims,<sup>28</sup> or the dissent accuses the majority of being improperly motivated by a desire to avoid such an increase.<sup>29</sup> In essence, this kind of floodgates argument is concerned with case volume, and how that volume will affect the federal courts themselves.

Given that the Court considers floodgates arguments in such fundamentally different ways, these arguments must be evaluated contextually, not categorically.<sup>30</sup> This Article therefore begins by analyzing how floodgates arguments actually function in the Supreme Court.<sup>31</sup> Following other scholarship that has

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<sup>25</sup> See Neil S. Siegel, *Prudentialism in McDonald v. City of Chicago*, 6 Duke J Const L & Pub Pol 16, 16–17 (2010).

<sup>26</sup> See *Wilkie*, 551 US at 555–61.

<sup>27</sup> See *Vieth*, 541 US at 326 n 14 (Stevens dissenting).

<sup>28</sup> See note 4.

<sup>29</sup> See note 5.

<sup>30</sup> Consider Note, *Satisfying the “Appearance of Justice”: The Uses of Apparent Impropriety in Constitutional Adjudication*, 117 Harv L Rev 2708 (2004) (suggesting that apparent-impropriety concerns should be determined contextually rather than categorically).

<sup>31</sup> To find the universe of cases containing floodgates arguments in the Supreme Court, I first ran a search in Westlaw in the winter of 2013 for all Supreme Court cases containing the word “flood,” “floodgate,” “floodgates,” “deluge,” or “avalanche”—which resulted in approximately 650 cases. I reviewed the operative language in each case to determine which ones were relevant, and narrowed the pool to approximately sixty cases. A research assistant then conducted tailored searches (such as “floodgates” within five words of “cases” or “litigation”) as a check against my own winnowing of the cases. Second, recognizing that not all cases that rely upon floodgates reasoning use the explicit language of floodgates, I ran another series of searches designed to capture at least some of the cases in which the Court discussed the impact a decision would have on case volume (such as “staggering” or “tremendous” within five words of “cases” or “litigation”). Finally, I ran searches using certain excerpts from what appeared to be key opinions that addressed floodgates arguments (such as Justice Harlan’s concurrence in *Bivens* and Justice Jackson’s concurrence in *Brown v Allen*). See *Bivens*, 403 US at 410 (Harlan concurring); *Brown v Allen*, 344 US 443, 537 (1953) (Jackson concurring). Including these additional searches, the total number of relevant cases that I located was just above sixty. I performed this same set of searches in the summer of 2013 and added one new case from October Term 2012 (*McQuiggin v Perkins*, 133 S Ct 1924 (2013)).

To be clear, I do not purport that every Supreme Court case that mentions case volume as a concern is captured in this set; for example, *Merrell Dow Pharmaceuticals Inc v Thompson*, 478 US 804 (1986), or, more recently, *University of Texas Southwestern Medical Center v Nassar*, 133 S Ct 2517 (2013), could have been included in this analysis but were not captured by my search. Rather, the claim is simply that I have captured a

focused on a particular kind of argument in legal discourse,<sup>32</sup> this Article's initial goal is to unpack the argument in question—determining how floodgates arguments are employed, for what purposes, and what impact they have had in shaping doctrine. As the discussion above indicates, the answers to those questions are varied and important. These answers also enable the second major project of the Article, which is to begin to evaluate the normative basis underlying floodgates arguments—whether and under what circumstances they *should* play a role in judicial decision making.

The first three Parts of the Article delineate the primary uses of this consequentialist line of reasoning, based on why the reasoning is being invoked and which branch of government will be affected by the consequences.<sup>33</sup> Part I examines cases in which the Court considers floodgates arguments in the service of a larger argument about interbranch concerns. Specifically, Part I.A focuses on judicial-executive interactions, and Part I.B turns to judicial-legislative interactions. Part II considers floodgates arguments as they implicate intersystemic concerns. Part II.A examines cases in which the Court is concerned about taking too many cases from the state courts, and Part II.B discusses the near opposite—cases in which the Court is concerned about flooding the state courts with too many cases and related obligations. Part III then assesses cases in which the Court invokes floodgates out of concern for the judiciary itself. This Part explores how this reasoning has been raised in particular lines of

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sizeable number of cases that address this kind of reasoning, including most if not all explicit floodgates cases.

<sup>32</sup> For a prime example of this type of scholarly literature, see generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv L Rev 1026 (2003) (providing a detailed exposition of slippery slope arguments). For related scholarship, see generally Russell B. Korobkin and Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 Cal L Rev 1051 (2000) (exploring the use of the rationality assumption in legal scholarship); Gluck, 120 Yale L J 1898 (cited in note 22) (analyzing the *Erie* doctrine in a decade's worth of federal and state court cases).

<sup>33</sup> As with any time one creates a taxonomy to better understand a set, one could rely on a different organizing principle (just as if one were examining a collection of various shapes in different colors, one could group the items by shape or by color, etc.). Regarding the set of floodgates cases, one could alternatively create a schematic that focused on the task the Court was performing in each case—say, constitutional interpretation, statutory interpretation, or federal common lawmaking. For my own part, I think the affected institution is a critical component of understanding floodgates arguments and so focus the discussion accordingly. That said, I do try to note the kind of task the Court was engaging in throughout the discussion and raise the task, where I think relevant, in the normative discussion in Part IV.



cases, including *Bivens*, habeas, and prisoner appeals. In these and other areas of law, the Court seeks to avoid increasing the number of claims coming into the federal courts—often frivolous cases but also cases in general.

Part IV then frames and begins to answer the normative questions of if and when the Court should employ this line of reasoning. I suggest that the concerns behind the first two categories of floodgates arguments are familiar ones, with ties to constitutional principles—including separation of powers and federalism—and key lines of doctrine—including qualified immunity and abstention. Although reasonable minds may disagree about how much weight to accord these floodgates arguments, their invocation generally is not problematic per se.

Whether the Court can properly shape substantive law based on caseload for caseload's sake—a matter of judicial “self-interest[ ]”<sup>34</sup>—is a more complicated question. Whereas concerns about interbranch and intersystemic relationships have a firm footing in various areas of law, concerns about workload stand on shakier ground. Accordingly, I argue that anxieties about workload are best addressed through other means, such as through the use of procedural rules and case-management practices.<sup>35</sup> Inviting a flood of new claims into federal court may well be dangerous. But without sound legal footing, it is more dangerous still to divert a line of cases where it would not otherwise flow.

## I. INTERBRANCH CONCERNS

The phrase “opening the floodgates” has become something of a legal trope, like “slippery slope”<sup>36</sup> or “parade of

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<sup>34</sup> See *Hudson v McMillian*, 503 US 1, 15 (1992) (Blackmun concurring).

<sup>35</sup> I use the term “case-management practices” to describe administrative means that the federal courts of appeals employ to manage their dockets, such as decreasing the percentage of cases that receive oral argument and result in published opinions. See, for example, Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 *Duke L J* 315, 320–25 (2011).

<sup>36</sup> See, for example, *Shady Grove Orthopedic Associates, PA v Allstate Insurance Co*, 130 S Ct 1431, 1465–66 n 5 (2010) (Ginsburg dissenting):

Shady Grove projects that a dispensation in favor of Allstate would require “courts in all diversity class actions . . . [to] look to state rules and decisional law rather than to Rule 23 . . . in making their class certification decisions.” This slippery-slope projection is both familiar and false. Cf. R. Bork, *The Tempting of America* 169 (1990) (“Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.”).

horribles.”<sup>37</sup> Judges and scholars tend to use the phrase as if it had a single, stable meaning.<sup>38</sup> But in fact, these arguments vary considerably depending upon the government institution—and the dynamic between the judiciary and that institution—that would be affected by a flood of new cases.

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(citations omitted). For a broader discussion of slippery slope arguments, see generally Volokh, 116 Harv L Rev 1026 (cited in note 32).

<sup>37</sup> See, for example, *Eastern Associated Coal Corp v United Mine Workers of America, District 17*, 531 US 57, 69 (2000) (Scalia concurring) (“One can, of course, summon up a parade of horribles, such as an arbitration award ordering an airline to reinstate an alcoholic pilot who somehow escapes being grounded by force of law.”); *Goldman v Weinberger*, 475 US 503, 519 (1986) (Brennan dissenting):

[T]he Air Force argues that while Dr. Goldman describes his yarmulke as an “unobtrusive” addition to his uniform, obtrusiveness is a purely relative, standardless judgment. The Government notes that while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor dreadlocks to a Rastafarian. If the Court were to require the Air Force to permit yarmulkes, the service must also allow all of these other forms of dress and grooming. The Government dangles before the Court a classic parade of horribles . . . .

Most recently, the parade of horribles was recast as “the broccoli horrible” by dissenting Justices in October Term 2011’s decision on the Affordable Care Act. See *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2624 (2012) (Ginsburg concurring in part and dissenting in part).

<sup>38</sup> For recent judicial examples, see *Geinosky v City of Chicago*, 675 F3d 743, 748 (7th Cir 2012) (“We do not credit the city’s assertion that allowing this suit will open the floodgates to a wave of ordinary malicious prosecution (or other tort cases) brought as constitutional class-of-one claims.”); *United States v City of Loveland, Ohio*, 621 F3d 465, 472 (6th Cir 2010) (“Because federal courts are already charged with enforcing the Clean Water Act . . . the district court’s exercise of jurisdiction over this matter would not open the floodgates of litigation that might overwhelm the federal courts.”); *Arar v Ashcroft*, 585 F3d 559, 629–30 n 7 (2d Cir 2009) (Pooler dissenting):

Because plaintiffs must meet a plausibility standard for claims against federal officials under *Ashcroft v. Iqbal*, I am not concerned that subjecting federal officials to liability under the [Torture Victim Protection Act] would open the floodgates to a wave of meritless litigation.

(citation omitted).

For recent scholarly examples, see F. Andrew Hessick, *Probabilistic Standing*, 106 Nw U L Rev 55, 89 (2012) (“A fourth objection to expanding standing to all risks of injury is that it would open the floodgates of litigation and overburden the federal dockets.”); Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 Vand L Rev 509, 555 (2012) (“One might be concerned . . . about opening the floodgates of federal court litigation. The argument that there are simply too many federal question cases for the federal courts to handle is somewhat responsive to this point.”); Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek behind the Curtains*, 100 Georgetown L J 1507, 1516 (2012) (“In the context of litigation, a ‘flood’ is normally treated as something to be avoided—it is common to argue that a particular legal theory should be rejected because its embrace would ‘open the floodgates of litigation.’”).

Chief among these institutions are the judiciary's own coordinate branches of the federal government: the executive and the legislature. Indeed, in quite a few cases the Supreme Court has considered floodgates arguments that address an inter-branch concern. The concerns themselves vary, depending on the branch involved. In the context of cases involving the executive, the worry has been that a flood of litigation would burden executive branch actors—be it federal agents or the president himself. In the context of the legislature, the concern is substantially different. There, the worry is not that a deluge of new claims would encumber Congress but rather that it would serve as evidence that the Court had disregarded legislative intent in construing a particular statute or had even usurped the legislative function altogether. Despite these specific variations, the larger point is that the Court has relied upon floodgates arguments to express concerns about how an increase in claims would affect its relationship with a coordinate branch of government.

#### A. Burdening the Executive Branch

The justices have occasionally entertained, and even invoked *sua sponte*, floodgates arguments when considering the impact their decisions will have on executive branch officials. Although litigation always absorbs defendants' time and resources, members of the Court have suggested that these costs may be particularly problematic when the defendants are executive officials, because of both the importance of their work and the troubling potential for judicial micromanaging of executive time and functions. These concerns are perhaps most prominent in cases involving civil suits against executive officials, and a close reading of those cases demonstrates both the form and weight of floodgates considerations.

One of the first examples of a floodgates argument used to express a concern about burdening the executive comes from *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>39</sup> in 1971. In *Bivens*, the Court considered whether a citizen has a cause of action against federal agents who violated his Fourth Amendment right to be free from an unreasonable search and seizure.<sup>40</sup> Although a majority answered that question in the affirmative, several Justices dissented on the ground

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<sup>39</sup> 403 US 388 (1971).

<sup>40</sup> *Id.* at 389–90.

that Congress, not the Court, had the authority to create a new cause of action.<sup>41</sup> For this reason *Bivens* is often perceived as a case that raises judicial-legislative concerns.<sup>42</sup> And yet, the floodgates argument that was ultimately put forward by a third dissenter expressed a concern about a different branch of government: unduly burdening the executive.

In his dissent, Justice Blackmun objected on the ground that the Court's decision would "open[] the door for another avalanche of new federal cases."<sup>43</sup> Specifically, he argued that after *Bivens*, "[w]henever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court."<sup>44</sup> Justice Blackmun envisioned federal agents being burdened with a barrage of litigation, thereby making it all the more difficult for them to carry out their official duties.<sup>45</sup> There was also an indirect fear that the very threat of a litigation avalanche would cause agents to alter *appropriate* behavior out of a broad fear of being sued.<sup>46</sup> These concerns were particularly pronounced at "this time of our history"<sup>47</sup>—a time when law enforcement officials were perceived to be under great strain.<sup>48</sup>

Significantly, this early example of a floodgates argument is not concerned with flooding the *courts* with cases. Rather, the potential flood here is one that would burden executive branch

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<sup>41</sup> See *id.* at 411 (Burger dissenting); *id.* at 427–28 (Black dissenting). See also James E. Pfander and David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 *Georgetown L J* 117, 117–18 (2009).

<sup>42</sup> See, for example, Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special about Special Factors*, 45 *Ind L Rev* 719, 729 (2012) (describing the "common understanding of *Bivens*'s central problem" to be "one of the separation of judicial from legislative powers").

<sup>43</sup> *Bivens*, 403 US at 430 (Blackmun dissenting).

<sup>44</sup> *Id.* (Blackmun dissenting).

<sup>45</sup> See *id.* (Blackmun dissenting) ("This will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical.").

<sup>46</sup> This view was expressed by Justice Black in his dissenting opinion. *Id.* at 429 (Black dissenting) ("There is also a real danger that such suits might deter officials from the *proper* and honest performance of their duties.").

<sup>47</sup> *Bivens*, 403 US at 430 (Blackmun dissenting).

<sup>48</sup> Just prior to *Bivens*, the United States had experienced a rise in crime rates. See Department of Justice, *Uniform Crime Reporting Statistics* (Mar 29, 2010), online at <http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (visited Sept 10, 2013) (reporting that both the violent crime rate and the property crime rate more than doubled between 1960 and 1970); Carol S. Steiker, Book Review, *Capital Punishment and Contingency*, 125 *Harv L Rev* 760, 769 (2012) (noting the "rising crime rates during the 1960s").

officials. What is also significant about *Bivens* is that, rather than dismissing the validity of the concern, the majority tried to refute the possibility that an avalanche would ensue. Justice Brennan, writing for the Court, cited a survey of “comparable actions against state officers” and found only fifty-three reported cases in seventeen years that survived a motion to dismiss.<sup>49</sup> While it is unclear whether this rejoinder sufficiently addresses Justice Blackmun’s floodgates argument,<sup>50</sup> what is clear is that the majority thought that argument was important enough to warrant a response.

Federal agents are not the only executive officials the Court has considered protecting from floods; the Court has also considered such arguments in the context of how litigation would affect the president. The primary example of this concern comes from *Clinton v Jones*,<sup>51</sup> in which the Court considered, inter alia, whether the federal courts must stay private actions against a sitting President until he is no longer in office.<sup>52</sup> Part of President Bill Clinton’s argument was that if the Court did not stay private actions against him, he would be flooded with cases, which would severely hinder his ability to perform his official functions.<sup>53</sup>

The invocation of this argument is perhaps unsurprising, but the Court’s response to it is especially interesting, for it illuminates the justices’ view of whether floods are valid concerns, and also how parties can go about demonstrating their would-be existence. As a general matter, there are two main responses to a floodgates argument. First, as in *Bivens*, the Court can respond internally and refute the claim that a flood will come.<sup>54</sup> Second, the Court can go outside of the argument and suggest that the existence of a deluge of new claims, or lack thereof, is not sufficient to determine the outcome of the case. In *Jones*, the Court did both.

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<sup>49</sup> *Bivens*, 403 US at 391 n 4.

<sup>50</sup> Even assuming that past actions of a different kind could be used to forecast how many actions would arise under *Bivens*, the question is how many cases in general would require the time and resources of federal agents—a number that might extend beyond only those cases that survived a motion to dismiss. I return to this point in Part IV.C.

<sup>51</sup> 520 US 681 (1997).

<sup>52</sup> *Id.* at 697–98.

<sup>53</sup> *Id.* at 701–02 (“[P]etitioner contends that this particular case—as well as the potential additional litigation that an affirmance of the Court of Appeals judgment might spawn—may impose an unacceptable burden on the President’s time and energy, and thereby impair the effective performance of his office.”).

<sup>54</sup> See notes 49–50 and accompanying text.

The Court first attempted to calm the fears of flooding by suggesting that new claims were unlikely to arise, regardless of its decision. Looking to history, the Court noted that over the previous two centuries, only three sitting Presidents had faced suits for private actions.<sup>55</sup> The Court concluded, “If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency.”<sup>56</sup>

But the Court went one step farther by suggesting that such a burden on the executive, even if it existed, would not necessarily establish a violation of the Constitution. As Justice Stevens wrote, “Of greater significance, petitioner errs by presuming that interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment of the Executive’s ability to perform its constitutionally mandated functions.”<sup>57</sup> The Court reasoned that if the federal courts may burden the executive by reviewing the legality of the President’s official conduct, then the courts may review the legality of his unofficial conduct as well.<sup>58</sup> Accordingly, the Court concluded that staying all private actions against the President until he had left office was unnecessary.<sup>59</sup>

Yet Justice Breyer wrote separately to suggest that the Court’s holding should be seen as a threshold, not a bar. In the opening of his concurrence, Justice Breyer focused on the issue of future litigation, noting the possibility that the majority could be “wrong in predicting the future infrequency of private civil litigation against sitting Presidents.”<sup>60</sup> He went on to suggest that the Court had understated the “danger” of future litigation and

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<sup>55</sup> See *Jones*, 520 US at 702.

<sup>56</sup> *Id.* As in *Bivens*, some slippage seems to exist between the floodgates argument and the Court’s response to it. After all, the President’s point was that allowing the suit to go forward would encourage more claims. See Brief for the Petitioner, *Clinton v Jones*, No 95-1853, \*7–8 (filed Aug 8, 1996) (available on Westlaw at 1996 WL 448096):

A personal damages action is bound to be burdensome and disruptive . . . .  
There is also no reason to believe that, if it is established that private damages actions against sitting Presidents may go forward, such suits would be rare. To the contrary, parties seeking publicity, partisan advantage or a quick settlement will not forbear from using such litigation to advance their objectives.

