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FRIVOLOUS CASES

*Suja A. Thomas**

INTRODUCTION

The problem of “frivolous cases” is invoked a lot. Although this term is used in the context of Rule 11 of the Federal Rules of Civil Procedure, it is also used to justify many procedural and substantive changes to the law. For example, concern about frivolous cases is invoked when explaining the need for procedures such as summary judgment, motions to dismiss, heightened pleading, and caps, as well as when referring to substantive areas such as prisoner cases and employment discrimination cases.

Cost, of course, is the worthy concern that underlies the use of the term “frivolous cases.” This Symposium Article argues, however, that an actual discussion regarding costs and also the relationship of costs to other important rights—such as the constitutional right to a jury trial—tends not to occur when the term “frivolous cases” is invoked. As a result, this Article reasons that the term “frivolous cases” should be discarded and replaced with a substantive discussion of costs and constitutional rights.

Part II argues that the term “frivolous cases” has been used prevalently to justify significant legal changes. Part III discusses the reasons for the focus on frivolous cases and then asserts that the term itself has tended to mask consequential changes. It contends that changes justified in terms of frivolousness largely have not been examined carefully, including to address the cost issue and to ensure the constitutional integrity of the changes with respect to the Seventh Amendment jury trial right. This Article concludes that the term “frivolous cases” itself should be retired and substituted for a substantive discussion of important interests, including costs and their relationship to the constitutional right to a jury trial.

* Professor of Law and Mildred Van Voorhis Jones Faculty Scholar, University of Illinois College of Law. Thanks to Meaghan Bayer, a University of Illinois College of Law student, for excellent work on this topic. I am grateful for discussions with and the comments of the following: Paul Caron, James Pfander, Michael Moore, Margo Schlanger, Nicola Sharpe, Michael Solimine, and Larry Solum. Thanks also to participants at the 15th Annual Clifford Symposium and the University of Illinois College of Law faculty retreat.

II. THE PREVALENT USE OF THE TERM “FRIVOLOUS CASES”

It seems that everyone is against frivolous cases. How can you not be? Frivolous is frivolous. It's bad. And frivolous cases seem to abound. But as much as everyone seems to be against frivolous cases and frivolous cases seem to be everywhere,¹ disagreement exists on what exactly constitutes a frivolous case.² It has been said though, borrowing from another area of law, that one knows it when one sees it.³ One type of litigation that many think of as involving frivolity is prisoner cases filed under 42 U.S.C. § 1983.⁴ Others think of the employment discrimination cases that fill the federal docket.⁵ Such so-called frivolous cases are a significant incentive for reform efforts by Congress and the courts.⁶ This Part discusses some of the major ef-

1. See, e.g., Nathan Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J., Feb. 19, 2009, at A16 (quoting a lawyer who stated that “[c]ases that aren't settled . . . often are frivolous and should be dismissed”); Editorial, *Obama's Malpractice Gesture*, WALL ST. J., June 16, 2009, at A14 (referring to the prevalence of “frivolous suits”).

2. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PENN. L. REV. 519, 520 (1996) (“We have no . . . common agreement on what constitutes a ‘frivolous suit.’”); see also Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 378 (1986) (stating that it is difficult to distinguish between “weak” and “frivolous” cases); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 449–50 (2004) (giving examples of public, judicial, and jury disagreement over what is frivolous). A similar argument to the one made in this Article has been made regarding the term judicial activism. See Robert Justin Lipkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181 (2008).

3. See Robert Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 705 (1972) (“Frivolousness, like madness and obscenity, is more readily recognized than cogently defined.”); see also William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1016 (1988) (“Although the standard that governs attorneys' conduct is objective reasonableness, what a judge will find to be objectively unreasonable is very much a matter of that judge's subjective determination.”); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 94 (1996) (“[C]laims which appear frivolous and baseless in the eyes of one judge may seem respectable losers to others.”).

4. See Stephen W. Miller, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 930–31 (2009) (citing Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520–22 (1996)).

5. See Amanda Sue Nichols, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177, 2193 (2008); cf. Gerald E. Calvasina, Richard V. Calvasina & Eugene J. Calvasina, *Frivolous Employment Discrimination Litigation: Myth or Reality?*, 6 J. LEGAL, ETHICAL & REG. ISSUES 27 (2003) (concluding that it is a myth).

6. Bone, *supra* note 2, at 521–22 (discussing changes to pleading, Rule 11, and summary judgment requirements as well as the enactment of the Private Securities Litigation Reform Act and the Prison Litigation Reform Act); Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court's 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUP. CT. ECON. REV. 93, 98–100 (1993) (discussing the procedural response to the perceived, real or not, explosion of frivolous cases). Judge Jack Weinstein has stated,

[F]rivolous litigation has been reduced in actual and relative numbers because of: 1. The expense; 2. Expanded and more efficient discovery, which usually makes clear who

forts that have been explicitly described as ways by which courts can eliminate frivolous cases.

