ABSTRACT:

The Supreme Court has increasingly considered a particular argument: that it should avoid deciding cases in ways 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, if not compelled, by independent constitutional principles and doctrine, including separation of powers and federalism. 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. This kind of self-regarding floodgates concern raises 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 strong 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 argument: that it should avoid deciding cases in ways that would “open the floodgates of litigation.” Of the sixty or so cases in which the Justices have raised or confronted floodgates arguments, ten came in the past three terms alone. And yet, despite the increased prominence of the floodgates argument, its normative justification remains contested. While several recent majority opinions contain assurances that the Court’s holding will not result in a deluge of new claims, several recent dissenting opinions accuse the majority of being driven by an improper desire to close the floodgates of litigation. In the

1 Although a floodgates argument appears in the Supreme Court as early as 1908 in Ex Parte Young, 209 U.S. 123, 166, the Court does not appear to begin considering this kind of argument consistently until the mid-1940s, see, e.g., De Beers Consol. Mines v. United States, 325 U.S. 212, 225 (1945) (Douglas, J., dissenting); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 583 (1944) (Stone, C.J., dissenting). That said, floodgates arguments have existed outside of 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 Johns. 484 (N.Y. Sup. Ct. 1818). See Adam Freedman, THE PARTY OF THE FIRST PART: THE CURIOUS WORLD OF LEGALESE 73 (2008). Outside of the United States, this kind of argument can be found in judicial opinions as early as the late 1700s. See Cast Plate Manufacturers v. Meredith, 4 T. R. 794 (1792) (Kenyon, C.J.) (“If this action could be maintained, every Turnpike Act, Paving Act and Navigation Act would give rise to an infinity of actions.”).

2 For a brief discussion of how I determined the relevant set of cases, see infra note 29.


4 See, e.g., 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.”); Skinner, 131 S. Ct. at 1299 (“[Respondent and amici] foresee a flood of lawsuits against creditors’ lawyers by plaintiffs . . . . We do not believe our holding today portends such grave consequences.”); and Padilla, 130 S. Ct. at 1484–85 (“We confronted a similar ‘floodgates’ concern in Hill [v. Lockhart, 474 U.S. 52 (1985)] . . . . A flood did not follow in that decision’s wake.”).

5 See, e.g., Wilkie v. Robbins, 551 U.S. 537, 569 (2007) (Ginsburg, J., dissenting) (“[T]he Court rejects his claim, for it fears the consequences. Allowing Robbins to pursue this suit,
words of Justice Ginsburg from her dissent in the 2007 case *Wilkie v. Robbins.*

“It the ‘floodgates’ argument the Court today embraces has been rehearsed and rejected before.”

It is no wonder that members of the Court have wrestled with the questions of whether and when to rely upon the floodgates argument. 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. At first blush, that the Court would try to stave off a flood of litigation seems reasonable, particularly in an era in which the lower courts have been said to face “a crisis in volume.” And yet, as one plumbs deeper, the argument becomes increasingly problematic. Taken literally, 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.”

Granting a floodgates argument implies that one’s “protection of the laws” depends, at least in part, on 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, even as some
floodgates arguments have shaped substantive law. Is it ever appropriate for courts to consider the effect their decision will have on the volume of litigation? 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, and uses consistent imagery to invoke it—a flood, a deluge, a rainfall, or even an avalanche—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.

Some of the time, the Court considers 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 encumber federal agents or even the president in performing their 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 or even usurped the legislative function by expanding its own jurisdiction. In both sets of cases, the concern about opening the floodgates is not that the federal courts would suffer, but rather that an increase in litigation would cause or be evidence of a problem for a coordinate branch of government.

Similarly, the Court considers floodgate arguments that are part of larger “intersystemic” concerns—those regarding the balance of federal and state courts. 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, or that the state courts would be burdened with a host of new claims and attendant obligations. As in the interbranch context, floodgate arguments focusing on state courts are also animated by concerns for other government institutions.

In some cases, however, the Justices consider floodgate arguments that are animated by 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 of “court-centered prudentialism.” Specifically, the Justices occasionally suggest or even hold that a cause of action must go unrecognized, or a case unreviewed, 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, or the dissent accuses the majority of being improperly motivated by a desire to avoid new claims. In these ways, the perceived flood of litigation changes not only the way courts manage their dockets administratively, but also the way they shape

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25 See Wilkie, 551 U.S. at 541.
27 Elsewhere, I have described and analyzed the ways in which the federal courts of appeals use administrate practices to manage their dockets, such as decreasing the percentage
substantive law.\(^{28}\)

Given that the Court considers floodgates arguments in such fundamentally different ways, these arguments must be evaluated contextually, not categorically. This Article therefore begins by analyzing how floodgates arguments actually function in the Supreme Court.\(^{29}\) As in other discussions of the forms of legal reasoning and rhetoric,\(^{30}\) this Article’s initial goal is to determine how such arguments are employed, for what purposes, and what impact they have 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 decisionmaking.

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. Part I examines cases in which the Court considers floodgates arguments in the service of a larger argument about interbranch concerns. Specifically, Section A focuses on judicial-executive interactions, and Section B turns to judicial-legislative interactions. Part II considers floodgates arguments as they implicate intersystemic concerns. Section A examines cases in which the Court is concerned with taking too many cases of cases that receive oral argument and result in published opinions. See generally Marin K. Levy, The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts, 61 DUKE L.J. 315 (2011).

\(^{28}\) I use the phrase “substantive law” to distinguish court decisions from court administration, not to draw the familiar—if problematic—line between “substance” and “procedure,” see John Hart Ely, The Irrepressible Myth of Erie, 87 HARV. L. REV. 693, 724 (1974) (“We were all brought up on the sophisticated talk about the fluidity of the line between substance and procedure.”).

\(^{29}\) To find the universe of cases containing floodgates arguments in the Supreme Court, I first ran a search in Westlaw for all Supreme Court cases containing the word “flood,” “floodgate,” “floodgates,” “deluge,” or “avalanche”—which resulted in nearly 650 cases. I then 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”) as a check against my own winnowing of the cases. Finally, I ran additional searches using certain excerpts from relevant opinions (such as Justice Harlan’s concurrence in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and Justice Jackson’s concurrence in Brown v. Allen, 344 U.S. 443, 537 (1953)). Including these additional searches, the total number of relevant cases was just above sixty.

from the state courts, and Section B discusses cases in which the Court is concerned with 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 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—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 much 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.31 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”32 or “parade of horribles.”33 Judges and

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31 See generally Levy, supra note 27.
32 See, e.g., Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1466 n.5 (2010) (“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. ROBERT 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.’) (internal citations omitted)). For a broader discussion of slippery slope arguments, see generally Volokh, supra note 30.
33 See, e.g., Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17, 531 U.S. 57, 69 (2000) (Scalia, J., concurring in the judgment) (“One can, of course, summon up a parade of horribles, such as an arbitration award ordering an airline to reinstate an
scholars tend to use the phrase as if it had a single, stable meaning. 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.

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 interbranch 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 an executive-branch actor—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 alcoholic pilot who somehow escapes being grounded by force of law.

For recent judicial examples, see, e.g., Geimsky v. City of Chicago, 675 F.3d 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 F.3d 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 F.3d 559, 629 n.7 (2d Cir. 2009) (Poolder, J., 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.” (internal citation omitted)).

