FEDERAL JUDGES AND FEARING THE "FLOODGATES OF LITIGATION"

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Today's caseloads make it a question of some moment whether judges legitimately may consider caseload effects when deciding a case.

—Judge Richard A. Posner

INTRODUCTION

For nearly two hundred years, judges in the United States have expressed a desire to avoid opening the "floodgates of litigation" upon the court system. Although in many cases unfounded, the argument has persisted and judges frequently invoke it today, including those on our nation's highest Court. Given the high caseloads in the federal courts today, the fear of "opening the floodgates" is especially understandable.

1 J.D. Candidate, 2004, University of Pennsylvania Law School; B.A., 2001, The Johns Hopkins University. Many thanks to Andrew Levine and Professor Catherine Struve for their helpful and insightful criticisms on earlier drafts of this piece. I also benefited from the comments of Malia Ebel, Heather Harkulich, and Sydney Stern. Finally, thank you to Jennifer Adams, Clark Craddock, Charles Rombeau, and Carlos S. Montoya for their editing assistance. All remaining errors, then, are mine.


3 See e.g., Whitbeck v. Cook, 15 Johns. 482, 490 (N.Y. Sup. Ct. 1818) ("If it could succeed, a flood-gate of litigation would be opened, and for many years to come, this kind of action would abound.").

4 See e.g., Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 489 (1992) (Scalia, J., dissenting) (claiming that the majority's holding "threatens to release a torrent of litigation"); see also In re Lawrence, 293 F.3d 615, 621 (2d Cir. 2002) (claiming that the recognition of an exception to res judicata could open the floodgates of litigation).


6 In this Comment, I focus on the federal courts. This is a matter of convenience—most of the scant scholarly writing on caseloads and judicial economy focuses on the federal courts. Additionally, the Constitution deals directly with those courts. It should be noted, though, that the floodgates argument is found just as frequently in state courts. See e.g., E. Dredging & Constr., Inc. v. Parliament House, L.L.C., 698 So. 2d 102, 105 (Ala. 1997) ("[I]f this Court were to hold otherwise, such a decision could potentially open the floodgates of litigation.").
This Comment answers Judge Posner's aforementioned question in the negative. Although rising caseloads have had negative effects on the judicial craft, I argue that in almost all situations, the fear of increased litigation is not a valid judicial argument. The thesis is simple: in most situations, the floodgates argument is inappropriate. This proposition is based on the limitations found in Article III of the Constitution and considerations of the proper role of the judiciary vis-à-vis the other branches of government.

My arguments focus on opinions in which a judge argues against a certain option due to a fear of unleashing a wave of litigation upon the court system. Nonetheless, the scope of this Comment should not be confined to the literal invocation of the floodgates, but rather to any similar argument.

In Part I, I introduce the floodgates argument and offer examples of its historical and modern uses. I characterize the floodgates argument as a special type of judicial economy argument. I also discuss types of cases where the floodgates argument tends to recur, such as those involving antitrust actions under the Clayton Act or those involving intervenors seeking next friend status. The floodgates argument recurs in these cases because they involve areas of law where a broad ruling might provide future plaintiffs an incentive to bring a suit in federal court.

In Part II, I discuss the caseload rise in the federal courts that has occurred over the past forty years. I discuss the implications of that rise on both the judicial craft in general and on the legitimacy of judicial concern for its own efficiency. There are several reasons for the rise in the federal caseload—including population increases, congressional grants of federal jurisdiction to remedy employment discrimination, broader Supreme Court interpretations of 42 U.S.C. § 1983 and of habeas corpus doctrines, and additional sources such as the reduction in legal costs. I also discuss the effects of the caseload on court functioning, including resolution of more cases in the pretrial stages and a greater reliance by some judges on their law clerks in order to provide timely justice. I conclude Part II with a discussion of Judge Posner's thoughts on when, if ever, it is appropriate for a judge to take caseload considerations into account when ruling on a legal matter.

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7 See infra Part II.C.
8 See infra Parts III.A and III.B.
9 Similar arguments include those warning of an "epidemic, avalanche, flood, tidal wave or deluge of litigation." Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 65 (1983). There are, of course, even more euphemisms for "floodgates," such as "explosion" and "torrent."
In Part III, I present my criticism of the floodgates argument in two parts: (1) constitutional concerns regarding the proper role of the federal judiciary with respect to controlling the rise in caseload, and (2) more general or prudential concerns regarding the structure and analytical rigor behind common uses of the floodgates argument.

My constitutional argument is twofold. First, I argue that since Article III of the Constitution leaves control over the jurisdiction of the federal courts to Congress, a ruling based on a concern over judicial economy would be a separation of powers violation. That is, if the federal courts are overburdened, Congress must ameliorate the situation through its control of federal court jurisdiction. The second component of my constitutional argument asserts that in the realm of statutory interpretation, invoking the floodgates argument improperly attributes a caseload-limiting desire to Congress that it may not have had, or at least that the proponent of the floodgates argument does not explicitly recognize.

My nonconstitutional argument (which I refer to as my "prudential" case against the floodgates) points out the argumentative holes that exist in common usages of the floodgates argument. First, I criticize floodgates arguments because they are not accompanied by an analysis tending to demonstrate that a certain judicial decision would, in fact, lead to a high amount of new federal court litigation. Second, I observe that the floodgates argument is almost never the central component of its proponent's legal argument. I question the necessity of this seemingly ancillary argument (especially considered alongside the argument's other flaws).

My third prudential criticism is that use of this flawed argument is often seen as pretext for other considerations. One concern is that the argument might simply be pretext for reducing the burden of the high federal caseload on a judge arguing against opening the floodgates. As such, it calls into question, as Judge Posner puts it, the "perceived legitimacy" of that judge's role. Finally, I note the problem of consistency: even if judges were to carefully explain why they believed that a certain decision would lead to a rash of litigation, there is no touchstone for what constitutes a mere acceptable rise in caseload and what constitutes a flood of litigation so heavy that it should alter the outcome of a case.

If my criticisms of the floodgates argument and its uses may be considered an "anti-floodgates rule," then my next subsection explores suitable exceptions to that rule. That is, I explain the situations in which a floodgates argument would not suffer constitutional flaws. Before I explain these exceptions, however, I note that the exceptions do not overcome the prudential flaws in floodgates arguments.

My first exception allows that a floodgates argument might be appropriate in the realm of statutory interpretation when limiting fed-
eral court caseloads would advance the statutory purpose of the law at issue. Thus I argue that when interpreting provisions of the Prison Litigation Reform Act, for example, floodgates considerations might be appropriate since that statute was enacted, in part, to curb "frivolous lawsuits."

My second exception is related to the first; it states that floodgates arguments may be appropriate in statutory interpretation when a flood of lawsuits would frustrate that law's statutory purpose. For example, a court might decide that an interpretation of the Antiterrorism and Effective Death Penalty Act, a law which sought (in part) to curb federal habeas corpus petitions, would lead to a flood of habeas petitions that would frustrate that law's habeas-limiting purpose.

I call my third exception the "total judicial failure" exception. This exception is reserved for a situation in which a court is faced with the opportunity to rule in a way that would lead to so many lawsuits that it would essentially grind the federal courts to a halt. Although such a situation seems unlikely, it is still necessary to recognize it as an exception. In short, I am arguing that the Constitution's framers would not have created a court system in Article III and then allowed those courts to make themselves nearly useless.

My fourth exception recognizes that a fear of increased litigation may not be premised on the burden it would put on the federal court system. This exception would arise in situations where a flood of litigation could threaten the effectiveness of a branch of government other than the courts. This consideration (among others) underlies the Supreme Court's decision in *Nixon v. Fitzgerald* to grant the President of the United States absolute immunity from § 1983 suits for actions taken in his official capacity.

Finally, I argue, albeit cautiously, that if a court truly were to have no guidance either way on an issue (or if two options were in a decisional dead heat), caseload considerations would be appropriate.

In Part IV, I apply my reasoning to what I consider a difficult example—one that walks the line between the rule I offer and its exceptions. I first lay the groundwork for my example, in which I consider whether the Supreme Court's decision in *Apprendi v. New Jersey* should be applied retroactively on collateral review. In the *Apprendi* decision, the Court held that any fact (other than a prior conviction) which causes a criminal sentence to be longer than the statutory maximum must be proven to a jury beyond a reasonable doubt. An additional question, which the *Apprendi* Court did not address, is whether prisoners may collaterally attack their sentences that would have violated *Apprendi* had it been the law of the land at the time of their sentencing. This question has vast implications for federal court caseloads: if prisoners were permitted to prevail on such a theory, then thousands of eligible prisoners would have potentially meritorious lawsuits. I follow my discussion of *Apprendi* with an explanation of the
analysis that a court must employ when considering whether or not to apply a case retroactively on collateral review.

I further note that what is interesting about this question is not that every regional circuit court of appeals has ruled that Apprendi should not be applied retroactively on collateral review, but rather that in so doing, none of those courts made a floodgates argument.

I conclude this Comment with an explanation of how a judge might go about making the floodgates argument in one of those cases if she were to take my "rule" and its "exceptions" into account. I argue that the complexity of considering caseload implications in light of murky statutory intent counsels in favor of leaving the floodgates out of federal court decisions.

I. THE FLOODGATES ARGUMENT

This Part discusses the "floodgates of litigation" argument and some of its uses. The floodgates argument is one of judicial economy. Nonetheless, it can be distinguished from the usual arguments in favor of judicial economy and efficiency, since it is an argument that a specific result will cause such a high amount of litigation that the efficacy of the federal courts would be severely threatened. The argument recurs in cases where a particular ruling would provide an incentive or a vehicle for future plaintiffs to bring federal court lawsuits where none previously existed.

A. Judicial Economy

The "floodgates of litigation" argument asserts that a proposed ruling, "if adopted, will inundate the court with lawsuits." The argument appears in numerous situations, such as when a "proposed rule is confusing, overly broad, or the problem it addresses is extremely common," so that its adoption "would overwhelm the courts and lead to inefficient use of the courts' valuable time and resources." Judge Posner has characterized this argument as a "functional" type of "prudential self-restraint." According to Posner's definition, the argument "is based on [a] recognition that decisions

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10 Ellie Margolis, Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs, 62 MONT. L. REV. 59, 73 (2001); see also BLACK'S LAW DICTIONARY 517 (abr. 7th ed. 2000) (defining a floodgate as a "restraint that prevents a release of a [usually] undesirable result <the new law opened the floodgates of litigation>.

11 Margolis, supra note 10, at 73.

that create rights lead to heavier caseloads which can in turn impair the courts’ ability to function (hence the word ‘functional’).\textsuperscript{13}

Essentially, then, the floodgates argument is an argument in favor of judicial economy.\textsuperscript{14} It is important, however, to distinguish general arguments in favor of judicial economy from specific floodgates-type arguments. An example of a general judicial economy argument can be found in Justice Brennan’s majority opinion in \textit{United Mine Workers of America v. Gibbs}.\textsuperscript{15} In \textit{Gibbs}, the Court affirmed the practice of pendant jurisdiction,\textsuperscript{16} whereby a federal court was permitted to hear a plaintiff’s state law claims insofar as they arose out of the same “common nucleus of operative fact” such that they formed the same case or controversy.\textsuperscript{17} The Court noted that the rule’s “justification” lay, among other places, “in considerations of judicial economy.”\textsuperscript{18}

The \textit{Gibbs} Court’s consideration of judicial economy simply sought to promote an efficient judiciary. It reasoned that if a single case were comprised of both federal and state claims arising out of the same events, a judge should not automatically be barred from hearing them all at once. The judicial economy approach can be contrasted with a floodgates argument; the floodgates argument goes much further. It asserts not that it would be more efficient to adopt one rule or interpretation over another, but rather that adopting a particular rule or interpretation will lead to such a deluge of litigation as to make the entire court system inefficient on a much more serious scale.\textsuperscript{19} This Comment is concerned only with the floodgates-type arguments, not more basic judicial economy arguments, such as a court’s consideration of how a judge-made rule might improve the efficiency of a court system.\textsuperscript{20}

\textsuperscript{13} Posner, \textit{Judicial Self-Restraint}, \textit{supra} note 12, at 11.
\textsuperscript{14} Judicial economy may be fairly characterized as a promotion of efficiency in the court system. Angela Moffitt explains:

The term “judicial economy” may be broadly defined as the propensity of the court to settle as many claims as possible in one litigation. This is done to avoid the circuity of litigation likely to result by a defendant bringing a subsequent, independent action arising out of the same claim sued upon by plaintiff.