A. Summary Judgment

The Supreme Court has emphasized the relationship between summary judgment and the elimination of frivolous cases, stating that “to the extent the litigation is frivolous, . . . ‘the plaintiff can be hastened from [the] court by summary judgment.’”⁷ Under summary judgment, a court may dismiss a case before trial if the court determines that “there is no genuine issue as to any material fact.”⁸ The standard established in the trilogy of Supreme Court cases on summary judgment⁹ in 1986 arguably made it easier to dismiss cases upon summary judgment.¹⁰ Under that standard, a case can be dismissed if a “reasonable jury could [not find] for the nonmoving party.”¹¹ Courts have used summary judgment to dismiss many cases, including factually in-

should win and, if recovery is appropriate, how much it should be; 3. The frequent resolution by administrative agencies of many matters (e.g., SEC and consumer safety) in which they can impose fines; 4. Maturation of the law in many legal fields, enabling attorneys to settle more rapidly because they understand what cases are worth due to availability of information about other cases and the development of specialized bars; 5. Compulsory non-judicial settlement procedures to deflect cases from the courts (e.g., employment and brokerage arbitration agreements); and court-attached mediation and arbitration services; 6. The reluctance, particularly of appellate courts, to allow juries to decide cases—as demonstrated through much increased use of summary judgment, *Daubert*-based motions to dismiss, and reversal of rulings for plaintiffs on appeal; and 7. The increased difficulty of sustaining a complaint in some fields because of, for example, specialized pleading requirements, as in fraud and security cases.

Jack B. Weinstein, *The Role of Judges in a Government, of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 *CARDOZO L. REV.* 1, 104–05 (2008). Judge Weinstein has also stated, “Procedural devices including motions to dismiss and summary judgment already function . . . too vigorously—as screening devices for frivolous and improvable claims.” *Id.* at 72. “It is now harder for a plaintiff to enter the courts because of increased pleading burdens; extensive use of summary judgment to take cases from juries; increased use of restrictive statutes of limitations; and expansion of immunity, qualified immunity and executive and other privileges.” *Id.* at 105.

7. *Kleppe v. Sierra Club*, 427 U.S. 390, 422 (1976) (quoting *Barlow v. Collins*, 397 U.S. 159, 175 n.10 (1970)); see also Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 *VA. L. REV.* 1849 (2004) (discussing the problem of frivolous cases and advocating mandatory summary judgment such that settlements can occur only after summary judgment review); Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 *Nw. U. L. REV.* 1667, 1684 (2008) (noting that summary judgment, among other methods, is used by courts to dispose of supposed frivolous civil rights claims).

8. *FED. R. CIV. P.* 56(c).

9. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

10. See Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 *MINN. L. REV.* 1851, 1856 (2008).

11. *Anderson*, 477 U.S. at 248.

tensive cases such as the employment discrimination cases that occupy a large part of the federal docket.¹²

B. Motions to Dismiss

The Supreme Court has also invoked the term “frivolous cases” when referring to motions to dismiss. The Court has stated that “[m]ost frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment.”¹³ Under a motion to dismiss, a court can dismiss a case that “fail[s] to state a claim upon which relief can be granted.”¹⁴ Until recently, cases were rarely dismissed upon a motion to dismiss.¹⁵ The standard to dismiss a case centered upon whether “the plaintiff [could] prove no set of facts in support of [the] claim which would have entitled [the plaintiff] to relief.”¹⁶ Under the new standard established in 2007 in *Bell Atlantic v. Twombly*,¹⁷ and interpreted again recently in *Ashcroft v. Iqbal*,¹⁸ a case can be dismissed more easily.¹⁹ A court can dismiss a claim if it is found not “plausible.”²⁰ Under this standard, courts have used the motion to dismiss much more often in order to dispose of cases, including factually intensive employment discrimination cases that occupy a large part of the federal docket.²¹

12. See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 141 n.5 (2007).

13. *Clinton v. Jones*, 520 U.S. 681, 708 (1997); see also Elizabeth Chamblee Burch, *Securities Class Actions As Pragmatic Ex-Post Regulation*, 43 GA. L. REV. 63, 78–79 (2008) (mentioning Rules 11, 12, and 56 as solutions for frivolous cases).

14. FED. R. CIV. P. 12(b)(6).

15. See Thomas, *supra* note 10, at 1851. But see Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 599 (2010) (suggesting, through empirical evidence, that courts granted motions to dismiss much more often than was thought under *Conley v. Gibson*, 355 U.S. 41 (1957)).

16. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

17. *Bell Atl. v. Twombly*, 550 U.S. 544 (2007).

18. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

19. See Thomas, *supra* note 10, at 1851.

20. *Twombly*, 550 U.S. at 556.