For recent scholarly examples, see, e.g., F. Andrew Hessick, Probabilistic Standing, 106 NW. 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 GEO. 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.’”).
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 considered, 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* 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. Although a majority answered that question in the affirmative, several justices dissented on the ground that Congress, not the Court, was responsible for creating a new cause of action. For this reason *Bivens* is often perceived as a case that raises judicial-legislative concerns. And yet, the floodgates argument that was ultimately put forward by a third dissenter was meant to express 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

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36 Id. at 389–90.
37 See id. at 411 (Burger, C.J., dissenting); id. at 427–28 (Black, J., dissenting); see also James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 118 (2009).
38 See, e.g., Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What is Special About Special Factors*, INDIANA LAW REV. (forthcoming) (describing the “common understanding of Bivens’s central problem” to be “one of the separation of judicial from legislative powers”).
federal cases.” Specifically, Justice Blackmun argued that after Bivens, “whenver 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.” The Justice 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. 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. These concerns were particularly pronounced at “this time of our history”—a time when law enforcement officials were perceived to be under great strain.

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 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 eighteen years that survived a motion to dismiss. While it is unclear whether this rejoinder sufficiently addresses Justice Blackmun’s floodgates argument, 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

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39 Bivens, 403 U.S. at 430 (Blackmun, J., dissenting).
40 Id.
41 Id. (“This will tend to stultify proper law enforcement and to make the days’ labor for the honest and conscientious officer even more onerous and more critical.”).
42 This view was expressed by Justice Black in his dissenting opinion. Id. at 429 (Black, J., dissenting) (“There is also a real danger that such suits might deter officials from the proper and honest performance of their duties.”).
43 Id. at 430 (Blackmun, J., dissenting).
45 Bivens, 403 U.S. at 391 n.4.
46 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.
arguments in the context of how litigation would affect the president. The primary example of this concern comes from *Clinton v. Jones*, in which the Court had to consider, *inter alia*, whether the federal courts must stay private actions against a sitting president until he is no longer in office. Part of President Clinton’s argument was that if the Court did not stay private actions against him, he would be flooded with cases, which would severely hamper his ability to perform his official functions.

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 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. Second, the Court can go outside of the argument and suggest that the existence, or lack thereof, of a deluge of new claims is not sufficient to determine the outcome of the case. In *Jones* the Court did both.

The Court first attempted to calm the fears of a flood 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. The Court concluded that “[i]f the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency.”

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

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48 *Id.* at 697.
49 *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.”).
50 *Id.* at 702.
51 *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 Petitioner 7–8 (“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 at best for predicting how many new claims would follow.
Executive’s ability to perform its constitutionally mandated functions.”52

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.53 Accordingly, the Court concluded that staying all private actions against the president until he had left office was unnecessary.54

Yet Justice Breyer wrote separately to suggest that 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.”55 He went on to suggest that the Court had understated the “danger” of future litigation and argued that the Court might have to eventually consider ways of avoiding “significant interference with the President’s ongoing discharge of his official responsibilities.”56 Justice Breyer’s separate opinion therefore seemingly leaves the 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.57

*Bivens* and *Jones* show that the Justices have considered, and even themselves raised, floodgates arguments in support of the executive. The

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52*Jones*, 520 U.S. at 702.
53 *Id.* at 705.
54 *Id.* at 705–06.
55 *Id.* at 711 (Breyer, J., concurring).
56 *Id.* at 723–24. 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.* at 724.
57 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 “dramatically 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 overrule *Jones* only a few years later. See Michael C. Dorf, *The Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 76 (1998). Professor 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 “took back some of the ground it had given away” in *Jones* in the case of *Cheney v. District Court*, 542 U.S. 367 (2004), as lower courts “were instructed to better protect internal executive branch deliberations from litigation.” Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 35–36 (2004).
underlying concern in both cases is that the Court’s decision could lead to an onslaught of new claims, which would significantly impinge the ability of executive actors to perform their official obligations.

As for the 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 tried to show, 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 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.58

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 to the judiciary.

With limited exceptions, Article III provides Congress the last word on the jurisdiction of the federal courts.59 Accordingly, questions about what claims can come into the courts often reduce to questions of congressional intent.60 Both litigants and Justices frequently invoke images of floodgates

58 Part IV, infra, will consider in more detail the question of whether it is normatively justifiable for the Justices to consider the impact of increased litigation on the executive when making decisions about substantive law.


60 See, e.g., I.N.S. v. St. Cyr, 533 U.S. 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 U.S. 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 U.S. 804, 810 (1986) (“In exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the
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 Consolidated Mines v. United States.\footnote{De Beers Consolidated Mines v. United States, 325 U.S. 212 (1945).} an antitrust case that came to the Supreme Court as an interlocutory appeal.\footnote{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 Act and the Wilson Tariff Act. 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. \textit{Id.} at 214–15.} 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.\footnote{Id. at 223 (Douglas, J., dissenting); \textit{see also} Pub. L. No. 57–82, 32 Stat. 823 (1903).} The purpose of the Expediting Act was to allow the Attorney General to see “expeditious treatment” of cases brought under the Sherman Act that were deemed to be of general public importance. \textit{See} Barak Y. Orbach, \textit{Antitrust and Pricing in the Motion Picture Industry}, 21 \textit{Yale J. Reg.} 317, 344 n. 145 (2004).

The dissent went on to say that although one effect of the Act was that some potentially erroneous interlocutory orders would not be reviewed, Congress made this tradeoff when it enacted the legislation and the Court “should respect it.”\footnote{De Beers, 325 U.S. at 225 (Douglas, J., dissenting).} 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.”\footnote{Id.} The majority did not respond to the dissent’s floodgates argument, but its significance is nonetheless easy to perceive. The dissenting Justices in \textit{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*, 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 parole after committing a series of nonviolent crimes. 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 in time, Congress had not intended. As Chief Justice Burger wrote, Congress had pondered for decades the concept of appellate review of sentences and had hesitated to act, meaning that the Court’s own decision constituted “judicial usurpation with a vengeance.”

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. This buttressed his conclusion that Congress could not have intended such a result, just as Justice Douglas’s floodgates argument had done in *De Beers*. 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.

As in *Bivens* and *Jones*, the *Solem* majority responded to the floodgates argument by refuting the suggestion that it had done anything to open the

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67 *Id.* at 303.
70 *Id.* at 315.
71 *Id.*
72 *Id.* *See also* Rachel 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 (2009) (describing the administrative concerns attendant with the Court’s proportionality jurisprudence).
74 *Id.* This latter point suggests that the Chief Justice was also motivated by the kind of court-centered floodgates concerns described *infra* in Part III. Indeed, this is a good example of the fact that the categories described here are nonexclusive, and the boundaries between them porous.
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 federal rule of appellate review of sentences.” 75 A few sentences later, 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.” 76 By arguing that its decision was narrow, the majority was attempting to minimize the extent to which it was contravening (or appearing to contravene 77) 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 cases that followed, 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 that it is not disregarding congressional intent.