\textsuperscript{15} 383 U.S. 715 (1966).
\textsuperscript{16} This practice (along with its cousin, ancillary jurisdiction) is now codified as supplemental jurisdiction, at 28 U.S.C. § 1367 (2000).
\textsuperscript{17} \textit{Gibbs}, 383 U.S. at 725.
\textsuperscript{18} \textit{Id.} at 726.
\textsuperscript{19} See \textit{supra} note 10 and accompanying text (characterizing floodgates arguments).
\textsuperscript{20} See \textit{infra} Part III.C.5 for a discussion of the application of the floodgates argument to situations that call for judge-made doctrines.
B. Historical and Modern Uses

The earliest known case in the United States to explicitly discuss the floodgates argument is *Delabigarre v. Bush.* In that case, one of the attorneys argued that allowing the forced sale of an entire parcel of mortgaged property to pay off a debt that amounted to less than the total property value would avoid costly litigation disputing the exact costs and parcels to be sold. In response, opposing counsel claimed that such a view, "instead of preventing suits, would only serve to open wider the flood-gates of litigation." The earliest known case in which a court made such an argument is *Whitbeck v. Cook.* In *Whitbeck,* the Supreme Court of Judicature of New York considered whether a landowner could sue the grantor of land for a breach of the covenant of quiet enjoyment when the nuisance—a public road—was a permanent and obvious part of the parcel. In granting the defendant's demurrer, the court noted that if the plaintiff's action were allowed, "a flood-gate of litigation would be opened, and for many years to come, this kind of action would abound." The argument takes the same form in more recent cases and arises frequently in several areas of law. The first is tort suits in which the plaintiff urges the court to recognize a new cause of action or tort. The classic statement regarding torts was then-Chief Judge Cardozo's fear of the litigation that might arise from exposing defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class." Another area of law in which floodgates arguments are often found is that of "next friend" suits. A next friend is "a person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as
a guardian."  

Floodgates arguments abound in these suits because the question is often whether the next friend should be allowed to bring the suit despite not being appointed by the court. In 1990, the Supreme Court announced in *Whitmore v. Arkansas* that a next friend "must have some significant relationship with the real party in interest," but did not provide any guidance on how to determine whether a potential next friend meets that requirement.

In *Hamdi v. Rumsfeld*, the Fourth Circuit Court of Appeals considered whether a public defender could file a next friend suit against the United States Government on behalf of a U.S. citizen who was being detained as an "enemy combatant" without an attorney. The court held that the public defender was not a suitable next friend because he did not have a "significant, preexisting relationship with the real party in interest." The court reasoned, "If we were to grant a supposed next friend access to federal court in the absence of such a relationship, we could be opening the floodgates of federal litigation to the very 'intruders or uninvited meddlers, styling themselves next friends.'"

*Hamdi* cites a Seventh Circuit case interpreting the *Whitmore* standard, in which the court held (in a decision by then-Chief Judge Posner) that a next friend seeking to represent a child must be either a parent, sibling, recognized guardian, or someone "akin to a trustee." The court reasoned that standing doctrines in place were meant to ensure that a litigant had more than a mere ideological interest in the case—that is, that a litigant had a "concrete stake" therein. The court explained that without such a limitation, "the federal courts [would] be flooded by 'cause' suits (really flooded)."

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29 *BLACK'S LAW DICTIONARY* 854 (abr. 7th ed. 2000).
30 A lawyer appointed by the court to represent an incompetent or minor party is a *guardian ad litem*. See id. at 566 (defining *guardian ad litem* as a party "appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party").
32 The indeterminacy of a test based on a finding of a "significant relationship" encourages judicial discretion, which in turn increases the likelihood that an opinion will contain the floodgates argument, since a less legally straightforward case is more likely to discuss policy justifications.
34 Id. at 605. The court did rule, however, that Mr. Hamdi's father was in fact a proper next friend. On appeal of the remanded case, the Fourth Circuit held that Mr. Hamdi's detention without charges or access to an attorney was lawful. See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); see also Tom Jackman, *Judges Uphold U.S. Detention of Hamdi*, WASH. POST, Jan. 9, 2002, at A1.
35 *Hamdi*, 294 F.3d at 605 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990)).
37 Id. at 896.
38 Id.
Another set of cases in which the floodgates argument recurs are those involving the enforcement of the antitrust laws under Section 4 of the Clayton Act.\footnote{Clayton Act, 15 U.S.C.A. § 15 (1997).} Floodgates arguments are particularly applicable to Section 4 cases. That statute mandates treble damages and attorneys' fees to a successful antitrust litigant,\footnote{Id. (requiring "threefold the damages" for antitrust violations).} providing an incentive for someone with a marginal claim to sue.\footnote{Floodgates arguments often appear in other areas of law that involve treble damages, such as litigation under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") or qui tam actions under the False Claims Act. \textit{See}, \textit{e.g.}, \textit{Procter \\& Gamble Co. v. Amway Corp.}, 242 F.3d 539, 565 (5th Cir. 2001) (discussing the floodgates with regard to RICO litigation); \textit{United States ex rel. Rabushka v. Crane Co.}, 40 F.3d 1509, 1514 (8th Cir. 1994) (Magill, J., dissenting) (invoking floodgates argument in a qui tam case).}

For example, in \textit{Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.}, the Second Circuit Court of Appeals considered "the question whether one who is not a 'target' of an alleged antitrust conspiracy has standing under § 4 of the Clayton Act."\footnote{454 F.2d 1292, 1293 (2d Cir. 1971).} In answering the question in the negative, the court argued against opening the floodgates to "every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected."\footnote{Id. at 1295.} Specifically, the court claimed that "the lure of a treble recovery, implemented by the availability of the class suit . . . would result in an overkill."\footnote{Id.} The dissenting judge, however, held fast to his view of the relevant Supreme Court precedents, claiming that the Court "has constantly recognized that antitrust laws should be given the broadest and most liberal interpretation in order to effectuate Congressional intent."\footnote{Id. at 1301 (dissenting opinion). Whether the floodgates argument is consistent with a statute's purpose is discussed \textit{infra} at Part III.A.3.}

A similar situation arose in \textit{In re Industrial Gas Antitrust Litigation.}\footnote{681 F.2d 514 (7th Cir. 1982).} In that case, the Seventh Circuit held that a fired and blacklisted gas worker was not entitled to bring a private treble damages suit against his employer under Section 4.\footnote{Id. at 520.} The court echoed the fear expressed in \textit{Calderone} (and cited the language quoted from \textit{Calderone} above), claiming that "[u]nless § 4's phrase 'by reason of' is interpreted to require a direct causal link between the antitrust violation and the resulting injury, the courts would be flooded with antitrust litigation."\footnote{Id. at 519.}

Thus the floodgates argument can appear in many types of cases, but tends to recur in those cases where a litigant seeks to establish a
new right or cause of action.\footnote{Naturally, cases in which a court must quite literally decide whether or not to allow a new right or imply a private cause of action under a statute frequently contain floodgates arguments. See, e.g., Reuber v. United States, 750 F.2d 1039, 1070 n.3 (D.C. Cir. 1984) (Starr, J., dissenting in part and concurring in part) (advancing the floodgates argument in criticizing implied damages actions under the Constitution). Such cases are considered more explicitly \textit{infra} at Part III.C.3.} At the appellate level, it is as likely to be found in dissenting opinions as it is in those of the majority.

II. THE CASELOAD EXPLOSION AND THE NEED FOR JUDICIAL ECONOMY

The floodgates argument is attractive because the federal courts are heavily burdened with constantly full dockets. This Part describes the rise in federal caseloads over the past forty years and explains some of the sources of this increase. This Part then proceeds to a discussion of the effects that this rise in caseload has had on the courts and judging. It concludes with a consideration of Judge Posner's thoughts on the question that this Comment answers in the negative: whether it is appropriate for federal court judges to take caseload considerations into account when deciding substantive issues of law.

A. The Explosion

In 1960, there were 79,200 cases filed in the United States district courts and 3,765 appeals filed in the United States courts of appeals.\footnote{POSNER, \textit{supra} note 1, at 57 tbl.3.1.} In 1995, the number of filings rose, respectively, to 283,688 and 49,625.\footnote{\textit{Id.} at 60-61 tbl.3.2.} This section focuses on this so-called "litigation explosion"\footnote{See, e.g., Galanter, \textit{supra} note 9, at 5 (quoting Macklin Fleming, \textit{Court Survival in the Litigation Explosion}, 54 \textit{JUDICATURE} 109 (1970)).} that has occurred over the last forty years, and more specifically considers how this "explosion" affects the analysis of the floodgates argument. While arguments in favor of judicial economy have always made sense,\footnote{After all, the practice of pendent jurisdiction predates the so-called "explosion." See \textit{supra} notes 14-18 and accompanying text.} the rise in litigation and its effects on the judiciary\footnote{See POSNER, \textit{supra} note 1, at 124-89 (describing effects of rapid caseload growth on the federal courts). The reader should note that POSNER, \textit{supra} note 1 is technically an update of POSNER, \textit{CRISIS}, \textit{supra} note 12. Thus, in many sections, the books are nearly identical. While there will certainly be citations to \textit{Crisis and Reform} in this section, most of the relevant statistics will come from \textit{Challenge and Reform}, since it includes over a decade's worth of additional data. In this section and others, the reader should assume that a single citation to \textit{Challenge and Reform} means that either the cited material is new to that edition, or the analogous passage in \textit{Crisis and Reform} is not materially different.} have made such arguments particularly pertinent. The summary of the caseload rise in the federal courts in this chapter is relatively
brief,\textsuperscript{55} as is the description of the effects of the caseload rise on the process and quality of federal judging.\textsuperscript{56} Both areas are too expansive to cover in detail here.\textsuperscript{57} What is relevant to this discussion is that there has been a rise in caseload that has had a tangible effect on judicial reasoning.

Federal caseloads began to rise around 1960. The rise was so acute that some commentators wondered if it would be a metaphorical monkey wrench in the wheels of justice.\textsuperscript{58} In fact, Judge Posner authored a 1983 article with the tongue-in-cheek title, \textit{Will the Federal Courts of Appeals Survive until 1984?}\textsuperscript{59} Whether the situation was truly dire or not is a matter of opinion,\textsuperscript{60} but the rise in federal court litigation over the past forty years is undeniable.\textsuperscript{61}

Nonetheless, the rate of increase has leveled off,\textsuperscript{62} especially in the Supreme Court and district courts.\textsuperscript{63} While the caseload in the courts

\textsuperscript{55} There is a good deal of scholarship on the rise in federal court litigation in the late twentieth century. A useful starting point for any interested reader is Judge Posner's \textit{Federal Courts} series. See \textsc{Posner, supra} note 1, and \textsc{Posner, Crisis, supra} note 12. Footnote 6 on pages 58–59 in \textsc{Posner, supra} note 1, references several useful sources. See also Paul D. Carrington, \textit{Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law}, 82 \textsc{Harv. L. Rev.} 542 (1969) (describing the effects of the rise in caseloads in the federal courts of appeals); Lauren K. Robel, \textit{Caseload and Judging: Judicial Adaptations to Caseload}, 1990 \textsc{Byu L. Rev.} 3 (discussing the effects of caseload pressures on federal judges). \textit{But see} \textsc{Galanter, supra} note 9 (refuting the existence of a caseload crisis).

\textsuperscript{56} As with the issue of caseload in general, Judge Posner’s \textit{Federal Courts} series provide a useful starting point. \textsc{See supra} note 55.

\textsuperscript{57} The brief treatment of the effects of the caseload rise on the federal courts should not be seen as a minimization of their importance.