21. See Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1026–41; see also Jess Bravin, *New Look at Election Spending Looms in September*, WALL ST. J., July 1, 2009, at A8 (quoting Tom Goldstein, founder of SCOTUSblog, who stated that *Iqbal* will “be the most cited Supreme Court case in a decade,” and also quoting Richard Samp of the Washington Legal Foundation, who stated that the Court responded with *Iqbal* because “[t]he court is sort of fed up with excesses in the tort system and is looking for ways to try to eliminate frivolous lawsuits”).

C. Caps on Damages

Damages caps are also said to be a response to the filing of frivolous lawsuits.²² As one example, Congress has enacted caps to limit the compensatory and punitive damages available to a plaintiff in a Title VII employment discrimination suit.²³ In discussing the caps in Title VII cases, the Second Circuit stated that “the purpose of the cap is to deter frivolous lawsuits and protect employers from financial ruin as a result of unusually large awards.”²⁴ Thus, a plaintiff who seeks to bring a frivolous case may not bring it if the damages that he may recover are limited.²⁵

D. Prison Litigation Reform Act

Another response to frivolous cases has been the Prison Litigation Reform Act (PLRA).²⁶ Congress enacted the PLRA to curb frivolous litigation brought by prisoners.²⁷ In its discussion of the necessity of the PLRA, the Supreme Court stated that “[i]n 2005, nearly 10 percent of all civil cases filed in federal courts nationwide were prisoner

22. See David A. Hyman et al., *Estimating the Effect of Damages Caps in Medical Malpractice Cases: Evidence from Texas*, 1 J. LEGAL ANAL. 355, 356 (2009) (“[C]aps on non-economic damages . . . are a silver bullet . . . simultaneously targeting frivolous lawsuits, excessive damage awards, run-away juries, and high medical malpractice premiums.”); Jonathon Klick & Catherine M. Sharkey, *What Drives the Passage of Damages Caps?*, (Feb. 13, 2009) (unpublished manuscript), <http://ssrn.com/abstract=1342535> (referring to state statutory caps being driven by frivolous cases); see also Anita Bernstein, *Complaints*, 32 McGEORGE L. REV. 37, 44 (2000) (discussing reforms, such as caps on damages and arguing “that suppression of complaints is an important motive for their enactment”).

23. 42 U.S.C. 1981a(b)(3) (2006).

24. *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997); see also *EEOC v. CEC Entm’t, Inc.*, No. 98-C-698-X, 2000 WL 1339288, at *21 (W.D. Wis. Mar. 14, 2000).

25. See *Luciano*, 110 F.3d at 221; see also Klick & Sharkey, *supra* note 22.

26. Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321, 1321-66 to 1321-77 (1996).

27. Justice Lewis Powell has stated that

[a]lthough most of these cases [brought by state prisoners in federal court under § 1983] present frivolous claims, many are litigated through the courts of appeals to this Court. The burden on the system fairly can be described as enormous with few, if any, benefits that would not be available in meritorious cases if exhaustion of appropriate state administrative remedies were required prior to any federal-court litigation. It was primarily this problem that prompted enactment of § 1997e.

Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 535 (1982) (Powell, J., dissenting); see also *Riley v. Kurtz*, 361 F.3d 906, 917 (6th Cir. 2004) (“One of Congress’ purposes in passing the PLRA was to reduce the large number of frivolous prisoner lawsuits being filed in federal courts.”). In a 1998 opinion that involved a prisoner claim, Justice John Paul Stevens referred to “plainly frivolous” cases that “may [have been] motivated more by a desire to obtain a ‘holiday in court,’ than by a realistic expectation of tangible relief.” *Crawford-El v. Britton*, 523 U.S. 574, 596 (1998). For an interesting analysis of a proposed change to ensure that meritorious prisoner suits are not dismissed, see *Miller*, *supra* note 4.

complaints challenging prison conditions or claiming civil rights violations.”²⁸

Under the PLRA, a court can dismiss prisoner cases that it deems “frivolous.”²⁹ This provision supplemented the already existing prerogative of courts to dismiss frivolous cases filed *in forma pauperis*.³⁰ The PLRA states that

[t]he court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is *frivolous*, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.³¹

In addition to establishing separate dismissal standards, the PLRA attempts to eliminate frivolous cases by requiring prisoners to go through an internal administrative process before filing a lawsuit.³²

E. Private Securities Litigation Reform Act

Another congressional enactment to curb frivolous lawsuits is the Private Securities Litigation Reform Act (PSLRA).³³ Under the

28. *Jones v. Bock*, 549 U.S. 199, 203 (2007) (citing a report of the Administrative Office of the United States Courts). In 2007, all civil rights and prison condition petitions brought by prisoners composed nine percent of the total filings on the federal docket. JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 145–46 tbl.C-2 (2007), available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>.

29. 42 U.S.C. § 1997e(c) (2006).