In Bowen v. Michigan Academy of Family Physicians, 78 for example, a unanimous 79 Court held that the Medicare Act 80 did not bar judicial review of regulations promulgated under Part B of the Medicare program, 81 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.” 82 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.” 83

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75 Solem, 463 at 290 n. 16.
76 Id. (emphasis added).
79 Id. at 668.
81 Bowen, 476 U.S. at 669.
82 Id. at 690 n.11.
83 Id. The Court went on to say that “[a]s one commentator pointed out, ‘permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a
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. In Skinner, a convicted state prisoner sought access to crime-scene evidence for the purposes of DNA testing. The question presented was whether he could raise the claim in federal court in a civil-rights action under 42 U.S.C. § 1983, as opposed to the recognized route of filing a petition for habeas corpus under 28 U.S.C. § 2254. The respondent argued that recognizing a claim of this kind under section 1983 would result in a “vast expansion” of federal jurisdiction. 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.” The Court went on to give additional reasons why its holding would not result in a flood, including that Congress had specifically designed the Prison Litigation Reform Act of 1995 to help control the influx of prisoner suits into the federal courts. 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.

These cases and others demonstrate the Court using floodgates...
arguments to bolster its decisions about substantive law. And as with the executive-centered cases described in Section 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.

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. Indeed, in all of the cases after De Beers, the Court simply concluded that no flood was imminent, not that such a flood would be irrelevant. Part IV will return to the normative assumptions implicit in the latter conclusion.

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.

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 [Prisoner Litigation Reform Act].” (internal citations omitted)); Woodford v. Ngo, 548 U.S. 81, 91 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.” (internal citation omitted)).
Both sets of concerns can be understood as part of a larger intersystemic concern about the balance between federal and state courts. 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

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

A prime example of this phenomenon can be found in United States v. Maze, a 1974 case involving the federal mail fraud statute. A majority of the Court concluded that the defendant’s actions—which included stealing a credit card but not directly using the mails—fell outside the definition of the statute. 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.” In other words, the majority had—assuming that Chief Justice accurately identified its “desire”—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 (an issue discussed in more detail in Part III), it is also one about maintaining the “appropriate[]” balance of federal-state power.

A more recent example can be seen in Justice Ginsburg’s dissent in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co. 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

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94 See Gluck, supra note 21, at 1906 (using the term “intersystemic” to describe the relationship between the federal and state court systems).
96 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. Id at 396.
97 Id. at 404–05.
98 Id. at 407 (Burger, C.J., dissenting).
99 See infra Part III.
class action seeking penalties or statutory minimum damages conflicted with Rule 23 of the Federal Rules of Civil Procedure.\textsuperscript{101} A majority of the Court held that the New York law conflicted with Rule 23 and that Rule 23 must govern.\textsuperscript{102} Justice Ginsburg, joined by Justices Kennedy, Breyer, and Alito, dissented, arguing that the rules could be reconciled,\textsuperscript{103} but also that the decision would create intersystemic problems. 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.”\textsuperscript{104} Judge Ginsburg then argued that her own proposed holding 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.”\textsuperscript{105}

\textit{Shady Grove} raises a multitude of questions about interpreting state law and Federal Rules,\textsuperscript{106} about the nature of the Rules Enabling Act,\textsuperscript{107} and about federalism generally.\textsuperscript{108} But in the midst of this sprawling decision, the Justices also took care to address the balance of cases between the state and federal courts. 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]”\textsuperscript{109} with cases that truly belonged in state court, emphasizing the view that an onslaught of such cases coming into federal court would be problematic.

In both \textit{Maze} and \textit{Shady Grove}, then, 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 courts.\textsuperscript{110} The expressed concern of

\begin{itemize}
  \item \textsuperscript{101} Id. at 1436.
  \item \textsuperscript{102} Id. at 1448.
  \item \textsuperscript{103} Id. at 1460 (Ginsburg, J., dissenting).
  \item \textsuperscript{104} Id. There was also a legislative intent element to this argument—Justice Ginsburg noted that surely Congress did not mean to have this outcome when creating the Class Action Fairness Act. Id.
  \item \textsuperscript{105} Id. at 1472 n.14.
  \item \textsuperscript{109} \textit{Shady Grove}, 130 S. Ct. at 1472 n.14.
  \item \textsuperscript{110} Although not expressed in terms of floodgates, another recent example of this general sentiment can be found in Justice Breyer’s concurrence in \textit{Stop the Beach Renourishment, Inc. v. Florida Dep’t of Environmental Protection}, 130 S. Ct. 2592 (2010). As Justice Breyer argued, “[T]he
the Justices is not simply one about how those cases would affect the federal judiciary, but also 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 an inverse problem: creating too many cases—and obligations more generally—for state courts. 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, N.C. and then overtly in the 1996 case of M.L.B. v. S.L.J.

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. A majority of the Court decided against recognizing a categorical right, and instead adopted a case-by-case approach. 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 cases, the dissenting Justices argued that this fear motivated the Court’s decisionmaking. Justice Blackmun, joined by Justices Brennan and

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111 To be clear, the claim is that this category is an inverse of the previous one in that the previous category included concerns about taking too many cases from state courts, and 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 in that in the previous category, the federal courts were taking cases that would otherwise go to the state courts and in this category, the federal courts’ caseload is not directly impacted.

112 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 Div., Dept. of Human Resources of Oregon v. Smith, 484 U.S. 872, 916 (1990) (“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.”).


115 Id. at 24.

116 Id. at 33.
Marshall, wrote that requiring appointment of counsel in these cases “will not open the ‘floodgates’ that, I suspect, the Court fears.” The dissent continued: “On the contrary, we cannot constitutionally afford the closure that the result in this sad case imposes upon us all.” 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—both federal and state—as well as imposing a burden on the states by requiring them to supply counsel in more cases.

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 mother appealed a termination decree, but her appeal was dismissed because she could not afford the fee to prepare the record below as Mississippi law required. The majority held that the Mississippi statutes conditioning the right to appeal on ability to pay violated both due process and equal protection. 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), the Court was inviting a flood of new cases. As Justice

117 Id. at 58–59 (Blackmun, J., dissenting).
118 Id. at 59. Notably, Justice Blackmun 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. What precisely the dissenting Justices were thinking is unclear—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 would justify the number of cases that might flow from it.
119 See Stephen Loffredo & 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.”).
120 Lassiter itself had come from the North Carolina Court of Appeals. Lassiter, 452 U.S. at 24.
121 See Recent Legislation, 123 Harv. L. Rev. 1532, 1536 (2010).
122 519 U.S. at 106.
123 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 this” class of litigant “required the Court to thread a complex path in light of contemporary equal protection and due process law”).
124 See Mayer v. Chicago, 404 U.S. 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 U.S. 12, 19 (1956) (plurality opinion) (holding that a state must provide an indigent criminal defendant appealing his conviction with a trial transcript or its equivalent).
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.” 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.