\textsuperscript{58} Hence Judge Posner’s subtitle, \textit{“Crisis and Reform”} (emphasis added). \textsc{Posner, Crisis, supra} note 12.


\textsuperscript{60} \textit{Compare} \textsc{Galanter, supra} note 9, with \textsc{Posner, Crisis, supra} note 12 (suggesting different effects of heavy caseloads on the federal courts).

\textsuperscript{61} \textit{See, e.g.}, \textsc{Posner, Crisis, supra} note 12, at 59–86 (demonstrating a rise in caseloads).

\textsuperscript{62} One factor that has aided the leveling off is the passing of two statutes that serve to drastically decrease the availability of legal remedies to federal prisoners. \textit{See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–107, 110 Stat. 1214, 1217–26} (codified as amended in scattered sections of 28 \textsc{U.S.C.}) (refining federal habeas corpus statutes to reduce the number of situations in which a prisoner could challenge his unlawful detention based on constitutional error at the trial court level); \textit{Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321} (codified as amended, at 18 \textsc{U.S.C. § 3626} (2000)) (imposing limiting requirements on prisoner suits).

\textsuperscript{63} \textit{See Posner, supra} note 1, at xiii (describing changes in the federal court caseload from 1982 to 1995). Posner’s observations on the Supreme Court presumably regard the number of certiorari petitions filed. It should be noted, though, that over the last twenty years the number of Supreme Court decisions on the merits has steadily fallen. \textit{Id.} at 80–81 tbl.3.9.
of appeals has continued its ascent, it grows at a lower rate than in previous years.64

B. Causes of the Rise in Caseloads

This rise in litigation is attributable to many sources. First, the United States population has grown since 1960,65 from about 179 million people in that year66 to about 281 million in 2000,67 roughly a fifty-seven percent increase. Naturally, this is not enough to account for the caseload rise on its own—after all, the caseload of the courts of appeals rose more than thirteen-fold from 1960 to 1995.68

Second, there have been congressional sources of the rise in caseloads. Since 1960, Congress has passed two laws—Title VII of the Civil Rights Act of 196469 and the Age Discrimination in Employment Act of 196770—that have created civil remedies available to private parties for employment discrimination that are enforceable in the federal courts.71 Furthermore, in addition to other statutes creating private rights of action,72 federal regulation has grown in the late twentieth century, which has created additional rights of action.73

Third, there are, of course, the courts themselves. The Warren Court "enormously enlarged the number of rights upon which a suit in federal court could be founded and... strengthened their enforcement."74 That Court also gave new readings to two key statutes—the Habeas Corpus Act of 186775 and the Ku Klux Klan Act of

64 See id. at 60-61 tbl.3.2.
65 Like many scholars, Posner uses 1960 as the starting point for the growth in the federal caseload. Obviously, the rise did not begin on January 1, 1960, but it seems clear that "[a]lthough the change in the rate of caseload growth cannot be pinpointed to 1960, it is apparent that the period 1958-1962, of which 1960 is the midpoint, represents a sharp turning point." POSNER, CRISIS, supra note 12, at 65.
68 See supra text accompanying notes 50-51.
71 See POSNER, supra note 1, at 98 (describing the creation of new federal rights which increased the number of potential claims).
72 See id. at 98 n.18 (listing examples of such statutes).
74 POSNER, supra note 1, at 99.
1871— that gave rise to a vast number of federal suits. Although the Burger Court was generally less eager to allow additional litigation, it created additional judicial remedies, such as those for constitutional violations by federal officers.

Finally, there is another set of causes for the rise in federal court litigation, such as a lower inflation-adjusted amount in controversy requirement for diversity jurisdiction, a relaxation of justiciability doctrines and a drop in the cost of legal services and an increase in their availability.

C. Effects of the Caseload Rise in the Federal Courts

There are myriad effects of the rise in litigation over the past forty years. This section considers some of the effects that the caseload rise has had on federal judges and their work.

In analyzing the results of a survey sent to federal judges by the Federal Courts Study Committee, Lauren Robel found that court of appeals judges increasingly were doing away with oral arguments because their dockets were so crowded. Furthermore, Robel found that some appellate judges' adaptations to their caseloads had limited their contact with litigants and attorneys. In response to their crowded dockets, judges indicated that they increasingly relied on unpublished, nonprecedential opinions. Nonprecedential opinions have the potential to undermine the judicial process in that they reduce the opportunity for outside scrutiny and peer review from other judges. The survey responses revealed also that many judges simply do not have the time to reflect on their own work or read preceden-

77 See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977) (formulating a restrictive test that habeas corpus litigants must pass in order to overcome state procedural defaults).
78 See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389-98 (1971) (allowing damages suits against federal officers for constitutional violations). Naturally, this result led to a significant number of suits, known as Bivens actions.
79 See POSNER, CRISIS, supra note 12, at 77-87.
80 Id.
81 Id.
83 Robel, supra note 55, at 56.
84 Id.
85 Id. In the thirteen years since that survey, however, the pendulum of publishing has begun to swing in the opposite direction. See, e.g., Howard J. Bashman, Steps Taken to End Non-Precedential Federal Appellate Opinions, THE LEGAL INTELLIGENCER (Phila.), Jan. 13, 2003, at 5 (describing the "incremental" progress towards eliminating use of nonprecedential opinions in the federal courts).
86 Robel, supra note 55, at 56.
tional opinions from their circuit, and in some cases, the Supreme Court. Robel found also that district court judges had increased their involvement in case management in order to dispose of more cases in a smaller amount of time. This increased case management included time-saving tactics like encouraging settlement, limiting discovery, using pretrial conferences to guide the litigation, and increasing reliance on magistrate judges to handle pretrial matters. These changes do not necessarily have a detrimental effect on the judiciary. This Part is meant only to establish that the rising federal caseload has had tangible effects on judges' behavior.

Judge Posner has considered the effects of the caseload rise on federal judges (especially federal appellate judges such as himself). In addition to those topics discussed in the preceding paragraph, Posner has long been wary of judicial reliance on law clerks to maintain a proper level of functioning. Posner notes that the increased reliance on law clerks has pushed judges more into the position of an editor rather than that of a writer. Posner argues that this reliance, especially at the appellate level, has had several negative effects: (1) judges' increasing lack of recognizable writing style; (2) increases in opinion lengths; (3) less likelihood that judges will recognize that they are presented with a novel case; (4) less expansive research; (5) lower credibility, and (6) a lack of judicial "greatness." Posner notes also an increased trend in appellate court jurisprudence toward "ruledness"—that is, finding explicit, more easily implemented rules as opposed to more elastic interpretations of vague constitutional

87 Id. at 57. As a result, these tasks are often delegated to law clerks. For Judge Posner's criticism of reliance on law clerks, see infra text accompanying notes 96–103.
88 Robel, supra note 55, at 12.
89 Id. at 16–17.
90 Id. at 13–14.
91 Id. at 16.
92 Id. at 34–36.
93 See POSNER, supra note 1, at 124–89.
94 See id. at 160–83 (discussing federal appellate judges' increased reliance on unpublished opinions and the decrease in appellate oral arguments).
95 See id. at 139–59 (stating that the increased number of law clerks per judge leads to a greater delegation of judicial responsibility); see also Posner, supra note 59, at 767–75.
96 See POSNER, supra note 1, at 139–59. The judge-as-editor is meant to be contrasted with judges like Posner who write their opinions from scratch.
97 See id. at 145–46.
98 See id. at 146–47.
99 See id. at 147–48 (calling this a lack of "candor").
100 See id. at 148 (claiming that because clerks must now spend more time drafting opinions, they have less time to do research on those opinions and for the judge).
101 See id. at 148–49 (noting that an opinion not expressing a judge's thinking will be seen by practitioners as less authoritative for future decisions).
102 See id. at 149–51 (arguing that a judge who simply serves as an editor to his law clerks cannot be a "great" judge—one who leaves the bench having made a profound mark on the law).
doctrines. Finally, Posner argues that the "least visible but probably most important way in which the pressure of a growing caseload has resulted in streamlining or corner cutting" is the "redefinition of the standards for granting summary judgment and for dismissing a complaint for failure to state a claim" in the district courts. He suggests that these standards have been "watered down," such that "[t]he tendency, though it is only that, is to make summary judgment a substitute for trial, and judgment on the pleadings a substitute for summary judgment." Thus, while the rise in federal caseload appears to be leveling off, the future of the federal court caseloads remains in a "setting of profound uncertainty."

D. Caseload and Judicial Economy

The previous three sections raise the question this Comment seeks to answer: when (if ever) is it appropriate for a judge to explicitly rule, at least in part, based on caseload-related judicial economy considerations, namely floodgates concerns?

Part III of this Comment will answer that question in the negative (although some exceptions are discussed).

First, however, it is useful to consider the work of other commentators on this precise question. Analysis on this point is scarce. Nonetheless, Judge Posner has considered the question not once, but three times. In 1983, Posner first considered the question in an *Indiana LawJournal* article. He then incorporated that article into a chapter in the first edition of *The Federal Courts*. Finally, over a decade later, Posner updated *The Federal Courts*, including the section in question. The three versions offer three similar, but ultimately varied, positions and suggestions about this question. They are considered in chronological order.

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103 *Id.* at 177-78.
104 *Id.* at 178.
105 *Id.* at 179.
106 *Id.* at 180.
107 See *supra* note 62 and accompanying text. *Cf.* POSNER, *supra* note 1, at 123 ("[B]oth economic theory and past experience teach that a continued increase in federal caseloads is not inevitable or an actual decline in those caseloads impossible.").
108 POSNER, *supra* note 1, at 123.
110 POSNER, *CRISIS, supra* note 12, at 207-08.
1. 1983

In *The Meaning of Judicial Self-Restraint*, Judge Posner sought to create a taxonomy of "judicial self-restraint."112 One type of judicial self-restraint Posner discussed was "prudential self-restraint," which he defined by way of a judge whose "decisions are influenced by a concern lest promiscuous judicial creation of rights result in so swamping the courts in litigation that they cannot function effectively."115 Posner further refines this definition, noting that one of the two types of prudential self-restraint is "functional."116 He states that functional self-restraint "is based on recognition that decisions that create rights lead to heavier caseloads which can in turn impair the courts' ability to function (hence the word 'functional')."115

With this in mind, Posner cites his previous work116 for the proposition that if the solution to the caseload crisis is to continually add judges, the judiciary will consequentially function less effectively.117 He then admits that "[a]n interesting (and in light of the present overload of the federal system, an urgent) question . . . is whether it is legitimate for a judge to consider caseload effects when deciding a case."118 Posner asserts that the practice certainly is acceptable in cases involving 'jurisdiction and procedure.'119 These include issues such as standing to sue, a consideration of where judicial review of administrative action lies in the first instance, the scope of pendent (now supplemental)200 jurisdiction, and "whether a federal court should abstain when a parallel suit is pending in state court."121

Judge Posner is sure to note that such considerations only come into play when "the answer is not dictated by precedent"122 and that the consideration of judicial economy "will be weightier the heavier

115 Id. at 10.
114 Id. at 11.
115 Id.
116 Posner, supra note 59.
117 Posner, *Judicial Self-Restraint*, supra note 12, at 11 ("[B]eyond some point, increasing the number of judges in a court system will only make the system work less well."). I do not pass on the relative truth of this proposition, as it is beyond the scope of this Comment. I suspect that Judge Posner and I have somewhat different views on where the benefit/detraction line lies for judge-adding, but for the purposes of this Comment, I am willing to assume the truth of his arguments.
118 Id.
119 Id.
120 See supra note 16 (discussing supplemental jurisdiction as codified in 28 U.S.C. § 1367).
122 Id.
the caseload is."125 Finally, he notes that if he is granted his earlier proposition about adding new judges,124 then a failure to consider caseload in the situations delineated above risks the imposition of "substantial social costs in the form of reduced judicial quality."125 That, he concludes, "is a legitimate consideration in any area of law where judicial economy is itself a legitimate consideration."126

2. 1985

With the exception of some minor wording changes, Posner's adaptation of the above section into The Federal Courts leaves the original intact.127 There is one notable difference: Posner creeps closer to answering the question of whether caseload should be considered in deciding cases. Whereas in his 1983 paper Posner simply explained his views on procedure and jurisdiction, here he adds a parenthetical. Thus, on the question of "whether a judge legitimately may consider caseload effects when deciding a case," the 1985 response is, "[h]e surely may in areas such as jurisdiction and procedure where judicial economy is an accepted factor in judicial decision making (and, at least in close cases, I should think, in other areas as well)."128

3. 1996

Eleven years later, in updating The Federal Courts,129 Judge Posner finally begins to look at the question beyond the scope of procedural and jurisdictional matters.130 First, Posner incorporates his 1983 and 1985 work in essentially the same form; the one notable difference is that the essential "caseload" question has been transformed into the speculation that begins this Comment.131 In the 1996 version, Posner

125 Id. To be sure, judicial economy concerns encompass more than an increased caseload, although caseload concerns are certainly a component thereof.