(emphasis added). As such, history would be an unreliable guide for predicting how many new claims would follow. I return to this point in Part IV.C.

<sup>57</sup> *Jones*, 520 US at 702.

<sup>58</sup> See *id.* at 705.

<sup>59</sup> See *id.* at 705–06.

<sup>60</sup> *Id.* at 711 (Breyer concurring).

argued that the Court might have to eventually consider ways of avoiding “significant interference with the President’s ongoing discharge of his official responsibilities.”<sup>61</sup> Justice Breyer’s separate opinion therefore seemingly leaves the proverbial door slightly ajar by suggesting that if a future president could show that he was facing an onslaught of new private claims, the Court’s position might be different, or indeed might need to be different.<sup>62</sup>

*Bivens* and *Jones* show that the justices have considered, and even themselves raised, floodgates arguments in support of the executive. The underlying concern in both cases is that the Court’s decision could lead to an onslaught of new claims, which would significantly hamper the ability of executive actors to perform their official obligations.

As for outcomes, one might be tempted to cast both *Bivens* and *Jones* as cases in which the floodgates argument did not prevail and thus question how much weight the Court has been willing to accord such arguments. But as this Section has shown, a critical factor in both cases seemed to be that the majority did not believe that a flood was truly coming. Had the Court thought concerns about floods irrelevant, it would never have bothered to assure itself on that point in either case. Instead, the Justices recognized the danger of encumbering law enforcement or the

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<sup>61</sup> *Jones*, 520 US at 723–24 (Breyer concurring). Specifically, Justice Breyer suggested that ordinary case-management principles might prove insufficient to handle private civil lawsuits for damages “unless supplemented with a constitutionally based requirement that district courts schedule proceedings” to avoid interfering with the President’s ability to perform his official functions. *Id.* (Breyer concurring).

<sup>62</sup> Indeed, not long after the decision came down, scholars suggested that the Court was wrong to be so optimistic, particularly regarding how costly allowing civil litigation would be for the executive. See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 *Tex L Rev* 269, 281 n 45 (1999) (noting how President Clinton subsequently argued that the Court “drastically underestimated” the extent to which civil litigation would burden the President’s time and how commentators suggested that events after *Jones* proved the prediction to be “flatly wrong and even laughable”). Some even questioned whether the Court could appropriately overrule *Jones* only a few years later. See, for example, Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 *Harv L Rev* 4, 76 (1998). Professor Michael Dorf suggested that “the answer depends on whether one views the course of events as merely idiosyncratic rather than as a harbinger of likely litigation against future Presidents.” *Id.* Perhaps most telling, the Court later, in *Cheney v United States District Court for the District of Columbia*, 542 US 367 (2004), “took back some of the ground it had given away” in *Jones*, as lower courts “were instructed to better protect internal executive branch deliberations from litigation.” Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 *Harv L Rev* 29, 35–36 (2004) (citations omitted).

president with a vast number of cases, and concluded that no such danger was present. There is reason to think, particularly in light of Justice Breyer's concurrence in *Jones*, that, if the Court had perceived a high burden, it would have acted differently.

## B. Encroaching upon the Legislative Branch

In a second category of cases, the Court has considered floodgates arguments in the context of the relationship between the federal courts and Congress. In this category, the expressed concern is not that a flood of cases would burden officials from a coordinate branch of government, but rather that the potential flood would show a disregard for legislative intent or arrogation of power to the judiciary.

With limited exceptions, Article III provides Congress the last word on the jurisdiction of the federal courts.<sup>63</sup> Accordingly, questions about what claims can come into the courts often reduce to questions of congressional intent.<sup>64</sup> Both litigants and justices frequently invoke images of floodgates to support arguments about why particular classes of claims fall outside the legislative grant of jurisdiction. Flood metaphors serve several distinct roles in this context. Forecasts of floods are sometimes used as evidence of the existence of a problem—a violation of congressional intent—and sometimes as evidence of the practical extent of that problem. In a stronger vein, forecasts of floods are also used to suggest that the Court has usurped the legislative function by expanding federal court jurisdiction on its own.

One of the starkest examples of a floodgates concern in the legislative-branch context comes from one of the earliest cases to contain a floodgates argument: the 1945 case *De Beers*

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<sup>63</sup> See US Const Art III, § 2, cl 2. But for a thoughtful analysis of the limits of Congress's power to affect the Court's jurisdiction, see Lawrence Gene Sager, *The Supreme Court, 1981 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv L Rev 17, 20–22 (1981).

<sup>64</sup> See, for example, *INS v. St. Cyr*, 533 US 289, 298 (2001) (“For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.”); *American National Red Cross v. S.G.*, 505 US 247, 258 (1992) (“Respondents also claim that language used in congressional charters enacted closely in time to the 1947 amendment casts doubt on congressional intent thereby to confer federal jurisdiction over cases involving the Red Cross.”); *Merrell Dow Pharmaceuticals Inc v. Thompson*, 478 US 804, 810 (1986) (“[I]n exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.”).



*Consolidated Mines, Ltd v United States*,<sup>65</sup> an antitrust case that came to the Supreme Court as an interlocutory appeal.<sup>66</sup> The Supreme Court ultimately reversed the lower court's ruling, but four Justices dissented on the ground that the Court should not have considered the appeal in the first place. Specifically, they argued that the case did not involve the kind of "extraordinary situation" that Congress intended to be subject to interlocutory appeal under the Expediting Act of 1903.<sup>67</sup> The dissent went on to say that although one effect of the Act was that some potentially erroneous interlocutory orders would not be reviewable, Congress made this tradeoff when it enacted the legislation and the Court "should respect it."<sup>68</sup> It then concluded with its own forecast: "The decision, if followed, will open the flood gates to review of interlocutory decrees. It circumvents the policy of Congress to restrict review in these cases to final judgments."<sup>69</sup> The majority did not respond to the dissent's floodgates argument, but its significance is nonetheless easy to perceive. The dissenting Justices in *De Beers* saw the Court as contravening congressional intent, and the ensuing flood was invoked to prove that transgression.

But statutory interpretation is not the only context in which a justice has invoked a floodgates argument to avoid encroaching on what he or she sees as the legislative domain. Similar rhetoric surfaces even in cases involving constitutional rights. In *Solem v Helm*,<sup>70</sup> for example, the Court held that the petitioner's Eighth Amendment right to be free from cruel and unusual punishment was violated when he was sentenced to life without

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<sup>65</sup> 325 US 212 (1945).

<sup>66</sup> Id at 215. The defendants were several foreign corporations who were charged with engaging in a conspiracy to monopolize commerce in gemstones in violation of the Sherman Antitrust Act, ch 647, 26 Stat 209 (1890), codified as amended at 15 USC § 1 et seq, and the Wilson-Gorman Tariff Act, ch 349, 28 Stat 509 (1894), codified as amended at 15 USC § 8 et seq. They were challenging a preliminary injunction to restrain them from selling any property within the United States or withdrawing any property from the United States until the district court resolved the case. *De Beers Consolidated Mines*, 325 US at 214–15.

<sup>67</sup> *De Beers Consolidated Mines*, 325 US at 223 (Douglas dissenting), citing Expediting Act of 1903, Pub L No 57-82, ch 544, 32 Stat 823, codified as amended at 15 USC § 29. The purpose of the Expediting Act was to allow the Attorney General to seek "expeditious treatment" of cases brought under the Sherman Act that were deemed to be of general public importance. Barak Y. Orbach, *Antitrust and Pricing in the Motion Picture Industry*, 21 Yale J Reg 317, 344 n 145 (2004).

<sup>68</sup> *De Beers Consolidated Mines*, 325 US at 225 (Douglas dissenting).

<sup>69</sup> Id (Douglas dissenting).

<sup>70</sup> 463 US 277 (1983).

parole after committing a series of nonviolent crimes.<sup>71</sup> Chief Justice Burger dissented, joined by Justices White, Rehnquist, and O'Connor, arguing that, in reaching its decision, the Court had given itself the power to review sentences for excessiveness—something that, at that point,<sup>72</sup> Congress had not intended.<sup>73</sup> As Chief Justice Burger wrote, Congress had pondered for decades the concept of appellate review of sentences and had hesitated to act,<sup>74</sup> meaning that the Court's own decision constituted "judicial usurpation with a vengeance."<sup>75</sup>

The dissent's floodgates reasoning echoed that of the dissent in *De Beers* in some ways but differed in others. The Chief Justice wrote that the "real risk" of the decision was that it would result in a "flood" of new cases, all requiring difficult decisions by the courts.<sup>76</sup> This buttressed his conclusion that Congress could not have intended such a result,<sup>77</sup> just as Justice Douglas's floodgates argument had done in *De Beers*.<sup>78</sup> But in *Solem* the floodgates argument also took on a weight of its own. The invocation of a flood was used not simply to show that the Court had made an error but also to convey the cost of that error. The Court had contravened congressional intent, and its doing so would impact a significant number of cases.<sup>79</sup>

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<sup>71</sup> Id at 303.

<sup>72</sup> Just one year after *Solem* was decided, Congress passed the Sentencing Reform Act of 1984, which provided for appellate review. See Sentencing Reform Act of 1984, Pub L No 98-473, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq. See also Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 2 (Chicago 1998) (describing one of the "hallmarks" of the Sentencing Reform Act as providing "for the first time . . . for appellate review of sentences").

<sup>73</sup> *Solem*, 463 US at 314–15 (Burger dissenting).

<sup>74</sup> Id at 315 (Burger dissenting).

<sup>75</sup> Id (Burger dissenting).

<sup>76</sup> Id (Burger dissenting). See also Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich L Rev 1145, 1182–86 (2009) (describing the administrative concerns attendant with the Court's proportionality jurisprudence).

<sup>77</sup> *Solem*, 463 US at 314–15 (Burger dissenting).

<sup>78</sup> See *De Beers Consolidated Mines*, 325 US at 225 (Douglas dissenting) ("Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them non-reviewable."). See also notes 67–69 and accompanying text.

<sup>79</sup> *Solem*, 463 US at 314–15 (Burger dissenting). This latter point suggests that the Chief Justice was also motivated by the kind of court-centered floodgates concerns described in Part III. Indeed, this is a good example of the fact that the categories described here are not mutually exclusive; some floodgates arguments encompass more than one type of concern (regarding more than one governmental institution).

As in *Bivens* and *Jones*,<sup>80</sup> the *Solem* majority responded to the floodgates argument by refuting the suggestion that it had done anything to open the floodgates. Writing for the majority, Justice Powell argued that “[c]ontrary to the dissent’s suggestions, we do not adopt or imply approval of a general rule of appellate review of sentences.”<sup>81</sup> A few lines farther down in the opinion, he went out of his way to show that the Court had not overextended itself vis-à-vis Congress, writing, “In view of the *substantial deference that must be accorded legislatures* and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.”<sup>82</sup> By arguing that its decision was narrow, the majority was attempting to minimize the extent to which it was contravening (or appearing to contravene<sup>83</sup>) legislative intent. And although the Court did not specifically refer to floodgates, it implied that its limited holding would not invite a slew of new claims.

Since the dissents in *De Beers* and *Solem* first employed them, floodgates arguments in the judicial-legislative context have taken on increased prominence. In the cases that follow, the prime discussion of floodgates appears in majority opinions, with the Court offering assurances that its decision will not result in new litigation. Put another way, these cases show the Court offering assurances on its own that it is not disregarding congressional intent.

In *Bowen v Michigan Academy of Family Physicians*,<sup>84</sup> for example, a unanimous<sup>85</sup> Court held that the Medicare Act<sup>86</sup> did not bar judicial review of regulations promulgated under Part B

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<sup>80</sup> See *Bivens*, 403 US at 391 n 4 (rejecting the dissent’s concern that an “avalanche” of new cases would follow); *Jones*, 520 US at 702 (“[I]t seems unlikely that a deluge of such litigation will ever engulf the Presidency.”).

<sup>81</sup> *Solem*, 463 US at 290 n 16 (citation omitted).

<sup>82</sup> *Id* (emphasis added).

<sup>83</sup> Consider Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 Tex L Rev 959, 1012 (2008) (assessing the significance of the appearance of various constitutional decisions).

<sup>84</sup> 476 US 667 (1986).

<sup>85</sup> *Id* at 668.

<sup>86</sup> Through the Medicare Act, Congress created a scheme for the judicial review of certain Medicare claims and not others, such as those under general federal question jurisdiction. See Social Security Amendments of 1965 § 102(a), Pub L No 89-97, 79 Stat 286, 330, 331, codified as amended at 42 USC §§ 1395ff(B)(1), 1395ii; 42 USC § 405(g). See also Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 Tex L Rev 339, 356–57 (2005) (describing *Michigan Academy of Family Physicians* and the Medicare Act more generally).

of the Medicare program,<sup>87</sup> going out of its way to note that “[w]e do not believe that our decision will open the floodgates to millions of Part B Medicare claims.”<sup>88</sup> The basis for this statement was the Court’s own experience: “We observed no flood of litigation in the first 20 years of operation of Part B of the Medicare program, and we seriously doubt that we will be inundated in the future.”<sup>89</sup> But the *significance* of the statement was that it provided assurance that the Court was not contravening the intention of Congress in passing the Medicare Act.

The Court has continued to consider these concerns—most recently in the 2011 case *Skinner v Switzer*.<sup>90</sup> In *Skinner*, a convicted state prisoner sought access to crime-scene evidence for the purposes of DNA testing.<sup>91</sup> The question presented was whether he could raise the claim in federal court in a civil rights action under 42 USC § 1983, as opposed to the recognized route of filing a petition for habeas corpus under 28 USC § 2254.<sup>92</sup> The respondent argued that recognizing a claim of this kind under § 1983 would result in a “vast expansion” of federal jurisdiction.<sup>93</sup> The majority found these fears to be “unwarranted.”<sup>94</sup> As part of its reasoning, the Court noted that “[i]n the Circuits that currently allow § 1983 claims for DNA testing . . . no evidence tendered by Switzer shows any litigation flood or even rainfall.”<sup>95</sup> The Court went on to give additional reasons why its holding would not result in a flood, including that Congress had

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<sup>87</sup> *Michigan Academy of Family Physicians*, 476 US at 669.

<sup>88</sup> *Id.* at 680–81 n 11.

<sup>89</sup> *Id.* The Court went on to say that “as one commentator pointed out, ‘permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case.’” *Id.* (alterations in original), quoting Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 Harv L Rev 778, 792 (1984).

<sup>90</sup> 131 S Ct 1289 (2011).

<sup>91</sup> *Id.* at 1293.

<sup>92</sup> *Id.* See also Samuel R. Wiseman, *Habeas after Pinholster*, 53 BC L Rev 953, 1004–05 (2012).

<sup>93</sup> *Skinner*, 131 S Ct at 1299.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* Justice Ginsburg relied on this same language in *Connick v Thompson*, 131 S Ct 1350 (2011), from the same term. *Id.* at 1382–83 n 17 (Ginsburg dissenting) (“The deliberate indifference jury instruction in this case was based on the Second Circuit’s opinion in *Walker v. New York* . . . . There has been no ‘litigation flood or even rainfall,’ *Skinner v. Switzer*, in that Circuit in *Walker’s* wake.”) (citations omitted), citing *Walker v. New York*, 974 F2d 293, 297–98 (2d Cir 1992), and quoting *Skinner*, 131 S Ct at 1299.

specifically designed the Prison Litigation Reform Act of 1995<sup>96</sup> (PLRA) to help control the influx of prisoner suits into the federal courts.<sup>97</sup> In short, the majority tried to make plain that its decision would not result in a deluge of new claims and ultimately that it was not unduly expanding its own authority vis-à-vis Congress.<sup>98</sup>

These cases and others<sup>99</sup> demonstrate the Court's use of floodgates arguments to bolster its determinations about substantive law. And as with the executive-centered cases described in Part I.A, the Court does so in the interests of a coordinate branch of government—here, the legislature. But important differences exist between the cases arising in the context of judicial-executive interactions and those arising in judicial-legislative ones. The former are primarily concerned with the direct effects of a flood on executive actors and the encumbrances the flood would create. In the latter cases, the Court does not fear that an influx of filings would place a burden on the legislative branch. Rather, the concern in these cases is that a possible deluge of new claims would demonstrate that the Court had disregarded congressional intent or even that the Court had usurped the legislative function altogether.

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<sup>96</sup> Omnibus Consolidated Receptions and Appropriations Act of 1996, Title VIII §§ 801–10, Pub L No 104-134, 110 Stat 1321, 1321-066 to -077, codified in relevant part, as amended, at 18 USC § 3626.

<sup>97</sup> See *Skinner*, 131 S Ct at 1299.

<sup>98</sup> For a similar sentiment, see *Smith v Wade*, 461 US 30, 91 (1983) (Rehnquist dissenting) (“In a time when the courts are flooded with suits that do not raise colorable claims . . . it is regrettable that the Court should take upon itself, in apparent disregard for the likely intent of the 42d Congress, the legislative task of encouraging yet more litigation.”).

<sup>99</sup> In a slightly separate vein, the Court has decided cases in which it has referred to Congress's attempts to address a flood of cases through legislation. See, for example, *Jones v Bock*, 549 US 199, 203 (2007):

Our legal system [ ] remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law. The challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit. Congress addressed that challenge in the PLRA.

(citation omitted); *Woodford v Ngo*, 548 US 81, 91–92 n 2 (2006):

As for the suggestion that the PLRA might be meant to require proper exhaustion of nonconstitutional claims but not constitutional claims, we fail to see how such a carve-out would serve Congress' purpose of addressing a flood of prisoner litigation in the federal courts when the overwhelming majority of prisoner civil rights and prison condition suits are based on the Constitution.

(citation omitted).

As in the judicial-executive context, none of the decisions here rest exclusively or unambiguously on floodgates arguments. Such arguments are more often employed as accusations by dissenters than they are embraced by majorities. But the evolution from *De Beers* through cases such as *Skinner* shows a Court that increasingly believes such arguments must at the very least be answered, and thus have relevance in substantive decision making.

## II. INTERSYSTEMIC CONCERNS

The previous Part demonstrated that the justices have used floodgates arguments to orient the Court with respect to coordinate branches of government, ensuring that it does not unduly burden the executive or disregard congressional intent. This Part discusses how the Court has also considered floodgates arguments in the context of its relationship to state courts. Specifically, justices have raised or responded to two types of such floodgates concerns: first, about flooding the federal courts with claims that belong in state courts, and second, flooding the state courts with claims or obligations that would significantly burden them.