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. The Court’s response was that parental-termination cases were sufficiently sui generis so as to avoid creating a flood. 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—and the creation of related obligations, such as free transcripts. As in the interbranch context, the

125 M.L.B., 519 U.S. at 129–30 (Thomas, J., dissenting).
126 Id. at 130.
127 Id. at 143 n.8. Specifically, the Justice 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.
128 Id. at 127 (majority opinion).
129 Id. at 127–28. As the majority wrote, “we 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. (citing Lassiter v. Dep’t of Social Servs. of Durham Cnty., N.C., 452 U.S. 18, 27 (1981)).
130 For another example of a concern over increasing filings in the state courts, see Apprendi v. New Jersey, 530 U.S. 466, 551 (2000) (O’Connor, J., 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.”).
131 It is worth noting that part 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
immediate concern is not over flooding the federal courts with additional cases. Rather, these cases, along with Maze and Shady Grove, show the Court 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 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 hinder the ability of the federal courts to administer justice. 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 judge in the federal courts of appeals nearly doubled—from seventy-four to 137. 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. As a result, judges and scholars began to refer to the “crisis in volume” that the federal judiciary faced. Since that time, the caseloads have only continued to expand. It is thus

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transcript in this case, it will necessarily have to do so in the next set of cases down the line. See supra note 12. 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 floodgate cases as well.

133 Id.
134 See Huang, supra note 9, at 1112; see also Levy, supra note 27, at 321 n.21 and accompanying text.
135 As of 2011, the annual filing per active judge in the federal court of appeals hovers
unsurprising that, particularly starting in the 1970s, Justices began to raise floodgates concerns for themselves.

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


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 found in this Part are not impermeable.

137 See, e.g., James E. Pfander, Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN ST. L. REV. 11387, 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 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.”).

138 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 U.S. 443, 537 (1953), that “[i]t must prejudice the occasional meritorious application [for habeas corpus] to be buried in a flood of worthless ones.” Nearly twenty years later, Judge Friendly commented on Justice Jackson’s sentiment, writing, “The thought may be distasteful but no judge can honestly deny it is real.” Henry J. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. CHI. L. REV. 142, 149 (1970).
and prisoner cases. The discussion here focuses on these lines of cases 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 decisionmaking: in a policymaking context, in statutory interpretation, and in consideration of constitutional claims.

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”—thereby giving the Justices greater latitude in their own decisionmaking. 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, *Bivens* and its progeny merit particular attention.

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

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139 The number of frivolous filings from prisoners—particularly *pro se*—was perceived to be such a problem that Congress passed the Prisoner Litigation Reform Act of 1995 (PLRA). See Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996). In the words of the Supreme Court, “[b]eyond doubt, Congress enacted [the exhaustion provision of the PLRA] to reduce the quantity and improve the quality of prisoner suits.” *Porter v. Nussle*, 534 U.S. 416, 524 (2002). Still, Judge Jon O. 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 the 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, 527 (1996).

140 Floodgate arguments, of course, have existed outside of these three lines of cases. See, e.g., *Agostini v. Felton*, 521 U.S. 203 (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 U.S. 1, 11 (1951) (Jackson, J., concurring in the judgment) (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.”).


142 *Wilkie*, 551 U.S. at 577 (Ginsburg, J., dissenting).

143 See supra Part I.A.
federal judiciary itself. In his dissent, Justice Black wrote that the courts by that time were “chocked with lawsuits” and that even the Supreme Court’s own docket had reached “an unprecedented volume.” 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.” 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 wading through such claims.

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 interest. 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.

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.

Eight years later in Davis v. Passman, the Court considered whether an implied cause of action and damages remedy could be read into the Fifth Amendment’s right to due process. 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.” The

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144 Justice Black here refers to both the “courts of the United States” and “those of the States” when expressing his concerns. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 428 (1971) (Black, J., dissenting).
145 Id.
146 Id.
147 Id.
148 Id. at 411 (Harlan, J., concurring in the judgment).
150 Id. at 230. The case arose when a former employee of Louisiana Congressman Otto Passman tried to bring a civil suit against him for sexual harassment. Davis, the employee, claimed that she had an implied cause of action in the Fifth Amendment’s right to due process. Id. at 230–31.
151 Davis v. Passman, 571 F.2d 793, 800 (5th Cir. 1978).
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.”\textsuperscript{152} 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 \textit{Bivens}.”\textsuperscript{153} 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.\textsuperscript{154}

Despite the Court’s resounding rejection of the floodgates argument in \textit{Davis}, 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 \textit{Bivens} claims generally.\textsuperscript{155} In \textit{Wilkie v. Robbins}, the Court declined to recognize a \textit{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.\textsuperscript{156} Writing for the majority, Justice Souter engaged in a balancing analysis,\textsuperscript{157} and concluded that defining a “workable” cause of action in the case at hand was simply too difficult.\textsuperscript{158} Any kind of general standard that the Court could articulate, the majority argued, would invite a flood of new claims.\textsuperscript{159} To be clear, the majority’s argument was not that the government’s alleged behavior could not support a \textit{Bivens} claim—indeed, Justice Souter wrote that “[t]he point here is not to deny that Government employees sometimes overreach, for of

\begin{itemize}
  \item[\textsuperscript{152}] \textit{Davis}, 442 U.S. at 248. By way of support, the Court noted, \textit{inter alia}, that a damages remedy was already available to redress certain injuries arising under color of state law under 42 U.S.C. § 1983. \textit{Id}.
  \item[\textsuperscript{153}] \textit{Id}.
  \item[\textsuperscript{154}] \textit{Id}.
  \item[\textsuperscript{155}] See Reinert, supra note 137, at 824 (noting the “Supreme Court’s refusal to extend \textit{Bivens} liability to new constitutional claims or new defendants since 1980”).
  \item[\textsuperscript{156}] Wilkie v. Robbins, 551 U.S. 537, 541 (2007).
  \item[\textsuperscript{157}] Specifically, the Court said that its task was to “weigh[] reasons for and against the recreation of a new cause of action.” \textit{Id} at 554. This inquiry is also known as “\textit{Bivens} step two,” \textit{Id} (citing \textit{Bush v. Lucas}, 462 U.S. 367, 378 (1983)). The Court in \textit{Wilkie} reached this inquiry only after deciding in “\textit{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.” \textit{Id}.
  \item[\textsuperscript{158}] \textit{Id} at 555.
  \item[\textsuperscript{159}] \textit{Id} at 561 (“[A]t this high level of generality, a \textit{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.”).}
course they do, and they may have even done so here”—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.”

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

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

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.” The dissent then concluded by returning to its original position: “shutting the door to all plaintiffs . . . is a measure too extreme.”

The Bivens line of cases provide 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

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160 Id. at 561.
161 Id. at 562.
162 Id. at 569 (Ginsburg, J., dissenting).
163 Id. at 577 (internal citation omitted).
164 Id. at 581 (internal citations omitted). 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. She noted, however, that the court of appeals and the solicitor general agreed that there were “no reported cases on charges of retaliation by state officials against the exercise of Taking Clause rights.” Id. (citations omitted).
165 Id. at 582.
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 concerns about the 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 resistant to recognizing new Bivens claims generally in the years after Passman was decided.\footnote{166 See supra note 155. Indeed, following the Court’s decision in Wilkie, judges and scholars alike have concluded that the Bivens doctrine has been greatly diminished. See, e.g., Marsha S. Berzon, Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts, 84 N.Y.U. 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 SUP. 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 this past Term, when the Court declined to find a Bivens action against federal contractors in Minneci v. Pollard, 132 S. Ct. 617 (2012). For a thoughtful analysis of the Court’s current Bivens jurisprudence, see Carlos M. Vázquez & Stephen I. Vladeck, State Law, the Westfall Act, and the Nature of the Bivens Question After Minneci v. Pollard, 161 U. PA. L. REV. (forthcoming 2012).} Although there are undoubtedly several moving pieces to the Court’s shift in jurisprudence, one piece may 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 are willing to take potential increases in litigation—particularly unmeritorious litigation—into account when reaching a decision.

