

## THE UNCONSTITUTIONAL APPLICATION OF SUMMARY JUDGMENT IN FACTUALLY INTENSIVE INQUIRIES

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### I. INTRODUCTION

Although summary judgment was not always favored,<sup>1</sup> the 1986 trilogy<sup>2</sup> has transformed the device into a widely accepted and encouraged means of adjudicating without trial.<sup>3</sup> Aimed to preserve judicial resources by “filtering out cases not worthy of trial,”<sup>4</sup> summary judgment generally serves as the post-pleading analog to Federal Rule of Civil Procedure 12(b)(6),<sup>5</sup> which allows for pre-trial dismissal for failure to state a claim.<sup>6</sup> Thus, summary judgment generally occurs after

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1 See, e.g., Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1904 (1998) (describing summary judgment's “difficult infancy” and the subsequent caution with which judges utilized the procedure prior to the Court's revitalization of it in 1986).

2 As used in this Comment, the term “trilogy” refers to the Court's decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

3 See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1040–41 (2003) (explaining that the 1986 trilogy “collectively forge[s] a new, stronger role for the motion,” and that *Celotex* in particular represents “strong advocacy of summary judgment as a tool to promote judicial efficiency”).

4 *Id.* at 1041; see also *Celotex*, 477 U.S. at 327 (noting that the “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy, and inexpensive determination of every action’” (quoting FED. R. CIV. P. 1)).

5 See FED. R. CIV. P. 12(b)(6) (stating that “failure to state a claim upon which relief can be granted” is a defense that may be presented in a motion).

6 There are, to be sure, considerable differences between the two procedures; 12(b)(6) is concerned with whether the facts, if true, represent a cognizable legal claim while the summary judgment inquiry is focused on the existence (or lack) of material factual issues. In terms of substantive similarity, summary judgment is most like the motion for judgment as a matter of law, and the Court has expressly recognized as much. See, e.g., *Anderson*, 477 U.S. at 250 (noting that the summary judgment standard “mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)”).

discovery and recognizes that going behind the pleadings can establish that triable issues do not, in fact, exist.<sup>7</sup>

While the 1986 “trilogy” redefined the rules governing the summary judgment procedure by “providing a logical framework for deciding how and when it can be used,”<sup>8</sup> the determination still is, in many respects, a product of judicial discretion.<sup>9</sup> This Comment analyzes the extent to which the discretion inherent in the standard provides an avenue for judges to distort it, and evaluates the constitutional consequences of doing so. Specifically, wrongful application of the summary judgment standard could run afoul of the Seventh Amendment guarantee to “preserve[]” the right to a jury trial in cases at law.<sup>10</sup> Although it is well-settled that summary judgment does not generally violate the Seventh Amendment,<sup>11</sup> this verity is a mere

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- 7 See FED. R. CIV. P. 56(e)(2) (noting that responding party must not “rely merely on allegations or denials in its own pleading” in responding to a moving party’s motion for summary judgment).
- 8 Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 787 (1988).
- 9 See Miller, *supra* note 3, at 1045 (stating that summary judgment could be conceived as transforming judges into “pretrial factfinders”). Some have criticized the degree of judicial discretion the trilogy affords judges vis-à-vis the jury which would otherwise (and ordinarily does) exercise control over factual matters. See, e.g., Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 491–92 (1988) (noting that the summary judgment standard, which inquires into what a rational jury would do, affords too much discretion to judges in some contexts). While these concerns relate to the propriety of the standard itself based on the discretion it affords judges, a more subtle issue is the question of what discretion judges should have in applying the standard—that is, whether or not summary judgment *must* be granted when its requirements are met; this issue remains unresolved. See Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 104 (2002) (noting that “[f]ederal courts of appeals are currently split over whether judges must grant summary judgment if it is technically appropriate”).
- 10 U.S. CONST. amend. VII. This article does not delve into the due process concerns that would be implicated by arbitrary summary judgment grants. For a brief discussion of that issue, see Friedenthal, *supra* note 8, at 771–73.
- 11 Most scholars note that the constitutionality of summary judgment in the face of the Seventh Amendment was definitively settled by the Supreme Court in *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902). See, e.g., Miller, *supra* note 3, at 1019 (noting that the *Fidelity & Deposit Co.* Court accepted the constitutionality of summary judgment in cases where a jury trial right would otherwise exist). This view has recently been questioned, however. See Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 139 (2007) (noting that the “conventional wisdom . . . that the Supreme Court settled the issue [of summary judgment’s constitutionality] a century ago in *Fidelity & Deposit Co. v. United States*. . . is wrong”). In any event, others have defended summary judgment’s constitutionality by analogizing to the constitutional propriety of the judgment as a matter of law standard which—as noted *supra* note 6—mirrors the summary judgment standard. See Friedenthal, *supra* note 8, at 772 (noting that “[t]here is no need to ‘reinvent the wheel’ by investigating the question whether summary judgment should never be granted, regardless of the circumstances, in a case in which the right to jury trial exists”

product of the fact that the Seventh Amendment does not extend to cases where the summary judgment standard is met—that is, where there are no material factual issues to be tried.<sup>12</sup> Thus, the Seventh Amendment guarantee of a right to trial by jury is violated by grants of summary judgment where there are “genuine issue[s] as to . . . material fact[s]”<sup>13</sup> and a right to jury trial exists, because such grants entail a judge deciding questions reserved for the jury.

To explore whether the Seventh Amendment is violated in practice, this Comment examines cases in which summary judgment is granted, where strict application of the standard would likely result in the case proceeding to a jury trial. It does so by examining Fourth Amendment excessive force cases because such claims involve highly factual inquiries,<sup>14</sup> frequently entail disputes as to historical fact<sup>15</sup> and, at least in cases where the only evidence adduced is one’s own say-so,<sup>16</sup> are likely to be suits that would fail if they reached a jury.<sup>17</sup> Inap-

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because “[t]hat fundamental matter has long been decided in the context of the directed verdict [in *Galloway v. United States*, 319 U.S. 372 (1943)]”).