Both sets of concerns can be understood as part of a larger intersystemic concern about the balance between federal and state courts.<sup>100</sup> As these cases demonstrate, the justices have been concerned with how a high volume of litigation and attendant obligations can affect or even upset that balance.

### A. Taking Too Many Cases That Belong in State Courts

The justices have considered in some cases whether a particular decision will lead to a flood of new claims into federal court—claims that would otherwise fall to state courts. Many issues are bound up in these cases, but a consistent theme is that some justices do not want to upset the balance between the two court systems by, in effect, taking too many cases that they believe belong in state court.

A prime example of this phenomenon can be found in *United States v Maze*,<sup>101</sup> a 1974 case involving the federal mail fraud

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<sup>100</sup> See Gluck, 120 Yale L.J. at 1906 (cited in note 22) (using the term “intersystemic” to describe the relationship between the federal and state court systems).

<sup>101</sup> 414 US 395 (1974).

statute.<sup>102</sup> A majority of the Court concluded that the defendant's actions—which included stealing a credit card but not directly using the mails<sup>103</sup>—fell outside the definition of the statute.<sup>104</sup> Chief Justice Burger dissented, suggesting that the majority's decision was influenced by its “seeming desire not to flood the federal courts with a multitude of prosecutions for relatively minor acts of credit card misrepresentation considered as more appropriately the business of the States.”<sup>105</sup> In other words, the majority had, assuming Chief Justice Burger's account, interpreted federal law narrowly so as to keep its own dockets from being inflated and to not encroach upon “the business of the States.” Although this is in part a concern about overcrowding the federal courts, it is also undoubtedly one about maintaining the “appropriate[ ]” balance of federal-state power.<sup>106</sup>

A more recent example can be seen in Justice Ginsburg's dissent in *Shady Grove Orthopedic Associates, PA v Allstate Insurance Co.*<sup>107</sup> The question in *Shady Grove* was whether the petitioners' suit could proceed as a class action—a question that turned on whether New York's law prohibiting a class action seeking penalties or statutory minimum damages conflicted with Rule 23 of the Federal Rules of Civil Procedure.<sup>108</sup> A majority of the Court held that the New York law conflicted with Rule 23 and that Rule 23 must govern.<sup>109</sup> Justice Ginsburg, joined by Justices Kennedy, Breyer, and Alito, dissented, arguing that the rules could be reconciled but also that the decision would create intersystemic problems.<sup>110</sup> Specifically, the dissent predicted that, as a result of the decision, federal courts would become a “mecca” for “class actions seeking state-created penalties for claims arising under state law—claims that would be barred from class treatment in the State's own courts.”<sup>111</sup> Justice

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<sup>102</sup> Id at 396, citing 18 USC § 1341.

<sup>103</sup> Specifically, Thomas Maze had stolen his roommate's credit card and used it in multiple states at various purveyors, who ultimately mailed receipts to the bank attached to the credit card. See *Maze*, 414 US at 396.

<sup>104</sup> See id at 404–05.

<sup>105</sup> See id at 407 (Burger dissenting).

<sup>106</sup> Id (Burger dissenting).

<sup>107</sup> 130 S Ct 1431 (2010).

<sup>108</sup> See id at 1436, citing FRCP 23.

<sup>109</sup> See *Shady Grove Orthopedic Associates*, 130 S Ct at 1448.

<sup>110</sup> See id at 1460 (Ginsburg dissenting).

<sup>111</sup> Id at 1473 (Ginsburg dissenting). There was also a legislative intent element to this argument—Justice Ginsburg noted that surely Congress did not mean to cause this outcome when creating the Class Action Fairness Act of 2005. Pub L No 109-2, 119 Stat

Ginsburg then argued that her own proposed approach would not result in an improper shuffling of cases from state to federal court: “There is no risk that individual plaintiffs seeking statutory penalties will flood federal courts with state-law claims that could be managed more efficiently on a class basis; the diversity statute’s amount-in-controversy requirement ensures that small state-law disputes remain in state court.”<sup>112</sup>

*Shady Grove* raises a multitude of questions about interpreting state law and Federal Rules,<sup>113</sup> about the nature of the Rules Enabling Act,<sup>114</sup> and about federalism generally.<sup>115</sup> But in the midst of this considerable decision, the Justices also took care to address the balance of cases between the state and federal courts. In particular, Justice Ginsburg went out of her way to note that, under her view of how the case should be decided, the federal courts would not be “flood[ed]”<sup>116</sup> with cases that truly belonged in state court, emphasizing the view that an onslaught of such cases coming into federal court would be problematic.

But perhaps the best example of the Court being concerned with intersystemic issues can be seen in the 2005 case *Grable & Sons Metal Products, Inc v Darue Engineering & Manufacturing*.<sup>117</sup> In *Grable*, the Court again tried to define the boundaries of the federal question jurisdiction (its earlier attempt in *Merrell Dow Pharmaceuticals Inc v Thompson*<sup>118</sup> having left something to be desired<sup>119</sup>). The specific question at hand was whether a state-law quiet-title action against a federal tax sale purchaser

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4, codified in various sections of Title 28. See *Shady Grove Orthopedic Associates*, 130 S Ct at 1473 (Ginsburg dissenting).

<sup>112</sup> Id at 1472–73 n 14 (Ginsburg dissenting).

<sup>113</sup> See Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 Nw U L Rev 1, 50–53 (2012).

<sup>114</sup> Pub L No 73-415, ch 651, 48 Stat 1064 (1934), codified as amended at 28 USC § 2072. See also Stephen B. Burbank and Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U Pa L Rev 17, 25–53 (2010).

<sup>115</sup> See Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 Notre Dame L Rev 1131, 1137–43 (2011).

<sup>116</sup> *Shady Grove Orthopedic Associates*, 130 S Ct at 1472–73 n 14 (Ginsburg dissenting).

<sup>117</sup> 545 US 308 (2005).

<sup>118</sup> 478 US 804 (1986).

<sup>119</sup> Justice Brennan, joined by Justices White, Marshall, and Blackmun, dissented from the majority’s holding in *Merrell Dow*, arguing that the Court’s new test for federal question jurisdiction was “infinitely malleable.” Id at 821–23 n 1 (Brennan dissenting). Court scholars were even stronger in their criticism. See, for example, Martin Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 99–102 (Michie 2d ed 1990).



could be removed from state to federal court, in light of the fact that an essential element of the claim was that the previous owner had not received adequate notice of the sale from the Internal Revenue Service.<sup>120</sup> A unanimous Court concluded that the case could be brought in federal court, and noted that expanding federal question jurisdiction in this way “would not distort any division of labor between the state and federal courts.”<sup>121</sup> Indeed, the Court’s holding was clearly influenced by the fact that its decision would not greatly upset the state-court balance. As Justice Souter wrote for the majority:

Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (or at least assumed) by Congress, the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction.<sup>122</sup>

The Court then determined that allowing the particular case at hand would not be problematic, because it would not result in a flood of cases: “[B]ecause it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.”<sup>123</sup> (This finding was in marked contrast to what would have happened, the Court said, if it had allowed in the kind of claim at issue in *Merrell Dow*—a “tremendous number of cases” would have come from state to federal court.<sup>124</sup>) Returning to the floodgates theme once more, the Court concluded, “jurisdiction over actions like Grable’s would not materially affect, or threaten to affect, the normal currents of litigation.”<sup>125</sup>

In both *Maze* and *Shady Grove*, one can see members of the Court considering the effects of diverting cases into federal courts that, to their minds, are truly the business of state

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<sup>120</sup> *Grable & Sons Metal Products*, 545 US at 310–11.

<sup>121</sup> *Id.* at 310.

<sup>122</sup> *Id.* at 314. It is worth noting that in addition to being concerned about the division of labor between the federal and state court systems, the Court was also concerned about being faithful to Congress’s view of where this division should lie. As noted earlier, the categories of floodgates cases are not meant to be exclusive of each other—some cases will of course raise multiple kinds of floodgates concerns. See note 79.

<sup>123</sup> *Grable & Sons Metal Products*, 545 US at 315.

<sup>124</sup> *Id.* at 318.

<sup>125</sup> *Id.* at 319.

courts.<sup>126</sup> In *Grable*, the entirety of the Court is concerned with the division of labor between the state and federal courts, and how that division is affected ultimately dictates the outcome of the case. Most importantly, in all of these cases, the expressed concern of the justices is not simply one about how an increased caseload would affect the federal judiciary, but about the balance between the federal and state courts more broadly.

## B. Creating Too Many Cases or Obligations for State Courts

Beyond worrying about shifting cases from state to federal court, the justices have also worried about the inverse problem:<sup>127</sup> creating too many cases—and obligations more generally—for state courts.<sup>128</sup> Examples of this concern can be found in the line of cases on the termination of parental rights—obliquely in the 1981 case of *Lassiter v Department of Social Services of Durham County, North Carolina*<sup>129</sup> and then overtly in the 1996 case of *M.L.B. v S.L.J.*<sup>130</sup>

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<sup>126</sup> Although not expressed in terms of floodgates, another recent example of this general sentiment can be found in Justice Breyer's concurrence in *Stop the Beach Renourishment, Inc v Florida Department of Environmental Protection*, 130 S Ct 2592 (2010). As Justice Breyer argued,

[T]he approach the plurality would take today threatens to open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges. And the failure of that approach to set forth procedural limitations or canons of deference would create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law.

Id at 2619 (Breyer concurring).

<sup>127</sup> The claim is that this category is the inverse of the previous one insofar as the previous category included concerns about taking too many cases from state courts while this category includes concerns about imposing too many cases or obligations on state courts. I recognize that the two are not perfectly opposite from the standpoint of the federal courts, though. In the previous category, the federal courts were taking cases that would otherwise go to the state courts; in this category, the federal courts' caseload is not necessarily impacted.

<sup>128</sup> In a related vein, the Court has considered concerns that a particular holding would lead to a flood of cases that would create mutually exclusive obligations for the states. See *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 916 (1990) (Blackmun dissenting):

The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risking a violation of the Establishment Clause by arbitrarily limiting its religious exemptions.

<sup>129</sup> 452 US 18 (1981).

<sup>130</sup> 519 US 102 (1996).

In *Lassiter*, the Court confronted the question of whether the Due Process Clause of the Fourteenth Amendment requires the appointment of counsel for indigent parents in all parental status–termination proceedings.<sup>131</sup> A majority of the Court decided against recognizing a categorical right, and instead adopted a case-by-case approach.<sup>132</sup> Although the Court’s opinion did not state that finding the right to counsel in all parental status–termination cases would lead to an increase in caseload, the dissenting Justices argued that this fear motivated the Court’s decision making. Justice Blackmun, joined by Justices Brennan and Marshall, wrote that requiring appointment of counsel in these cases “will not open the ‘floodgates’ that, I suspect, the Court fears.”<sup>133</sup> The dissent continued: “On the contrary, we cannot constitutionally afford the closure that the result in this sad case imposes upon us all.”<sup>134</sup> While the dissenting Justices’ language is not entirely precise, it suggests that they thought the majority was improperly motivated by a fear of additional due process cases coming into court<sup>135</sup>—both federal and state<sup>136</sup>—as well as imposing a burden on the states by requiring them to supply counsel in more cases.<sup>137</sup>

In *M.L.B.*, several of the Justices raised similar intersystemic concerns about the burdens that the Court would be imposing upon the states, this time more directly. In *M.L.B.* a

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<sup>131</sup> *Lassiter*, 452 US at 24.

<sup>132</sup> See *id.* at 32–33.

<sup>133</sup> *Id.* at 58–59 (Blackmun dissenting).

<sup>134</sup> *Id.* at 59 (Blackmun dissenting). Notably, the dissent began by arguing that a contrary decision would not open the floodgates, but then concluded with a different sentiment: that the price of closing the gates would be too costly. Yet the precise cost the Justices were concerned with is unclear; it is ambiguous whether they were taking the position that the Court should not consider a potential increase in litigation in this realm full stop or whether the particular issues raised in this case justified the number of cases that might flow from it.

<sup>135</sup> See Stephen Loffredo and Don Friedman, Gideon Meets Goldberg: *The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 *Touro L Rev* 273, 311 (2009):

*Lassiter* is most intelligible through the lens of underenforcement . . . as a prudential determination to cabin the so-called “due process revolution”—and calm the institutional, federalism, and separation-of-powers concerns it carried in its wake—by drawing a doctrinally arbitrary line to close the “floodgates” the Court apparently feared.

<sup>136</sup> *Lassiter* itself had come from the North Carolina Court of Appeals. *Lassiter*, 452 US at 24.

<sup>137</sup> See Note, *Access to Justice—Civil Right to Counsel—California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties—Act of Oct. 11, 2009, ch. 457 (Codified in Scattered Sections of Cal. Bus. & Prof. Code and Cal. Gov’t Code)*, 123 *Harv L Rev* 1532, 1536 (2010).

mother appealed a decree terminating her parental rights, but her appeal was dismissed because she could not afford the fee to prepare the record below as Mississippi law required.<sup>138</sup> The majority held that it was unconstitutional for Mississippi to condition the right to appeal on ability to pay, invoking both due process and equal protection.<sup>139</sup> Justice Thomas, joined by Justice Scalia and in part by Chief Justice Rehnquist, dissented, arguing that by creating a constitutional right to a free transcript in a civil case (as opposed to in criminal cases, where the right had already been established),<sup>140</sup> the Court was inviting a flood of new cases.<sup>141</sup> As Justice Thomas wrote, “The inevitable consequence will be greater demands on the States to provide free assistance to would-be appellants in all manner of civil cases involving interests that cannot, based on the test established by the majority, be distinguished from the admittedly important interest at issue here.”<sup>142</sup> The Justice went on to emphasize just what a burden the decision would create for state courts, citing the tens of thousands of civil actions that Mississippi faced each year.<sup>143</sup>

The majority addressed these arguments directly, noting that “[r]espondents and the dissenters urge that we will open floodgates” if the right were extended to include free transcripts in noncriminal cases.<sup>144</sup> The Court’s response was that parental-termination cases were sufficiently *sui generis* so as to avoid

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<sup>138</sup> *M.L.B.*, 519 US at 106.

<sup>139</sup> See *id.* at 107. See also Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U Pa L Rev 2119, 2135 (2000) (describing how requiring a subsidy for this “and then only for this” class of litigant “required the Court to thread a complex path in light of contemporary equal protection and due process law”).

<sup>140</sup> See *Mayer v City of Chicago*, 404 US 189, 193–94 (1971) (holding that the Equal Protection Clause requires providing an indigent criminal defendant appealing his conviction with an adequate record even in cases involving a minor offense); *Griffin v Illinois*, 351 US 12, 19 (1956) (plurality) (holding that a state must provide an indigent criminal defendant appealing his conviction with a trial transcript or its equivalent).

<sup>141</sup> *M.L.B.*, 519 US at 129–30 (Thomas dissenting).

<sup>142</sup> *Id.* at 130 (Thomas dissenting).

<sup>143</sup> *Id.* at 143 n 8 (Thomas dissenting). Specifically, Justice Thomas argued that “Mississippi will no doubt find little solace in the fact that, as the majority notes, of 63,765 civil actions filed in Mississippi Chancery Court in 1995, 194 were parental termination cases . . . [since] ‘39,475 were domestic relations cases,’ ‘1027 involved custody or visitation, and 6080 were paternity cases.’” *Id.*, quoting Brief for Respondents, *M.L.B. v S.L.J.*, No 95-853, \*28 (filed June 28, 1996) (available on Westlaw at 1996 WL 365897).

<sup>144</sup> *M.L.B.*, 519 US at 127 (majority).

creating a flood.<sup>145</sup> Because the majority saw parental-termination cases as a distinct set, it was not concerned that a flood of requests would come to state court for free transcripts or that the states would now be obligated to pay for free transcripts in other kinds of cases. It simply did not forecast a flood of any kind.

Together, *Lassiter* and *M.L.B.* show the justices to be concerned about the effects their decisions will have on the volume of litigation—litigation that will largely end up in state court<sup>146</sup>—and the creation of related obligations, such as free transcripts.<sup>147</sup> As in the interbranch context, the immediate concern is not over flooding the federal courts with additional cases. Rather, these cases, along with *Maze*, *Shady Grove*, and *Grable*, show the Court considering floodgates arguments while engaging more generally with the question of how their decisions will affect the balance between the federal and state court systems.

### III. COURT-CENTERED CONCERNS

The floodgates arguments discussed thus far can be cast as primarily outward looking; that is, the Supreme Court has considered what a deluge of claims would mean for another

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<sup>145</sup> Id 127–28. As the majority wrote, “[W]e have repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody. To recapitulate, termination decrees ‘wor[k] a unique kind of deprivation.’” Id (second alteration in original and citation omitted), quoting *Lassiter*, 452 US at 27.

<sup>146</sup> For another example of a concern over increasing filings in the state courts, see *Apprendi v New Jersey*, 530 US 466, 550–51 (2000) (O’Connor dissenting):

[P]erhaps the most significant impact of the Court’s decision will be a practical one—its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes. . . . Thus, with respect to past sentences handed down by judges under determinate-sentencing schemes, the Court’s decision threatens to unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court’s decision today. Statistics compiled by the United States Sentencing Commission reveal that almost a half-million cases have been sentenced under the Sentencing Guidelines since 1989. Federal cases constitute only the tip of the iceberg. . . . Because many States, like New Jersey, have determinate-sentencing schemes, the number of individual sentences drawn into question by the Court’s decision could be colossal.

<sup>147</sup> It is worth noting that parts of the floodgates arguments in *Lassiter* and *M.L.B.* have a slippery slope quality to them—that is, if the Court recognizes the right to counsel or a free transcript in this case, it will necessarily have to do so in the next set of cases down the line. See note 13. That said, because the justices are also clearly concerned with the number of cases and attendant obligations that the state courts will be forced to handle as a result of their decisions, these cases can be understood as traditional floodgates cases as well.

institution, or its dynamic with that institution—be it the executive branch, the legislative branch, or state courts. But there is a final set of floodgates arguments that are inward looking, through which the justices consider guarding the floodgates to protect the federal judiciary itself.

At the most basic level, the Court in these cases considers the possibility of a flood because it is concerned that a slew of additional cases would lead to an increased workload for the federal courts. But not all floods are alike, and the Court has reacted to them based not only on their size, but also on the *types* of claims they are likely to contain. Specifically, the justices sometimes argue that a particular decision would be problematic because it would unleash a large number of frivolous cases, making it more difficult to give time to, and even to discern, the meritorious claims the courts must review. In other cases, the justices make no mention of potential frivolity, focusing instead on the sheer number of cases that could come into federal court.