Bivens and its progeny demonstrate the prominence of, and even controversy surrounding, floodgates arguments in cases involving judicial policymaking. In the habeas context,\footnote{167 Decisions that lead to an increase in habeas petitions of course also have some effect on state courts, sometimes because they lead to an increase in filings in state court. That said, the floodgates arguments raised in this set of cases speak to concerns about flooding the federal courts with claims. As such, they are included only in this category.} 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.\footnote{168 Brown v. Allen, 344 U.S. 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. See id. at} Allen is now...
seen as the case that ushered in the “modern era of federal habeas corpus,” standing for the proposition that constitutional challenges considered in state court could nevertheless be raised in a federal habeas petition. 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 trivializations 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.” 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.”

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—either in deciphering text or congressional intent.

In Harris v. Reed, 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 state clearly that its judgment rested on the procedural default. A majority of the Court decided that the answer was no, but Justice Kennedy dissented, arguing that the Court’s decision would have a harmful effect on the federal judiciary. He argued that “[t]he majority’s decision can only increase prisoner litigation and add...
to the burden on the federal courts.”

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.”

The majority responded directly to Justice Kennedy’s dissent and argued, as Justices have done with previous floodgates arguments, that little reason existed 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.’” 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 above: an argument that a potential decision would open the floodgates, and a denial that the gates would actually be opened. In that sense, *Harris* did not differ much from the policymaking cases discussed above. But in *Artuz v. Bennett* the Court found that the statutory nature of the habeas question at issue flatly precluded the consideration of a potential flood. 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 (AEDPA). A unanimous Court held that it was. 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.” The Court quickly dismissed

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176 *Harris*, 489 U.S. at 282 n.6 (Kennedy, J., dissenting) (quoting *Rose v. Mitchell*, 443 U.S. 545, 584 (1979) (Powell, J., concurring in judgment) (internal citations omitted)).

177 *Id.* (internal quotation marks omitted). 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.” *Id.*

178 *Id.* at 265 n.12 (majority opinion).


180 *Id.* at 5.

181 *Id.* (“[T]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.”) (quoting Section 2244(d)(2) of Title 28 U.S.C. (1994 ed., Supp. IV)).

182 *Id.* at 10.
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.”

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.

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 Section 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.184 Pace v. Diguglielmo faced 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. 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

183 Id.; see also John F. Manning, What Divides Textualists From Purposivists?, 106 COLUM. L. REV. 70, 109 n.141 & accompanying text (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 U.S. 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. The Court ultimately concluded that “our role in appraising petitioners’ reading of § 1915(d) is not to make policy, but to interpret a statute” and that “[t]aking 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 that] it does not follow that a complaint which falls afoul of the former standard will invariably fall afoul of the latter.” Id. at 326.

184 Artuz, 531 U.S. at 9 n.2.
186 Id. at 410.
purpose of that provision—the need to avoid burdening district courts.\footnote{187} “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.”\footnote{188} Although Justice Stevens framed his argument partially in terms of being deferential to Congress,\footnote{189} 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.’”\footnote{190}

Finally, the same court-centered floodgates concerns that were rejected in \textit{Artuz} and accepted by four Justices in \textit{Pace} apparently drove the outcome in the 2007 case of \textit{Schriro v. Landrigan}.\footnote{191} In \textit{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.\footnote{192} The same four Justices who dissented in \textit{Pace} also dissented in \textit{Schriro}. 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.”\footnote{193} Relying upon a 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 the Antiterrorism and Effective Death Penalty Act of 1996, 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

\begin{footnotes}
\item[187] \textit{Id}. at 420 (Stevens, J., dissenting).
\item[188] \textit{Id}. at 429.
\item[189] \textit{See supra} note 167.
\item[192] \textit{Id}. at 472.
\item[193] \textit{Id}. at 499 (Stevens, J., 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: “[i]mmediately before turning to the facts of this case, it 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.’” \textit{Id}.
\end{footnotes}
the heavens to fall.\textsuperscript{194}

In short, the dissenting Justices did not suggest that a flood would be irrelevant, but rather, that the majority had erred in its forecasting.

A close reading of this set of habeas cases\textsuperscript{195} demonstrates that the Court has been sensitive to how its decisions will affect the future volume of claims coming into federal courts—particularly frivolous ones. While, as in the \textit{Bivens} context, numerous factors are at work in these different decisions, one such factor seems to be the clarity of the underlying statutory provision. The Justices unanimously rejected floodgates considerations in \textit{Artuz} on the ground that the text in question led to a clear result. Absent straightforward interpretation, some Justices have been more willing to turn to floodgates reasoning.

The \textit{Bivens} cases showed the Court considering arguments about increasing frivolous filings in the context of judicial policymaking; 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 few constitutional challenges that were raised by prisoners. As noted earlier, the Justices have long been wary of frivolous prisoner filings,\textsuperscript{196} 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,\textsuperscript{197} it will suffice to consider two—

\textsuperscript{194} \textit{Id.} at 499–500 (internal quotation marks and citations omitted).

\textsuperscript{195} An additional data-point can be found beyond the set of traditional habeas cases. In \textit{Ryder v. United States}, 515 U.S. 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 \textit{de facto}. \textit{Id.} at 179. The Court reached its holding over a concern on the part of the Government that “a flood of habeas corpus petitions will ensue”—a concern that the Court dismissed, without further elaboration, as having “little basis” in past precedent. \textit{Id.} at 185.

\textsuperscript{196} See, \textit{e.g.}, \textit{Harris v. Reed}, 489 U.S. 255, 282 n.6 (1989) (Kennedy, J., dissenting) (“It is well known ‘that prisoner actions occupy actions to occupy a disproportionate amount of the time and energy of the federal judiciary,’ and that many of these petitions are entirely frivolous.” (quoting \textit{Rose v. Mitchell}, 443 U.S. 545, 584 (1979) (Powell, J., concurring in the judgment)); \textit{Cruz v. Beto}, 405 U.S. 319, 326–27 (1972) (Rehnquist, J., 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.”).

\textsuperscript{197} For example, the Court has considered whether a flood of cases will follow from decisions based on the manner of execution. See, \textit{e.g.}, \textit{Baze v. Rees}, 553 U.S. 35, 70 (2008) (Alito, J., concurring in the judgment) (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
one challenging a search within a cell and another challenging the use of excessive force—as they largely involve Fourth and Eighth Amendment claims, respectively.

The first example is Hudson v. Palmer, 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. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented, challenging both the merits of the decision 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 have any Fourth Amendment protection this will lead to a flood of frivolous lawsuits.” 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.” The Justice 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.”

These arguments presaged those that Justice Stevens would later make in his Pace and Schriro dissents—the habeas cases discussed above. But in Hudson v. Palmer, the Justice went on to suggest other ways that courts could protect themselves from potential floods instead of “modifying” the “requirements of law.” Specifically, he argued that “costs can be awarded against the plaintiff when frivolous cases are brought . . . [e]ven modest assessments against prisoners’ accounts could provide an effective as a practical matter.”); Nelson v. Campbell, 541 U.S. 637, 649 (2004) (“Respondents argue that a decision to reverse the judgment . . . 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.”).