124 See supra note 117 and accompanying text (citing Posner's discussion of the effects of caseload increases on the functioning of the federal courts).


126 Id.

127 Compare id. at 10–11 (defining functional prudential self-restraint as restraint "based on recognition that decisions that create rights lead to heavier caseloads which can in turn impair the courts' ability to function"), with POSNER, CRISIS, supra note 12, at 208 (defining functional prudential self-restraint as restraint "based on recognition that decisions that create rights result in heavier caseloads, which can in turn impair the courts' ability to function") (emphasis added).

128 POSNER, CRISIS, supra note 12, at 208 (emphasis added).

129 See supra note 54 (discussing the different versions of Judge Posner's Federal Courts series).

130 POSNER, supra note 1, at 315–18 (expanding the discussion to include "problematic" cases).

131 See supra text accompanying note 1 ("Today's caseloads make it a question of some moment whether judges legitimately may consider caseload effects when deciding a case.").
more candidly considers this question. He notes that a “problematic case” is one in which “substantive doctrines . . . have substantial implications for caseload.”

As an illustration, he offers DeShaney v. Winnebago County Department of Social Services, where the Supreme Court decided “whether the Constitution creates a right to public services,” which in that case was specifically “a right to be protected against a physically abusive parent,” and also whether that right can be enforced in lawsuits for damages and other relief. As Posner notes, “[w]hatever the abstract merits of the right asserted (and by the Supreme Court denied), the stakes for the federal caseload were momentous,” since the Court’s ruling could lead to a situation in which after every serious accident a disgruntled survivor or relative could bring suit in federal court against the rescue workers on the scene. Although the Court did not rule in that manner, Posner admits that had the Court decided the case differently, the lower courts would have developed limiting doctrines, but the transition would still have left the caseload at a “substantially higher” plateau.

Posner continues, noting that “[o]ne could take the position that it is not the business of the judiciary to worry about the infrastructure of rights enforcement; that the responsibility lies elsewhere, with Congress and the President” and that those branches “supported judicial expansion to the point necessary to accommodate new rights.” But he responds to such a position:

The danger is not that the judiciary may be starved for resources but that it will expand so promiscuously, and be stretched so thin, that its effectiveness will be compromised. It is as irresponsible of judges as it is of scholars to ignore the effects of creating new rights on the ability of the federal courts to protect the holders of old rights. The issue has been ignored in part because few judges or law professors take any interest in the causes or consequences of heavy caseloads.

Posner explains that “[i]n the heyday of legal doctrinalism judges freely invoked fears of opening the ‘floodgates’ to litigation, but this concern was seen as a thin excuse for not wanting to create new

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132 POSNER, supra note 1, at 315.
133 489 U.S. 189 (1989); see also RICHARD A. POSNER, OVERCOMING LAW 208–09 (1995) (discussing David Strauss’s criticism of the Supreme Court decision in DeShaney for protecting government employees from suit and not offering society an additional right of action).
134 POSNER, supra note 1, at 315.
135 Id. at 315–16.
136 Id. at 316.
137 Id. at 316–17.
138 Id. at 317.
rights, since the judges knew nothing about the actual capacity of the judicial system, which was actually underutilized. With those “thin excuse[s]” in mind, Judge Posner admits “to misgivings about the mingling of caseload and substantive concerns.” He compares some courts’ practice of skipping legislative history analyses in order to get through cases faster to the problems regarding summary judgment and motions to dismiss discussed earlier. Posner concludes with a self-aware challenge:

Someone has to consider the tradeoff between caseload and substance, but perhaps the judges do not have the requisite knowledge and powers for this task and would compromise the perceived legitimacy of their role if they undertook it other than in the cases in which “judicial economy” is already a recognized factor in the formulation or application of legal doctrine.

In Part III, this Comment seeks to meet that challenge and consider whether the consideration of the floodgates, even in the types of cases Judge Posner mentions, is proper.

III. MEETING POSNER’S CHALLENGE: THE CASE AGAINST THE FLOODGATES

The argument against judges ruling based on fears that their decision will open the floodgates of litigation in federal court proceeds on two grounds: first, the floodgates argument represents a value—caseload-based judicial economy—that is simply not considered in the Constitution and thus ruling on its basis should not be assumed to effectuate the purpose of the judiciary as delineated in Article III. As such, doing so violates the Constitution’s separation of powers. Furthermore, in statutory interpretation cases, the argument improperly imputes a desire to limit caseloads onto Congress and across Congresses. Second, the floodgates argument has structural problems: it fosters inconsistencies between judges, usually has no explicit factual basis, is ancillary to the central holding of a case, and has a high potential for misuse.

The rule against using the floodgates argument has at least five exceptions. The first two permit the floodgates argument when caseload considerations serve to advance the statutory purpose or to avoid the frustration of legislative intent (when interpreting state...
The third authorizes the use of the argument when a ruling has the potential to end the judiciary as we know it—that is, to bring with it a deluge of litigation that literally slows the courts to a halt. The fourth exception is a recognition that a desire to limit multitudinous litigation need not always be predicated on easing the caseload burden on the federal courts. Finally, the last exception acknowledges that in a situation where a judge is truly left without authority to guide her, then pragmatic, efficiency-based policy arguments are acceptable.

Nothing described below is intended as fodder for any enforceable rule—that is, the argument is not that Congress should enact a bill based on Part III of this Comment. Rather, it is intended to be a critique of the vast majority of floodgates-style arguments. A reasonable goal for this Part would be that it could function as a dissent in a case in which the majority decided the case wholly on the basis of fear of the floodgates of litigation.

Finally, the rule offered in this section, through its exceptions, has the inherent flexibility that has always been granted to federal judges.

A. Article III, Separation of Powers, and Congressional Intent

1. Limited Jurisdiction, Not Limited Number

The constitutional case against the "floodgates of litigation" argument is simple: the desire to limit the caseload of the federal courts is nowhere mentioned or implied in Article III of the Constitution. Since many constitutional scholars have covered the history and structure of the federal judiciary in detail, any references here should be assumed to be somewhat simplified.

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146 See infra Parts III.C.1 and III.C.2.
147 See infra Part III.C.3.
148 See infra Part III.C.4.
149 See infra Part III.C.5.
150 I know of no such case. Cf infra text accompanying notes 202–03 (demonstrating how the floodgates argument may often be ancillary to the central holding of a case). That said, decisions have been attacked as pretext for floodgates considerations.
151 Cf. James C. Rehnquist, Note, The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court, 66 B.U. L. Rev. 345, 349 (1986) ("The doctrine of stare decisis—even in common law adjudication—has never been viewed as an absolute bar to overruling precedent.").
It is a basic premise of constitutional interpretation that Article III of the Constitution delineates a federal courts system of "limited jurisdiction." Article III vests judicial power in the Supreme Court and in lower courts that Congress could, at its discretion, create. Allowing the lower courts to exist at Congress's will was the result of the so-called "Madisonian Compromise," whereby James Madison and James Wilson found a middle ground between those at the Constitutional Convention who favored a national system of lower courts and those who preferred to leave the trial courts exclusively to the states and have their judgments appealed directly to the Supreme Court. Nonetheless, when Article III delineates the nine types of cases or controversies that would comprise the federal jurisdiction, it specifically refers to "all Cases."

Thus the constitutional argument is a recognition of the grant of federal jurisdiction in Article III: the Constitution creates a judicial system in which all cases (or controversies) within certain subject matters are meant to be heard, not one in which they must be heard unless they become too numerous.

Furthermore, it is crucial to recognize what Article III does not say. It does not say that the federal courts should hear "all cases, except if allowing other people like the plaintiff to sue would create just too many suits," or "all cases, except those which judges deem to be too numerous."
Finally, as a textualist or an originalist would likely argue, Article III (and the rest of the Constitution) contains no explicit mandate to judges to control the caseload of their courts—in fact, such a power is not even implied in the text or the structure and history thereof. The lack of any foundation in the text of the Constitution or its creation differentiates the floodgates argument from other judicial policy considerations, such as comity.

More prudential criticisms are pertinent as well. Although today's society is often decried as unduly litigious, it might be argued that the increased reliance on the judiciary counsels its expansion, not its limitation. As Justice Tobriner said in Dillon v. Legg, "the existence of a multitude of claims merely shows society's pressing need for legal redress."

A corollary of such a view is that a broad statement advocating a resistance to allow a certain type of (potentially) multitudinous suits unfairly discriminates against those with meritorious claims. Put another way, "[i]t seems far better to protect the rights of the few than to make a blanket ruling where the rights of those few are brushed aside in the name of efficient court dockets."

Other commentators and judges take their criticism further. W. Page Keeton insisted that "[i]t is the business of the law to remedy wrongs that deserve it, even

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I would certainly not wait for Congress to give its blessing to our deciding cases clearly within our Article III jurisdiction. To wait for a sign from Congress is to allow important constitutional questions to go undecided and personal liberty unprotected.

There need be no inundation of the federal courts if taxpayers' suits are allowed. There is a wise judicial discretion that usually can distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing, and the like. When the judiciary is no longer "a great rock" in the storm, as Lord Sankey once put it, when the courts are niggardly in the use of their power and reach great issues only timidly and reluctantly, the force of the Constitution in the life of the Nation is greatly weakened.

Id. at 111-12 (Douglas, J., concurring) (footnotes omitted). Several years later, the Court adopted the spirit of Douglas's argument, at least as it relates to the floodgates. See United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973) ("[S]tanding is not to be denied simply because many people suffer the same injury."); cf Fed. Election Comm'n v. Akins, 524 U.S. 11, 23-25 (1998) (rejecting the idea that a litigant would lack standing merely because his injury was "widely shared").

See BLACK'S LAW DICTIONARY 1199 (abr. 7th ed. 2000).

See id. at 902.


See, e.g., Fred Smith, Mandates Don't Fit Market, USA TODAY, Oct. 17, 2002, at A12 (noting "our litigious society").

441 P.2d 912 (Cal. 1968).

Id. at 917 n.3.

Nancy S. McCahan, Comment, Justice Scalia's Constitutional Trinity: Originalism, Traditionalism and the Rule of Law as Reflected in His Dissent in O'Hare and Umbehr, 41 ST. LOUIS U. L.J. 1435, 1463-64 (1997).
at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."166

Although they do not always state so explicitly, all of these criticisms of the floodgates argument (or similar considerations) claim that it simply lacks a proper basis in the law. Prudential as the floodgates argument may be in some cases, it is (at least generally) unacceptable because it makes judgments about the merits of cases based on their number, not their legal validity.

2. Separation of Powers: "A Felt Necessity"167

The structure and principles of the Constitution's separation of powers forbid giving preference to manageable dockets over otherwise cognizable legal claims. As Justice Harlan explained, concurring in Bivens,

Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

If a judge denies a cause of action in federal court on the grounds that to allow it would allow a multitude of others, that judge is acting outside of his or her constitutional authority and violating the separation of powers principles of the Constitution.