30. The federal *in forma pauperis* statute provides that “the court shall dismiss the case at any time the court determines . . . the action or appeal is frivolous or malicious.” 28 U.S.C. § 1915(e)(2)(B)(i) (2006). In the context of *in forma pauperis*, the Supreme Court has stated more generally that a frivolous claim “[l]acks an arguable basis in law or in fact.” *Denton v. Hernandez*, 504 U.S. 25, 31 (1992). The Court has also stated that “a court may dismiss a claim as factually frivolous only if the facts alleged are ‘clearly baseless,’ . . . a category encompassing allegations that are ‘fanciful,’ . . . ‘fantastic,’ . . . and ‘delusional.’” *Id.* at 32–33 (quoting *Neitzke v. Williams*, 490 U.S. 319, 325, 327–28 (1992)). In *Neitzke*, the Court distinguished between cases that fail to state a claim and those that are frivolous under the *in forma pauperis* statute. *See Neitzke*, 490 U.S. at 325–31. In some circumstances, a case that fails to state a claim may not necessarily be frivolous. *See id.* The term frivolous cases also comes up in the context of attorney’s fees in civil rights cases. The Eleventh Circuit has stated that “[a]lthough attorney’s fees are typically awarded to successful Title VII plaintiffs as a matter of course, prevailing defendants may receive attorney’s fees only when the plaintiff’s case is ‘frivolous, unreasonable, or without foundation.’” *Quintana v. Jenne*, 414 F.3d 1306, 1309 (11th Cir. 2005) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)); *accord Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624 (6th Cir. 2009).

31. 42 U.S.C. § 1997e(c)(1) (2006) (emphasis added).

32. *See* § 1997e(a).

33. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); *see also* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (interpreting the scienter pleading requirement of the PSLRA).

PSLRA, to survive a motion to dismiss, in a securities fraud complaint, a plaintiff must have pled misleading statements with “particularity” and pled “a strong inference” of scienter.³⁴ The PSLRA also “limit[s] recoverable damages and attorney’s fees, provide[s] a ‘safe harbor’ for forward-looking statements, impose[s] new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate[s] imposition of sanctions for frivolous litigation, and authorize[s] a stay of discovery pending resolution of any motion to dismiss.”³⁵

F. Rule 11

Of course, the term “frivolous cases” is often invoked in the context of sanctions under Rule 11. Rule 11 permits lawyers who bring frivolous cases to be sanctioned.³⁶ Over the twenty-five years of the Rule’s existence, however, there has been disagreement on what is actually a frivolous case. In response to criticisms of an amended version of the Rule—including, for example, that in applying the Rule, judges sometimes differed on whether a pleading was frivolous or “‘well grounded’ in fact and ‘warranted’ in law”³⁷—Congress promulgated the 1993 amendments. The 1993 amendments made sanctions discretionary, removed discovery proceedings from the possibility of sanc-

34. 15 U.S.C. § 78u-4(b)(2) (2006).

35. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006); *see also Tel-labs*, 551 U.S. at 321.

36. *See* FED. R. CIV. P. 11.

37. *Kobayashi & Parker*, *supra* note 6, at 108.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

FED. R. CIV. P. 11 (1992) (emphasis added) (amended in 1993); *see also* FED. R. CIV. P. 11 (1983 Advisory Committee Note) (discussing the 1983 amendment); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some ‘Chilling’ Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1317–18 (1986) (discussing the 1983 amendment).

tion, and created a “safe harbor” provision, among other things.³⁸ The current Rule 11 provides, among other things, that attorneys must certify to the best of their knowledge after conducting

an inquiry reasonable under the circumstances . . . [that] the claims, defenses, and other legal contentions are warranted by existing law or by a *nonfrivolous* argument for extending, modifying, or reversing existing law or for establishing new law . . . [and that] the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.³⁹

In 2005, the discussion to eliminate frivolous cases continued with the Lawsuit Abuse Reduction Act (LARA), which proposed another amendment to Rule 11.⁴⁰ Although it was not enacted, among other things, LARA would have made sanctions against lawyers who brought frivolous cases mandatory and would have required payment of attorney’s fees and expenses if a case was deemed frivolous. U.S. Representative Phil Gingrey stated that LARA’s goal was to “prevent[] frivolous lawsuits from closing the doors of justice for those who have truly been harmed.”⁴¹ He went on to state that such frivolous lawsuits have driven up costs in the courts.⁴² The discussion of LARA and the text of LARA did not state, however, what was meant by “frivolous.”⁴³ In its letter of opposition to LARA, the American

38. FED. R. CIV. P. 11(c)(1)(A). Under Rule 11(c)(1)(A), attorneys are given the opportunity to correct their alleged violations upon receipt of a motion from opposing counsel. The “safe harbor” period begins to run upon service of the motion. FED. R. CIV. P. 11 (1993 Advisory Committee Notes).