Context is crucial for deciphering the Court's arguments, and timing is part of that context. Between 1950 and 1978, the annual filings per active judgeship in the federal courts of appeals nearly doubled—from 73 to 137.<sup>148</sup> Although figures for the district judges improved as their ranks more than doubled during this period, they still faced an average of 343 filings per year at the end of that time.<sup>149</sup> As a result, judges and scholars began to refer to the “crisis in volume” that the federal judiciary faced.<sup>150</sup> Since that time, the caseloads have only continued to expand.<sup>151</sup> It is thus unsurprising that, particularly beginning in

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<sup>148</sup> See Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* 14 (Dec 18, 1998), online at <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf> (visited Sept 10, 2013).

<sup>149</sup> *Id.*

<sup>150</sup> See Huang, 124 Harv L Rev at 1112 (cited in note 9). See also Levy, 61 Duke L J at 321 n 21 (cited in note 35).

<sup>151</sup> As of the 12-month period ending March 31, 2013, the average number of filings per active judgeship in the federal courts of appeals was 338 (which is the number of filings excluding the Federal Circuit—56,453—divided by the number of active judgeships excluding the Federal Circuit—167). See *U.S. Court of Appeals—Judicial Caseload Profile \*1* (Administrative Office of the US Courts Mar, 2013), online at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/appeals-fcms-profiles-march-2013.pdf&page=1> (visited Sept 10, 2013).

The annual filing per active judge in the federal district courts during the same time period was 560. See *United States District Courts—National Judicial Caseload Profile \*1* (Administrative Office of the US Courts Mar, 2013) online at <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2013/district-fcms-profiles-march-2013.pdf&page=1> (visited Sept 10, 2013).

the 1970s, justices began to raise floodgates concerns on their own<sup>152</sup> and their colleagues' behalf.

This Part explores the various court-centered floodgates arguments that the Court has confronted, beginning with those focused on frivolous claims before turning to those based on claims more generally. Though the particulars vary, the theme remains the same: the Court has consistently considered the possibility that a particular decision will result in a flood of new claims into the federal courts, and has even taken that possibility into account in its substantive analysis.

#### A. Burdening the Courts with Frivolous Claims

The justices have often expressed the concern that a given holding will unleash a flood of new claims—particularly frivolous claims.<sup>153</sup> As one might expect, this kind of court-centered argument appears with a relatively high frequency in lines of cases that have consistently been perceived as containing a high percentage of unmeritorious claims: *Bivens*,<sup>154</sup> habeas,<sup>155</sup> and

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<sup>152</sup> It is worth remembering that before Congress enacted legislation in 1988 to make the Court's jurisdiction almost entirely discretionary, the Court's own docket was viewed as "unmanageable." See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U Penn L Rev 1, 13 (2011). Indeed, in 1972, Chief Justice Burger created a commission, known as the Freund Study Group, specifically to examine the demanding workload of the Supreme Court and ways to reduce the burden on the Court. See Judith A. McKenna, *Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States* 76 (1993).

<sup>153</sup> Although the Court discusses floodgates in the context of frivolous cases and in the context of claims more generally, just which concern is animating the argument in a given opinion is not always clear. As with the rest of the discussion, I rely primarily on the text of the opinions themselves to determine the particular concern. But as with the preceding categories, the categories surveyed in this Part are not impermeable.

<sup>154</sup> See, for example, James E. Pfander, *Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation*, 114 Penn St L Rev 1387, 1407 (2010) (noting the "widely held view that frivolous Bivens claims . . . have multiplied over the past generation to a degree that threatens to overwhelm the federal judiciary"). See also Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 Stan L Rev 809, 846 (2010) (noting that there are "those in the judiciary who see Bivens claims as almost universally frivolous" but also providing data that indicates that Bivens claims have enjoyed "greater success than has been assumed to date").

<sup>155</sup> Judges and justices have consistently viewed habeas filings as being filled with a high percentage of frivolous cases. Justice Jackson wrote in *Brown v Allen*, 344 US 443 (1953), that "[i]t must prejudice the occasional meritorious application [for habeas corpus] to be buried in a flood of worthless ones." *Id.* at 537 (Jackson concurring). Nearly twenty years later, Judge Henry Friendly commented on Justice Jackson's sentiment, writing, "The thought may be distasteful but no judge can honestly deny it is real."

prisoner cases.<sup>156</sup> The discussion here focuses on these lines of cases<sup>157</sup> not only because they have been prominent sources of floodgates arguments, but also because these three areas of substantive law, in turn, illustrate three different ways in which court-centered floodgates concerns can impact legal decision making: in a policy-making context, in statutory interpretation, and in consideration of constitutional claims.

1. *Bivens* cases.

The *Bivens* line of cases provides the starkest examples of the justices considering floodgates reasoning in their substantive analysis. This makes sense on an intuitive level as *Bivens* is generally understood to allow for “judicial policymaking”<sup>158</sup>—thereby giving the justices greater latitude in their own decision making. What is surprising, though, is the extent to which the Court as a whole has pivoted on whether concerns about workload can be taken into account when deciding whether to recognize a private right of action and remedy. Because of this marked judicial back-and-forth, and because the justices themselves specifically discuss “the ‘floodgates’ argument” in the context of this line of cases,<sup>159</sup> *Bivens* and its progeny merit particular attention.

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Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U Chi L Rev 142, 149 (1970).

<sup>156</sup> The number of frivolous filings from prisoners—particularly pro se—was perceived to be such a problem that Congress passed the PLRA. In the words of the Supreme Court, “Beyond doubt, Congress enacted [the exhaustion provision of the PLRA] to reduce the quantity and improve the quality of prisoner suits.” *Porter v Nussle*, 534 US 516, 524 (2002). Still, Judge Jon Newman of the Second Circuit Court of Appeals wrote that the challenge for courts, even after the passage of the PLRA, is “to avoid letting the large number of frivolous complaints and appeals impair their conscientious consideration of the few meritorious cases that are filed.” Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 Brooklyn L Rev 519, 526–27 (1996).

<sup>157</sup> Floodgates arguments, of course, have existed outside of these three lines of cases. See, for example, *Agostini v Felton*, 521 US 203, 238 (1997) (“If we were to sanction this use of Rule 60(b)(5), respondents argue, we would encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions premised on nothing more than the claim that various judges or Justices have stated that the law has changed.”); *Stack v Boyle*, 342 US 1, 11–13 (1951) (Jackson concurring) (describing the need for an approach to reviewing bail orders that “would not open the floodgates to a multitude of trivial disputes abusive of the motion procedure”). These three lines of cases are simply the most prominent among the cases surveyed.

<sup>158</sup> See George D. Brown, “Counter-Counter-Terrorism via Lawsuit”—*The Bivens Impasse*, 82 S Cal L Rev 841, 883 (2009).

<sup>159</sup> *Wilkie*, 551 US at 577 (Ginsburg concurring in part and dissenting in part).



As noted in Part I.A, the specific floodgates argument raised in *Bivens* was that recognizing the cause of action would result in suits that would in turn hamper the ability of executive officials to perform their jobs. Yet other opinions in the case revealed a deep concern for the welfare of the federal judiciary itself. In his dissent, Justice Black wrote that the courts<sup>160</sup> by that time were “choked with lawsuits” and that even the Supreme Court’s own docket had reached “an unprecedented volume.”<sup>161</sup> As a result of the rise in caseload, Justice Black argued that the system was not functioning as it should: “Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits.”<sup>162</sup> From his perspective, a “growing number” of the cases coming to the federal courts were “frivolous,” and given the existing demands on the courts, he thought that judges had better things to do with their time than wade through such claims.<sup>163</sup>

Justice Harlan responded in his concurrence with what would become the paradigmatic denouncement of court-centered floodgates arguments. While acknowledging the “increasingly scarce” resources of the judiciary, he also argued that the courts’ strained resources should not preclude recognition of a cause of action:

[W]hen we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.<sup>164</sup>

Members of the Court have repeatedly invoked this rejection of workload-related floodgates arguments as the Court has continued to confront whether to create new private rights of action under *Bivens*.

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<sup>160</sup> Justice Black here refers to both the “courts of the United States” and “those of the States” when expressing his concerns. *Bivens*, 403 US at 428 (Black dissenting).

<sup>161</sup> *Id.* (Black dissenting). Again, it is important to recall that the decision in *Bivens* occurred well before the Supreme Court’s docket became almost entirely discretionary. See note 152.

<sup>162</sup> *Bivens*, 403 US at 428–29 (Black dissenting).

<sup>163</sup> *Id.* (Black dissenting).

<sup>164</sup> *Id.* at 411 (Harlan concurring).

Eight years later in *Davis v Passman*,<sup>165</sup> the Court considered whether an implied cause of action and damages remedy could be read into the Fifth Amendment's right to due process.<sup>166</sup> The court of appeals had declined to recognize a new private right of action—a decision based in part on its concern that doing so would “delug[e] federal courts with claims.”<sup>167</sup> The Supreme Court reversed the decision and went out of its way to state that “[w]e do not perceive the potential for such a deluge.”<sup>168</sup> After rejecting the notion that a flood of claims would likely follow its decision, however, the Court rejected the very invocation of floodgates reasoning. Writing for the majority, Justice Brennan stated, “[P]erhaps the most fundamental answer to the concerns expressed by the Court of Appeals is that provided by Mr. Justice Harlan concurring in *Bivens*.”<sup>169</sup> He then repeated Justice Harlan's statement that the Court should not “automatically close the courthouse door solely” on the basis of how decisions affect judicial resources.<sup>170</sup>

Despite the Court's resounding rejection of the floodgates argument in *Passman*, the Justices apparently found the same argument deeply influential in a more recent case—a move consistent with the Court's seeming desire to limit *Bivens* claims generally.<sup>171</sup> In *Wilkie*, the Court declined to recognize a *Bivens* action for a person who claimed that he was harassed and intimidated by officials of the Bureau of Land Management who were trying to gain an easement across his private property in violation of his Fourth and Fifth Amendment rights.<sup>172</sup> Writing for the majority, Justice Souter engaged in a balancing analysis<sup>173</sup>

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<sup>165</sup> 442 US 228 (1979).

<sup>166</sup> *Id.* at 230. The case arose when Shirley Davis, a former employee of Louisiana Congressman Otto Passman, tried to bring a civil suit against Passman for sexual harassment. Davis claimed that she had an implied cause of action in the Fifth Amendment's right to due process. *Id.* at 230–31.

<sup>167</sup> *Davis v Passman*, 571 F2d 793, 800 (5th Cir 1978).

<sup>168</sup> *Passman*, 442 US at 248. By way of support, the Court noted, *inter alia*, that a damages remedy was already available to redress certain injuries arising under color of state law under 42 USC § 1983. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Reinert, 62 Stan L Rev at 824 (cited in note 154) (noting the “Supreme Court's refusal to extend *Bivens* liability to new constitutional claims or new defendants since 1980”).

<sup>172</sup> *Wilkie*, 551 US at 541.

<sup>173</sup> Specifically, the Court said that its task was to “weigh[ ] reasons for and against the creation of a new cause of action.” *Id.* at 554. This inquiry is also known as “*Bivens* step two.” *Id.*, citing *Bush v Lucas*, 462 US 367, 378 (1983). The Court in *Wilkie* reached

and concluded that defining a “workable” cause of action in the case at hand was simply too difficult.<sup>174</sup> Any kind of general standard that the Court could articulate, the majority argued, would invite a flood of new claims.<sup>175</sup> To be clear, the majority’s argument was not that the government’s alleged behavior could not support a *Bivens* claim—indeed, Justice Souter wrote that “[t]he point here is not to deny that Government employees sometimes overreach, for of course they do, and they may have done so here”<sup>176</sup>—but that any attempt to separate the wheat from the chaff would lead to too much work for the courts themselves. As the majority concluded, “A judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out, and . . . would invite an onslaught of *Bivens* actions.”<sup>177</sup> It is worth noting that the majority went out of its way to claim that its decision was influenced by how difficult it was to create a limiting principle for future cases, not by how many cases would follow.<sup>178</sup> But this statement is inconsistent with the majority’s express concern over inviting “an onslaught of *Bivens* actions”<sup>179</sup> and indeed, the dissent clearly thought it was the possibility of increased litigation that was motivating the majority’s decision.<sup>180</sup>

In dissent, Justice Ginsburg, joined by Justice Stevens, squarely rejected the majority’s reliance on floodgates concerns. Alleging that the Court’s primary concern was with the “consequences” of “open[ing] the floodgates to a host of unworthy suits,”<sup>181</sup> the dissent invoked both Justice Harlan’s concurrence in *Bivens* and the Court’s language in *Passman* to push back on that argument:

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this inquiry only after deciding in “*Bivens* step one” that the “state of the law gives Robbins no intuitively meritorious case for recognizing a new constitutional cause of action, but neither does it plainly answer no to the question whether he should have it.” *Wilkie*, 551 US at 551, 554.

<sup>174</sup> *Wilkie*, 551 US at 555–57.

<sup>175</sup> *Id.* at 561 (“[A]t this high level of generality, a *Bivens* action to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations.”).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 562.

<sup>178</sup> *Wilkie*, 551 US at 561 n 11.

<sup>179</sup> *Id.* at 562.

<sup>180</sup> See *id.* at 569 (Ginsburg concurring in part and dissenting in part).

<sup>181</sup> *Id.* (Ginsburg concurring in part and dissenting in part).

The “floodgates” argument the Court today embraces has been rehearsed and rejected before. In *Passman*, the Court of Appeals emphasized, as a reason counseling denial of a *Bivens* remedy, the danger of “deluging federal courts with . . . claims.” . . . This Court disagreed, turning to Justice Harlan’s concurring opinion in *Bivens* to explain why. The only serious policy argument against recognizing a right of action for *Bivens*, Justice Harlan observed, was the risk of inundating courts with Fourth Amendment claims. He found the argument unsatisfactory.

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In attributing heavy weight to the floodgates concern pressed in this case, the Court today veers away from Justice Harlan’s sound counsel.<sup>182</sup>

After this thorough rejection of the floodgates argument, the dissent went on to give reasons why “one could securely forecast that the flood the Court fears would not come to pass.”<sup>183</sup> The dissent then concluded by returning to its original position: “[S]hutting the door to all plaintiffs . . . is a measure too extreme.”<sup>184</sup>

The *Bivens* line of cases provides an unusually sharp illustration of the Court wrestling with the relevance of workload concerns—particularly those involving frivolous cases—to the substantive analysis of law. Early on, a majority of the justices directly confronted the use of floodgates arguments and decisively stated that a possible increase in litigation simply was not a sufficient—or even appropriate—reason to decide against recognizing a private right of action. More recently, the Court has shown itself to be receptive to considering concerns about the

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<sup>182</sup> *Wilkie*, 551 US at 577 (Ginsburg concurring in part and dissenting in part), quoting *Passman*, 442 US at 248, and citing *Bivens*, 403 US at 410–11 (Harlan concurring).

<sup>183</sup> *Wilkie*, 551 US at 581 (Ginsburg concurring in part and dissenting in part). Specifically, Justice Ginsburg reasoned that “[i]f numerous *Bivens* claims would eventuate were courts to entertain claims like Robbins’, then courts should already have encountered endeavors to mount Fifth Amendment Takings Clause suits under § 1983.” *Id.* (Ginsburg concurring in part and dissenting in part). She noted, however, that “the Court of Appeals, the Solicitor General, and Robbins all agree[d] that there [were] no reported cases on charges of retaliation by state officials against the exercise of Taking Clause rights.” *Id.* (Ginsburg concurring in part and dissenting in part), citing *Robbins v Wilkie*, 433 F3d 755, 767 (10th Cir 2006), Brief for the Petitioners, *Wilkie v Robbins*, No 06-219, \*48 (filed Jan 16, 2007) (available on Westlaw at 2007 WL 128587), and Brief for the Respondent, *Wilkie v Robbins*, No 06-219, \*31 (filed Feb 20, 2007) (available on Westlaw at 2007 WL 550926).

<sup>184</sup> *Wilkie*, 551 US at 582 (Ginsburg concurring in part and dissenting in part).

workload of the federal courts in reaching its decisions. Just what is responsible for this about-face is unclear. As scholars have noted, the Court has been generally resistant to recognizing new *Bivens* claims in the years after *Passman* was decided.<sup>185</sup> Although there are undoubtedly several moving pieces to the Court's shift in jurisprudence, one piece appears to be the concern about workload itself—that is, it is possible that the justices became willing to include caseload concerns in their analysis precisely because they began to see the caseload as a greater problem that needed somehow to be addressed. Whatever the cause, this set of cases makes clear that at least some of the justices recently have been willing to take potential increases in litigation—particularly unmeritorious litigation—into account when reaching a decision.

## 2. Habeas cases.

*Bivens* and its progeny demonstrate the prominence of, and even controversy surrounding, floodgates arguments in cases involving judicial policy making. In the habeas context,<sup>186</sup> the controversy changes shape as concerns about fidelity to statutory text come to the fore. One of the first cases to raise concerns about a deluge of new habeas claims, many of which would likely be frivolous, is the 1953 case of *Brown v Allen*.<sup>187</sup> *Allen* is now

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<sup>185</sup> See note 171. Indeed, following the Court's decision in *Wilkie*, judges and scholars alike have concluded that the *Bivens* doctrine has been greatly diminished. See, for example, Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 NYU L Rev 681, 699 (2009) ("*Bivens* today appears to be hanging by a thread."); Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs without Remedies after Wilkie v. Robbins*, 2007 Cato S Ct Rev 23, 26 ("[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery."). This view was reinforced during October Term 2011, when the Court declined to find a *Bivens* action against federal contractors in *Minneeci v Pollard*, 132 S Ct 617, 623 (2012). For a thoughtful analysis of the Court's current *Bivens* jurisprudence, see generally Carlos M. Vázquez and Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U Pa L Rev 509 (2013).

<sup>186</sup> Decisions that lead to an increase in habeas petitions of course also have some impact on state courts. That said, the floodgates arguments raised in this set of cases speak to concerns about flooding the federal courts, not the state courts, with claims. As such, they are included only in this category.

Similarly, floodgates concerns in the context of habeas often tie in a concern about Congress—specifically, whether a flood of cases will frustrate the purpose of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L No 104-132, 110 Stat 1214, codified in various sections of Title 28. Again, the cases in this set are ones in which the stated concern is primarily focused on the federal courts.