12 *See Calvi v. Knox County*, 470 F.3d 422, 427 (1st Cir. 2006) (stating that “a grant of summary judgment does not compromise the Seventh Amendment’s jury trial right because that right exists *only with respect to genuinely disputed issues of material fact*” (emphasis added)). The Supreme Court, in *Fidelity & Deposit Co.*, reached a similar conclusion by noting that the standard “prescribes the means of making an issue.” 187 U.S. at 320. For the reasons stated *supra* note 11, it is not (necessarily) clear whether this definitively settles the constitutional question with respect to summary judgment.

13 FED. R. CIV. P. 56(c).

14 *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (noting that the excessive force determination under the Fourth Amendment involves consideration of whether the force “used to effect a particular seizure [was] reasonable under the Fourth Amendment [through] a careful balancing of the ‘nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake” (quoting *United States v. Place*, 462 U.S. 696, 703 (1983))). Excessive force cases often bring about qualified immunity defenses; as discussed further *infra* Part II, this inquiry serves as a separate step with respect to the *Graham* constitutional inquiry and is also, at least in some cases, highly factual. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) (noting that the constitutional question of excessive force is distinct from the question of whether the defendant is entitled to qualified immunity).

15 *See Scott v. Harris*, 550 U.S. 372, 378 (2007) (noting that the plaintiff’s version of the facts “unsurprisingly” differs considerably from the defendant’s in Fourth Amendment excessive force suit); *see also infra* note 79.

16 I use this term in this Comment to refer to both direct evidence and the functional equivalent adduced via indirect, circumstantial evidence.

17 *See Smith v. City of New York*, No. 03 Civ. 7576, 2005 WL 1026551, at \*6 (S.D.N.Y. May 3, 2005) (denying summary judgment where plaintiff’s sole evidence of defendant’s complicity in property destruction was plaintiff’s own deposition alleging as much, but cautioning plaintiff about the ability of the case to succeed at trial). Although the *Smith* Court appropriately adhered to the rule that summary judgment may not be granted for a defendant where a jury could—but almost certainly would not—find for the plaintiff, *see Hossaini v. W. Mo. Med. Ctr.*, 97 F.3d 1085, 1088 (8th Cir. 1996) (noting that summary judgment may not be granted “merely because [the court] believes the nonmoving party

propriately granting summary judgment in such cases, then, is a particularly attractive option for the federal judge with an otherwise crowded docket.<sup>18</sup>

This Comment concludes that application of summary judgment in practice has the propensity to diverge from its legal standard in a way that brings question to its ostensibly settled constitutional basis—at least in factually intensive inquiries. The Comment continues in this Part by: (1) more fully discussing the summary judgment standard along with the device’s history, and (2) discussing when there is a Seventh Amendment right to trial by jury. Part II outlines the excessive force standard, and addresses the constitutional implications of wrongful summary judgment grants by analyzing four instructive cases in detail. Finally, Part III discusses the policy considerations behind inappropriate summary judgment grants, and how judicial efficiency considerations bear on the constitutional violations the summary judgment standard may, at times, allow.

#### A. *The Summary Judgment Standard and Its History*

Promulgated in 1938,<sup>19</sup> Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”<sup>20</sup> While debates about the scope and constitutional propriety of the summary

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will lose at trial”); *Bieghler v. Kleppe*, 633 F.2d 531, 534 (9th Cir. 1980) (summary judgment may not be granted “even if the trial judge is convinced plaintiffs will eventually lose”), it is not hard to conceive of a scenario in which a trial judge could, sensing that a plaintiff would not be able to convince a jury that he or she is entitled to a verdict, grant summary judgment to avoid (what could thus be viewed as) a senseless trial. Perhaps for this reason, objective data indicates that summary judgment is disproportionately granted in civil rights cases—a category which includes excessive force suits. See FED. JUDICIAL CTR., ESTIMATES OF SUMMARY JUDGMENT ACTIVITY IN FISCAL YEAR 2006, at 6 (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) (reporting that summary judgment is granted in seventy percent of civil rights cases in which it is sought although the corresponding figures for other claims are lower).

18 See Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269, 1291 (2005) (stating that “caseloads are rising faster than the rate of appointments of new district court judges to handle them”). This is not to say, of course, that every inappropriate grant of summary judgment is exercised for purely docket-clearing purposes.

19 The rules governing summary judgment were amongst the 1938 rules’ major procedural innovations. See, e.g., Brooke D. Coleman, *The Celotex Initial Burden Standard and an Opportunity to “Revivify” Rule 56*, 32 S. ILL. U. L.J. 295, 298 (2008) (“The summary judgment rule was an integral part of the 1938 rule package . . .”).

20 FED. R. CIV. P. 56(c).

judgment standard continue to this day,<sup>21</sup> there was, from the beginning, a clear ideological divide about the standard which manifested itself in a string of Second Circuit opinions authored by Judges Charles Clark<sup>22</sup> and Jerome Frank.<sup>23</sup>

While the 1986 trilogy has clarified the law governing the summary judgment standard,<sup>24</sup> the debate between Judges Clark and Frank continues today because the “disagreement . . . offers a penetrating preview of the extreme versions of the pro- and anti-summary judgment positions . . . among current judges.”<sup>25</sup> The debate, in essence, revolved around whether summary judgment should be limited merely to “those cases where there was not the ‘slightest doubt’ about the . . . facts.”<sup>26</sup> Judge Clark urged a more expansive view of the standard, while Judge Frank believed it should be restricted so as to preserve the constitutional right to jury trial.<sup>27</sup>

Even before the 1986 trilogy reformed the summary judgment standard,<sup>28</sup> Judge Clark’s expansive view had won the day.<sup>29</sup> Summary judgment, however, was fundamentally limited in the wake of the Frank-Clark debate because judges were very cautious in granting it—particularly in the “presumptively off-limit areas [of] antitrust, patents, negligence, civil rights, and broadly conceived categories labeled ‘important public issues’ or ‘complex cases,’ . . . because such areas disproportionately involved questions of credibility, motive, state of mind, and intent.”<sup>30</sup> More importantly, though, the Court’s

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21 See, e.g., Thomas, *supra* note 11, at 139.