39. FED. R. CIV. P. 11(b) (emphasis added). The 1993 Advisory Committee Notes describe the rule as requiring litigants to “stop and think” before filing cases in federal court. According to a study of the Federal Judicial Center, judges have seemed to be relatively satisfied with the changes. See DAVID RAUMA & THOMAS E. WILLGING, REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES’ EXPERIENCES AND VIEWS CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE (2005); JOHN SHAPARD ET AL., REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE (1995). When asked if they experienced groundless litigation in federal civil cases, eighty-five percent of judges answered that it was a small to no problem. RAUMA & WILLGING, *supra*, at 4. The Federal Judicial Center also inquired about how Rule 11 should be modified if at all. Eighty-one percent of the surveyed judges believed that the rule was “just right” and thirteen percent answered that it should be modified to increase its effectiveness in deterring groundless filing. *Id.* at 13–14. Only one percent of all judges surveyed believed that it should be modified to avoid deterring meritorious filings. *Id.* at 14.

There is a rule similar to Rule 11 in the appellate context. Under Rule 38, “[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” FED. R. APP. P. 38

40. Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. (2005).

41. 151 CONG. REC. H9288 (daily ed. Oct. 27, 2005).

42. *Id.*

43. *Id.* at H9283–89.

Bar Association expressed concern about the effects of the proposed new rule on civil rights litigation and environmental litigation.⁴⁴ Also in objection to the proposed changes, Judge Robert Carter stated, “I have no doubt that the Supreme Court’s opportunity to pronounce separate schools inherently unequal [in *Brown v. Board of Education*] would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start.”⁴⁵

III. RETIRING THE TERM “FRIVOLOUS CASES”

The discussion in Part II illustrates that the term “frivolous cases” has been used extensively to justify significant legal changes. This Part explores the reason for the focus on frivolous cases, and then argues that the focus should shift to a more specific discussion of costs and other concerns such as the constitutional right to a jury trial.

A. *The Focus on Frivolous Cases: Concern About Costs*

There is a focus on frivolous cases because of cost. Frivolous cases may be costly to the court system and to litigants. Frivolous cases could consume court time when court resources are limited, and defendants might need to devote significant resources to defend these cases. Government officials are of particular concern. The Supreme Court has stated that “firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.”⁴⁶ The Court has stated more generally that even “a

44. See *id.* at H9287 (Letter from Michael S. Greco, President, Am. Bar Ass’n (Oct. 10, 2005)).

45. 151 CONG. REC. H9286 (daily ed. Oct. 27, 2005); cf. D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 57 (1976) (“Today’s frivolity may be tomorrow’s law, and the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), then accepted as theoretically tenable (though not the law), then accepted as the law.”). The Supreme Court has stated that “not all unsuccessful claims are frivolous.” *Neitzke v. Williams*, 490 U.S. 319, 329 (1989). Lucian Bebchuk has stated that frivolous can be equated with non-meritorious. See Lucian Ayre Bebchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371, 373 (1996).

46. *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982) (internal quotation marks and citations omitted). “When we see the myriad irresponsible and frivolous cases regularly filed in American courts, the magnitude of the potential risks attending acceptance of public office emerges.” *Id.* at 827; cf. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2008) (discussing the problem of officials being sued). *But see Nixon v. Fitzgerald*, 457 U.S. 731, 795–96 (1982) (White, J., dissenting) (noting that “the majority[] admit[ted] that ‘there is no historical record of numerous suits against the President,’” and that “[e]ven granting that a *Bivens* cause of action did not become available until 1971, in the 11 years since then there have been only a handful of suits”).

frivolous complaint that is withdrawn burdens 'courts and individuals alike with needless expense and delay.'⁴⁷ The Seventh Circuit has expressed its displeasure at frivolous cases because they "clog court dockets and threaten to undermine the ability of the judiciary to efficiently administer the press of cases properly before it."⁴⁸ Although he is not certain whether there is a serious problem with frivolous cases,⁴⁹ Professor Robert Bone has concluded that "[f]rivolous litigation is problematic because it generates wasted litigation costs and unjustified wealth transfers."⁵⁰ Moreover, it also "frustrate[s] settlement of legitimate suits."⁵¹

B. Shifting the Discussion from Frivolous Cases to Cost and the Seventh Amendment

While frivolous cases impose potential costs on courts and defendants, efforts to eliminate frivolous cases implicate the constitutional right to a jury trial. For such cases to be dismissed through summary judgment, motions to dismiss, or heightened pleading described above, or alternatively, to be avoided through the threat of sanctions and caps also described above, the cases must not require a jury trial. However, the jury trial right has not been adequately explored in conjunction with efforts to rid the courts of frivolous cases. Instead, efforts to curb frivolous cases, including prisoner and employment discrimination cases, continue to be adopted and expanded without ensuring constitutional integrity. If a constitutional jury trial analysis occurs, it tends to occur after a procedure is well-entrenched in the court system, and thus the procedure is unlikely to be changed.