For cases outside the constitutional realm, see, e.g., Cleavinger v. Saxner, 474 U.S. 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.”).

199 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).
200 Hudson, 468 U.S. at 558 (Stevens, J., dissenting) (arguing that affording an inmate no constitutional protection over their own property—from “a photo of a child to a letter from a wife”—contravened a longstanding “ethical tradition”).
201 Id. at 554 n.30.
202 Id.
203 Id.
204 Id.
weapon for deterring truly groundless litigation.”

Eight years later, the Court was less willing to embrace a floodgates argument. In *Hudson v. McMillan*, 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. Justice O’Connor, writing for a majority of the Court, answered that question in the affirmative. 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. Although the majority did not address the propriety of 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.

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 *Hudson v. Palmer*. After forcefully rejecting the validity of that concern in *McMillan*, Justice Blackmun went on to argue that “in any event,” the Court’s ruling “does not open the floodgates for filings by prison inmates.” The Justice pointed to several other gate-keeping 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. Justice Blackmun concluded that “[t]hese measures should be adequate to control any docket-

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205 *Id.*
208 *Hudson*, 503 U.S. at 4.
209 *Id.* at 14 (Blackmun, J., concurring in the judgment) (citing Brief for Texas, et al. as *Amici Curiae* 15). Texas, in particular, noted that the “significant injury requirement has been effective in the Fifth Circuit in helping to control its system-wide docket management problems.” *Id.* (citing Brief for Texas, et al. as *Amici Curiae* 15).
210 *Id.* at 15.
211 *Id.*
212 *Id.* at 16 (internal citations omitted).
management problems that might result from meritless prisoner claims.\textsuperscript{213} In neither of these two decisions—\textit{Palmer} and \textit{McMillan}—did a majority of the Court openly rely on floodgates arguments as a legitimate consideration in interpreting the constitution. That said, if the dissent in \textit{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 \textit{McMillan} 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 in this Section, that the Court has wrestled with when it can take these considerations into account.

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 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 \textit{Wilkie}; other times the Court rejects all such considerations, as in \textit{Artuz}. 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 even in the policymaking realm of \textit{Bivens}, the Court has gone back and forth 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, and the need to explore its normative foundations.\textsuperscript{214}

\textbf{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. But what of other cases, in which the merit of the claims in the flood is not in doubt? Even in those cases, the Court has apparently been receptive to floodgates concerns. Floodgate concerns were raised—and were perhaps deeply influential—

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{See infra} Part IV.
in the gerrymandering case of *Vieth v. Jubelirer* in 2004. The case involved a challenge to a Pennsylvania redistricting plan on the ground that it constituted an unconstitutional political gerrymander. A plurality of the Court decided that the claims were nonjusticiable. In his dissent, Justice Stevens suggested that the plurality 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.” 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*, 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.” 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.” 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.

Within this past term, a member of the Court similarly pushed back on a workload concern of the majority. In *Perry v. New Hampshire*, Justice Sotomayor 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. In her dissent, the Justice 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.” 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

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216 *Id.* at 271.
218 *Vieth*, 541 U.S. at 326 n.14 (Stevens, J., dissenting).
220 *Vieth*, 541 at 326 n.14 (Stevens, J., dissenting).
221 *Id.*
223 *Id.* at 737–38 (Sotomayor, J., dissenting).
224 *Id.*
appeared relevant to the majority.\textsuperscript{225}

Neither \textit{Vieth} nor \textit{Perry} contains even a suggestion that the \textit{merits} of the claims in the flood had anything to do with the majority’s apparent desire to avoid them. Rather, the Court has—again, if the dissenting Justices are correct—been aware of, and concerned by, the number of cases coming into federal court. Here, the most basic concern is not about the effect that a flood of new cases—be they largely frivolous or meritorious—would have on coordinate branches of government or state courts, but that they would lead to an increased burden on the federal courts themselves. In light of the strain that has existed on these courts over the past several decades, the underlying fear 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 reasoning? If so, when and why? The fact that the Justices have considered such arguments in more than sixty cases\textsuperscript{226}—and that that this consideration has increased over the last few Terms\textsuperscript{227}—underscores the need to answer these questions. The fact that floodgates arguments are so often raised in “\textit{j’accuse}” form—with the dissent claiming that the majority was driven by an improper desire to stave off litigation—suggests that the justification for at least some of these arguments is questionable at best, and possibly illegitimate at worst.

The objective of this Part is to consider and compare the normative justifications for the different kinds of floodgates arguments discussed in the first three Parts. As the Parts demonstrate, floodgates arguments vary considerably based upon the institution that is being affected by the flood

\textsuperscript{225} Again, this is not to suggest that workload was a dispositive or even significant factor to the Court in \textit{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, \textit{Eyewitnesses and Exclusion}, 65 \textit{VAND. L. REV.} 451 (2012).

\textsuperscript{226} See supra note 29.

\textsuperscript{227} See supra note 3 and accompanying text.
and what the feared flood contains. These factors, in turn, determine which, if any, constitutional principles and doctrine can be called upon to justify the argument. This Part therefore frames its normative discussion around the lines drawn in the previous three Parts, moving from the arguments that are more defensible to those that are less so.

Section 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 the doctrines of qualified immunity and abstention. These ties suggest that the use of other-regarding floodgates is defensible, although they do not suggest that they should be immune from scrutiny or that they should always prevail. To the degree that such arguments are predicated on empirical predictions, for example, those predictions should themselves be well founded. Nevertheless, the fact that other-regarding floodgates arguments have footing in constitutional principles and doctrine at least gives them a \textit{prima facie} claim to legitimacy.

Section B then argues that court-centered floodgates arguments are on shakier ground. The Court is vindicating no well-established constitutional principle when it defends the federal courts’ docket from caseload pressures. Nor does the Court have an obviously acceptable reason for shaping statutory or constitutional doctrine—the authority for which flows from sources other than the Court itself—based on docket-related concerns. This is especially true given that the judiciary as a whole has other tools—including case-management practices, which I have analyzed in detail elsewhere\footnote{See generally Levy, \textit{ supra} note 27.}—with which to address the problem. Accordingly, this Section concludes that the Court should be wary about employing or considering court-centered floodgates arguments going forward.

\textit{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 deserve so that the courts can protect another government institution from excessive burdens. This gives other-regarding floodgates arguments a relatively stable normative footing that justifies their use, at least in the abstract. In practice, however, courts employing such arguments must
nonetheless take care to use them only when they have a well-grounded reason to think that a true flood will actually follow.