<sup>187</sup> 344 US 443 (1953). In point of fact, the Supreme Court considered three separate cases in its opinion: *Brown v Allen*, *Speller v Allen*, and *Daniels v Allen*. *Id.* at 443.

seen as the case that “ushered in the modern era of federal habeas corpus,”<sup>188</sup> standing for the proposition that constitutional challenges considered in state court could nevertheless be raised in a federal habeas petition.<sup>189</sup> Justice Jackson had reservations about the decision, and wrote separately to express his concern about the effect of the Court’s decision on its habeas jurisprudence: “[T]his Court has sanctioned progressive trivialization of the writ [of habeas corpus] until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own.”<sup>190</sup> The Justice then famously issued a warning about these effects: “It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.”<sup>191</sup>

Justice Jackson’s characteristically quotable opinion identified broad themes that have continued to animate the Court’s habeas jurisprudence: the risk of obscuring meritorious habeas claims in a sea of frivolous ones, and the possibility that frivolous cases might drown out cases in other areas of law. In habeas appeals, unlike in *Bivens* appeals, the justices have had to consider how to balance these concerns often in the midst of statutory interpretation—in deciphering either text or congressional intent.

In *Harris v Reed*,<sup>192</sup> the Court considered whether a procedural-default rule would bar consideration of a federal claim on habeas review if the state court rendering the judgment failed to say clearly that its judgment rested on the procedural default.<sup>193</sup> A majority of the Court decided that the answer was no,<sup>194</sup> but Justice Kennedy dissented, arguing that the Court’s decision

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<sup>188</sup> John H. Blume, Sheri Lynn Johnson, and Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 Cornell L Rev 435, 440 (2011). See also Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 Ohio St L J 337, 345 (1983) (“The commencement of the modern era of habeas corpus may be traced to the Court’s historic decision in 1953 in the *Brown v. Allen* cases.”).

<sup>189</sup> *Allen*, 344 US at 458.

<sup>190</sup> *Id* at 536 (Jackson concurring).

<sup>191</sup> *Id* at 537 (Jackson concurring). Ultimately Justice Jackson joined in the result of the case, but he espoused a different, more limited role for federal courts in the review of habeas petitions. *Id* at 545–48. See also Richard H. Fallon Jr and Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 Harv L Rev 1731, 1814–15 (1991) (describing Justice Jackson’s theory of habeas corpus from *Brown v Allen*).

<sup>192</sup> 489 US 255 (1989).

<sup>193</sup> *Id* at 259–60.

<sup>194</sup> *Id* at 266. See also Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 Nw U L Rev 979, 1023 (2010) (delineating the majority’s analysis in the case).

would have a harmful effect on the federal judiciary. Specifically, he argued that “[t]he majority’s decision can only increase prisoner litigation and add to the burden on the federal courts.”<sup>195</sup> That burden, to Justice Kennedy, would be comprised largely of unmeritorious claims: “It is well known ‘that prisoner actions occupy a disproportionate amount of the time and energy of the federal judiciary,’ and that many of these petitions are entirely frivolous.”<sup>196</sup>

The majority responded directly to Justice Kennedy’s dissent by claiming, as justices have in response to earlier floodgates arguments, that there was little reason to think that a flood would be unleashed by its decision. Writing for the majority, Justice Blackmun argued that “the dissent’s fear that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that ‘relief is denied for reasons of procedural default.’”<sup>197</sup> Again, the counterargument from the Court was not that a flood of cases would be irrelevant, but that no such flood was likely.

The floodgates debate in *Harris* echoed many of those discussed in the *Bivens* context: an argument was made that a potential decision would open the floodgates, which was followed by a denial that the gates would actually be opened. In that sense, *Harris* did not differ much from the policy-making cases discussed above. But in *Artuz v Bennett*<sup>198</sup> the Court found that the statutory nature of the habeas question at issue flatly precluded the consideration of a potential flood.<sup>199</sup> The question in *Artuz* was whether an application for state postconviction relief containing procedurally barred claims could nevertheless be “properly filed” within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996<sup>200</sup> (AEDPA).<sup>201</sup> A unanimous

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<sup>195</sup> *Harris*, 489 US at 282 n 6 (Kennedy dissenting).

<sup>196</sup> *Id.* at 282–83 n 6 (Kennedy dissenting) (citation omitted), quoting *Rose v Mitchell*, 443 US 545, 584 (1979) (Powell concurring). Specifically, Justice Kennedy noted that “[i]n the year ending June 30, 1987, almost 10,000 habeas corpus petitions were filed by state prisoners” and argued that “[t]his monumental burden is unlikely to be alleviated by a rule that . . . requires federal courts to resolve the merits of defaulted claims.” *Harris*, 489 US at 282–83 n 6 (Kennedy dissenting).

<sup>197</sup> *Harris*, 489 US at 265 n 12 (majority) (citation omitted).

<sup>198</sup> 531 US 4 (2000).

<sup>199</sup> *Id.* at 10.

<sup>200</sup> Pub L No 104-132, 110 Stat 1214, codified in various sections of Title 28.

<sup>201</sup> *Artuz*, 531 US at 5 (“[T]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or

Court held that it was.<sup>202</sup> Toward the end of the opinion, the Court took up a floodgates argument made by the respondent—that allowing such claims would “trigger a flood of protective filings in federal courts, absorbing their resources in threshold interpretations of state procedural rules.”<sup>203</sup> The Court quickly dismissed the argument: “Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them. We hold as we do because respondent’s view seems to us the only permissible interpretation of the text.”<sup>204</sup>

*Artuz* contains important clues about the justices’ views on the weight of court-centered floodgates concerns and how those concerns can or should play a role in statutory interpretation. In *Artuz*, the Court’s unanimity and the language of the decision itself suggest that the Justices saw the question of statutory interpretation as a relatively straightforward one. By declining to consider “policy arguments” about floodgates in the face of this “only permissible interpretation,” the Justices did not rule out the possibility of court-centered floodgates concerns playing a role in other cases where the statutory language was less clear.<sup>205</sup>

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claim is pending shall not be counted toward any period of limitation under this subsection.”), quoting 28 USC § 2244(d)(2) (1994).

<sup>202</sup> *Artuz*, 531 US at 10–11.

<sup>203</sup> *Id.* at 10.

<sup>204</sup> *Id.* See also John F. Manning, *What Divides Textualists from Purposivists?*, 106 *Colum L Rev* 70, 108–09 & n 141 (2006) (describing how judges are bound by the means Congress has selected for effectuating its purposes, and citing *Artuz*, among other cases, for the proposition that this sentiment has “become common in the Court’s statutory decisions”).

For an example of this reasoning outside the habeas context, see *Neitzke v Williams*, 490 US 319 (1989). In *Neitzke*, the Court considered the question “whether a complaint filed *in forma pauperis* which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) is automatically frivolous within the meaning of 28 U.S.C. § 1915(d).” *Id.* at 320. Petitioning prison officials urged the Court to answer the question in the affirmative, “primarily on the policy ground that such a reading will halt the ‘flood of frivolous litigation’ generated by prisoners that has swept over the federal judiciary.” *Id.* at 325, quoting Brief for Petitioners, *Neitzke v Williams*, No 87-1882, \*7 (filed Nov 17, 1988) (available on Westlaw at 1988 WL 1025738). The Court ultimately concluded,

[O]ur role in appraising petitioners’ reading of § 1915(d) is not to make policy, but to interpret a statute. Taking this approach, it is evident that the failure-to-state-a-claim standard of Rule 12(b)(6) and the frivolousness standard of § 1915(d) were devised to serve distinctive goals . . . [but] it does not follow that a complaint which falls afoul of the former standard will invariably fall afoul of the latter.

*Neitzke*, 490 US at 326.

<sup>205</sup> *Artuz*, 531 US at 10.



And in fact, in a series of 5–4 decisions following *Artuz*, the Court seemed to back away from the apparently definitive rejection of court-centered floodgates concerns in statutory cases. In deciding that a timely filed petition that contained procedurally barred claims was “properly filed” within § 2244(d)(2) of AEDPA, the Court in *Artuz* explicitly reserved the question of whether a petition rejected by the state court as untimely could still be “properly filed” under the same section.<sup>206</sup> *Pace v DiGuglielmo*<sup>207</sup> confronted that question. A majority of the Court held that the answer was no and that the federal petition at issue in the case was time barred.<sup>208</sup> Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. They argued that the majority’s result was not compelled by the text of the provision and, moreover, that it would frustrate the purpose of that provision—the need to avoid burdening district courts:<sup>209</sup> “Unfortunately, the most likely consequence of the Court’s new rule will be to increase, not reduce, delays in the federal system. The inevitable result of today’s decision will be a flood of protective filings in the federal district courts.”<sup>210</sup> Although Justice Stevens framed his argument partially in terms of being deferential to Congress,<sup>211</sup> he also made clear that his concern was with flooding federal courts with petitions, arguing, “I fail to see any merit in a rule that knowingly and unnecessarily ‘add[s] to the burdens on the district courts in a way that simple tolling . . . would not.’”<sup>212</sup>

Finally, the same court-centered floodgates concerns that were rejected in *Artuz* and accepted by four Justices in *Pace* apparently drove the outcome in the 2007 case of *Schriro v Landrigan*.<sup>213</sup> In *Schriro*, the Court held that a district court did not abuse its discretion, as defined by AEDPA, when it denied a convicted state prisoner an evidentiary hearing in connection with his ineffective assistance of counsel claim.<sup>214</sup> The same four Justices who dissented in *Pace* also dissented in *Schriro*, though

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<sup>206</sup> Id at 8–9 & n 2.

<sup>207</sup> 544 US 408 (2005).

<sup>208</sup> Id at 410.

<sup>209</sup> Id at 420 (Stevens dissenting).

<sup>210</sup> Id at 429 (Stevens dissenting).

<sup>211</sup> See *Pace*, 544 US at 427 (Stevens dissenting). See also note 186.

<sup>212</sup> *Pace*, 544 US at 429 (Stevens dissenting) (alterations in original), quoting *Duncan v Walker*, 533 US 167, 192 (2001) (Breyer dissenting).

<sup>213</sup> 550 US 465 (2007).

<sup>214</sup> Id at 472–73.

this time they came out the other way on floodgates concerns. Justice Stevens, again joined by Justices Souter, Ginsburg, and Breyer, made plain that he thought the majority's decision was motivated by a concern about case volume, stating, "In the end, the Court's decision can only be explained by its increasingly familiar effort to guard the floodgates of litigation."<sup>215</sup> Relying upon the floodgates leitmotif, the dissenting Justices made the argument that a flood was unlikely to follow from their proposed holding:

[H]abeas cases requiring evidentiary hearings have been "few in number," and "there is no clear evidence that this particular classification of habeas proceedings has burdened the dockets of the federal courts." Even prior to the passage of [AEDPA], district courts held evidentiary hearings in only 1.17% of all federal habeas cases. This figure makes it abundantly clear that doing justice does not always cause the heavens to fall.<sup>216</sup>

In short, within just a few-year span the Court had done something of an about-face; the same Justices who were earlier worried about flooding the courts with protective filings in *Pace* were now suggesting, somewhat disparagingly, that the majority was being motivated by case volume concerns in *Schriro* (and according to the dissent, the Justices who had earlier failed to embrace the floodgates argument found it dispositive this time around).

A close reading of this set of habeas cases<sup>217</sup> demonstrates a few critical points. First, the Court has consistently been sensitive

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<sup>215</sup> *Id.* at 499 (Stevens dissenting). As evidence of this motivation, the dissent noted that the majority had commented on how requiring the hearing would affect the lower federal courts:

Immediately before turning to the facts of this case, [the majority] states that "[i]f district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts."

*Id.* (Stevens dissenting) (second alteration in original), quoting *id.* at 475 (majority).

<sup>216</sup> *Schriro*, 550 US at 499–500 (Stevens dissenting) (citations omitted), quoting *Keeney v Tamayo-Reyes*, 504 US 1, 24 (Kennedy dissenting).

<sup>217</sup> An additional data point can be found beyond the set of traditional habeas cases. In *Ryder v United States*, 515 US 177 (1995), the Court held that the actions of two civilian judges who served on the Court of Military Review, but who had not been appointed in accordance with the dictates of the Appointments Clause, were not valid *de facto*. *Id.* at 179. The Court reached its holding over a concern on the part of the government that "a

to how its decisions will affect the future volume of claims coming into federal courts—particularly frivolous ones. Second, while, as in the *Bivens* context, numerous factors are at work in these different decisions, one such factor in this context seems to be the clarity of the underlying statutory provision. The Justices unanimously rejected floodgates considerations in *Artuz* on the ground that the text in question led to a clear result. Absent straightforward interpretation, the justices appear to have been willing to turn to floodgates reasoning. And third, in cases that lack the straightforward statutory interpretation present in *Artuz*, the Court has fractured, and indeed, the justices themselves have gone back and forth, on just when floodgates reasoning should be dispositive.<sup>218</sup>

### 3. Prisoner cases.

The *Bivens* cases showed the Court considering arguments about increasing frivolous filings in the context of judicial policy making; the habeas cases showed the same for statutory interpretation. To round out the picture of how the Court has addressed these concerns, it is worth considering cases that raise floodgates arguments in the constitutional realm.

Here, it is useful to look to a set of constitutional challenges in which concerns about future litigation have consistently

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flood of habeas corpus petitions will ensue”—a concern that the Court dismissed, without further elaboration, as having “little basis” in past precedent. *Id.* at 185.

<sup>218</sup> Bringing the point full circle, several of the Justices recently returned to Justice Jackson’s language in *Allen* to express their own concerns about the current state of habeas corpus:

It has now been 60 years since *Brown v. Allen*, in which we struck the Faustian bargain that traded the simple elegance of the common-law writ of habeas corpus for federal-court power to probe the substantive merits of state-court convictions. Even after AEDPA’s pass through the Augean stables, no one in a position to observe the functioning of our byzantine federal-habeas system can believe it an efficient device for separating the truly deserving from the multitude of prisoners pressing false claims. “[F]loods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. . . . It must prejudice the occasional meritorious applicant to be buried in a flood of worthless ones.”

The “inundation” that Justice Jackson lamented in 1953 “consisted of 541” federal habeas petitions filed by state prisoners. By 1969, that number had grown to 7,359. In the year ending on September 30, 2012, 15,929 such petitions were filed. Today’s decision piles yet more dead weight onto a postconviction habeas system already creaking at its rusted joints.

*McQuiggin*, 133 S Ct at 1942–43 (Scalia dissenting) (citations omitted).

appeared: cases brought by prisoners. As noted earlier, the justices have long been wary of frivolous prisoner filings,<sup>219</sup> and in several cases, they have considered whether to factor concerns about increasing frivolous filings into their decisions. Although the justices have considered the possibility of new cases arising from a variety of decisions,<sup>220</sup> it will suffice to examine two—one challenging a search within a cell and another challenging the use of excessive force—that largely involve Fourth and Eighth Amendment claims, respectively.

The first example is the 1984 case *Hudson v Palmer*,<sup>221</sup> in which a majority of the Court held that an inmate had no reasonable expectation of privacy in his prison cell such that he was entitled to Fourth Amendment protection.<sup>222</sup> Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented, challenging both the merits of the decision<sup>223</sup> and the motivation behind it: “I cannot help but think that the Court’s holding is influenced by an unstated fear that if it recognizes that prisoners

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<sup>219</sup> See, for example, *Harris*, 489 US at 282–83 n 6 (Kennedy dissenting) (“It is well known ‘that prisoner actions occupy a disproportionate amount of the time and energy of the federal judiciary,’ and that many of these petitions are entirely frivolous.”), quoting *Rose v Mitchell*, 443 US 545, 584 (1979) (Powell concurring); *Cruz v Beto*, 405 US 319, 326–27 (1972) (Rehnquist dissenting) (“The inmate stands to gain something and lose nothing from a complaint stating facts that he is ultimately unable to prove. Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse.”).

<sup>220</sup> For examples of cases in which the Court has considered whether a flood of cases will follow from decisions based on the manner of execution, see *Baze v Rees*, 553 US 35, 70 (2008) (Alito concurring) (arguing that the dissent’s proposed standard of whether the manner of execution would create an “untoward” risk of pain “would open the gates for a flood of litigation that would go a long way toward bringing about the end of the death penalty as a practical matter”); *Nelson v Campbell*, 541 US 637, 649 (2004):

Respondents argue that a decision to reverse the judgment of the Eleventh Circuit would open the floodgates to all manner of method-of-execution challenges, as well as last minute stay requests. But, because we do not here resolve the question of how to treat method-of-execution claims generally, our holding is extremely limited.

There of course have also been prisoner cases outside the constitutional realm that raise floodgates concerns. See, for example, *Cleavinger v Saxner*, 474 US 193, 207 (1985) (“We [ ] are not impressed with the argument that anything less than absolute immunity [for members of federal prison’s Institution Discipline Committee] will result in a flood of litigation and in substantial procedural burdens and expense for committee members.”).

<sup>221</sup> 468 US 517 (1984).

<sup>222</sup> See *id.* at 530. See also Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 *Stan L Rev* 503, 521 (2007) (describing the Court’s expectation-of-privacy analysis in *Palmer*).

<sup>223</sup> *Palmer*, 468 US at 558 (Stevens concurring in part and dissenting in part) (arguing that affording an inmate no constitutional protection over his own property—from “a photo of a child to a letter from a wife”—contravened a longstanding “ethical tradition”).

have any Fourth Amendment protection this will lead to a flood of frivolous lawsuits.”<sup>224</sup> He then responded to this possible motivation by stating that “[o]f course, this type of burden is not sufficient to justify a judicial modification of the requirements of law.”<sup>225</sup> Justice Stevens went on to suggest that no reason existed to think that a flood of cases would even come, claiming that “the lower courts have permitted such suits to be brought for some time now without disastrous results.”<sup>226</sup>

These arguments presaged those that Justice Stevens would later make in his *Pace* and *Schriro* dissents—the habeas cases discussed above. But in *Palmer*, Justice Stevens went on to suggest other ways that courts could protect themselves from potential floods instead of “modif[ying]” the “requirements of law.”<sup>227</sup> Specifically, he argued that “costs can be awarded against the plaintiff when frivolous cases are brought. Even modest assessments against prisoners’ accounts could provide an effective weapon for deterring truly groundless litigation.”<sup>228</sup>

Eight years later, the Court was less willing to embrace a floodgates argument. In *Hudson v McMillian*,<sup>229</sup> the Court confronted whether the use of “excessive physical force” against an inmate violates the Eighth Amendment’s prohibition against cruel and unusual punishment when the inmate does not actually suffer serious injury.<sup>230</sup> Justice O’Connor, writing for a majority of the Court, answered that question in the affirmative.<sup>231</sup> The Court reached its holding over the arguments made by respondents, who were joined by five states as amici curiae, that limiting Eighth Amendment violations to those involving “significant injury” was necessary to limit the number of filings by inmates.<sup>232</sup> Although the majority did not address the propriety of

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<sup>224</sup> Id at 554 n 30 (Stevens concurring in part and dissenting in part).

<sup>225</sup> Id (Stevens concurring in part and dissenting in part).