Summary judgment illustrates this phenomenon of using and changing procedure without constitutional analysis in the name of, at least partly, the need to eliminate frivolous cases. For years, the Supreme Court and commentators have stated that a 1902 case, *Fidelity & Deposit Co. v. United States*, had stood for the proposition that summary judgment was constitutional.⁵² In that case, the Court upheld as constitutional a procedure whereby a court decided whether a legal defense existed after accepting as true the facts pled by the defendant.⁵³

47. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 411 (1990) (Stevens, J., concurring in part and dissenting in part) (quoting and criticizing the majority opinion).

48. *Lepucki v. Van Wormer*, 765 F.2d 86, 87 (7th Cir. 1985).

49. *See Bone*, *supra* note 2, at 579.

50. *Id.* at 576.

51. *Id.* at 597.

52. *Thomas*, *supra* note 12, at 163-66 (discussing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902)).

53. *Id.*

As argued in an earlier article, summary judgment under Rule 56 is not similar to the procedure in *Fidelity*.⁵⁴ Under the summary judgment standard, unlike the rule in *Fidelity*, a judge does not accept as true the facts alleged by the non-movant.⁵⁵ Instead, a judge decides whether sufficient evidence exists to support the non-movant or in other words decides whether a reasonable jury could find for the non-movant.⁵⁶ Indeed, despite citations to *Fidelity* for the proposition that summary judgment is constitutional, the Court has never actually analyzed the constitutionality of summary judgment.⁵⁷ No such analysis has occurred despite the significant use of summary judgment to dismiss fact-specific cases, including those in the areas of antitrust and employment discrimination, where there is a right to a jury trial.⁵⁸

To summarize the “summary judgment is unconstitutional” argument that I have made previously, the Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be re-examined in any Court of the United States, than according to the rules of the common law.”⁵⁹ The Supreme Court has stated that the “common law” referenced in the Seventh Amendment means the English common law of 1791.⁶⁰ 1791 is the date when the Seventh Amendment was adopted, and the English common law was the “common law” to which the Founders referred.⁶¹ Summary judgment violates the Seventh Amendment because a judge makes a sufficiency of the evidence determination to dismiss a case upon summary judgment, which was not permitted under the common law of 1791.⁶² Under the common law of 1791, a judge made a sufficiency of the evidence determination only upon a motion for a new trial and could actually dismiss a case only if the demurring party accepted the facts and the conclusions of the evidence as true and no claim existed under those facts and conclusions.⁶³ Despite this constitutional predicament, summary judgment

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 688 & nn.9–10 (2004).

59. U.S. CONST. amend. VII; see also Thomas, *supra* note 12, at 145–60.

60. *Parson v. Bedford*, 28 U.S. (3 Pet.) 433, 446–47 (1830); see also Thomas, *supra* note 12, at 146 & n.25 (citing several cases including *Thompson v. Utah*, 170 U.S. 343, 350 (1898)).

61. Thomas, *supra* note 12, at 146.

62. *Id.* at 145–60.

63. *Id.*

continues to be used extensively in the name of eliminating frivolous cases.

Similar to summary judgment, every other effort discussed in Part II has a potential Seventh Amendment problem. Again, however, the Seventh Amendment jury trial right has not been the focus or even a factor carefully considered. Instead, the focus has been on frivolousness and costs. These issues recently arose in the context of the motion to dismiss. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the Supreme Court considered the issue of the proper interpretation of the “strong inference” of scienter pleading requirements in the PSLRA, the failure of which to plead sufficiently would result in the dismissal of the case.⁶⁴ The Court stated that it was important to keep in mind “the PSLRA’s twin goals: to curb frivolous, lawyer-driven litigation, while preserving investors’ ability to recover on meritorious claims.”⁶⁵ After the Seventh Circuit posed the potential Seventh Amendment issue in addition to the main issue of how the requirement should be interpreted, the Court held that the Seventh Amendment did not prevent Congress from setting forth pleading requirements for statutes that it enacted.⁶⁶ The Court failed to examine the English common law when determining the constitutional question and instead simply cited *Fidelity* to support its decision that the Seventh Amendment did not prevent Congress from enacting pleading requirements.⁶⁷ In this discussion, the Court mentioned Congress’s intent “to screen out frivolous complaints” in conjunction with previous constitutional efforts to dismiss frivolous defenses.⁶⁸ The Court further emphasized that “[p]rivate securities fraud actions . . . can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.”⁶⁹

Just weeks earlier, in *Bell Atlantic Corp. v. Twombly*, an antitrust class action, the Supreme Court considered the proper standard by which a court can dismiss a case upon a motion to dismiss.⁷⁰ The Court “retire[d]”⁷¹ the old standard to dismiss and held that a court can dismiss a complaint if the court decides that the claim is not “plau-

64. 551 U.S. 308 (2007).