The problems with such a ruling inhere beyond the mere separation of powers principles to the literal separation of the powers in the text of the Constitution. That is, Article III explicitly leaves the establishment of lower courts and jurisdictional tinkering to the legislative branch.169 The Framers left it to Congress, not the courts, to delineate the lower federal courts' subject matter jurisdiction.170

The separation of powers argument admittedly frays when a case is within the Supreme Court's original jurisdiction, which is created by Article III and not Congress. Nonetheless, the Court should not

166 KEETON ET AL., supra note 27, at 56.
167 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) ("For [the framers] the doctrine of separation of powers was not mere theory; it was a felt necessity."); see also THE FEDERALIST NO. 47 (James Madison) (explaining separation of powers).
169 U.S. CONST. art. III.
170 U.S. CONST. art. III; see also FALLON ET AL., supra note 152, at 348–54 (describing congressional power to control federal court jurisdiction).
invoke the floodgates argument in its original jurisdiction cases for at least two reasons. First, Article III mandates that the judicial power extend to “all” of certain types of cases; it does not give the Court explicit power to limit the number of those suits it might hear. Second, use of the floodgates argument in such a situation is prudentially flawed. These flaws are discussed below at Part III.B.

In any event, if any governmental body is to consider caseload effects, it is the legislative branch—not the judiciary. Naturally, Congress is free to consider (and given the caseload rise charted in previous sections, one might argue that it should consider) the caseload effects of its legislation. Consequently, Congress may restructure the lower federal courts to better manage the massive judicial caseload. For example, Congress could raise the federal court filing fee or the amount in controversy requirement for diversity jurisdiction.

Just as a court may not impose a new federal filing fee or raise the amount in controversy requirement to control its caseload (or achieve any other goal, for that matter), a court likewise may not control its own jurisdiction through aversion to a flood of litigation. Since Congress can (and does) limit federal courts' caseloads through its control over subject matter jurisdiction, when federal judges invoke the “floodgates of litigation” argument, they impermissibly usurp the jurisdictional powers reserved solely to the legislature.

3. The Floodgates and Congressional Intent

The argument against the use of the floodgates argument in statutory interpretation is even simpler than its constitutional sibling, and similar concerns underlie both arguments.

Courts generally should not consider the floodgates implications of their decisions on congressional statutes because they will be assuming a legislative intent that Congress may not have had. Since there is relatively little federal common law, most cases in which

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171 The impropriety of implicitly imputing a view on caseload effects to Congress is considered infra in Part III.A.3.
172 See generally POSNER, supra note 1, at 193–272 (discussing legislative options for limiting the caseload surge in the federal courts).
174 Although the constitutional considerations discussed in the previous two sections underlie the discussion of the floodgates and statutory interpretation, this argument is not founded explicitly in the Constitution's text.
175 See generally CHEMERINSKY, supra note 152, at 349–84 (describing the history of federal common law). To be sure, federal courts regularly seek to determine legislative intent. The problem with the floodgates argument is that it presupposes legislative approval of a reduced caseload where one may or may not have existed.
judges might invoke the floodgates argument and contravene the principles of separation of powers will be those interpreting statutes.

A court should not assume that Congress intended or would now desire a reduction in litigation. For example, the interpretation of a federal child welfare statute may require a court to decide whether a particular party can proceed as a next friend on behalf of an endangered child. In deciding that issue, the court rightly may consider whether Congress intended for the party to be able to bring the action. In all likelihood, such a statute would ask the court to look to the best interests of the child. It would certainly be unacceptable, however, for the court to announce that despite what Congress might say about the child, the action must be denied because allowing the party to proceed as a next friend would throw open the floodgates to a deluge of litigation.

Such an argument is unacceptable for several reasons. First, the statute would almost surely say nothing about the caseload or general functioning of the federal courts. As such, making a decision regarding the statute’s function on floodgates grounds would usurp the role of the legislature, whose job it is to consider the caseload implications of its legislation.

Second, even if the statute contains provisions related to causes of action, those provisions may have little to do with limiting federal caseloads and might even encourage litigation by easing restrictions on suits or creating a federal cause of action. One common example of explicitly provided causes of action that do not otherwise touch on caseload considerations is the use of “citizen suit” provisions in environmental legislation.

Finally, any plea to the floodgates argument without some relevant statutory purpose reads into Congress’s intentions a desire to limit litigation. Since only Congress can control the bounds of federal court jurisdiction, the floodgates argument assumes that, if given the choice, Congress would choose to limit federal court litigation.

Naturally, Congress might have a different agenda. What if the bill’s sponsor was, say, a well-known trial lawyer and plaintiffs’ rights advocate? After all, trial lawyers are a powerful lobbying group at the

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176 See supra text accompanying note 29.
177 But cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).
178 See, e.g., Clean Water Act § 505, 33 U.S.C. § 1365 (1994) (authorizing “any citizen” to “commence a civil action” against “any person . . . who is alleged to be in violation of” the Act); Clean Air Act § 304, 42 U.S.C. § 7604 (1994) (employing nearly identical language). If any interpretation of these statutes were to be made regarding caseload considerations (although one should not be made at all), it would be that these provisions are meant to encourage litigation, not limit it.
national level and might have pushed passage of the bill precisely so that it would create a rise in federal litigation.

None of this is to suggest that a judge can clearly divine an intent to limit or encourage litigation from a bill's text or legislative history. Much has been written about the perils of statutory interpretation, so it should suffice to note that any apparent legislative intent to encourage or limit litigation may itself be a cause for disagreement.

Thus the floodgates argument suffers from severe constitutional flaws. Judicial considerations of the caseload implications their decisions are an improper usurpation of the legislature's role in controlling federal court jurisdiction. Furthermore, these considerations may lead to the attribution of a caseload-limiting goal to Congress where it may not have existed. These flaws, along with the prudential flaws considered below, should counsel against the use of the floodgates argument in federal court decisions.

B. Prudence, Common Sense, and Realism

Even if the constitutional (or statutory) underpinnings of the floodgates argument were such that it were a legitimate judicial consideration under Article III, the argument itself would still be unsound. This subsection contemplates some basic flaws in the use and premise of the floodgates argument that are unrelated to the constitutional structure of the courts or statutory interpretation.

1. Predictability

One of the most easily identifiable problems with the floodgates argument is that it is rarely, if ever, followed by a true analysis of the potential litigation of which it speaks. That is, one response to a floodgates argument might be, "Are you sure that a contrary position would yield a flood of litigation?"

This criticism is frequently leveled against the floodgates argument, especially in the realm of tort litigation. For example, as one commentator has argued:

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179 See, e.g., J. Ross Harper, Good, Bad and Ugly of the American System, THE SCOTSMAN, Aug. 16, 1995, at 11 (describing the Trial Lawyers Association as "one of the most powerful lobbies in America").


181 See supra Part III.B.

182 The logical follow-up question, "How much litigation is enough to constitute a flood," is considered infra in Part III.B.4.

183 See supra text accompanying notes 27–28 (discussing the use of floodgates arguments in tort cases).
The "floodgates of litigation" argument has proven wrong time and again. The lifting of the "impact" rule in rewarding damages for mental anguish, allowing third parties to recover under contracts, and the recognition of the right to privacy, were all prophesied to overwhelm the courts with frivolous claims. They have not.

This argument, one should think, is relatively strong. While the floodgates argument is generally based on policy considerations, policy arguments are rarely so indeterminate. While moral arguments are certainly not precise—one cannot quantify, say, "fairness" or "justice"—they are simply used differently. That is, when a judge says that a decision "promote[s] justice," he or she is not speaking about a tangible, actual result. In contrast, when a judge expresses that a decision will open the floodgates of litigation, he or she is saying that there will be actual, cognizable caseload results from the decision.

Given how often the floodgates do not open when we are warned that they will, making the argument without a proper foundation is dangerous. While there certainly are situations in which a judge should consider the implications of a decision on his or her

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The Association suggests, first, that reversing the judgment here will somehow trigger an epidemic of unprecedented federal litigation. Even if that might be counted as a good reason for a Polk County decision to call the Association's action private, the record raises no reason for alarm here. Save for the Sixth Circuit [in the case below], every Court of Appeals to consider a statewide athletic association like the one here has found it a state actor.... No one, however, has pointed to any explosion of § 1983 cases against interscholastic athletic associations in the affected jurisdictions. Not to put too fine a point on it, two District Courts in Tennessee have previously held the Association itself to be a state actor, but there is no evident wave of litigation working its way across the State. A reversal of the judgment here portends nothing more than the harmony of an outlying Circuit with precedent otherwise uniform.

(internal citations omitted). A recent district court case provides another example:

Similarly unpersuasive is defendants' floodgates argument. There is no reason to believe that allowing subrogues to aggregate subrogated claims will flood the federal courts with such cases. Indeed, there is reason to believe the contrary since no flood has yet occurred despite existing authority allowing aggregation of subrogated claims by subrogues to meet the jurisdictional amount. In any event, Congress, as architect of diversity jurisdiction, may act to restrict the scope of this jurisdiction by foreclosing subrogues from aggregating claims to meet the jurisdictional amount.


185 See infra Part III.B.2 (noting that the floodgates argument has no statutory or constitutional basis). See also Margolis, supra note 10, at 72-73 (describing the floodgates argument as a policy argument of judicial administration).


187 See supra text accompanying notes 183-84 (challenging the accuracy of the floodgates argument, especially in the context of tort actions).
caseload, doing so without considering the factual bases of those implications is problematic. And while uncertainty is an unavoidable part of the law, the language with which the floodgates argument is regularly employed expresses anything but conjecture and uncertainty. The arguments are forceful; they are intended to conjure "[i]mages of a destructive, elemental force." After all, as Judge Posner notes, "So irregular has been the growth of the caseloads of each of the three tiers of the federal judiciary in the past, and so many and poorly understood are the causes of changes in judicial caseloads, that it is impossible to make responsible predictions about future changes." The failure of judges to recognize this limitation of the argument reduces the weight afforded thereto.

2. Necessity

One interesting aspect of the floodgates argument is that it is usually ancillary to the central holding of the judicial opinions in which it is used. Although policy arguments are often not essential to a court's decision, the hope is that they usually are connected to the

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188 See infra Part III.C (discussing exceptions to the rule discussed in this section).
189 This is not to say that a judge is always unreasonable when predicting a rise in caseload. A judge might take a reasoned look at statistical evidence to suggest that the decision would yield a large amount of additional litigation. Furthermore, some sharp caseload increases are easily predictable. For example, any Supreme Court constitutional rights decision made retroactive on collateral review would lead to a number of habeas corpus challenges. See infra Part IV for a discussion of such a case.
190 None of these considerations, however, change the status of the floodgates argument with regard to the separation of powers flaws discussed infra in Parts III.A and III.B. Finally, although there are such self-evident potential rises in caseload or opportunities for a judge to make a strong statistical argument as to why he or she expects a rise in caseload to flow from a particular decision, the self-evident cases are rare and the meticulous statistical arguments even rarer.
191 See, e.g., Eli J. Richardson, Eliminating the Limitations of Limitations Law, 29 ARIZ. ST. L.J. 1015, 1044 (1997) ("Uncertainty should not necessarily be excoriated, however, as it is not per se an unacceptable characteristic of adjudication.").
192 Galanter, supra note 9, at 65.
193 POSNER, supra note 1, at 122 (emphasis added). Note that Posner is speaking about federal court caseloads generally, not about floodgates predictions specifically.
194 The use of "ancillary" in this section is meant to suggest that the legal bases of decisions using the floodgates argument are independently supportable. This is not to say that a decision could not rest solely on a floodgates justification. Courts are free to reason as they wish. Nonetheless, floodgates arguments simply are not used as the sole basis for case resolution in the federal courts. See supra note 150 and accompanying text (noting that there does not appear to be a single case that was decided solely on the basis of a floodgates argument).
195 Cf. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (justifying pendent jurisdiction in part on the policy grounds of "judicial economy, convenience and fairness to litigants"). The suggestion that floodgates arguments are nonessential is not to ignore their use. For the purposes of this section, a holding that says, e.g., "Because Plaintiff v. Defendant is a clear and controlling precedent, and because to decide otherwise would unleash a flood of litigation upon the federal courts, we affirm," includes the floodgates argument as a nonessential
underlying logic of the case. Thus, for example, an argument against the floodgates might be worthy in a case interpreting a statute that limits lawsuits, such as the Prison Litigation Reform Act of 1995 ("PLRA"). On the other hand, expressing a fear of the floodgates of litigation when interpreting, say, the Clayton Act, has no such connection.