22 It is worth noting that Judge Clark himself played an integral role in the development of the 1938 Rules. For a personal, retrospective account of that process, see Charles E. Clark, *The Federal Rules of Civil Procedure: 1938–1958*, 58 COLUM. L. REV. 435 (1958).

23 For a fuller discussion of the infamous Clark-Frank debate, see Wald, *supra* note 1, at 1898–1905. See also Marcy J. Levine, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 EMORY L.J. 171, 173–80 (1988); Miller, *supra* note 3, at 1019–24.

24 See *supra* note 8 and accompanying text.

25 Wald *supra* note 1, at 1903; see also *id.* at 1899 (noting that the divergent views of Judges Frank and Clark “showed not what summary judgment was meant to be, but what, unchecked, it could turn into”).

26 *Id.* at 1899.

27 See *id.* at 1903 (explaining that “Judge Frank represented a staunchly pro-jury . . . view . . . valu[ing] the preservation of jury trials almost for their own sake . . . [while] Judge Clark leaned towards an unabashedly pro-elitist position, worrying that the surrender of too much power to unsophisticated jurors with their ‘musically naive’ ears would overwhelm the fine symphony of justice in a chaotic cacophony of the common” (citing *Arnstein v. Porter*, 154 F.2d 464, 479–80 (2d Cir. 1946) (Clark, J., dissenting))).

28 See *supra* note 3.

29 Wald, *supra* note 1, at 1904.

30 *Id.*

decision in *Adickes v. S.H. Kress & Co.* crippled the standard by placing an onerous burden on moving parties when it held summary judgment to be inappropriate because the moving party had “failed to show the absence of any disputed material fact.”<sup>31</sup> While the *Adickes* decision could be understood as a “civil rights case that the Court did not want to dispose of without trial,”<sup>32</sup> it was read by lower courts to impose a clear burden on moving parties “to show the *absence* of genuine issues of material fact in order to obtain summary judgment.”<sup>33</sup>

The 1986 trilogy represents the strengthened, modern view of the summary judgment standard. While each of the individual cases<sup>34</sup> reflects a more expansive view of the standard than that previously believed to be appropriate, they collectively form a coherent set of guidelines to be applied. Perhaps most notably, a moving party may—following the trilogy—establish a lack of material facts sufficient to warrant summary judgment without being required “to show the absence of any disputed material fact.”<sup>35</sup> Indeed, *Celotex Corp. v. Catrett* permits a grant of summary judgment where the moving party shows that the non-moving party—bearing the burden of proof at trial—cannot meet an essential element of his or her claim.<sup>36</sup> While a non-moving party may respond to such a showing by requesting additional time for discovery,<sup>37</sup> establishing as much otherwise shifts the burden to the non-moving party to defeat the motion by showing that material issues of genuine fact do, in fact, exist.<sup>38</sup>

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31 398 U.S. 144, 148 (1970).

32 Friedenthal, *supra* note 8, at 779.

33 Wald, *supra* note 1, at 1907. Professor Friedenthal articulates an even broader reading of the decision whereby a moving party would, under the *Adickes* regime, be required to “comb through all the material available to see if there is *something* to be refuted even though the responding party has never mentioned it in answers to interrogatories.” Friedenthal, *supra* note 8, at 778.

34 For a discussion of the background and facts of the cases, see Miller, *supra* note 3, at 1026–44.

35 *Adickes*, 398 U.S. at 148.

36 477 U.S. 317, 322 (1986) (noting that summary judgment may be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial”).

37 FED. R. CIV. P. 56(f) states that, in response to a party’s affidavit stating reasons it cannot currently respond to a moving party’s summary judgment motion, a court may: “(1) deny the [summary judgment] motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order.” This rule gives judges the authority to delay ruling on a summary judgment motion. See *Crawford-El v. Britton*, 523 U.S. 574, 599 n.20 (1998) (noting a discretionary ability to “postpone ruling on a . . . summary judgment motion”).

38 *Celotex*, 477 U.S. at 322.

In addition to making “it easier to make the motion” via the *Celotex* burden-shifting framework, the 1986 trilogy also “increased the chances that [summary judgment] will be granted.”<sup>39</sup> For one, the Court, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, held that, although the summary judgment calculus is drawn by construing all the evidence and inferences in favor of the non-moving party,<sup>40</sup> a court need not be blind to the facts adverse to the non-moving party. Thus, summary judgment may be granted where the record as a whole belies the evidence submitted by the non-moving party.<sup>41</sup> Additionally, the Court, in *Anderson v. Liberty Lobby, Inc.*, held that the summary judgment standard is to be analyzed under the applicable law governing the claim the jury would be deciding were the case to proceed to trial.<sup>42</sup> Accordingly, a non-moving party bearing a heavy burden of proof at trial must provide enough evidence for a reasonable jury to find for them under the particular (heightened) trial burden.

While the increased functionality of summary judgment following the 1986 trilogy has predictably resulted in a “dramatic reduction in federal trials,”<sup>43</sup> it is important to remember that, in deciding on a

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<sup>39</sup> Miller, *supra* note 3, at 1041.

<sup>40</sup> 475 U.S. 574, 587 (1986).