65. *Id.* at 322.

66. *Id.* at 326–29.

67. *Id.*; Thomas, *supra* note 10, at 1863–69, 1874–79.

68. *Tellabs*, 551 U.S. at 327–28 (comparing this to the use of “frivolous” in the rule at issue in *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902), which the Court found constitutional).

69. *Tellabs*, 551 U.S. at 313.

70. 550 U.S. 544 (2007).

71. *Id.* at 563.

sible.”⁷² Throughout the decision, the Court emphasized the high costs of discovery and also mentioned a concern about “frivolous claims.”⁷³ While the Court did not consider the constitutionality of the new standard, it is implicit in the decision that the Court did not think the new standard posed any constitutional problem. Like *Tel-labs*, the constitutional provision at issue would have been the Seventh Amendment. Under the common law relevant to the Seventh Amendment analysis, no procedure existed whereby a court could decide whether a claim was not plausible and dismiss the claim.⁷⁴ Now, like summary judgment, courts have used the new motion to dismiss standard to dispose of more factually intensive cases, including employment discrimination cases, and given the most recent case of *Iqbal*, the trend seems likely to continue.⁷⁵

Finally, similar to the procedures of summary judgment, the motion to dismiss, and heightened pleading, the Seventh Amendment has not been a focus in either the establishment of caps on damages or the establishment of sanctions under Rule 11. The Supreme Court has not decided the constitutionality of damages caps in Title VII cases, despite the widespread use of them in Title VII cases, nor has it decided the constitutionality of sanctions under Rule 11, despite courts’ imposition of sanctions over the many years. The constitutionality of caps under the Seventh Amendment is suspect, however, because juries decided damages questions under the common law.⁷⁶ Moreover, a recent study has found that lawyers may bring fewer cases because of the existence of caps, which may interfere with access to the

72. *Id.* at 556.

73. *Id.* at 558–60, 567 n.12; accord A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 450–54 (2008) (discussing the “pleading policy” in *Twombly* of “screening of frivolous cases”); see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 1953–54 (2009) (mentioning the costs of discovery); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (discussing the possibility that per se rules in antitrust “may increase litigation costs by promoting frivolous suits against legitimate practices”). The *Twombly* dissent argued against the propriety of changing the motion to dismiss standard based on costs, stating that the courts can manage costs through the “case-management arsenal.” 550 U.S. at 593 n.13 (Stevens, J., dissenting).

74. See Thomas, *supra* note 10, at 1874–79.

75. See Hatamyar, *supra* note 15, at 7764 (discussing the increase in grants of motions to dismiss after *Iqbal*); cf. Seiner, *supra* note 21 (assessing the impact of *Twombly* in employment discrimination cases); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. (forthcoming 2010) (assessing impact of *Twombly* in disability cases).

76. See Suja A. Thomas, *Federal Tort Reform and the Seventh Amendment* (2006) (transcript available at <http://www.aals.org/am2006/program/papers/thurs/civilprocThomasspeech.pdf>); cf. Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 763–92 (2003) (discussing the jury’s role with respect to damages).

courts.⁷⁷ Similarly with respect to Rule 11, the constitutional questions should be addressed and the answers not assumed.

As stated above, with respect to summary judgment, the motion to dismiss, heightened pleading, damages caps, and sanctions, the Supreme Court, other courts, and Congress have explicitly mentioned the concern about frivolous cases and cost in conjunction with the necessity of these procedures, but no significant constitutional analysis has been conducted. The failure of the courts and the legislature to pay attention to the Seventh Amendment seems to condone either the use of cost in the assessment of the constitutionality of a procedure or the trumping of costs over the Seventh Amendment.

Given the lack of significant discussion of cost and the Seventh Amendment, a more substantive discussion about cost and the Constitution and what is permitted under the Constitution is necessary,⁷⁸ rather than a non-substantive reference to frivolousness. This discussion would include the role that cost can play in the Constitution, rather than an assumption that cost trumps the Constitution. While there have been scholarly attempts to better define what is frivolous,⁷⁹ all of these attempts have implicitly assumed away or minimized any constitutional problem, as have Congress and the Supreme Court. And while Judge Frank Easterbrook does not think any vagueness with regard to frivolous cases is problematic because uncertainty is part of law,⁸⁰ if the reference to frivolous cases is eliminated, a more substantive discussion about cost and the Seventh Amendment can occur.

77. See Stephen Daniels & Joanne Martins, "The Juice Simply Isn't Worth the Squeeze in Those Cases Anymore:" *Damage Caps, 'Hidden Victims,' and the Declining Interest in Medical Malpractice Cases* (Am. Bar Found. Res. Paper Series), available at <http://ssrn.com/abstract=1357092>; cf. Kathryn Zeiler, *Medical Malpractice Liability Crisis or Patient Compensation Crisis?*, 59 DEPAUL L. REV. 675 (2010) (discussing the possible harmful impact of noneconomic damages caps).