<sup>226</sup> Id (Stevens concurring in part and dissenting in part) (citation omitted).

<sup>227</sup> *Palmer*, 468 US at 554 n 30 (Stevens concurring in part and dissenting in part).

<sup>228</sup> Id (Stevens concurring in part and dissenting in part) (citation omitted), citing *Hoover v Ronwin*, 466 US 558, 601 n 27 (1984) (Stevens dissenting).

<sup>229</sup> 503 US 1 (1992).

<sup>230</sup> Id at 4. See also Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 NYU L Rev 881, 905–06 (2009) (generally assessing the facts of the case).

<sup>231</sup> *McMillian*, 503 US at 4.

<sup>232</sup> Id at 14 (Blackmun concurring), citing Brief Amici Curiae for the States of Texas, Hawaii, Nevada, Wyoming, and Florida, *Hudson v McMillian*, No 90-6531, \*21 (filed Aug 12, 1991) (available on Lexis at 1990 US Briefs 6531) (“Texas Amicus Brief”). Texas, in particular, noted that the “significant injury requirement has been very effective in the

these arguments, Justice Blackmun took them on directly in his concurrence: “This audacious approach to the Eighth Amendment assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions. . . . [T]his inherently self-interested concern has no appropriate role in interpreting the contours of a substantive constitutional right.”<sup>233</sup>

Of course, this very same “inherently self-interested concern” had, at least according to the dissenters, shaped the Court’s decision less than a decade earlier in *Palmer*. After forcefully rejecting the validity of that concern in *McMillian*, Justice Blackmun went on to argue that, “in any event,” the Court’s ruling “does not open the floodgates for filings by prison inmates.”<sup>234</sup> The Justice pointed to several other gatekeeping mechanisms already in place, including that inmates were required to exhaust administrative remedies before filing suit, and that the district court could dismiss an inmate’s complaint *in forma pauperis* if the court was satisfied that the action was frivolous or malicious.<sup>235</sup> Justice Blackmun concluded that “[t]hese measures should be adequate to control any docket-management problems that might result from meritless prisoner claims.”<sup>236</sup>

In neither of these two decisions—*Palmer* and *McMillian*—did a majority of the Court openly rely on floodgates arguments as a consideration in interpreting the Constitution. That said, if the dissent in *Palmer* is to be believed, concerns about creating more unmeritorious litigation played a significant role in driving the Court’s decision in that case. It is therefore interesting that, not long after, the Court did not accept the floodgates argument in *McMillian*, and one Justice went so far as to express hostility to the suggestion that it would. Although these two cases alone cannot provide a comprehensive account of how the Court has viewed court-centered floodgates arguments regarding frivolous cases in the constitutional realm, they suggest, consistent with the other cases discussed here, that the Court has wrestled with when it can consider these concerns, and certainly has not barred their consideration.

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Fifth Circuit in helping to control its system-wide docket management problems.” *McMillian*, 503 US at 4 (Blackmun concurring), quoting Texas Amicus Brief at \*21.

<sup>233</sup> *McMillian*, 503 US at 15 (Blackmun concurring) (emphasis added).

<sup>234</sup> *Id.* (Blackmun concurring).

<sup>235</sup> *Id.* at 15–16 (Blackmun concurring).

<sup>236</sup> *Id.* at 16 (Blackmun concurring).

In short, these cases together paint a picture about how the Court has struggled with whether and when to take into account its concerns about increasing the federal courts' caseload—particularly with frivolous cases. Justices and various parties have raised these concerns numerous times over the past several decades. Sometimes a majority of the Court is receptive, as in *Wilkie*;<sup>237</sup> other times the Court rejects all such considerations, as in *Artuz*.<sup>238</sup> Part of the story, of course, is under what circumstances the Court is asked to contemplate increases in litigation. It should be no surprise that some of the Court's soundest rejections of these considerations have come in cases in which it is interpreting a statute or a constitutional right. Yet it is important to recognize that floodgates reasoning comes into play even in these cases, and important as well to recognize that even in the policy-making realm of *Bivens*, the Court has vacillated on whether court-centered concerns can appropriately be taken into account in reaching a substantive decision. A close analysis of these cases reveals the fragility of the Court's position, in turn suggesting the fragility of its normative foundation.<sup>239</sup>

#### B. Burdening the Courts with Standard Claims

The previous Section demonstrated that concerns about inundating the federal courts with frivolous cases seem to have shaped at least some of the Court's decisions. One might wonder how the Court has responded to cases in which the merits of the claims in the flood were not in doubt. As it turns out, even in those cases, members of the Court apparently have been receptive to floodgates concerns.

As one prominent example, floodgates concerns were raised—and were perhaps deeply influential—in the gerrymandering case of *Vieth v Jubelirer*<sup>240</sup> in 2004. The case involved a challenge to a Pennsylvania redistricting plan on the ground that it constituted an unconstitutional political gerrymander.<sup>241</sup> A plurality of the Court decided that the claims were nonjusticiable.<sup>242</sup> In his dissent, Justice Stevens suggested that the plurality

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<sup>237</sup> See notes 173–77 and accompanying text.

<sup>238</sup> See notes 198–204 and accompanying text.

<sup>239</sup> See Part IV.

<sup>240</sup> 541 US 267 (2004).

<sup>241</sup> *Id.* at 271 (plurality).

<sup>242</sup> *Id.* at 306. See also Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U Pa L Rev 503, 506 (2004).

was swayed by a floodgates fear: “The plurality’s reluctance to recognize the justiciability of partisan gerrymanders seems driven in part by a fear that recognizing such claims will give rise to a flood of litigation.”<sup>243</sup> The Justice then gave one of the typical floodgates rejoinders—arguing that a flood was unlikely to follow. Noting that the plurality had compiled a list of gerrymandering cases since the 1986 case of *Davis v Bandemer*,<sup>244</sup> Justice Stevens wrote: “[T]he list of cases that [the plurality] cites in its lengthy footnote suggests that in the two decades since *Bandemer*, there has been an average of just three or four partisan gerrymandering cases filed every year.”<sup>245</sup> To put that figure in perspective, the Justice noted that it “is obviously trivial when compared, for example, to the amount of litigation that followed our adoption of the ‘one-person, one-vote’ rule.”<sup>246</sup> If Justice Stevens’s account of what was motivating the majority is correct, *Vieth* provides an example not just of the Court altering a decision out of general floodgates concerns, but also of the Court deciding not to review a case at all.

More recently, Justice Sotomayor similarly pushed back on what she took to be the workload concerns of the majority. In *Perry v New Hampshire*,<sup>247</sup> the Justice challenged the majority’s assessment that requiring an inquiry into the reliability of an eyewitness identification beyond police-arranged suggestive circumstances would “entail a heavy practical burden” on the lower courts.<sup>248</sup> In her dissent, Justice Sotomayor noted, inter alia, that “[t]here has been no flood of claims in the four Federal Circuits that, having seen no basis for an arrangement-based distinction in our precedents, have long indicated that due process scrutiny applies to all suggestive identification procedures.”<sup>249</sup> Justice Sotomayor invoked the flood metaphor to dispel the notion that extending the requirement of a reliability inquiry would actually lead to an increase in the burden on lower courts—a factor that appeared relevant to the majority.<sup>250</sup>

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<sup>243</sup> *Vieth*, 541 US at 326 n 14 (Stevens dissenting).

<sup>244</sup> 478 US 109 (1986).

<sup>245</sup> *Vieth*, 541 US at 326 n 14 (Stevens dissenting) (citation omitted).

<sup>246</sup> *Id* (Stevens dissenting), citing *Reynolds v Sims*, 377 US 533 (1964).

<sup>247</sup> 132 S Ct 716 (2012).

<sup>248</sup> *Id* at 737–38 (Sotomayor dissenting).

<sup>249</sup> *Id* (Sotomayor dissenting).

<sup>250</sup> See *id* at 727 (majority). Again, this is not to suggest that workload was a dispositive or even significant factor to the Court in *Perry*. For an analysis of the Court’s reasoning in the case and its jurisprudence on eyewitness identifications more broadly, see generally Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand L Rev 451 (2012).



And in an interesting twist, four dissenting Justices suggested that the majority had failed to sufficiently take floodgates concerns into account in the 2011 case *Stern v Marshall*.<sup>251</sup> The core questions in that case were whether a bankruptcy court judge had the statutory authority to enter a final judgment on a counterclaim for tortious interference and, if so, whether that statutory authority violated Article III of the Constitution.<sup>252</sup> The majority concluded that the answer to both questions was yes, meaning that from that point on, compulsory counterclaims could not be resolved in bankruptcy courts.<sup>253</sup> Justice Breyer, joined by Justices Ginsburg, Kagan, and Sotomayor, dissented, and devoted an entire section of the opinion to the practical consequences of the Court's decision:

[U]nder the majority's holding, the federal district judge, not the bankruptcy judge, would have to hear and resolve the counterclaim. Why is that a problem? Because these types of disputes arise in bankruptcy court with some frequency. Because the volume of bankruptcy cases is staggering, involving almost 1.6 million filings last year, compared to a federal district court docket of around 280,000 civil cases and 78,000 criminal cases. . . . Because under these circumstances, a constitutionally required game of jurisdictional ping-pong between courts would lead to inefficiency, increased cost, delay, and needless additional suffering among those faced with bankruptcy.<sup>254</sup>

What is unclear from this section is how the dissenting Justices thought the volume concerns should affect the Court's decision. Unlike the majority, the dissent concluded that the statute was constitutional; one is left to wonder, then, if the dissent meant to imply that the majority should have similarly adopted a broader reading of Article III to avoid these results.<sup>255</sup> What is clear,

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<sup>251</sup> 131 S Ct 2594 (2011).

<sup>252</sup> Id at 2600.

<sup>253</sup> Id at 2620. See also Rafael I. Pardo and Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L Rev 384, 417–18 (2012).

<sup>254</sup> *Stern*, 131 S Ct at 2630 (Breyer dissenting) (citations omitted).

<sup>255</sup> The majority, for its part, responded to this concern (as raised by the estate of Vickie Lynn Marshall and amici) by stating: "It goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" Id at 2619 (majority), quoting *INS v Chadha*, 462 US 919, 944 (1983). The Court went on to note that "[i]n addition, we are not convinced that the practical consequences of such limitations

however, is that the dissent thought an increase in filings to the district court was a truly problematic byproduct of the Court's decision and, it seems, should even somehow have been factored into that decision.

In all of these cases, at least some members of the Court were concerned about—or concerned that other members of the Court were concerned about—how the federal judiciary would be affected by a significant increase in caseload. And importantly, neither *Vieth* nor *Perry* contains even a suggestion that the merits of the claims in the flood had anything to do with the majority's apparent desire to avoid them. Likewise, the dissenting Justices in *Stern* made plain that their concern was with how the judiciary would face a higher number of cases, not frivolous cases, and how the eventual delays would affect the parties. In light of the strain that has existed on these courts over the past several decades, the underlying fear in all these cases seems to be that an expansion of the docket will simply make it more difficult for the courts to administer justice. Ultimately, the fact that the Court has gone back and forth on whether and when to take these concerns into account reveals the shaky foundation that the court-centered floodgates argument rests upon. In the final Part, I begin to address the normative questions about using all manner of floodgates arguments in shaping substantive law.

#### IV. EVALUATING FLOODGATES ARGUMENTS

The preceding Parts have identified and unpacked the primary types of floodgates arguments that the Supreme Court has considered. In doing so, however, the discussion has underscored a set of difficult normative questions: Should floodgates arguments ever be considered in the Court's decision making? If so, when and why? And in such cases where it might be legitimate for the Court to rely on floodgates reasoning, is it sufficient for a party or the Court itself to assert that a deluge of cases will surely follow, or is more required to turn the outcome of the case? In light of the fact that the justices have considered such arguments in more than sixty cases<sup>256</sup>—and this consideration has increased significantly over the last few terms<sup>257</sup>—the need

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on the authority of bankruptcy courts to enter final judgments are as significant as Vickie and the dissent suggest." *Stern*, 131 S Ct at 2619.

<sup>256</sup> See note 31.

<sup>257</sup> See note 3 and accompanying text.

to have purchase on these questions has become all the more pressing.

Answering these questions is no easy task. It is no accident that the Court has fractured—and, indeed, that individual justices have gone back and forth—on these very matters. A large part of the difficulty lies in the fact that these questions cannot be answered in a wholesale manner. As the preceding discussion demonstrates, floodgates arguments vary considerably based upon the institution that is being affected by the flood and what kinds of cases the feared flood contains.

And yet, what makes these questions challenging to answer is also what illuminates one way to begin to answer them. As the analysis here shows, floodgates arguments often are best understood as a subset of a larger category of normative arguments—about the relationship between courts and Congress, for example, or about the relationship between the federal and state court systems. The primary goal of this Part is to situate the various floodgates arguments in the appropriate normative contexts. As this Part demonstrates, once situated, the use of some floodgates arguments becomes fairly easily defensible, while the use of others—precisely because they are not supported by accepted lines of doctrine and practice—becomes far more questionable.

Specifically, Part IV.A considers the arguments based on other-regarding concerns—both interbranch and intersystemic—and argues that they are tied to the constitutional principles of separation of powers and federalism, as well as the doctrines of qualified immunity and abstention. These ties, in turn, suggest that the consideration of other-regarding floodgates is defensible. To be clear, the fact that these floodgates arguments have footing in constitutional principles and doctrine does not suggest that they should be immune from scrutiny or that they should always prevail; the point is simply that this grounding at least gives them a *prima facie* claim to legitimacy.

Part IV.B then considers court-centered floodgates arguments and finds them to be on shakier ground. The Court is vindicating no well-established constitutional principle when it defends the federal courts' docket from caseload pressures, and these arguments have no clear doctrinal or theoretical analogue. The use of court-centered floodgates arguments therefore requires some affirmative justification, which neither the Court nor commentators have provided. Moreover, there is reason to be skeptical of this kind of prudential argument, as shaping the

docket of the federal courts is generally understood to come under the purview of Congress, and not the Court. Accordingly, this Section concludes that the justices should let the lower courts rely on the other tools that they have at their disposal—such as case-management practices<sup>258</sup>—to respond to docket pressures, rather than altering substantive law.

The remaining objective of this Part is to briefly consider the follow-up question to the central normative one—that is, if there are some circumstances in which it is defensible for the Court to entertain a floodgates argument, what kind of analysis or even evidence is required to affect the outcome of a case? Accordingly, Part IV.C offers some initial thoughts on the minimum amount of support a floodgates argument should have for that argument to be dispositive.

#### A. Interbranch and Intersystemic Concerns

Many of the floodgates arguments are “other regarding”—meaning that the Court considers them to avoid encroaching upon Congress, burdening the executive, or upsetting the balance between the federal and state court systems. Each of these concerns can be connected in some way to basic structural constitutional principles or doctrinal rules that courts employ in a variety of contexts to deny parties the relief they might otherwise receive so that the courts can protect another government institution or dynamic with that institution. This gives other-regarding floodgates arguments a relatively stable normative footing that helps justify their consideration.

##### 1. Judicial-legislative concerns.

The floodgates arguments that are most easily defensible are the ones raised in the judicial-legislative context. As discussed in Part I.B, the justices have considered two major concerns within this context. The first is that a flood of new cases following a particular statutory decision would be problematic because it would demonstrate that the Court had contravened congressional intent and possibly even demonstrate the degree of that transgression. A classic example of this kind of concern comes from Justice Douglas’s dissent in *De Beers*: “The decision, if followed, will open the flood gates to review of interlocutory

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<sup>258</sup> See generally Levy, 61 *Duke L J* 315 (cited in note 35).

decrees. It circumvents the policy of Congress to restrict review in these cases to final judgments.”<sup>259</sup> The second subset of concerns is an extension of the first—specifically, that a flood of new cases would not just demonstrate a disregard for congressional intent but, in fact, an appropriation of the legislative function through unilateral expansion of jurisdiction. This sentiment is captured well by Chief Justice Burger’s dissent in *Solem*, which described the Court’s decision as “judicial usurpation with a vengeance.”<sup>260</sup>

The normative foundations of these two forms of judicial-legislative floodgates arguments are not difficult to identify, nor, for many, are they hard to embrace. Within the first kind of floodgates argument, the justices are endeavoring to construe the law correctly, and using the possibility of a flood as an indication that the Court has failed to do so. In this way, the floodgates argument becomes part and parcel of an approach to statutory interpretation that tries to give effect to the apparent intention or purpose of Congress.<sup>261</sup> The second type of floodgates argument is an extension of the first, in that the justices are concerned that the Court’s reading of a particular statute is so removed from what Congress intended that it essentially amounts to a usurpation of the legislative function. In this way, the floodgates arguments raised in the judicial-legislative context can be justified by basic separation-of-powers principles. At bottom, they are supported by the age old notion that each branch has its “proper place[ ],”<sup>262</sup> with Congress as the primary lawmaker and the Court as the law interpreter,<sup>263</sup> and neither should invade the territory of another.<sup>264</sup>

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<sup>259</sup> *De Beers Consolidated Mines*, 325 US at 225 (Douglas dissenting).

<sup>260</sup> *Solem*, 463 US at 315 (Burger dissenting).

<sup>261</sup> The Court has routinely recognized this approach to statutory interpretation. See, for example, *Flora v United States*, 357 US 63, 65 (1958) (“In matters of statutory construction the duty of this Court is to give effect to the intent of Congress.”).

<sup>262</sup> Federalist 51 (Madison), in *The Federalist* 347, 347–48 (Wesleyan 1961) (Jacob E. Cooke, ed).

<sup>263</sup> See, for example, *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2579 (2012) (“Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders.”); *Hepburn v Griswold*, 75 US 603, 611 (1869) (“All the legislative power granted by the Constitution belongs to Congress.”). Members of Congress have likewise echoed this sentiment. See, for example, *Hearings on the Nomination of H. Lee Sarokin to the Third Circuit Court of Appeals before the Senate Judiciary Committee*, 103d Cong, 2d Sess 27,526 (1994) (statement of Senator Phil Gramm) (“Sarokin Hearings”) (“[J]udges ought to be in the business of interpreting laws, not making them.”); *Sarokin Hearings*, 103d Cong, 2d Sess at 27,470

To be clear, claiming that judicial-legislative floodgates arguments have a prima facie legitimacy does not mean that reasonable minds cannot differ on the matter of when these arguments should be heeded. For example, there can be disagreements about whether the text of a particular statute is sufficiently clear such that one need not take into account the overarching purpose of the statute. Or even if there is agreement that congressional will is relevant, there can be disagreement about what that will is and how a potential flood of litigation would support or contravene it. The greater point is simply that these are arguments of a kind that we have seen before—they are part and parcel of a type of statutory interpretation with ties to separation of powers, and therefore their consideration is generally defensible.