<sup>41</sup> *See id.* (noting that the non-moving party “must come forward with more persuasive evidence to support their claim than would otherwise be necessary” where “the factual context renders [their] claim implausible”). Although much of the logic underlying the *Matsushita* decision plainly relates to its unique status as an antitrust case involving antitrust law, Miller, *supra* note 3, at 1033, the general principle of considering the record in its totality has been applied in other contexts as well. *See* Scott v. Harris, 550 U.S. 372, 380 (2007) (citing *Matsushita* and rejecting non-moving party’s factual contentions because they were “utterly discredited by the record”). Some have been critical of this approach, however—at least with respect to factually driven inquiries. *See* George M. Dery III, *The Needless “Slosh” Through the “Morass of Reasonableness”: The Supreme Court’s Usurpation of Fact Finding Powers in Assessing Reasonable Force in Scott v. Harris*, 18 GEO. MASON. U. CIV. RTS. L.J. 417, 436–37 (2008) (criticizing the *Scott* Court for applying *Matsushita* in the Fourth Amendment excessive force context). Some of the Justices on the *Scott* Court, in fact, expressed similar reservations with the Court’s approach. *See* Scott, 550 U.S. at 389–97 (Stevens, J., dissenting) (referring to Supreme Court colleagues as “jurors” throughout dissenting opinion). In any event, it is clear that, at a minimum, *Matsushita* is significant to the extent that it departed from the “Court’s prior cautious approach to summary judgment in complex cases involving issues of motive and intent.” Miller, *supra* note 3, at 1033.

<sup>42</sup> 477 U.S. 242, 254 (1986).

<sup>43</sup> Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005). Professor Redish notes that “[c]hanges in the law of summary judgment quite probably explain at least a large part of the . . . reduction.” *Id.* Indeed, a study conducted by the Federal Judicial Center in 2007 reports that summary judgment is granted in sixty percent of the roughly 29,000 suits in which it is sought. FED. JUDICIAL CTR., *supra* note 17, at 3. Some, however, have opined

summary judgment motion, the question the court asks is whether a reasonable jury could *possibly* or *rationaly* find for the non-moving party when viewing the evidence (and drawing all inferences) in his or her favor.<sup>44</sup> Although the *Matsushita* decision could be construed as limiting in some respects,<sup>45</sup> the Court's mandate that "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor,"<sup>46</sup> is not taken lightly.<sup>47</sup> The implications of this rule are stark, because strict adherence to the standard mandates denying summary judgment in every instance in which there are disputes as to historical fact<sup>48</sup> that could affect the legal outcome of the case. Professor Friedenthal nicely illustrates this point. He asserts:

[I]f a defendant, who is charged with negligently driving into the plaintiff, moves on the basis of an affidavit that he was not driving at the time in question, [the] plaintiff can defeat the motion with his own affidavit that he saw defendant operating the car when the accident occurred. Even if the responding party cannot produce evidence directly in support of its case, it may still defeat summary judgment by producing sufficient circumstantial evidence for a trier of fact to find in respondent's favor. It makes no difference in either situation how strong a case the defendant presents. The court must assume, for purposes of the motion, that a trier of fact would not believe any of the moving party's witnesses.<sup>49</sup>

Thus, the summary judgment standard affords a non-moving party two ways to reach a jury, and that party's mere say-so is not only permissible, but is in fact the easiest means of doing so.

While summary judgment may still be granted in the face of divergent factual allegations depending on the circumstances, the

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that this trend predates the trilogy. See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 620 (2004) (noting that "empirical evidence . . . does not support the claims of those who see a turning point in the Supreme Court's 1986 trilogy" but instead "suggests that summary judgment started to assume a greater role in the 1970s").

44 See, e.g., *Scott*, 550 U.S. at 380 (holding that summary judgment was appropriate because the relevant evidence precluded a rational jury from finding for the non-moving party).

45 See *supra* note 41.

46 *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)).

47 See, e.g., *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987) (noting that "[i]f the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party. The nonmoving party's evidence *must be taken as true.*" (emphasis added)).

48 These types of disputes, as the Court has stated, are not uncommon. See *supra* note 15.

49 Friedenthal, *supra* note 8, at 781.

prospects for this are necessarily limited.<sup>50</sup> So, faithful adherence to the summary judgment standard mandates routine denial of a defendant's summary judgment motion where one party's evidence contradicts another's even if all the non-moving party brings in opposition to summary judgment is his or her own statement, as a witness to the events in question, that the moving party is lying.<sup>51</sup> Circumstantial evidence suffices in this regard, too.<sup>52</sup> Even so-called "meritless" cases, then, should proceed to a jury if the non-moving party has any evidence that would allow a jury to reasonably find for him or her because the salient question is whether the non-moving party can meet his or her burden of production—and not whether the case ultimately has "merit."<sup>53</sup> Thus, preventing a case from proceeding to a jury where the non-moving party meets this burden can violate the Seventh Amendment.

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50 One such circumstance is if the purported factual disputes are immaterial based on the fact that the non-moving party does not have an actionable legal claim; this is akin to the principles underlying a FED. R. CIV. P. 12(b)(6) motion manifesting themselves at a later stage in the litigation. The other possible circumstance in which summary judgment can appropriately be granted in the face of legally significant factual contradictions is if the non-moving party's statements are directly contradicted by the record because, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). As explained *supra* note 41, some have been critical of this basis for granting summary judgment in the face of certain factual disputes.

51 While the rules governing summary judgment indicate that the non-moving party would have to do so via means of admissible evidence, *see* FED. R. CIV. P. 56(e) (noting opposing affidavit must "set out facts that would be admissible in evidence"), some of the Court's language has suggested otherwise. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (stating that nonmoving party need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgment"). Some courts have construed the *Celotex* Court's language to be merely "referring to the other means enumerated in Rule 56(c) for persuading the court that summary judgment is inappropriate including affidavits, which are evidence produced in a form that would not be admissible at trial." *Canada v. Blain's Helicopters Inc.*, 831 F.2d 920, 925 (9th Cir. 1987). Others, however, have "concluded that the Supreme Court meant that the nonmoving party could oppose a summary judgment motion using unauthenticated documents." *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991) (citing *Bushman v. Halm*, 798 F.2d 651 (3d Cir. 1986) and *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33 (D.C. Cir. 1987) as examples of such decisions). For a collection of sources and a fuller explanation of the split in authority, *see* James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1531 n.31, 1549 n.86 (1995).

52 *See* Friedenthal, *supra* note 8, at 781.

53 Except, of course, to the extent that "merit" is defined in terms of whether a jury could reasonably find for the non-moving party. *See* Thomas, *supra* note 11, at 139 (noting that summary judgment is utilized "extensively . . . to clear the federal docket of cases deemed meritless").