78. Weinstein, *supra* note 6, at 112–13, 124–25 (discussing summary judgment as one possible manner in which the Seventh Amendment is being violated). The Supreme Court's grant of summary judgment in *Scott v. Harris*, 550 U.S. 372 (2007), has been described as "an almost unprecedented effort to replace the fact-finding power of the jury." *Id.* at 124.

79. See, e.g., Bone, *supra* note 2; Yablon, *supra* note 3.

80. Levinson, *supra* note 2, at 374. Judge Easterbrook has stated that

something is frivolous only when (a) we've decided the very point, and recently, against the person reasserting it, or (b) 99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it's untenable. Either one is a pretty stiff test.

Id. at 375.

What might this discussion start to look like?⁸¹ The analysis must start with the Constitution—in this case the Seventh Amendment—and what the Seventh Amendment was intended to do. While Professor William Nelson has proposed that the Seventh Amendment has outlived its usefulness and that cost matters should reign supreme,⁸² the jury remains a part of the constitutional structure just like the Legislative Branch, the Judicial Branch, and the Executive Branch.⁸³ One might counter, however, that cost-shifting was part of the English system⁸⁴ and should be added to modern litigation. Professor Sanford Levinson asserts that “[f]ee shifting . . . can supply an economic control against frivolity that is otherwise lacking.”⁸⁵ However, fee-shifting may not be the right answer. To understand any appropriate role for fee-shifting, fee-shifting now and under the common law should be studied, including modern changes to cost, which include discovery.⁸⁶

Regardless of the result of this discussion, the proper conversation should occur. Right now, though, cost is trumping the Constitution. There must be a balance that does not disregard the Constitution. If cost is to be taken into account in the decision of whether a procedure is to be used, the decision should explicitly discuss cost in the analysis of the procedure’s constitutionality, and the use of cost should be jus-

81. *Cf. Locke v. Karass*, 129 S. Ct. 798 (2009) (First Amendment and union dues). In the context of the Eight Amendment, Justice Antonin Scalia has noted,

Those costs, those burdens, and that lack of finality are in large measure the creation of Justice STEVENS and other Justices opposed to the death penalty, who have “encumber[ed] [it] . . . with unwarranted restrictions neither contained in the text of the Constitution nor reflected in two centuries of practice under it”—the product of their policy views “not shared by the vast majority of the American people.”

Baze v. Rees, 128 S. Ct. 1520, 1555 (2008) (Scalia, J., concurring) (quoting *Kansas v. Marsh*, 548 U.S. 163, 186 (2006) (Scalia, J. concurring)).

82. See William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1660–64 (2008).

83. See Suja A. Thomas, *Why Summary Judgment Is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA L. REV. 1667, 1678–84 (2008); Suja A. Thomas, *Judicial Modesty and the Jury*, 76 COLO. L. REV. 767 (2005).

84. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 & n.18 (1975).

85. Levinson, *supra* note 2, at 374; Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 928–30 (2009) (discussing fee-shifting as an alternative to deter meritless suits); Paul Stancil, *Balancing the Pleading Question*, 61 BAYLOR L. REV. 90, 102–07 (2009) (discussing arguments regarding fee-shifting); *cf. Kansas v. Colorado*, 129 S. Ct. 1294, 1298 (2009) (discussing the “American rule” under which each party bears its own costs).

86. Samuel R. Bagenstos, *Thurgood Marshall Meet Adam Smith: How Fee-Shifting Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Justices Don’t Get It)* (Wash. Univ. Sch. of Law, Working Paper No. 09-06-01, June 15, 2009), available at <http://ssrn.com/abstract=1407275> (discussing the importance of fees to lawyers who bring civil rights claims); Bechuk, *supra* note 45, at 373 (discussing plaintiffs’ behavior under the American and British rules).

tified. Talking about frivolousness in an amorphous manner allows cost not to be defined, and thus, cost also not to be properly taken into account. It is time to have the right discussion, and eliminating the term "frivolous cases" would help begin this conversation.

IV. CONCLUSION

The concern for frivolous cases in the federal courts abounds. This signifies worry about the cost to the courts and the cost to the parties defending the actions. Congress and the Judiciary have reacted to the concern about frivolous cases through legislative and judicial pronouncements, many of which have resulted in cases being dismissed prior to trial as well as damages being capped and sanctions being imposed. These efforts have not carefully considered, though, the effect of these changes on the constitutional right to a jury trial. Thus, the term "frivolous cases" has not been useful to promote the proper discussion that needs to be had regarding costs and rights, including the jury trial right, and the term should be replaced with that very discussion.