## 2. Judicial-executive concerns.

Floodgates arguments made to protect the executive from becoming overburdened and to ensure a balance between the federal and state courts stand on less-sure footing. Although considering the possibility of a flood so as not to disregard congressional intent fits comfortably with familiar themes in statutory interpretation, that the Court has grounds to consider a flood while engaging in substantive analysis in these other areas is less clear. In particular, if Congress had wanted the Court to become involved in guarding these floodgates of litigation, it could have said so in framing the relevant substantive law. That said, even these arguments can be understood to have ties to familiar constitutional principles and lines of doctrine that

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(statement of Senator Orrin Hatch) (“What are judges for other than to implement the laws, to abide by them, to interpret them, not to make them.”); *Hearings on the Nomination of Clarence Thomas to the Supreme Court*, 100th Cong, 2d Sess 23,612 (1991) (statement of Senator Arlen Specter) (“Thomas Hearings”) (“[T]he Court is supposed to interpret law, not to make law.”). For these and similar statements, see Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 NC L Rev 1253, 1254 n 1 (2000).

<sup>264</sup> Federalist 48 (Madison), in *The Federalist* 332, 332 (cited in note 262) (describing power dynamics and potential consequences). See also *Massachusetts v Mellon*, 262 US 447, 488 (1923):

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.

protect the executive and state courts from excessive burdens—ties which lend legitimacy to the use of these arguments.

In the judicial-executive context, one prominent animating concern is that deciding a case in a particular way would create litigation that would ultimately burden the executive official in question. That burden, in turn, would make it difficult for the official to perform his duties. This is precisely the issue that Justice Blackmun raised in *Bivens* when he argued that an increase in lawsuits would “stultify” law enforcement<sup>265</sup> and that President Clinton raised in *Jones* when he argued that additional litigation would “impair the effective performance of his office.”<sup>266</sup> When understood in these terms, the executive floodgates arguments share much in common with the doctrine of qualified immunity.

As the Court itself has stated, immunity of public officers arose “to shield them from undue interference with their duties and from potentially disabling threats of liability.”<sup>267</sup> This is why the Court has “consistently [ ] held that government officials are entitled to some form of immunity from suits for damages.”<sup>268</sup> As a result, parties can be denied the relief that they would otherwise receive, all to protect the executive from what the Court has called the “burdens of litigation.”<sup>269</sup> Floodgates arguments in the context of the executive are based on the same principle. In the cases discussed here, the argument is that a private right of action should not be recognized or that litigation should be stayed—that is, parties should at least be temporarily denied the relief that they might otherwise receive—in order to protect the executive from burdensome litigation.

Of course, this analogy has its limits, and the purpose of drawing it is not to suggest that all executive floodgates arguments should prevail. Indeed, one might be inclined to reject the line of argument that seeks to protect members of the executive branch from burdensome litigation for a whole host of reasons.

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<sup>265</sup> *Bivens*, 403 US at 430 (Blackmun dissenting).

<sup>266</sup> *Jones*, 520 US at 701–02.

<sup>267</sup> *Harlow v Fitzgerald*, 457 US 800, 806 (1982). See also James E. Pfander and Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 NYU L Rev 1862, 1870 (2010) (noting how courts today view the purpose of qualified immunity as balancing the need to compensate victims with ensuring that public officials are not “chill[ed]” in “the zealous discharge of their appointed duties”).

<sup>268</sup> *Harlow*, 457 US at 806.

<sup>269</sup> *Saucier v Katz*, 533 US 194, 200–01 (2001).

The point is simply that the Court has relied upon some of the same concerns to justify creating immunity from suit before.<sup>270</sup> As such, floodgates arguments that are animated by a concern for shielding the executive have at least some legal footing, thereby rendering their consideration defensible.<sup>271</sup>

### 3. Intersystemic concerns.

The same may be said for the Court's consideration of intersystemic floodgates arguments. In the intersystemic realm, the Court has raised concerns in two nearly opposite directions—taking away too many cases that belong in state courts and flooding state courts with too many claims and obligations. A prime example of the first type of concern can be seen in *Maze*, in which Chief Justice Burger suggested that the majority was motivated by a desire “not to flood the federal courts” with cases perceived to be “more appropriately the business of the States.”<sup>272</sup> Justice Ginsburg raised this same concern in her dissent in *Shady Grove*, suggesting that, because of the Court's decision, federal courts would now become a “mecca” for “class actions seeking state-created penalties for claims arising under state law.”<sup>273</sup> The second concern is on display in the parental-termination cases—first *Lassiter*<sup>274</sup> and then *M.L.B.*<sup>275</sup>—in which the Justices' concern appears to be burdening state courts with too many claims and attendant obligations, such as providing parties with free transcripts.

Both concerns are about volume, to be sure, but they are also about ensuring, in the words of the *Grable* Court, that there is no “distort[ion] in the “division of labor between the state and federal courts.”<sup>276</sup> In this way, these kinds of floodgates arguments can be understood as having ties to federalism by maintaining “a healthy balance” between the federal and state

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<sup>270</sup> As currently construed by the Court, qualified immunity is an immunity from suit, and not simply a defense on the merits. See *Pearson v Callahan*, 555 US 223, 237 (2009).

<sup>271</sup> In a similar vein, one can make the argument that floodgates arguments in the judicial-executive context bear some resemblance to political question doctrine, which likewise safeguards certain executive actions from judicial scrutiny on the ground that the executive needs freedom of action. Thanks to Professor Stephen Sachs for suggesting this argument.

<sup>272</sup> *Maze*, 414 US at 407 (Burger dissenting).

<sup>273</sup> *Shady Grove Orthopedic Associates*, 130 S Ct at 1473 (Ginsburg dissenting).

<sup>274</sup> *Lassiter*, 452 US at 58–59 (Blackmun dissenting).

<sup>275</sup> *M.L.B.*, 519 US at 129–30 (Thomas dissenting).

<sup>276</sup> *Grable & Sons Metal Products*, 545 US at 310.



courts.<sup>277</sup> Moreover, these concerns link up to those that the Court has used in the past as grounds to refuse to hear claims through various forms of abstention. Specifically, in the cases of *Railroad Commission of Texas v Pullman Co.*,<sup>278</sup> *Burford v Sun Oil Co.*,<sup>279</sup> and *Louisiana Power & Light Co v City of Thibodaux*,<sup>280</sup> the Court fashioned atextual rules to avoid hearing cases that would be heard in state court for the purpose of, inter alia, avoiding “friction” between state and federal courts.<sup>281</sup> In these and related cases,<sup>282</sup> the Court essentially defers to the state courts—at least for some time—so that the states can handle their own business. For this reason, abstention has been described as a form of “judicial federalism”<sup>283</sup>—it is a prime example of a federal court ceding authority to a state court so as not to upset the balance between the two.

In this way, intersystemic floodgates arguments bear some resemblance to the kinds of analytic moves that the Court has already made. Both involve deciding a case in a particular way so as to avoid creating a tension with the state courts, and ultimately, upsetting the balance between the federal and state

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<sup>277</sup> See *Gregory v Ashcroft*, 501 US 452, 457–58 (1991):

As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.

...

Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

<sup>278</sup> 312 US 496 (1941).

<sup>279</sup> 319 US 315 (1943).

<sup>280</sup> 360 US 25 (1959).

<sup>281</sup> James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan L Rev 1049, 1051 & n 6 (1994), citing *Thibodaux*, 360 US at 35 (Brennan dissenting), *Burford*, 319 US at 335–36 (Douglas concurring), and *Pullman*, 312 US at 500.

<sup>282</sup> See, for example, *Younger v Harris*, 401 US 37, 43–44, 54 (1971) (fashioning an abstention doctrine to protect the autonomy of proceedings in state court from federal interference).

<sup>283</sup> Richard H. Fallon Jr., *Why and How to Teach Federal Courts Today*, 53 SLU L J 693, 723 (2009) (“The *Hart and Wechsler* casebook styles the chapter on abstention doctrines as one on ‘Judicial Federalism.’ This label is apt: By abstaining, a federal court typically cedes authority to a state court, and considerations of federalism will sometimes weigh heavily in favor of a federal court’s doing so.”). See also Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption against Preemption in the Roberts Court*, 2011 S Ct Rev 253, 315 n 332 (describing the judicial abstention doctrines as “based on broad notions of federalism”).

court systems. Again, this analogy has its limits, and the point is certainly not that floodgates arguments made in the service of intersystemic concerns should always prevail in court. Rather, the point is simply that these arguments fit within an established area of doctrine. Accordingly, as with floodgates arguments in the judicial-executive context, intersystemic floodgates arguments have a *prima facie* claim to legitimacy.

Ultimately the question of whether the use of other-regarding floodgates arguments can be justified is a complicated one. The way to begin to answer the question is to look to context—specifically, the institutions and the underlying concerns about those institutions at stake. When framed this way, the kinds of floodgates arguments that have arisen in the judicial-legislative context can best be understood as fitting comfortably with familiar themes in statutory interpretation. Accordingly, their consideration is easily defensible. The kinds of floodgates arguments that have arisen in the judicial-executive and intersystemic contexts are arguably somewhat more difficult to embrace. That said, other areas of the law—namely qualified immunity and abstention—serve as prime examples of the Court intervening, on its own, to protect other government actors from harmful litigation and to preserve the relationship between the state and federal courts more generally. By analogy, these kinds of floodgates arguments too have a legitimate basis. In short, by recognizing that other-regarding floodgates arguments fit within established areas of doctrine and practice, it becomes clear that the Court should be able to entertain or even raise such arguments on its own.

#### B. Court-Centered Concerns

As the earlier Parts have demonstrated, floodgates arguments that express court-centered concerns are fundamentally different from those that express interbranch or intersystemic concerns. While the latter are concerned with other governmental institutions and the Court's relationship with those institutions, the former are self-regarding or even "self-interested" to borrow a phrase from Justice Blackmun,<sup>284</sup> in that the Court considers them in the context of how federal courts themselves will be impacted by an increase in litigation. Moreover, with other-regarding floodgates arguments, the concern is not about

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<sup>284</sup> *McMillian*, 503 US at 15 (Blackmun concurring).

case volume per se, but rather that an increase in cases will show that congressional will was disregarded or will mean keeping members of the executive branch from performing their official obligations. By contrast, the concern with court-centered floodgates arguments is precisely about volume—that the federal courts will have additional cases to decide (which is, of course, precisely their official obligation).

To be sure, judicial workload is a critical concern. As noted earlier, the lower courts have faced rising caseloads over the last several decades<sup>285</sup>—a fact the justices have emphasized.<sup>286</sup> Today, both federal district and appellate judges must contend with hundreds of filings per year,<sup>287</sup> meaning that their ability to give attention to individual cases is greatly reduced. Employing the tools at hand, district judges have come to rely more heavily on the aid of magistrate judges,<sup>288</sup> and appellate judges have come to rely on the assistance of staff attorneys and other case-management tools to cope with their workload.<sup>289</sup> Still, judges and scholars alike have called for an expansion of the bench<sup>290</sup> and limiting the flow of cases<sup>291</sup> to alleviate the strain on the federal courts. Thus, when the justices express their desire to avoid inviting new claims into federal courts, the underlying concern is not a trivial one.<sup>292</sup> The critical question, though, is

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<sup>285</sup> See notes 148–49 and accompanying text. See also Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time across Cases in the Federal Courts of Appeals*, 81 *Geo Wash L Rev* 401, 407–09 (2013).

<sup>286</sup> See, for example, *Bivens*, 403 US at 428 (Black dissenting) (describing how the courts are “choked with lawsuits”).

<sup>287</sup> See note 151.

<sup>288</sup> See generally Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 *Valp U L Rev* 661 (2005) (discussing the increased role of magistrate judges).

<sup>289</sup> See Levy, 61 *Duke L J* at 320–25 (cited in note 35).

<sup>290</sup> See Stephen Reinhardt, *Developing the Mission: Another View*, 27 *Conn L Rev* 877, 880 (1995); William M. Richman and William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 *Cornell L Rev* 273, 299 (1996).

<sup>291</sup> See generally Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 *Cornell L Rev* 634 (1974) (outlining various ways the case flow to the courts could be reduced, including creating a Court of Tax Appeals and eliminating diversity jurisdiction). See also Richard A. Posner, *The Federal Courts: Crisis and Reform* 176 (Harvard 1985); Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, 61 *NY Bar J* 14, 14–15 (July 1989); Edith H. Jones, Book Review, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 *Tex L Rev* 1485, 1501–03 (1995); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 *U Chi L Rev* 761, 771–76 (1989).

<sup>292</sup> Several Justices have described the problems attendant with a high caseload. See *United States v Timmreck*, 441 US 780, 784 (1979) (“[I]ncreasing the volume of judicial

whether considerations of judicial workload can stand as an independent factor in shaping the Court's interpretation of substantive law.

As with evaluating other floodgates arguments, one way to begin to assess the normative validity of self-regarding floodgates arguments is to ask whether the argument in question has ties to a particular constitutional principle or resembles established areas of doctrine and practice. Ultimately, the answer seems to be no. Unlike the arguments raised in the interbranch and intersystemic contexts, those raised here have neither clear constitutional support nor close theoretical or doctrinal analogues. Accordingly, reliance on these arguments requires some sort of affirmative justification—a justification that the justices have yet to produce.

Beginning with constitutional principles, it is unclear just what provision in the constitution could justify using workload concerns as an independent basis to alter substantive law or decline to hear a case. Perhaps in extreme situations—for example, if a particular interpretation of a statute would create hundreds of thousands of new claims each year—the Court might be able to appeal to Article III itself. The rationale would be that such a decision would effectively amount to halting the functioning of the judiciary—arguably a violation of the Constitution's provision for a federal court system.<sup>293</sup> Short of this kind of catastrophic scenario, however, it is difficult to determine how the Court could justify altering its interpretation of substantive law with reference to a constitutional principle.

It is likewise difficult to discern just how court-centered floodgates arguments could be grounded in established doctrine and practice. To be sure, the Court has occasionally decided cases in particular ways out of fear of potential consequences. But even when examining the closest examples of these sorts of

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work, inevitably delays and impairs the orderly administration of justice.”), quoting *United States v Smith*, 440 F2d 521, 528–29 (7th Cir 1971) (Stevens dissenting); *Bivens*, 403 US at 429 (Black dissenting) (“Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur”); *Stern*, 131 S Ct at 2630 (Breyer dissenting) (defining the problems of increased litigation as “inefficiency, increased cost, delay, and needless additional suffering among [the parties]”).

<sup>293</sup> Specifically, Article III states that: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” As the Court itself has said, “Article III creates . . . a judicial department composed of ‘inferior Courts’ and ‘one supreme Court.’” *Plaut v Spendthrift Farm, Inc*, 514 US 211, 227 (1995) (emphasis omitted).

prudential cases, it is still evident that court-centered floodgates arguments have no true analogue.

One line of cases that could at first seem promising for grounding floodgates arguments are those based on institutional capacity concerns. In these cases, the justices' concern that a particular holding will take them outside of their institutional competency directly affects the outcome of the case. A prime example of this kind of case is *San Antonio Independent School District v Rodriguez*,<sup>294</sup> which involved an Equal Protection challenge to Texas's system for funding its public schools.<sup>295</sup> The majority acknowledged that its concerns about institutional competency—such as its lack of knowledge about local taxation schemes and school management—affected its interpretation of the Equal Protection Clause (and subsequent decision that Texas's funding scheme did not violate the Clause).<sup>296</sup> On the surface, this kind of institutional capacity argument could appear to be similar to a court-centered floodgates argument. After all, both involve the Court interpreting substantive law in a particular way so as to avoid giving the federal courts certain kinds of obligations.

And yet, there are quite plainly critical differences between the two types of arguments. Specifically, the two have fundamentally different animating concerns. While it is true that the Court in a case like *Rodriguez* is concerned with the kind of additional work the lower courts would have to take on, the primary reason for this concern is that such work would amount to getting into the weeds of a state public school and taxation system, forcing the courts to encroach upon the territory of the legislature. In the words of Justice Powell, “[t]he consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand.”<sup>297</sup>

What these comments help show is that this type of institutional capacity argument is, at least largely, other regarding. The underlying concern is that by deciding a case in a particular

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<sup>294</sup> 411 US 1 (1973).

<sup>295</sup> *Id.* at 4–6.

<sup>296</sup> *Id.* at 41–44. See also Lawrence G. Sager, *Fair Measure: The Legal Status of Unenforced Constitutional Norms*, 91 Harv L Rev 1212, 1218 (1978); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 Yale L J 330, 338 (2006).

<sup>297</sup> *Rodriguez*, 411 US at 58.

way, the courts will be forced to go outside of their areas of expertise and necessarily encroach upon the territory of another branch of government in that specific case. This is simply a fundamentally different concern than that the courts' own workload could become too great because of a subsequent increase in the volume of cases.

A second line of prudential cases—those based on concerns about the Court's legitimacy—arguably comes closer to grounding court-centered floodgates arguments, but still remains analytically distinct. In these cases, the Court relies upon concerns about maintaining its own legitimacy as an independent prudential factor in reaching a decision. The most direct example of this kind of argument can be seen in *Planned Parenthood of Southeastern Pennsylvania v Casey*,<sup>298</sup> in which Justices O'Connor, Kennedy, and Souter suggested that maintaining the Court's legitimacy was a valid reason to avoid overruling past precedent (and indeed, why the Court let its prior decision in *Roe v Wade*<sup>299</sup> stand).<sup>300</sup> Once again, on the surface, one can see parallels between this kind of argument and court-centered floodgates arguments. Both involve the Court reaching a particular decision out of what is arguably institutional self-interest.

That said, there is still a significant space between these two types of arguments. The Court has only openly<sup>301</sup> appealed to legitimacy concerns when it has claimed—as in *Casey*—that the power of the institution was truly at stake.<sup>302</sup> In the words of the plurality, overruling their prior decision in *Roe* absent “the most compelling reason” would “subvert the Court's legitimacy beyond any serious question.”<sup>303</sup> With court-centered floodgates arguments, the concern is not nearly so severe. Despite the fact that the justices speak of “opening the floodgates,” the suggestion from the cases is that, at worst, there will be a problematic accretion of cases (and therefore of work) over time, but not that

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<sup>298</sup> 505 US 833 (1992).

<sup>299</sup> 410 US 113 (1973).

<sup>300</sup> *Casey*, 505 US at 865–69.

<sup>301</sup> There have been other decisions that commentators and scholars have considered to be influenced at least partially by a desire to enhance the Court's legitimacy—most recently *Sebelius*. See, for example, A.E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 Va L Rev In Brief 76, 89–90 (2012).