*B. The Seventh Amendment Right to Jury Trial*

Of course, the Seventh Amendment could only be violated by a wrongful summary judgment grant in cases where there is a right to jury trial in the first instance. As noted, the Seventh Amendment “preserve[s]” the right to jury trial “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars.”<sup>54</sup> The limiting phrase “at common law” denotes the fact that the right to jury trial only extends to cases at law, and not to equitable or maritime suits.<sup>55</sup> The common law distinction between law and equity has eroded, however, as the Federal Rules of Civil Procedure provide for only one form of action in the federal courts.<sup>56</sup> So while the constitutional right to jury trial is limited by its own language, the historical distinction upon which its limitations are based no longer exists.

Although the consequences of the merger of law and equity along with the advent of untraditional causes of action have led to a rich body of law governing whether a right to jury trial exists,<sup>57</sup> this Comment need not examine these principles at any length<sup>58</sup> because it is clear that Fourth Amendment excessive force cases are actions that implicate the right to jury trial when they are for damages.<sup>59</sup> It is,

<sup>54</sup> U.S. CONST. amend. VII.

<sup>55</sup> See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) (noting that “[t]he phrase ‘common law,’ . . . is used in contradistinction to equity, and admiralty, and maritime jurisprudence”).

<sup>56</sup> See FED. R. CIV. P. 2 (“There is one form of action—the civil action.”).

<sup>57</sup> The Court has had to determine, for example, how to handle cases involving both legal and equitable claims, and has held that legal claims must be heard first where both are joined in the same suit. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959) (holding that “only under the most imperative circumstances . . . we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims” (footnote omitted)). This applies even if the legal claims are merely incidental to the equitable claims. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473 (1962).

Further, the Court has articulated a three-pronged test for ascertaining whether a right to trial by jury exists in cases that do not fit into the traditional “law” or “equity” mold. *Ross v. Bernhard*, 396 U.S. 531 (1970). In *Ross*, the Court stated that the “pre-merger custom,” “the remedy sought” and “the practical abilities and limitations of juries” were all factors worthy of consideration. *Id.* at 538 n.10. The Court reiterated these factors in *Tull v. United States*, but interestingly relegated the issue of the practical limitations of juries to a footnote. 481 U.S. 412, 418 n.4 (1987). However, the Court’s later decision in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996), expressly considered this latter issue in a different context by holding that judges, and not juries, may determine the construction of patent claims.

<sup>58</sup> Part III, *infra*, considers these issues more fully in discussing the relative importance of the Seventh Amendment.

<sup>59</sup> Excessive force suits are commonly brought under 42 U.S.C. § 1983 (“Section 1983”). Regardless of how such actions are brought, however, an excessive force suit is essentially a tort claim, and is thereby accorded a Seventh Amendment right to trial by jury. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999) (explaining that “the Seventh

however, worth noting that the Seventh Amendment right to jury trial may be waived.<sup>60</sup> Accordingly, the Seventh Amendment is neither implicated nor violated where summary judgment is wrongfully granted following a waiver of the right to trial by jury. With the limitations of the Seventh Amendment's applicability to summary judgment grants in mind, this Comment turns to consider instructive cases.

## II. WHY APPLICATION OF THE SUMMARY JUDGMENT STANDARD MAY VIOLATE THE SEVENTH AMENDMENT IN PRACTICE

Although Professor Thomas has put forth a strong and interesting argument that summary judgment is, as a general matter, unconstitutional by virtue of the fact that it was never expressly accepted by the Court nor a product of the English common law,<sup>61</sup> this argument has been handily rejected in the seemingly few cases in which it has been raised.<sup>62</sup> However, as the illustrative cases in this Part show, the standard is readily prone to distortion such that summary judgment may sometimes be granted in contravention of its purported constitutional basis.<sup>63</sup>

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Amendment jury guarantee extends to . . . claims unknown to the common law, so long as the claims can be said to 'soun[d] basically in tort,' and seek legal relief" (quoting *Curtis v. Loether*, 415 U.S. 189, 195–96 (1974)); see also Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 661–62 n.8 (2006) (stating that the *Del Monte Dunes* court accepted that excessive force suits for damages would "carry a right to jury trial").

60 Rule 38(b) of the Federal Rules of Civil Procedure requires that demand for jury trial be made within ten days from when the last pleading "directed to the issue [was] served." Failure to make demand amounts to waiver. See FED. R. CIV. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed.")

61 Thomas, *supra* note 11, at 139–40. More recently, Professor Thomas has argued that the "reasonable jury" standard used to evaluate summary judgment, and other dispositive motions should be abandoned on other grounds. See *infra* note 63.

62 As of the writing of this Comment, only five federal Court of Appeals cases even remotely address the merits of the constitutional argument. See *Cook v. McPherson*, 273 F. App'x 421, 425 (6th Cir. 2008) (rejecting constitutional argument opposing summary judgment); *Calvi v. Knox County*, 470 F.3d 422, 427 (1st Cir. 2006) (same); *Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996) (same); *In re Rodriguez*, 95 F.3d 54 (5th Cir. 1996) (same); *Malick v. Sandia Corp.*, 914 F.2d 1496 (9th Cir. 1990) (same).

63 As explained in Part I, summary judgment's constitutionality in the face of the Seventh Amendment is predicated on a lack of material facts to be tried. See *supra* notes 11–12 and accompanying text. Accepting this premise, Professor Thomas takes a more extreme position than advanced in this Comment; she argues that the standard utilized is not merely distorted in practice, but is—as a general matter—irreparably unconstitutional. See Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009) (arguing that "reasonable jury" standard is a legal fiction that *always* involves judges unconstitutionally making fact determinations because (1) judges routinely weigh on the suffi-

Because the selected cases all involve Fourth Amendment excessive force claims,<sup>64</sup> this Part proceeds by briefly considering the excessive force standard to be applied before turning to the cases themselves.