The floodgates arguments that are most plainly 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, or, 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 decrees. It circumvents the policy of Congress to restrict review in these cases to final judgments.”229 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.”230

The normative foundations of these two forms of judicial-legislative floodgates arguments are not difficult to identify, nor are they hard to embrace. At bottom, their use is evidence of the Court deferring to Congress as the primary lawmaking body,231 a deference that in turn derives from the principle of separation of powers.232 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

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231 *See, e.g.*, National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2579 (2012)(Roberts, C.J.) (“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[].”) Members of Congress have likewise echoed this sentiment. *See, e.g.*, 140 Cong. Rec. 27,526 (1994) (statement of Sen. Gramm regarding the nomination of H. Lee Sarokin to the Third Circuit Court of Appeals) (“[J]udges ought to be in the business of interpreting laws, not making them.”); 140 Cong. Rec. 27,470 (1994) (statement of Sen. Hatch regarding the nomination of H. Lee Sarokin to the Third Circuit Court of Appeals) (“What are judges for other than to implement the laws, to abide by them, to interpret them, not to make them.”); 137 Cong. Rec. 23,612 (1991) (statement of Sen. Specter regarding the nomination of Clarence Thomas to the Supreme Court) (“[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 N.C. L. REV. 1253, 1254 n.1 (2000).
232 *See, e.g.*, Hepburn v. Griswold, 75 U.S. 603, 611 (1869) (“All the legislative power granted by the Constitution belongs to Congress . . . .”).
has failed to do so. In this way, the floodgates argument becomes part and parcel of statutory interpretation, with the Justices trying to identify the will of Congress and whether that will has been contravened.\textsuperscript{233} 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—that each branch has its “proper place”\textsuperscript{234} and should not be invading the territory of another.\textsuperscript{235}

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 seems perfectly valid, 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 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 \textit{Bivens} when he argued that an increase in lawsuits would “stultify” law enforcement,\textsuperscript{236}

\textsuperscript{233} A prime example of this can be found in \textit{Whitman v. American Trucking Ass’ns}, 531 U.S. 458 (2001), when Justice Scalia put forth what has been called the “no-elephants-in-mouseholes principle,” \textit{see id.} at 468 (arguing that the textual arguments of respondents were flawed because they contravened the basic rule that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”); \textit{see also} John F. Manning, \textit{Separation of Powers as Ordinary Interpretation}, 124 HARV. L. REV. 1939, 1990 (2011).

\textsuperscript{234} \textit{The Federalist} No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

\textsuperscript{235} \textit{The Federalist} No. 48, \textit{supra} note 234, at 308 (James Madison); \textit{see also} Commonwealth of Massachusetts v. Mellon, 262 U.S. 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.”).

\textsuperscript{236} \textit{Bivens} v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S.
President Clinton raised in *Jones* when he argued that additional litigation would “impair the effective performance of his office.” When understood in these terms, the executive floodgates arguments seem to 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.” This is why the Court has “consistently held that government officials are entitled to some form of immunity from suits for damages.” 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.” 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—i.e. that parties should at least be temporarily denied the relief that they might otherwise receive—in order to protect the executive from burdensome legislation. Of course, this analogy has its limits, and the purpose of drawing it is not to suggest that all executive floodgates arguments should prevail, or even that their use is necessarily justifiable. The point is simply that the Court has relied upon some of the same concerns to justify creating immunity from suit, which suggests that these floodgates arguments have at least some footing in the law.

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 to 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.” Justice Ginsburg raised this same concern in her dissent in *Shady Grove*, suggesting that

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388, 430 (1971) (Blackmun, J., dissenting).
239 Id.
241 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 U.S. 223, 237 (2009).
242 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.
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.”

The second concern is on display in the parental-termination cases—first Lassiter and then MLB—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 a balance between the federal and state court systems. In this way, these kinds of floodgate arguments can be understood as having ties to federalism by maintaining “a healthy balance” between the federal and state courts. 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 v. Pullman Co., Burford v. Sun Oil Company, and Louisiana Power & Light Co. v. City of Thibodaux, 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. In these and related cases, 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”—it is a prime

247 See Gregory v. Ashcroft, 501 U.S. 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.”)
252 See, e.g., Younger v. Harris, 401 U.S. 37 (1971) (fashioning an abstention doctrine to protect the autonomy of proceedings in state court from federal interference).
253 See Richard H. Fallon, Jr., Why and How To Teach Federal Courts Today, 53 ST. LOUIS U. 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 SUP. CT. REV. 253,
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. Again, although the analogy has its limits, it is meant to show that intersystemic floodgates arguments have some connection to, and therefore footing in, clearly established doctrine.

In short, the question of whether the use of other-regarding floodgates arguments can be justified is a complicated one. As this analysis suggests, some of these arguments are easily defensible, while others stand on shakier ground. The kinds of floodgates arguments that have arisen in the judicial-legislative context—which can be understood as part of statutory interpretation—seem perfectly legitimate. The kinds of floodgates arguments that have arisen in the judicial-executive and intersystemic contexts are somewhat more difficult to defend. 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 have a legitimate basis, albeit a weaker one than those raised in the judicial-legislative context.

At the outset of this Article, I suggested that floodgates questions carried with them several normative questions. The first of these—whether it is ever appropriate for courts to consider the effect their decision will have on the volume of litigation—this Section has answered with a qualified yes, at least with respect to other-regarding floodgates arguments. That immediately raises the second question, which is how many cases are necessary to create an impermissible flood in any given context. This question, in turn, involves both empirical and normative tasks: a court must not only forecast the amount of litigation (a more or less empirical proposition) but 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 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]henever a suspect imagines, or chooses to assert, that a Fourth

315 n.322 (2011) (describing the judicial abstention doctrines as “based on broad notions of federalism”).
Amendment right has been violated, he will now immediately sue the federal officer in federal court. If he has now immediately sued the federal officer in federal court, he will now immediately sue the federal officer in federal court. 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. 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.” 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. 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—a particularly difficult task 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 Bowen and Skinner, or experience with comparable claims, as in Bivens. 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). Rather, the point is

258 Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.11 (1986) (“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.”).
259 Skinner v. Switzer, 131 S. Ct. 1289, 1299 (2011) (“In the Circuits that currently allow § 1983 claims for DNA testing. . . no evidence tendered . . . shows any litigation flood or even rainfall.”).
260 Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 391 n.4 (1971) (“In estimating the magnitude of any such ‘avalanche,’ it is worth noting that a survey of comparable actions against state officers under 42 U.S.C. § 1983 found only 53 reported cases in 17 years (1951-1967) that survived a motion to dismiss.”).
261 See, e.g., Sanford Levinson & Jack M. Balkin, What Are the Facts of Marbury v. Madison?, 20 CONSTITUTIONAL COMMENTARY 255, 281 n.74 (2003) (suggesting that one might “think that judges are not particularly good at predicting the future consequences of their decisions”).
that if claims about increases in litigation are to influence at least some decisions, the Justices need to clear about those claims—both for each other and for the public.

Secondly, it is important to recognize that the task of the Court is not merely empirical. 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. For example, a recent study shows that between 2001 and 2003, Bivens suits constituted 243 out of 143,092 civil filings in five district courts. Do 243 filings rise to the level of a “flood?” 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 the extent to which these cases actually prevented the law enforcement officials from performing their jobs.

In short, even when floodgates arguments are sufficiently rooted in normatively desirable principles, they 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. If Justices are to continue to put forward these arguments, they should do more on both fronts.

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 because the former are self-regarding, meaning that the Court considers them in the context of how federal courts themselves will be impacted by an increase in litigation. The critical question, then, is whether considerations of workload can stand as an independent factor to shape the Court’s interpretation of substantive law—a question on which, as the cases show, the Court has fractured.

The way to begin to answer this question is to return to the specific concerns that animate court-centered arguments. As noted earlier, the lower courts have consistently faced rising caseloads over the last several decades—a fact the Justices have emphasized. Today, both federal

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262 See Reinert, supra note 137, at 837. Specifically Professor, 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 twenty-eight in the Northern District of Illinois between 2001 and 2003. Id.