This is not to suggest that judges do not actually fear a rise in caseload. In many instances, though, the floodgates argument seems to present itself because it has the mere potential to be true. Consider the combination of this fact and the preceding subsection: in the majority of cases, judges are making an ancillary claim that often times has little, if any, factual support.

3. Legitimacy Implications

Given the implications of the previous two subsections, namely that judges are making factual arguments that are not necessarily justified and that those arguments are almost invariably ancillary to the central legal holding in a case, there is a legitimate question as to the motivation behind caseload-sensitive arguments. As Judge Posner has explained, in considering whether judges should consider caseload as a substantive argument, it "would compromise the perceived legitimacy of their role if they undertook it other than in the cases in which 'judicial economy' is already a recognized factor in the formulation or application of legal doctrine." Nonetheless, simply advancing the floodgates argument does not mean that judges are eschewing proper legal analysis in order to act in their self-interest. Rather, as Judge Posner put it, a consideration of this argument gives one pause to question its legitimacy vis-à-vis a court's control of its own caseload. The caseload pressures de-
scribed in Part II only raise the stakes when caseload considerations are involved.200

There are also questions of motivation. Judge Posner has noted that prior to the rise in caseloads, when judges invoked the floodgates argument, their "concern was seen as a thin excuse for not wanting to create new rights, since the judges knew nothing about the actual capacity of the judicial system, which was actually underutilized."201 A dissenting opinion often will accuse a majority of ruling out of a fear of excessive litigation. For example, in *Scott v. Moore*,202 Judge Wisdom writes for the dissenters that the "majority opinion is, regrettably, a subterfuge to avoid opening the floodgates of litigation."203

Even if they differ from the stated reasoning, judges' unstated and often subconscious considerations cannot be controlled. Not every judge practices what Judge Posner defines as judicial candor, namely "admitting that the judge's personal policy preferences or values play a role in the judicial process."204

4. Defining a "Flood"

Although the rise in the federal caseload has started to plateau,205 the high level of caseloads that persists bears on the federal judicial product.206 Nonetheless, when a judge invokes the floodgates argument, he or she does not explain what differentiates this potential flood from an acceptable rise in caseload. For example, it would seem that most pro-plaintiff decisions would have a small but actual effect on the overall caseload: they create a new set of facts that dictate a pro-plaintiff outcome, thereby increasing the likelihood that a

3B(8) cmt. ("In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties... A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts."). Nevertheless, while encouraging settlement will reduce the caseload in the federal courts, guiding litigants toward extrajudicial resolutions of their claims is different than using judicial opinions to reduce the caseload once the claims are before a court.

200 See POSNER, supra note 1, at 315 (arguing that "the heavier the caseload is," the more judicial economy will be weighted). It should be noted, though, that not all federal judges, busy as they surely are, are necessarily gasping under their caseloads. See *id.* at 150 n.46 ("The statement by Chief Judge Howard Markey... that 'in today's appellate world, no judge has adequate time to write every word of all his or her opinions,'... was incorrect when written and is incorrect now."). In any event, whether a judge is overburdened or not does not alter the prudential and constitutional problems with floodgates arguments.

201 Id. at 317.

202 114 F.3d 51 (5th Cir. 1997) (en banc).

203 Id. at 57 (Wisdom, J., dissenting).

204 POSNER, supra note 1, at 331.

205 See supra text accompanying notes 62-64 (describing the leveling off of caseloads at the district, circuit, and Supreme Court levels).

206 See supra text accompanying notes 82-106 (discussing judicial adaptations to the rise in federal caseload and the implications of these adaptations on judicial work product).
potential plaintiff possessing similar facts will seek legal redress. It is not clear, however, where a potential rise in lawsuits becomes a flood.

This is to be distinguished from other ambiguous considerations in the law. For example, the current controlling Supreme Court standard by which to judge legislation that restricts women's access to abortion requires an examination of whether that restriction poses an "undue burden on the woman's decision before fetal viability." This test is, of course, inherently subjective. But what distinguishes court-defined tests such as the undue burden test (or the probable cause standard for evaluating Fourth Amendment claims) from floodgates-type arguments is that the court-defined tests ostensibly have a specific basis in the law.

Whereas the undue burden test is a framework for evaluating possible violations of the constitutional right to noninterference with one's family and parenthood decisions, the floodgates argument enjoys no such basis in the Constitution. Although floodgates decisions could be more normalized following extensive appellate review, the source of the floodgates argument will necessarily be nebulous policy considerations, not a statute or the Constitution.

Thus, one must ask what a particular decision need cause in order to warrant prevention under a floodgates rationale. That is, how much litigation is so much that as a matter of policy we must prevent it? The indeterminacy of any answer to that question ties into the problem of consistency; regardless of the validity of the argument in the abstract, when judges use it they each have something different in mind, which yields an inconsistent judiciary. Certainly there will be cases that all can agree on—if a plaintiff sought a decision that reversed every single federal conviction in the history of the United States, almost every single judge would recognize that the ensuing litigation would eviscerate the court system. And surely every judge

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208 Cf. Elizabeth A. Schneider, Comment, Workability of the Undue Burden Test, 66 TEMP. L. REV. 1003, 1004 (1993) ("The discretionary nature of the undue burden test renders it unworkable. It is a standard which cannot be applied by state courts consistently, predictably, and without prejudice.") (footnote omitted).


210 Casey, 505 U.S. at 846.

211 Of course, Congress could write a statute that contains a line such as, "nothing in this statute should be construed in such a way as to encourage a flood of litigation upon the federal courts." That the floodgates argument is acceptable in a case where a statute intends to limit litigation (or, as here, prevent the floodgates themselves) is considered infra in Part III.C.1.

212 The potential to collapse the judiciary is an exception discussed infra in Part III.C.
would agree that there is no floodgates issue with, say, conferring a right of action on only a handful of citizens.\textsuperscript{213}

Those cases, however, lie at the margins. In between, in the uncertain gray area, lies another oft-invoked policy argument: the slippery slope.\textsuperscript{214} That is, if one type of action should be blocked because of the potential flood of litigation, how close must the next potential flood be in order to qualify for such treatment? There can be no question but that a flood of litigation means different things to different judges, and that the continued use of the phrase perpetuates inconsistency.\textsuperscript{215}

Considering the last few sections together, we are left with what can only be viewed as a deeply flawed argument. The floodgates argument can now be characterized as an ancillary argument not usually founded in fact, which implicates a judge's motivations and is necessarily inconsistent from judge to judge.

\textbf{C. Exceptions to the Prohibition}

Although the "floodgates of litigation" argument and its uses are deeply flawed, there are certain situations in which employing the argument is acceptable. If the previous subsection is taken as creating a general rule against using the argument,\textsuperscript{216} then this subsection defines the exceptions to that rule.

These exceptions should be prefaced with an important qualification: simply because the floodgates argument may avoid constitutional or statutory problems in certain circumstances does not mean that the prudential defects identified in the previous section should not caution against using it.

\textbf{1. Emphatically Saying What the Law Is}

The first exception is the vaguest. It states that when a decision calls for the interpretation of a statute, a court may consider the floodgates insofar as avoiding additional litigation would advance the

\textsuperscript{213} For example, if a court authorized an action specific to living Civil War veterans, and there were only five known living Civil War veterans, there would be no likelihood of any flood of litigation.

\textsuperscript{214} See, e.g., Margolis, supra note 10, at 73 ("A slippery slope argument asserts that if the proposed rule is adopted, the court will not be able to prevent its application to an ever broadening set of cases."). For an extensive consideration of that argument, see Eugene Volokh, The Mechanisms of the Slippery Slope, 116 HARV. L. REV. 1026 (2003).

\textsuperscript{215} This is true even if one ignores that what is "too much" antitrust litigation might be an "acceptable" amount of habeas corpus litigation, for example, or vice versa.

\textsuperscript{216} As mentioned, this Comment does not seek to create an anti-floodgates rule. See supra text accompanying notes 150–51.
statutory purpose. For example, the PLRA\textsuperscript{217} sought to reduce the number of "frivolous lawsuits" brought by federal prisoners challenging the conditions of their confinement.\textsuperscript{218} The bill was passed because:

[frivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens. The time and money spent defending these cases are clearly time and money better spent prosecuting violent criminals, fighting illegal drugs, or cracking down on consumer fraud.\textsuperscript{219}]

As such, if a lawsuit required a court to interpret that statute (because it was not clear on its face), precluding a rise in prisoner litigation might legitimately advance the purposes of the PLRA.\textsuperscript{220} Note that this would not be so much an expression of fear for the results of opening the floodgates as it would be a fear of reaching a result that Congress did not intend.\textsuperscript{221}

2. Frustration of the Statute

Related to advancing a statutory purpose is a separate (but related) fear that opening the floodgates of litigation will frustrate the purpose of a statute. An obvious example of this consideration would arise when interpreting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") which was enacted (in part) to reduce the number of habeas corpus petitions winding their way through the federal court system.\textsuperscript{222} In interpreting a question regarding habeas corpus petitions, a court must be especially mindful of the changes that AEDPA made to the federal habeas statutes.\textsuperscript{223}

Thus, if a court is considering how to rule in a particular case, it would be appropriate to \textit{narrowly} interpret a provision affected by the AEDPA changes, as to avoid giving rise to a flood of litigation.


\textsuperscript{218} 141 CONG. REC. S14,413 (1995) (statement of Sen. Dole) ("This legislation is . . . introduced . . . to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners.").

\textsuperscript{219} Id.

\textsuperscript{220} Of course, if the interpretation regarded nonfrivolous litigation, then floodgates concerns might not further the aims underlying the statute. \textit{See supra} text accompanying note 217 (discussing the goals of the PLRA). \textit{See also supra} Part III.A.3 (discussing legislative intent).

\textsuperscript{221} See Christiansen v. Clarke, 147 F.3d 655, 658 (8th Cir. 1998) (noting that, with regard to the PLRA, "[i]t is well settled that Congress has a legitimate interest in deterring meritless prisoner litigation").


\textsuperscript{223} \textit{See CHEMERINSKY, supra} note 152, at 848–49 (discussing AEDPA's narrowing the scope of habeas corpus relief).
Nonetheless, it is important to remember that legislation is rarely the result of a single-minded body; it is most often the result of a series of compromises. These conflicts are not unique to the floodgates realm—they underlie all statutory interpretation. If a judge reviewed a statute and found the text and legislative intent to imply a desire to limit a particular type of litigation, interpreting the statute as to avoid an amount of litigation that would frustrate that intent is not necessarily improper. In any event, as mentioned above, any use of the floodgates argument will suffer several internal flaws, as discussed above in Part III.B.

3. Total Judicial Failure

Imagine that Congress has passed an expansive law nullifying all federal convictions and setting free all incarcerated federal prisoners. Further imagine that Congress says little, if anything, about whether these former prisoners can seek redress from the government in federal court. In considering whether to allow a right of action under the statute, a court properly could (and perhaps should) consider the caseload effects of their decision.

The Court's implied right of action jurisprudence, starting with Touche Ross & Co. v. Redington, requires an inquiry into whether there is a clear legislative intent to create a cause of action under a particular statute. The rationale behind this approach, especially in recent cases, is that Congress now knows that it must be clear in its intent to allow a cause of action in order for the judiciary to recognize it. Nonetheless, even if the legislative history of a bill were silent as to an interest in limiting litigation, it might be fair to assume a desire not to slow the federal courts down to the point at which established causes of action, both civil and criminal, would cease to be handled at a reasonable pace. This situation would differ from a normal floodgates scenario, since it might be presumed that allowing every federal convict to sue would not merely slow down the federal courts, it would bring them to a halt.