#### A. *The Excessive Force Standard*

Using a variety of means,<sup>65</sup> plaintiffs may sue government officials for the violation of constitutional rights and recover damages for the excessive use of force. This particular civil remedy is rooted in the Fourth Amendment's objective reasonableness standard.<sup>66</sup> The Court, in *Graham v. Connor*, broadly defined the test for excessive force to involve a "careful balancing" between the individual and governmental interests involved.<sup>67</sup> As the Court explained:

[I]ts proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.<sup>68</sup>

The Court also clarified that, in undertaking this factually intensive analysis, the lower courts were to judge whether force was excessive "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."<sup>69</sup>

Although this latter language serves to limit the scope of excessive force liability, qualified immunity—which protects government officials from civil liability where their conduct does not violate "clearly established" rights<sup>70</sup>—has emerged as the true limitation on excessive force liability.<sup>71</sup> This is so because the Court, in the controversial de-

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ciency of the evidence in assessing the reasonable jury standard, (2) the reasonable jury standard has not been clearly defined, and (3) judges often disagree over what a reasonable jury could find).

64 See *supra* notes 14–17.

65 As noted *supra* note 59, Section 1983 provides such an avenue for relief.

66 See *Graham v. Connor*, 490 U.S. 386, 395–97 (1989) (describing how to determine whether a particular use of force was reasonable under the Fourth Amendment).

67 *Id.* at 396.

68 *Id.*

69 *Id.*

70 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

71 See *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (expressly rejecting lower court's approach of "deny[ing] summary judgment any time a material issue of fact remains on the excessive force claim" because this approach would frustrate the policy goal of qualified immunity).

cision of *Saucier v. Katz*,<sup>72</sup> expressly mandated that qualified immunity serve as a distinct step to the question of whether the Fourth Amendment was violated at all.<sup>73</sup>

While the *Saucier* Court rigorously distinguished qualified immunity from the Fourth Amendment excessive force standard,<sup>74</sup> it too is ultimately factually intensive because it inquires as to whether “the officer’s mistake as to what the law requires is *reasonable*.”<sup>75</sup> Accordingly, its practical benefit for defendant-officers is likely nominal in the emblematic excessive force case described by Justice Scalia in *Scott v. Harris*.<sup>76</sup> Indeed, as Justice Ginsburg observed in concurrence in *Saucier*:

[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* will not permit summary judgment in favor of the defendant official. And that is as it should be. When a plaintiff proffers evidence that the official subdued her with a

<sup>72</sup> *Id.* The *Saucier* decision was most readily criticized for mandating threshold consideration of the constitutional question prior to evaluating the applicability of qualified immunity. For a discussion of the salient criticisms, see *Scott v. Harris*, 550 U.S. 372, 387–89 (2007) (Breyer, J., concurring). In January 2009, the Court overruled the fixed two-step protocol that *Saucier* required, and invited lower courts to “exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Calahan*, 129 S. Ct. 808, 818 (2009).

<sup>73</sup> *Saucier*, 533 U.S. at 201. While the “rigid ‘order of battle,’” *Brosseau v. Haugen*, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring) (quoting *Bunting v. Mellen*, 541 U.S. 1019, 1025 (2004) (Scalia, J., dissenting from denial of certiorari)), of *Saucier* is no longer compulsory, the Court noted in *Pearson v. Calahan* that it was still advisable in many cases. See *Pearson*, 129 S. Ct. at 818 (recognizing that the procedure set forth in *Saucier* is “often appropriate”). Choosing to follow the two-step *Saucier* order, whereby the constitutional question serves as a threshold to the qualified immunity inquiry, could be seen as a boon for plaintiffs who do not automatically have their cases dismissed following the pleading stage on qualified immunity grounds—particularly since defendants invoking it, in some circuits, bear the burden of proving the applicability of qualified immunity as an affirmative defense. See *Henry v. Purnell*, 501 F.3d 374, 378 (4th Cir. 2007) (identifying split in authority over the burden of proving qualified immunity at trial). Indeed, at least in these courts, obtaining dismissal via summary judgment on qualified immunity grounds may be difficult. See Friedenthal, *supra* note 8, at 774 (noting that “[o]ne would expect summary judgment to be denied in nearly every action” where the moving party bore the burden of proof at trial despite Justice Brennan’s suggestion in his *Celotex* dissent to the contrary). *But see Saucier*, 533 U.S. at 202 (noting that “summary judgment based on qualified immunity is appropriate” where “the law did not put the officer on notice that his conduct would be clearly unlawful”).

<sup>74</sup> The Court expressly rejected the Ninth Circuit’s holding that, in excessive force cases, the qualified immunity inquiry was tautological to the constitutional question under *Graham*, 490 U.S. 386, since both inquire into the officer’s objective reasonableness. See *Saucier*, 533 U.S. at 203 (describing the similarity observed by the Ninth Circuit as “superficial”). This holding is undisturbed by *Pearson*.

<sup>75</sup> *Saucier*, 533 U.S. at 205 (emphasis added).

<sup>76</sup> See *supra* note 15.

chokehold even though she complied at all times with his orders, while the official proffers evidence that he used only stern words, a trial must be had. *In such a case, the Court's two step procedure is altogether inutile.*<sup>77</sup>

So, while a defendant has two means by which he or she could obtain summary judgment in response to a plaintiff's excessive force suit, a plaintiff's say-so should generally be sufficient to get to a jury where it reflects cognizable, affirmative evidence that a defendant-officer acted (patently) unreasonably.<sup>78</sup> It is unsurprising, then, that courts have cautioned against using summary judgment in excessive force suits.<sup>79</sup> But, as the cases that follow demonstrate, summary judgment is still granted in excessive force cases where formalistic adherence to the standard should lead to a jury trial.