263 See supra notes 132 & 133 and accompanying text; see also Levy, supra note 135.

264 See, e.g., Bivens, Bivens v. Six Unknown Named Agents of the Federal Bureau of
district and appellate judges must contend with hundreds of filings per year, meaning that their own ability to give attention to their cases is greatly reduced. Judges and scholars alike have called for ways to reduce the strain on the federal courts, including adding judges and limiting the flow of cases. Employing the tools at hand, district judges have come to rely more heavily on the aid of magistrate judges, and appellate judges have come to rely on the assistance of staff attorneys and other case-management tools to cope with their workload. Thus, when the Justices express their desire to avoid inviting new claims into federal courts—particularly frivolous claims—a significant reason is to ensure, in the words of Justice Stevens, avoiding the delay and impairment of the “orderly administration of justice.”

Although the judicial workload is a critical concern not only to the federal courts but also to the government as a whole, how caseload concerns could independently serve as a basis for a legal decision is unclear. 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, on the basis that the decision would amount to shutting down the judiciary. In a similar vein, Narcotics, 403 U.S. 388, 428 (1971) (Black, J., dissenting) (describing how the courts are “choked with lawsuits.”).

See supra note 135.


See Levy, supra note 27, at 320–25.

United States v. Timmreck, 441 U.S. 780, 784 (1979) (“[I]increasing the volume of judicial work[] inevitably delays and impairs the orderly administration of justice.”) (quoting United States v. Smith, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting)); see also Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 428 (1971) (Black, J., dissenting) (describing the problems attendant with a high caseload, including that “many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur.”).

Technically, Article III only guarantees the existence of “one supreme Court”; I am assuming for the purposes of the hypothetical that some principle of judicial independence would limit Congress’ ability to effectively shut down the courts by flooding them with cases.
at times the Court’s concerns about its own legitimacy have served as an independent prudential factor in reaching a decision.\footnote{See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–69 (1992) (suggesting that maintaining the Court’s legitimacy was an independent reason to avoid overruling past precedent).} If the federal courts were truly facing so many claims that the legitimacy of the institution were at stake, the Court could perhaps borrow this reasoning to support a court-centered floodgates argument. But short of such catastrophic situations—those in which the courts would no longer be able to function, at least not legitimately—self-regarding floodgates arguments are deeply troubling.

These arguments are troubling not because of their substance but rather because of who is acting on them. The Court’s concern with caseload pressure appears to be well founded, but our constitutional system gives Congress the authority to adjust laws so as to stem that flow.\footnote{Woodford v. Ngo, 548 U.S. 81, 91 n.2 (2006).} And Congress has not been shy about exercising that power; out of concern for the Court’s docket, Congress has repeatedly enacted targeted legislation to reduce frivolous filings. For example, Congress passed the Prison Litigation Reform Act of 1995 precisely as a way of “addressing a flood of prisoner litigation in the federal courts.”\footnote{Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.).} Similarly, part of the purpose of the Private Securities Litigation Reform Act of 1995\footnote{H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.).} was to limit frivolous securities claims.\footnote{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 N. C. L. REV. 1023, 1033 (1989).} In short, the obvious principle in this context would suggest that the Court should not undertake what essentially amounts to managing of its own jurisdiction through its decisions, but rather leave that job to Congress.

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 pretrial “discouragement mechanisms.”\footnote{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 N. C. L. REV. 1023, 1033 (1989).} The first mechanism is the pleading

\footnote{Cf. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (finding limitations on Congress’ power to restrict the Supreme Court’s appellate jurisdiction, notwithstanding the broad language of Article III).}
stage itself, with the possibility for a motion to dismiss. Although pleadings obviously have several purposes, scholars have consistently identified a significant one as “allowing a court to screen cases for merit.”

278 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,” and that rule is now regarded as a “powerful tool for judges to control dockets.”

279 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” and to deter such litigation from coming into court in the first place. In short, the district courts have at their disposal several critical procedural rules that were designed at least in part so that district courts could 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—a powerful timesaving mechanism. Additionally, courts of appeals can rely on staff attorneys to help draft summary dispositions. 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.

Moreover, these mechanisms are not static—if they are insufficient to curb the flow of frivolous cases, they can be altered, and indeed have been.

278 David L. Noll, The Indeterminacy of Iqbal, 99 GEO. 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.”).


280 Id. at 1056.


282 FED. R. CIV. P. 11 advisory committee’s note to the 1983 amendment (“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.”).

283 See FED. R. APP. P. 34.


285 Id. at 323, 345–46.

286 See FED. R. APP. P. 38.
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.287 Similarly, Federal Rule of Civil Procedure 11 was amended in 1983 precisely to reduce the number of frivolous filings.288 And although this has been more controversial, the Supreme Court itself has shifted the meaning of various procedural rules in its own opinions.289 In 1986, the Court in a trilogy of cases290 altered Rule 56 “from an infrequently granted procedural device to a powerful tool for the early resolution of litigation.”291 And of course, more recently, the Court altered pleadings with its decisions in Bell Atlantic Corp. v. Twombly292 and Ashcroft v. Iqbal.293 The point is not to wade into the propriety of the way these rules have shifted over time; rather, the point is 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 “interpretation of the law.”294 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, Justices Stevens has argued, “Frivolous

288 See FED. R. CIV. P. 11 Advisory Committee’s note to the 1983 amendment.
291 See Miller, supra note 279, at 984.
292 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); see id. at 547 (holding that a complaint must contain “enough facts to state a claim to relief that is plausible on its face.”).
294 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001). See id. (“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.”).
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 the procedures, not with the law.\textsuperscript{295} Accordingly, the Court should have a strong presumption against using court-centered floodgates arguments. The problems of caseflow should be addressed through case management and, more broadly, the tools of Congress.

This discussion leaves at least one question open: Does the presumption against court-centered floodgates arguments extend to cases in which the Court is essentially making a policy judgment? One could imagine that although it is difficult 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, as in the \textit{Bivens} line of cases.\textsuperscript{296}

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 may not be as difficult to justify as using court-centered floodgates arguments 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 policymaking 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 the Court should shy away from using caseload as a reason to shift the direction of the law.

\textbf{Conclusion}

When the Court first consistently began using floodgates rhetoric in the mid-1940s,\textsuperscript{297} little did it know that it would be opening the floodgates of floodgates arguments themselves. In the last decade alone, Justices have repeatedly made references to floods—both in majority opinions, as an assurance that a flood will not result,\textsuperscript{298} and in dissenting opinions, as an accusation that the Court was improperly motivated by a desire to avoid an


\textsuperscript{296} See supra note 157.

\textsuperscript{297} See supra note 1.

\textsuperscript{298} See supra note 4.
increase in claims. 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 all the more important. 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 such arguments, these other-regarding arguments themselves are generally defensible.

The same cannot be said for court-centered floodgates arguments—those arguments in which the Court is concerned with 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 raises serious concerns. Short of a catastrophic situation, concerns about caseload would do well to be addressed through Congress and the lower courts’ case-management tools.

This Article began by analyzing a particular rhetorical device, but has touched on broader 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 consideration. The central normative takeaway of the present discussion is 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 substantive analysis of law.

299 See supra note 5.