It might be objected that such an assumption is unfair. After all, the objector could note, Congress has the power to establish additional lower federal courts, so a judge should not be concerned with slowing the judiciary to a near halt. That is, the separation of powers considerations discussed above should not yield, even in the face of a

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224 Portions of AEDPA itself have been interpreted as the result of legislative compromise. See Larry W. Yackle, A Primer on the New Habeas Corpus Statute, 44 BUFF. L. REV. 381, 422-43 (1996) (describing the debate between opponents and proponents of the legislation).
226 See CHEMERINSKY, supra note 152, at 382 (discussing private right of action cases).
flood of litigation that would quite literally cripple the courts. The objection is not without merit, but this Comment does not take such a strong stand on the issue. It is one thing to argue against an oft-used policy argument, it is quite another to argue that judges may assume that Congress meant to flood the courts with so many suits that even those suits would not be resolved with any speed.

In any event, the argument need not rest solely on congressional intentions. If the previous subsection referred to statutory frustration, then this exception could be considered "constitutional frustration." That is, the Constitution may not give support to the judicial consideration of caseload effects, but Article III surely does not authorize its own demise. Thus, if a particular ruling were to literally grind the federal wheels of justice to a halt, invoking an argument against such a ruling on the grounds that doing so would release an untenable flood of litigation is acceptable.

To be sure, there is notable disagreement over exactly what Article III means with respect to establishing federal courts. Nonetheless, this exception to the floodgates rule is valid independently of various scholarly interpretations of Article III. The Constitution declares that "[t]he judicial power of the United States shall be vested in one supreme Court." Whether Congress were to establish lower federal courts or not, surely the Framers did not intend to vest a power in a Court only to have it be burdened to the point at which it could no longer execute that power.

This exception, in the paradigmatic situation, avoids some of the "common sense" problems with floodgates arguments. For example, if a ruling were literally to grind the courts to a halt, such a result would likely be apparent (and thus not in need of empirical proof). Similarly, the dangers of inconsistency among judges would be alleviated because such a situation would be so obvious that one would expect nearly every judge to recognize it. Finally, in such a situation, the floodgates argument might serve as a court's holding (as opposed to being ancillary to another holding).

That this exception avoids some of the prudential problems discussed earlier is desirable, since the exception would seem as constitutionally necessary as the anti-floodgates rule itself. Implicit in Article III is the assumption that the federal courts will actually

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227 See supra Part III.A.
228 See generally CHEMERINSKY, supra note 152, at 191–207 (reviewing several interpretations of the congressional power to establish lower federal courts under Article III).
229 U.S. CONST. art. III, § 1.
230 The circuit courts of appeals were established at a time when "[t]he Supreme Court docket got beyond control," and reached "the absurd total of 1800 [cases per year]." FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 86 (1927).
231 See supra Part III.B.
function—if a ruling could potentially freeze litigation across the country, considering what the Constitution says about such a result is never undesirable.

With the wrong intentions, though, this exception easily could be abused—a judge could overstate the dangers of litigation or simply use a faux-floodgates argument as pretext for some other endeavor. Nonetheless, the ability for abuse, in the abstract, is no reason to reject the exception.

4. Caretaking and the Floodgates

It is permissible for a court to rule based on the potential caseload effects of a decision when the chief consideration regarding the potential caseload rise is focused on something (or someone) other than the courts. For example, in Nixon v. Fitzgerald, the Supreme Court held that the President of the United States enjoyed absolute immunity from suits for money damages for acts committed while carrying out the duties of the presidency. One rationale behind this grant of immunity (and other grants of immunity from suits under 28 U.S.C. § 1983) is that if anyone were allowed to sue the President for his actions in office, then he would be so involved with defending himself that he could not as effectively act as President.

This consideration is not so much one of the floodgates, but rather an acceptable use of caseload considerations. That is, the fear is not that a flood of litigation will drown the courts and make them inefficient or ineffective, but rather that a rash of lawsuits would compromise the effectiveness of another branch of government. Nevertheless, the considerations involved in such a determination suffer from some of the same prudential flaws as any other use of the floodgates, namely the failure of judges to properly substantiate claims about the potential flood of litigation.

5. Are the Floodgates Tolerable When All Else Fails?

The final exception comes from Judge Posner's three versions of his consideration of judicial restraint. Posner claims that judges

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233 Id. at 751–54; see also CHEMERINSKY, supra note 152, at 511; FALLON ET AL., supra note 152, at 1171.
234 See CHEMERINSKY, supra note 152, at 511 (noting that "the Court emphasized the likelihood of frequent suits as a justification" for the grant of immunity).
235 But see Clinton v. Jones, 520 U.S. 681 (1997) (refusing to extend Nixon to civil suits filed against a sitting President arising out of actions taken outside of his official capacity).
236 See supra Part III.B (discussing prudential flaws in the floodgates argument).
237 See supra Part II.D.
can and should consider caseload implications in procedural and jurisdictional matters when "the answer is not dictated by precedent." Posner's view is that when a court is forced to rule despite a complete lack of guidance from precedent, the statutes at issue, or the Constitution, a judge may turn to more practical considerations.

This exception is the most cautiously accepted of the five—no matter how little precedent on a matter, the Constitution will always be a guide and thus the Article III considerations and criticisms in discussed in Part III.A above apply here. What sets this situation apart as an exception is that if there is a true lack of guidance on a question, then constitutional principles do not necessarily act as a guide (although one might argue that they always inform the discussion). Thus, the criticism that the Constitution in no way mandates considering the floodgates argument in a "normal" judging situation is negated by the Constitution's lack of any positive guidance on the matter (other than to stay within the bounds of the Constitution and its amendments).

This is far from a controversial premise: if a judge truly has no guidance, then that judge has extremely wide latitude in which to work.

IV. THE RULE AND EXCEPTIONS IN ACTION AT THE MARGINS: APPRENDI AND RETROACTIVITY FOR COLLATERAL REVIEW

 Armed with the above rule and its exceptions, this Comment concludes with a real-life example of how a more thorny case might play out. This Part considers how the arguments from the previous Part would apply to the question of whether the Supreme Court's decision in Apprendi v. New Jersey should be applied retroactively on collateral review. The reader should note that the following analysis focuses on the propriety of using the floodgates argument in a particular situation, not on the substantive law at hand in that situation. More specifi-

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238 POSNER, supra note 1, at 315.
239 Id.
240 See supra Part III.A.
241 One of the limitations of this exception is that whether there is guidance on a particular question is a matter of opinion subject to genuine debate. It is difficult to imagine a situation in which there is truly no constitutional or statutory guidance on a matter. For example, in one recent case, the Supreme Court dealt with statutory interpretation difficulties by making inferences from other statutes. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143-59 (2000) (looking to congressional statutes regulating tobacco when considering whether the Food, Drug and Cosmetic Act gave the FDA jurisdiction to regulate cigarettes and other tobacco products). A true lack of guidance, should it exist, is certainly more likely in the procedural and administrative cases Posner describes. See supra text accompanying notes 238-39.
242 See supra Part III.A.2.
cally, this section deals with a question of law that will likely remain settled unless the Supreme Court decides it wants to reconsider the issue.

A. The Issue

1. Background: Apprendi

In *Apprendi*, the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” This holding constituted a drastic change in criminal sentencing procedure, as judges had previously been entrusted to depart beyond the maximum sentence prescribed in the relevant statute. In dissent, Justice O'Connor characterized the decision as “a watershed change in constitutional law.”

Soon after *Apprendi*, courts began to hear cases in which prisoners challenged their pre-Apprendi sentences, arguing that *Apprendi* should be applied retroactively on collateral review. These challenges were unsuccessful; as Justice Thomas noted in dissent in *Harris v. United States*, “No Court of Appeals, let alone this Court, has held that *Apprendi* has retroactive effect.”

Justice Thomas’s observation remains true today, as every federal court of appeals (except the Federal Circuit, which does not hear such cases) has held that *Apprendi* does not apply retroactively on collateral review. While some district courts have held that *Apprendi* is

244 That the question of *Apprendi*’s retroactivity has a relatively straightforward resolution, see cases cited infra at note 250, makes it particularly useful for this analysis. As discussed supra in Part III-B, the floodgates argument is usually ancillary to the central holdings of cases in which it is involved. Here, the argument also would be ancillary, but would not necessarily be without factual basis.

245 Id. at 490.


247 Collateral review of convictions or sentences infected with constitutional errors may be brought in federal court through a writ of habeas corpus. See generally CHEMERINSKY, supra note 152, at 837–49.


249 Id. at 581 (Thomas, J., dissenting).

in fact retroactively applicable on collateral review,\textsuperscript{251} barring a Supreme Court reversal of the eleven courts of appeals to consider the issue, nonretroactivity will remain the settled interpretation.

\section*{2. A (Mostly) Straightforward Analysis}

Although the focus of this section is on the applicability of the floodgates argument to the question of whether \textit{Apprendi} should be applied retroactively on collateral review, a basic review of the relevant analysis is useful. A court faced with the question of whether a prisoner should be granted habeas corpus relief on the basis of a new constitutional rule\textsuperscript{252} must employ the analytical framework delineated in \textit{Teague v. Lane}.\textsuperscript{253} Although AEDPA made many changes to the habeas corpus statutes,\textsuperscript{254} \textit{Teague} still controls the question of retroactivity in an initial habeas petition.\textsuperscript{255}

In \textit{Teague}, a plurality of the Court\textsuperscript{256} created a framework for deciding whether to allow a habeas petitioner to prevail based on a new

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\textsuperscript{252} It is assumed in this section that the habeas corpus petition is the prisoner's first. To succeed on a second or successive motion for habeas corpus relief based on a new rule, a prisoner must show that his claim is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255 (2000). The Court recently interpreted "made" in that clause to mean "held," such that the Supreme Court must have held that a case should be applied retroactively for a prisoner to avail himself of that language. Tyler v. Cain, 533 U.S. 656, 662 (2001) ("[T]he requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review."). Although courts use the floodgates argument in an ancillary manner, see supra Part III.B.2, \textit{Apprendi} (nor any subsequent Supreme Court case) did not hold its rule to be retroactively applicable on collateral review. Under \textit{Tyler}, this makes the second or successive petition question not ripe for the floodgates argument. That is, it is too clear a result.

\textsuperscript{253} 489 U.S. 288 (1989) (plurality opinion); cf. \textit{Tyler}, 533 U.S. at 665-67 (considering \textit{Teague} as applied to a second or successive habeas petition).

\textsuperscript{254} See, e.g., Yackle, supra note 224, at 381-422 (discussing AEDPA's effect on habeas statutes).

\textsuperscript{255} See \textit{Mora}, 293 F.3d at 1218 ("Initial habeas petitions based upon a new rule of constitutional law are not guided by the gatekeeping language of AEDPA, but rather are guided by the framework established by the Supreme Court in \textit{Teague v. Lane}"). (citations omitted).

\textsuperscript{256} "Although only four justices fully embraced the \textit{Teague} plurality opinion at the time it was handed down, it is now accorded the full precedential weight of a majority opinion." Jones v. Smith, 231 F.3d 1227, 1236 n.5 (9th Cir. 2000); \textit{see also id.} (citing Caspari v. Bohlen, 510 U.S. 383, 389-90 (1994); Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (supporting the proposition that \textit{Teague}'s plurality opinion is given full precedential weight)).
constitutional rule.\textsuperscript{257} The Teague framework creates two exceptions to a general rule of nonretroactivity.\textsuperscript{258}

The first exception allows for retroactive application of a new rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."\textsuperscript{259} That is, a judicial pronouncement that certain activities cannot (constitutionally) be criminalized will be applied retroactively. This exception is inapplicable to Apprendi, which constrained only New Jersey's sentencing system, not its power to criminalize certain conduct.\textsuperscript{260}

The second Teague exception applies when a new rule "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty."\textsuperscript{261} Thus, a case will be retroactive if it contains a "watershed" rule that "implicate[s] the fundamental fairness of the trial."\textsuperscript{262} To qualify as a "watershed" rule, the new rule must "alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding."\textsuperscript{263}

Although these terms are not unambiguous, the circuit courts of appeals have applied this prong uniformly to find Apprendi inapplicable to collateral review.\textsuperscript{264} While most courts recognize Justice O'Connor's observation, dissenting in Apprendi, that the majority's decision in that case represented a "watershed change in constitutional law,"\textsuperscript{265} they nonetheless find that its rule does not rise to the levels that Teague's second exception demands.\textsuperscript{266}

This analysis, over which the circuit courts are in agreement,\textsuperscript{267} is likely correct.