### B. Illustrative Cases

This Subpart proceeds by analyzing four illustrative excessive force cases in detail. In each of the cases, summary judgment was granted in the district court. The summary judgment grant was reversed in two of the four cases,<sup>80</sup> however, demonstrating the importance of appellate oversight of summary judgment grants.<sup>81</sup> Collectively, these cases show the readiness with which summary judgment is granted in the fact-specific excessive force inquiry<sup>82</sup>—even in cases where evidence exists that could, at least arguably, prompt a reasonable jury to find for the plaintiff under the applicable evidentiary standard.<sup>83</sup>

#### 1. *Tapia v. City of Albuquerque*

In *Tapia v. City of Albuquerque*, the plaintiff brought an excessive force claim against several defendant-officers after he was placed in

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<sup>77</sup> *Saucier*, 533 U.S. at 216 (Ginsburg, J., concurring) (emphasis added).

<sup>78</sup> See *supra* note 49 and accompanying text. Of course, as noted *supra* note 50, there are exceptions to this general rule.

<sup>79</sup> See, e.g., *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002) (noting that “summary judgment . . . should be granted sparingly” in excessive force cases because they “nearly always require[] a jury to sift through disputed factual contentions, and to draw inferences therefrom”).

<sup>80</sup> Because appellate review of a summary judgment is *de novo*, the reviewing court applies the same summary judgment test as the lower court. See *infra* note 94. Thus, the court of appeals decisions affirming summary judgment lend independent support to the conclusions advocated in this Part.

<sup>81</sup> See *infra* note 165 and accompanying text.

<sup>82</sup> This is not meant to imply that the decisions discussed are representative of all federal summary judgment cases which, of course, they are not.

<sup>83</sup> It is worth noting that excessive force is one of several claims made in the cases discussed in this Part.

protective custody following an intoxicated suicide attempt.<sup>84</sup> Though he had not committed any crime and was not under arrest, the plaintiff was brought to a prison facility to be housed while he sobered up.<sup>85</sup>

In its opinion, the district court explained that the plaintiff had been agitated throughout the encounter and insulted the officers while they conducted a protective pat down at the prison facility.<sup>86</sup> The court noted that the plaintiff, in his deposition, claimed that the officers initiated a “physical altercation” with him following his (mere) insults.<sup>87</sup> This account was corroborated by soundless video evidence that showed the plaintiff being forcibly restrained and handcuffed after speaking with the officers.<sup>88</sup> Further, after being handcuffed, the plaintiff was moved into a holding cell and—per his deposition—thrown onto the floor, slapped and spit on.<sup>89</sup>

The district court nevertheless granted summary judgment in favor of the defendants. Reasoning that the intake area of the prison was a “stressful, uncertain environment . . . in which officers may be ‘forced to make split-second judgments,’”<sup>90</sup> the court noted that the force used prior to moving the plaintiff into the holding cell was reasonable in light of the fact that the plaintiff “behaved arrogantly and angrily in the moments leading up to the use of force.”<sup>91</sup> The court additionally held that the officers were entitled to qualified immunity with respect to the force utilized<sup>92</sup> in moving the plaintiff to the cell because he had suddenly fell along the way; this, as the court explained, could have been “interpreted . . . as an attempt at resis-

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84 No. CIV 02-695 MCA/RLP, slip op. at 2–3 (D.N.M. June 2, 2003) [hereinafter *Tapia I*].

85 *Id.* at 3.

86 *Id.* at 4–5.

87 *Id.* at 5.

88 *Id.* The plaintiff claimed in his deposition that he had been picked up by his neck during this altercation, and the motion in opposition to summary judgment states that the video also reflects as much. Plaintiff’s Response Brief to Defendants’ Motion for Summary Judgment at 23, *Tapia I*, No. CIV 02-695 MCA/RLP. The plaintiff also claimed that he was kned in the back, a contention which the defendants argued was belied by the video. Brief of Appellant at 15, *Tapia v. City of Albuquerque*, 101 F. App’x 795 (10th Cir. 2004) (No. 03-2133) [hereinafter *Tapia II*].

89 *Tapia I*, No. CIV 02-695 MCA/RLP, slip op. at 6–7. The Court indicated that the defendants “den[ied] these contentions.” *Id.* at 7.

90 *Id.* at 12 (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).

91 *Id.* The Court also reasoned in the alternative that the officers would be entitled to qualified immunity because they could have reasonably believed the plaintiff would fight back during the pat down. *Id.* at 14.

92 Although the Court makes no explicit mention of it in this context, presumably this language refers to the allegation that the defendants threw, slapped and spit on the plaintiff in the holding cell.

tance.”<sup>93</sup> Applying de novo review,<sup>94</sup> the district court’s grant of summary judgment was affirmed by the Tenth Circuit.<sup>95</sup>

While the availability of video evidence in *Tapia* lends initial credibility to the court’s summary judgment grant in light of the Supreme Court’s recent holding in *Scott v. Harris*,<sup>96</sup> in *Tapia*, unlike *Scott*, there was some question as to the clarity of the video evidence.<sup>97</sup> And, interestingly, the plaintiff in *Tapia* used one of the videos from the scene as supporting evidence in his motion opposing summary judgment believing it corroborated his account of the facts.<sup>98</sup> Further, the video evidence did not capture anything that transpired in the holding cell in which the plaintiff claimed in his deposition to have been thrown, hit and spit on while handcuffed and compliant.<sup>99</sup> So, at its essence, the question of whether the force utilized by the officers in *Tapia* was “reasonable”<sup>100</sup> or, alternatively, whether the officers made a “reasonable mistake”<sup>101</sup> boils down to whose story one accepts.

The plaintiff’s affirmative evidence showed that he suffered injuries relating to (1) being lifted in the air by his neck, (2) being kned in the back and (3) being thrown into a cell and struck. A jury could reasonably find such force excessive in a case where the plaintiff was not “resistant in any remotely threatening way”<sup>102</sup> as the plaintiff claimed in his testimony, given that the video evidence did not prove

<sup>93</sup> *Id.* at 15.

<sup>94</sup> Appellate review of a summary judgment grant is always de novo, and the district court’s decision is thus afforded little, if any, weight in determining the appropriate conclusion. *See, e.g., T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987) (noting that, on appeal, the court applies the “same summary judgment test that governs the district court’s decision”).