<sup>302</sup> *Casey*, 505 US at 867. See also Richard H. Fallon Jr, *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 Cal L Rev 1, 27–28 (2003); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22, 70–71 (1992).

<sup>303</sup> *Casey*, 505 US at 867.

the courts will imminently face a true catastrophe. Again, short of a decision that would result in a cataclysmic situation for the courts—say by leading to tens or hundreds of thousands of new claims—court-centered floodgates arguments are clearly distinct from those based on the Court’s own legitimacy as voiced in *Casey*.

In short, while one could readily identify related doctrine or even constitutional principles in the context of other-regarding floodgates arguments that suggested the consideration of these arguments was legitimate, the same cannot be said of floodgates arguments in the court-centered context. With this latter set, it is unclear just what kind of legal footing, if any, these arguments could have. Accordingly, these arguments need some sort of affirmative normative justification—a justification that the justices have yet to offer. Until such a justification can be offered, the Court should be wary of considering court-centered floodgates concerns in shaping the “requirements of law.”<sup>304</sup>

Now, it is important to recognize that counseling Courts against considering caseload volume in this kind of decision making does not mean that there is no recourse when it comes to docket concerns. Our system provides several ways to relieve caseload pressure short of the courts not recognizing causes of action or deciding not to hear particular sets of cases. Specifically, our constitutional system gives *Congress* the authority to adjust laws so as to stem that flow.<sup>305</sup> And Congress has indeed exercised that power. As noted earlier, Congress passed the Supreme Court Case Selections Act<sup>306</sup> to alleviate the Court’s then “unmanageable workload” by eliminating most of the Court’s mandatory jurisdiction.<sup>307</sup> With respect to the rest of the federal court docket, Congress has repeatedly enacted targeted legislation to reduce frivolous filings. For example, Congress passed the PLRA precisely as a way of “addressing a flood of prisoner litigation in the federal courts.”<sup>308</sup> Similarly, part of the purpose of the Private Securities Litigation Reform Act of 1995<sup>309</sup> was to limit frivolous securities claims.<sup>310</sup> This is not to

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<sup>304</sup> *Palmer*, 468 US at 554 n 30 (Stevens concurring in part and dissenting in part).

<sup>305</sup> Furthermore, Congress, of course, has the power to create additional judgeships, which would serve to reduce the burden on any single judge.

<sup>306</sup> Pub L No 100-352, 102 Stat 662.

<sup>307</sup> See *Watts*, 160 U Penn L Rev at 13–14 (cited in note 152).

<sup>308</sup> *Woodford v Ngo*, 548 US 81, 91–92 n 2 (2006).

<sup>309</sup> Pub L No 104-67, 109 Stat 737, codified at 15 USC § 78(a) et seq.

suggest that Congress could not do more in this vein; rather the point is simply that there is still a branch of government that has the clear authority to take the courts' caseload into account in substantive decision making and has done so repeatedly in the past.

This does not leave the courts defenseless against the rising tide, however; they have many tools besides substantive law with which to keep themselves afloat. Perhaps most prominently, both the district courts and the courts of appeals can avail themselves of various procedural rules to help cope with, and indeed limit, their dockets. Most plainly, the Federal Rules of Civil Procedure employ what have been called three basic pre-trial "discouragement mechanisms."<sup>311</sup> The first mechanism is the pleading stage itself, with the possibility for a motion to dismiss. Although pleadings obviously have several purposes, scholars have come to identify a significant one as "allowing a court to screen cases for merit."<sup>312</sup> At this juncture, courts can siphon off some of the frivolous cases that come before them. The second mechanism is summary judgment. The main goal of Rule 56 has been said to be "filtering out cases not worthy of trial,"<sup>313</sup> and that rule is now regarded as a "powerful tool for judges to control dockets."<sup>314</sup> A third mechanism is the possibility of Rule 11 sanctions, which were developed to "punish lawyers for advancing meritless contentions that wasted the courts' attention"<sup>315</sup> and to deter such litigation from coming into court in the first place.<sup>316</sup> In short, the district courts have at their disposal

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<sup>310</sup> *Securities Litigation Reform: Conference Report to Accompany HR 1058*, HR Conf Rep No 104-369, 104th Cong, 1st Sess 44 (1995).

<sup>311</sup> Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions under the Federal Rules of Civil Procedure*, 67 NC L Rev 1023, 1033-34 (1989).

<sup>312</sup> David L. Noll, *The Indeterminacy of Iqbal*, 99 Georgetown L J 117, 123 (2010). See also Adam N. Steinman, *The Pleading Problem*, 62 Stan L Rev 1293, 1347 (2010) ("Scholars have broken down the purpose of pleadings in a number of different ways, but they might broadly be characterized as: notice-giving, process-facilitating, and merits-screening.").

<sup>313</sup> Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 NYU L Rev 982, 1041 (2003).

<sup>314</sup> *Id.* at 1056.

<sup>315</sup> Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 Duke L J 597, 611 (2010).

<sup>316</sup> FRCP 11, Advisory Committee Notes to the 1983 Amendments ("Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.").



several critical procedural rules that have been fashioned, at least in part, so that district courts can more quickly dispose of frivolous filings and streamline the litigation process more generally.

Many of the mechanisms that exist at the district court level have analogues at the courts of appeals. Through the Federal Rules of Appellate Procedure, the circuit courts have several key ways to manage their dockets and reduce the time taken by frivolous filings. Rule 34 permits appeals courts to decide cases without oral argument<sup>317</sup>—a powerful time-saving mechanism.<sup>318</sup> Additionally, courts of appeals can rely on staff attorneys to help draft summary dispositions.<sup>319</sup> Finally, per Rule 38, if a court of appeals determines that a particular filing was frivolous, the court can award damages and costs to the appellee.<sup>320</sup>

Moreover, these mechanisms of the federal courts are not static—if they are insufficient to curb the flow of frivolous cases, they can be altered, and indeed have been so altered in the past. Rule 34, for example, was amended in 1979 to authorize the resolution of an appeal without oral argument whenever a panel agrees that argument is unnecessary because, *inter alia*, an appeal is frivolous.<sup>321</sup> Similarly, Federal Rule of Civil Procedure 11 was amended in 1983 precisely to reduce the number of frivolous filings.<sup>322</sup>

And although this has been more controversial, the Supreme Court itself has shifted the meaning of various procedural rules in its own opinions.<sup>323</sup> In 1986, the Court in a trilogy of cases<sup>324</sup> solidified Rule 56 as “a powerful tool for the early resolution

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<sup>317</sup> See FRAP 34.

<sup>318</sup> See Levy, 61 Duke L J at 323, 345–46 (cited in note 35). See also Honorable J. Clifford Wallace, *Improving the Appellate Process Worldwide through Maximizing Judicial Resources*, 38 Vand J Transnatl L 187, 200 (2005) (“The amount of time saved by foregoing oral argument is significant.”).

<sup>319</sup> Wallace, 38 Vand J Transnatl L at 196–98 (cited in note 318).

<sup>320</sup> See FRAP 38.

<sup>321</sup> See FRAP 34, Advisory Committee Notes to the 1979 Amendments.

<sup>322</sup> FRCP 11, Advisory Committee Notes to the 1983 Amendment.

<sup>323</sup> See, for example, Joseph A. Seiner, *Plausibility beyond the Complaint*, 53 Wm & Mary L Rev 987, 1014 (2012) (describing the Court’s decisions in *Twombly* and *Iqbal* as “enormously controversial”), citing *Bell Atlantic Corp v Twombly*, 550 US 544 (2007) and *Ashcroft v Iqbal*, 556 US 662 (2009); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 Notre Dame L Rev 849, 883–84 (2010) (critiquing *Iqbal* on the ground that changes to pleading standards should be made through the Rules Enabling Act or Congress, not the Court).

<sup>324</sup> *Celotex Corp v Catrett*, 477 US 317 (1986); *Anderson v Liberty Lobby, Inc.*, 477 US 242 (1986); *Matsushita Electric Industrial Co v Zenith Radio Corp.*, 475 US 574 (1986).

of litigation.”<sup>325</sup> And of course, more recently, the Court altered pleadings with its decisions in *Bell Atlantic Corp v Twombly*<sup>326</sup> and *Ashcroft v Iqbal*.<sup>327</sup> There can be disagreement about the propriety of the way these rules have shifted over time, but the point remains that the federal courts have an extensive set of procedures to manage their dockets, and these procedures can be ratcheted up if they prove insufficient.

What this discussion suggests is that, when compared to floodgates arguments that express interbranch and intersystemic concerns, those that express court-centered concerns are on significantly shakier ground. Barring a true flood of tens or hundreds of thousands of cases, no evident principle exists to support the Court taking workload concerns into account when engaging in “[i]nterpretation of the law.”<sup>328</sup> Therefore, although the Court may have a legitimate interest in ensuring that the number of filings, and particularly frivolous filings, does not become too high, it should be wary of using substantive law as the limiting device. Speaking of unmeritorious cases in particular, Justice Stevens has argued, “Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate . . . then there is something wrong with those procedures, not with the law.”<sup>329</sup> Accordingly, the Court should have a presumption against using court-centered floodgates arguments. The problems of case flow should be addressed through case management and, more broadly, the tools of Congress.

This discussion leads to another question: Does the presumption against court-centered floodgates arguments extend to cases in which the Court is essentially engaging in federal common lawmaking? One could imagine that although it is difficult

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<sup>325</sup> Miller, 78 NYU L Rev at 984 (cited in note 313). It is worth noting that according to several empirical studies, in almost all categories of cases the summary judgment rates began to increase prior to the Court’s decision in the trilogy of cases. See generally Joe S. Cecil, et al, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J Empirical Legal Stud 861 (2007); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting toward Bethlehem or Gomorrah?*, 1 J Empirical Legal Stud 591 (2004).

<sup>326</sup> 550 US 544 (2007).

<sup>327</sup> 556 US 662 (2009).

<sup>328</sup> *Legal Services Corp v Velazquez*, 531 US 533, 545 (2001) (“Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy.”).

<sup>329</sup> *Hoover v Ronwin*, 466 US 558, 601 (1984) (Stevens dissenting).

to justify the Court using workload concerns as a reason to alter its interpretation of substantive law, the Court could legitimately take that same consideration into account when its role is to make a policy judgment rather than interpret the law, as in the *Bivens* line of cases.<sup>330</sup> After all, if the goal of the Court in this context is simply to make good law, then the consideration of future litigation might well be relevant in the determination of what constitutes a good law.

The normative assessment of floodgates arguments thus far has been partially relativistic—some arguments are more or less easily defensible when compared to others, and a court-centered argument in this context is no exception. Considering workload in a policy context is easier to justify than using court-centered floodgates concerns as stand-alone grounds for a decision, but it is not altogether unproblematic. To borrow another legal trope, one concern is based on a slippery slope. If the Court relies on floodgates considerations in a policy-making context, these same concerns are more likely to bleed into its substantive analysis in other cases. But the greater point may be that, in light of the various legitimate options for managing caseload that are open to the judiciary, even when engaging in policy analysis it might be preferable for the Court to shy away from using caseload as a reason to shift the direction of the law.

### C. Empirical Concerns

The outset of this Part poses several normative questions about floodgates arguments, including whether it is ever appropriate for courts to consider the effect their decision will have on the volume of litigation and if so, how many cases are necessary to create an impermissible flood in any given context. The preceding Sections have tried to frame and begin to answer the first of these questions, suggesting that the use of other-regarding floodgates arguments is generally defensible, whereas the Court should be wary of relying on court-centered floodgates arguments, particularly when outside the policy-making context. This Section turns to the second of these questions—what precisely is needed to make the case for an oncoming flood? It is important to recognize that answering this question, in turn, involves a critical two part task: a court must not only forecast the amount of litigation (a more or less empirical proposition) but

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<sup>330</sup> See note 173.

also say why that amount would constitute a flood instead of a permissible flow. It is worth briefly considering each task here.

Beginning with the purely empirical component, the preceding discussion reveals that the justices often invoke floodgates arguments without much support for why they believe a large number of cases will come. In *Bivens*, Justice Blackmun suggested that the Court's decision would "open[ ] the door for another avalanche of new federal cases" on the theory that "[w]henver a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court"<sup>331</sup> and nothing more. In *Solem*, Chief Justice Burger claimed that the Court's decision to hold the petitioner's sentence unconstitutional would lead to a "flood" of new cases with no additional support.<sup>332</sup>

Of course, it can be easy to hide one's claims behind this kind of hyperbole—and there is reason to suspect that parties and justices have invoked this language at times precisely because, in the words of Justice Powell, a "floodgates' argument can be easy to make and difficult to rebut."<sup>333</sup> But if a particular decision is made to avoid an influx of cases that could harm a coordinate branch of government or state court, then it should be based on something more than the suggestion that an "avalanche" or "flood" is imminent.

Forecasting the number of cases that will follow a decision is no easy task and may be near impossible in some cases. For example, if one of the justices had been willing to accept the basic principle of President Clinton's argument in *Jones*, that justice then would have needed to show why a decision by the Court not to stay civil litigation against the President would "spawn" a host of new litigation<sup>334</sup>—a particularly difficult undertaking given the sui generis nature of the case. But outside of a unique case such as *Jones*, we should expect the justices to have some extended discussion about why they think a flood is likely to come. This reasoning could be based on past experience with the same kind of claims, as in *Michigan Academy of Family Physicians*<sup>335</sup> and *Skinner*,<sup>336</sup> or experience with comparable

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<sup>331</sup> *Bivens*, 403 US at 430 (Blackmun dissenting).

<sup>332</sup> *Solem*, 463 US at 315 (Burger dissenting).

<sup>333</sup> *Rummel v Estelle*, 445 US 263, 304 (1980) (Powell dissenting).

<sup>334</sup> *Jones*, 520 US at 701–02.

<sup>335</sup> *Michigan Academy of Family Physicians*, 476 US at 680–81 n 11 ("We observed no flood of litigation in the first 20 years of operation of Part B of the Medicare program, and we seriously doubt that we will be inundated in the future.").

claims, as in *Bivens*.<sup>337</sup> Now to be clear, the point of this prescription is not to encourage the justices to become empiricists (an important caveat given that there will certainly be skepticism about the ability of the Court to make these kinds of forecasts even outside the most challenging cases<sup>338</sup>). Rather, the point is that if claims about increases in litigation are to influence at least some decisions, the justices need to provide support for those claims—both for each other and for the public.

Second, it is important to recognize that the final part of the Court's task goes beyond mere forecasting. A floodgates argument rests on a claim about how many cases would follow a particular decision, but then also a claim about why that number would actually create a burden. Hypothetically, the Court could accurately predict the number of new cases that will stem from the case before it—be it, say, one thousand or even ten thousand per year—yet this number still must be set in context. Specifically, the justices must still make a determination about whether the figure will truly be problematic.

To see how challenging this can be, one need only look to a recent study of *Bivens* cases—one of the sets of cases that concerned the Court. The study showed that between 2001 and 2003, *Bivens* suits constituted 243 out of 143,092 civil filings in five district courts.<sup>339</sup> Do 243 filings rise to the level of a flood within these district courts? It is difficult to say. But if a justice claims that it does, then that justice should make that case, presumably based on context-specific information, such as how much time these cases consume and ultimately the extent to which they tend to prevent law enforcement officials from performing their jobs.

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<sup>336</sup> *Skinner*, 131 S Ct at 1299 (“In the Circuits that currently allow § 1983 claims for DNA testing, no evidence tendered . . . shows any litigation flood or even rainfall.”) (citation omitted).

<sup>337</sup> *Bivens*, 403 US at 391 n 4 (“In estimating the magnitude of any such ‘avalanche,’ it is worth noting that a survey of comparable actions against state officers under . . . § 1983 found only 53 reported cases in 17 years (1951–1967) that survived a motion to dismiss.”).

<sup>338</sup> See, for example, Sanford Levinson and Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 Const Commen 255, 281 & n 74 (2003) (suggesting that one might “think that judges are not particularly good at predicting the future consequences of their decisions”).

<sup>339</sup> See Reinert, 62 Stan L Rev at 837 (cited in note 154). Specifically, Professor Alexander Reinert noted that fifty-one *Bivens* actions were filed in the Southern District of New York, sixty-seven in the Eastern District of New York, sixty-four in the Southern District of Texas, twenty-three in the Eastern District of Pennsylvania, and thirty-eight in the Northern District of Illinois between 2001 and 2003. *Id.*

In short, even when the consideration of a particular type of floodgates argument is generally defensible, an individual argument can still be problematic as employed. This discussion has shown that when the justices invoke floodgates arguments, they often do so without much support for why a flood will come or why a particular high-water mark is problematic. While these areas are ripe for further scholarly exploration, at the very least one can conclude at this juncture that if the justices are to continue to put forward these arguments, they should do more on both fronts.

### CONCLUSION

When the Court first consistently began using floodgates rhetoric in the mid-1940s, little did it know that it would be opening the floodgates of floodgates arguments themselves. Since 2000, the justices have considered floodgates arguments in nearly thirty cases, with fourteen coming from the last few years alone.<sup>340</sup> This flood shows no sign of receding anytime soon.

In light of the Court's consistent—and even increasing—discussion of floodgates arguments, exploring and understanding them is vital. Though courts and scholars often refer to “the floodgates argument” as if it had a singular, stable meaning, it can be invoked in various ways, depending upon who is being flooded, the effect of that flood, and what the flood contains. As this Article has demonstrated, the Court has considered floodgates arguments made to avoid unduly burdening the executive, encroaching upon the legislature, or upsetting the balance between the federal and state courts. These are common concerns that the Court often encounters, and they have ties to the principles of separation of powers and federalism, as well as the doctrines of qualified immunity and abstention. Although the justices should take care to support claims that a flood will truly ensue when making other-regarding floodgates arguments, the use of such arguments is generally defensible.

The same cannot be said for court-centered floodgates arguments—those arguments in which the Court is concerned about its own workload and the workload of the rest of the judiciary. Although the caseload of the federal courts is a critical issue, attempts to reduce it through the interpretation of substantive law raise serious concerns. Short of a catastrophic situation,

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<sup>340</sup> See note 3.

anxieties about caseload would do well to be addressed through Congress and the lower courts' case-management tools.

Ultimately, what seemed to be an innocuous line of argumentation implicated broad questions about when the Court should consider the consequences of its decisions, how the Court should engage with empirics, and what measures the Court can undertake to ensure its own ability to administer justice. These and related questions all deserve sustained scholarly and judicial consideration. But based on this preliminary analysis, it is clear that the justices should guard their own decisions to ensure that workload concerns, as manifested in the court-centered floodgates arguments above, do not spill over into the substantive analysis of law.