3. Whither the Floodgates?

Ironically, while the basis for the courts of appeals's decisions was relatively straightforward,\textsuperscript{268} none of those courts invoked the flood-

\textsuperscript{257} Teague, 489 U.S. at 310–13.
\textsuperscript{258} Id.
\textsuperscript{259} Id. at 307 (internal quotations omitted).
\textsuperscript{260} See Apprendi, 530 U.S. at 474 (describing the "constitutional question" in terms of Apprendi's sentence).
\textsuperscript{261} Teague, 489 U.S. at 307 (internal quotations omitted).
\textsuperscript{262} Id. at 312.
\textsuperscript{264} See supra note 250 and accompanying text.
\textsuperscript{265} Apprendi, 530 U.S. at 524 (O'Connor, J., dissenting).
\textsuperscript{266} See, e.g., United States v. Mora, 293 F.3d 1213, 1219 (10th Cir. 2002) (finding that Apprendi's "rule is clearly not on the same level as a truly landmark decision").
\textsuperscript{267} See supra note 250 (citing circuit court decisions that have mentioned the likely nonretroactive nature of collateral review in Apprendi).
gates argument even though a contrary decision would likely have led to thousands of lawsuits.269

It might be questioned why the floodgates argument would be used in such a case in the first place, given that the applicable analysis and its resolution thereof are relatively straightforward.270 But this is precisely the message of Part III.B.2 above, namely that the floodgates argument invariably is ancillary to otherwise complete legal reasoning. Given the obvious caseload implications of a finding of Apprendi’s retroactivity,271 and given the straightforward application of Teague to Apprendi’s potential retroactivity,272 the lack of any floodgates arguments is surprising.

For example, in United States v. Mack,273 a Third Circuit case that predates that circuit’s rejection of a retroactive Apprendi claim,274 Chief Judge Becker, concurring, expressed a fear that “the number of Apprendi challenges by incarcerated defendants will soon reach tidal proportions.”275 Becker further noted that “[f]ederal courts . . . will no doubt soon be required to grapple with the question whether Apprendi applies retroactively on collateral review.”276 It is certainly noteworthy that this appears to be the lone circuit case to consider the flood of litigation that might follow from a ruling of nonretroactivity.

Nonetheless, Becker is not alone. In Jackson v. United States,277 the District Court for the Eastern District of Michigan held Apprendi to be retroactive on collateral review.278 In his first footnote, Judge Paul Gadola noted:

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268 See supra Part IV.A.2. The arguments in favor of retroactivity, however, do not lack merit. See supra note 252 and accompanying text; see also Coleman v. United States, 329 F.3d 77, 90–93 (2d Cir. 2003) (concurring opinion) (arguing that Apprendi was a substantive (and not procedural) change in the law and as such is presumptively retroactive on collateral review). This section is concerned only with the potential floodgates arguments, not the merits of Apprendi’s potential retroactivity on collateral review.

269 In the twelve-month period ending March 31, 2001, almost 4,000 habeas corpus petitions had been filed in the U.S. district courts. Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, tbl.C-3 (2001), available at https://www.uscourts.gov/caseload2001/contents.html (Mar. 31, 2002). While the number of those that would be eligible to challenge on Apprendi grounds is unclear, it does not seem unreasonable to assume that most prisoners sentenced according to the U.S. Sentencing Guidelines, or similar state sentencing schemes, would at least try for one bite at the apple.

270 See supra Part IV.A.2.

271 See supra note 269 and accompanying text.

272 See supra Part IV.A.2.


274 See In re Turner, 267 F.3d 225, 227 (3d Cir. 2001) (holding that Apprendi has not been "made retroactive to cases on collateral review by the Supreme Court").

275 Mack, 229 F.3d at 236 (Becker, C.J., concurring).

276 Id. at 236 n.1.


278 Id. at 1059.
The Court is ruefully aware that, as Justice O'Connor forecast in her dissent in *Apprendi*, federal courts may now face a "flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of" *Apprendi*. But the Court cannot help this situation because the Court's function is to interpret a statute as Congress intended it to be, and not as the Court might prefer it to be. To the extent that the statute is ailing, Congress possesses the sole remedy.79

Thus while the courts of appeals that set their circuits' precedents on the matter were not moved enough to discuss the floodgates,260 other courts openly considered that issue.

Regardless of what the courts actually held, the floodgates argument invariably is an ancillary consideration.261 Discussing *Apprendi*'s potential retroactivity is useful because it demonstrates the rule delineated above and its exceptions.262

B. Applying the "Rule"

Application of the principles explained in Part III above to the example of *Apprendi*'s retroactivity is not a simple task. The analysis in this section will assume that an appellate judge is considering whether or not the floodgates argument should be used in support of his or her other legal conclusions.

There are essentially three competing factors in this inquiry. The first is *Teague*,283 the Supreme Court case that governs whether a particular rule will be applied retroactively on collateral review.284 The second is AEDPA, which was an expansive reduction in the availability of habeas corpus review.285 AEDPA "essentially codifies" *Teague*,286 except for *Teague*'s exceptions to its own rule, which are the only relevant sections here. AEDPA is considered in this section because it is the result of a congressional desire to limit habeas corpus litigation in the federal courts.287 Third, the writ of habeas corpus is implicated.288

279 Id. at 1059 n.1 (citations omitted).
280 See supra text accompanying notes 268-69 (noting that none of the circuit court cases denying retroactive application of *Apprendi* made a floodgates argument). It is certainly possible, if not likely, that a concern over the possibility of a wave of prisoner suits was an unstated motivation for some of the courts ruling on the matter.
281 See supra Part III.B.2.
282 See supra Part III.C.
284 See also *Tyler* v. Cain, 533 U.S. 656, 662 (2001) (holding that new rules of constitutional law must be made explicitly retroactive before they may be raised in successive habeas petitions). *Tyler*, which only some of the courts of appeals considered in barring retroactive consideration of *Apprendi*, further restricts the *Teague* framework.
286 See CHEMERINSKY, supra note 152, at 880-81.
287 See supra text accompanying note 222.
This is notable because, after all, the "Great Writ" encourages litigation.

1. Article III Frustration

The first theory under which one might avoid the constitutional/statutory problems with the floodgates argument would be the aforementioned "total judicial failure." Under this theory, the floodgates argument would be acceptable because allowing Apprendi to be applied retroactively on collateral review would unleash a flood of litigation so immense that the courts would literally cease to function properly. It is unmistakably correct that such a decision would lead to court congestion, either through new lawsuits or appeals. While it is unclear how much litigation would ensue, it is difficult to imagine that it would truly bring the level of the courts' functioning below that envisioned in Article III.

2. The Statutory/Case Law Question

The second consideration is far more interesting and nuanced. The purpose of AEDPA was to streamline the crowded process of habeas litigation and give the federal courts some relief, and keeping the floodgates closed would promote that purpose. Furthermore, allowing habeas litigation to flood the courts might arguably frustrate AEDPA's statutory purpose.

Similarly, Teague limits habeas litigation through its restrictive view of the availability of retroactive relief for new rules of constitutional law on collateral review. While Teague is not itself statutory law, it is the governing case regarding the retroactive applicability of new rules on habeas review.

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See, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES *131 (detailing historical development of the "Great Writ").

Of course, the writ of habeas corpus does not itself actively encourage litigation. Rather, it encourages litigation in the sense that it provides a mechanism for vindicating personal rights through litigation.

See supra Part III.C.3.

See id. The habeas corpus statute's timing provisions necessarily limit the number of first-time habeas petitioners who might take advantage of a retroactive application of Apprendi. See 28 U.S.C. § 2244(d) (delineating a one-year statute of limitations for new habeas petitions).

See supra text accompanying note 222.

But see supra notes 222–24 and accompanying text (discussing restrictions on inferences of AEDPA's statutory purpose).

See CHEMERINSKY, supra note 152, at 872–73 (describing Teague as a case that "substantially limits the ability of federal courts to hear constitutional claims raised in habeas corpus petitions").
Finally, there is the writ of habeas corpus itself. There cannot be any conclusion but that its purpose encourages litigation, creating a cause of action to attack constitutionally flawed convictions post hoc.

So, then, how do the statute-based exceptions described above in Parts III.C.1 and III.C.2 apply to this case? The underlying cause of action, the writ of habeas corpus, encourages litigation to remedy constitutional violations. This fact counsels in favor of allowing litigation to remedy a prison sentence that was in violation of the constitutional principles recognized in *Apprendi*.

On the other hand, AEDPA is Congress's latest word on the matter. The Suspension Clause of the Constitution mandates that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it," which includes no mention of preserving the writ as it was in the Framers' days. As such, there should be no bar to considering any AEDPA adjustments as superceding authority over any previous version of the habeas statutes.

Nonetheless, while AEDPA codifies *Teague's* restrictive view of retroactivity, it is silent on *Teague's* exceptions to its rule. There is thus a legitimate question as to whether AEDPA's purported statutory purpose should even bear on this question, which would seem to involve a construction of *Teague's* exceptions, not the sections that AEDPA adopted.

In the end, the uncertainty regarding what statutory intent, if any, would guide the decision of whether or not to use the floodgates argument is simply too great a concern. That some scholars have concluded that AEDPA was the result of legislative compromise only exacerbates this uncertainty. If that inherent uncertainty is considered alongside the other flaws in the floodgates argument, it would seem imprudent to raise the argument in such a situation.

It would be nice to imagine that the judges in the court of appeals cases were guided by the same logic, and ultimately decided against invoking this flawed argument. Unfortunately, though, it is likely that the absence of the floodgates argument in the cases holding that *Apprendi* is not retroactively applicable to collateral review is more by coincidence than by design.

**CONCLUSION**

Judge Posner undoubtedly was correct in noting that the question of whether judges should consider caseload when deciding cases is

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296 U.S. CONST. art. I, § 9, cl. 2.  
297 See supra note 224.  
298 See supra note 250.
"of some moment" because of the high caseload levels in the federal
courts. In arguing that the "floodgates of litigation" argument has
few valid uses, I have not ignored the fact that the federal courts are
quite busy. Nonetheless, I have tried to create a compelling case
against using the fear of the floodgates of litigation in judicial opin-
ions as a remedy for the caseload problem. The argument is too
flawed to continue to be used in the judicial opinions of the federal
courts. The pragmatic uncertainties and inconsistencies, separation
of powers problems, and shaky (and in most cases, absent) statutory
basis combine to outweigh any beneficial effect the argument might
have.

Furthermore, the floodgates argument is almost always ancillary to
the central holding in a case. When judges invoke the floodgates
argument and its ilk, they needlessly chip away at the reliability and
strength of their other arguments.

I am keenly aware that while I seek to remove one tool of judicial
economy from the realm of judging, I offer no solution or palliative in its stead. To offer a solution to the federal caseload problem
would be beyond the scope of this Comment. Judge Posner dis-
cusses several in The Federal Courts—specialized courts, eliminating or
limiting diversity jurisdiction, increased reliance on alternative dis-
pute resolution, and adding more judges. The problem, of course,
is that even Judge Posner recognizes the limitations of his palliatives,
and he offers persuasive criticisms of each. While I am not fully
persuaded by Posner's main offering, so-called "structural re-
straint," it certainly seems to be a step in the right direction.

While I agree with Posner that "we cannot predict future [caseload] growth with any confidence," I have come to agree with
Professor Keeton that "[i]t is the business of the law to remedy
wrongs that deserve it, even at the expense of a 'flood of litigation.'"
Whether the caseload grows, remains level, or declines, arguments that a court is bound to rule lest the floodgates of litigation be opened should be discounted and mostly, if not entirely, abandoned.