<sup>95</sup> *See Tapia II*, 101 F. App’x 795, 800 (10th Cir. 2004) (affirming the district court largely because the plaintiff “verbally confronted the defendants and pulled back from the booking counter while they were trying to frisk him”).

<sup>96</sup> *See supra* note 41.

<sup>97</sup> *See Tapia II*, 101 F. App’x at 796 (discussing the questions as to the clarity of the video evidence utilized by the district court); Brief of Plaintiff-Appellant at 3–4, *Tapia II*, 101 F. App’x 795 (No. 03-2133) (stating that the video submitted by the defendants was hazy, and that the second video was clearer but did not “provide a definitive view of the incident[s] in question”); *cf. Scott v. Harris*, 550 U.S. 372, 378 (2007) (holding summary judgment appropriate because the “videotape quite *clearly* contradicts the version of the story told by [the plaintiff]” (emphasis added)).

<sup>98</sup> *See Tapia II*, 101 F. App’x at 796 (noting that “*Tapia* . . . filed . . . video 2, as a part of his response to defendants’ motion for summary judgment”).

<sup>99</sup> *See* Plaintiff’s Response Brief to Defendants’ Motion for Summary Judgment at 23, *Tapia I*, No. CIV 02-695 MCA/RLP (stating that the plaintiff’s deposition testimony contradicts the defendants’ summation of what the video shows and that there are divergent factual allegations “as to what took place out of the sight of the camera”).

<sup>100</sup> *See supra* notes 66–69 and accompanying text.

<sup>101</sup> *See supra* notes 71–75 and accompanying text.

<sup>102</sup> Brief of Appellant-Plaintiff, *Tapia II*, *supra* note 97, at 6–7.

otherwise. Indeed, it is hard to envision that the insults the plaintiff conceded to have lodged against the defendants merited, as a matter of law, the use of such a high degree of force. Faithful adherence to the summary judgment standard would have likely resulted in a jury trial in this dispute over historical facts notwithstanding the video evidence in the record. In short, the plaintiff seemingly met his burden of production such that a reasonable jury could find for him when drawing all inferences in his favor.<sup>103</sup>

## 2. *Sowards v. City of Trenton*

In *Sowards v. City of Trenton*, Terry Sowards's estate brought suit after Sowards was shot dead by several police officers.<sup>104</sup> The police had been called to Sowards's apartment complex after Sowards, a paranoid schizophrenic, was reported to have been engaged in a violent altercation with another individual.<sup>105</sup> After arriving on the scene, the responding police officer identified Sowards walking into his apartment building and knocked on his door to request permission to speak with him.<sup>106</sup> Sowards profanely declined, and three additional police officers subsequently arrived at Sowards's door.<sup>107</sup>

The officers continued to request that Sowards open the door, and Sowards continued to be non-responsive and profane in response to their requests.<sup>108</sup> The officers thus decided to forcibly enter Sowards's apartment; they kicked the door open, which as the court noted, "resulted in the door opening up by approximately one foot."<sup>109</sup> The officers testified in their depositions that, upon opening the door, they saw a gun that fired at them, and that they returned fire until the shooting ceased.<sup>110</sup> The police report stated that the police had collectively fired thirty-nine shots, and that Sowards had been hit seven times.<sup>111</sup>

The district court granted summary judgment for the defendants on the excessive force claim because the "use of force . . . was not unconstitutionally excessive."<sup>112</sup> The court predicated this holding on

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103 See *supra* note 77 and accompanying text.

104 No. 02-CV-71899-DT, slip op. at 1 (D. Mich. Mar. 14, 2003).

105 *Id.* at 2–3.

106 *Id.* at 2.

107 *Id.* at 2–3.

108 *Id.* at 3.

109 *Id.* at 4.

110 *Id.* at 4–5.

111 *Id.* at 5.

112 *Id.* at 18.

the assumption that Sowards had a gun when the door was knocked open.<sup>113</sup> Viewed in this light, it did not matter who fired first because the officers felt the need to utilize deadly force in responding to the threat posed by Sowards.<sup>114</sup> Thus, no jury could reasonably find for Sowards if it were granted that he had, in fact, aimed a gun at the officers.

Sowards did not concede, however, that a weapon was pointed at the officers when they knocked the door down.<sup>115</sup> While recognizing that finding Sowards could have possibly *not* had a gun would create a material factual issue for trial, the court held that Sowards had not met his burden of production to prove as much at trial by characterizing the evidence to that effect as providing only a scintilla of support for Sowards's claim.<sup>116</sup> The Sixth Circuit affirmed the district court's finding, noting that the record belied Sowards's account of the facts because: (1) shell casings were found at the residence, (2) a handgun was found at the residence and (3) there were bullet holes from the weapon alleged to have belonged to Sowards.<sup>117</sup>

As discussed in Part I.A, summary judgment should be granted in cases where the record as a whole demonstrates that no reasonable jury could possibly find for the non-moving party. And, of course, a supposed "scintilla" of evidence is insufficient to defeat summary judgment where it is otherwise appropriate.<sup>118</sup> Notwithstanding these clear principles, it hardly seems evident that a reasonable jury could not possibly find for Sowards when drawing all favorable inferences in his favor.

Specifically, Sowards's motion opposing summary judgment provided that: (1) Sowards's sister and girlfriend had stated in their depositions that Sowards did not own a gun, was afraid of guns, and that they had never seen one in his apartment; (2) Sowards's fingerprints were not on the gun alleged to have been his; (3) the gun was found "a considerable distance" from Sowards's body in the apartment; (4) there was no blood on the gun which was, according to an expert, unusual if Sowards was holding a gun during the encounter; and (5) ballistics tests adduced showed the bullets purportedly fired by So-

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113 *Id.*

114 *Id.*

115 *See* Plaintiff's Response to Defendant's Motion for Summary Judgment at 13, *Sowards*, No. 02-CV-71899-DT (arguing that the question of whether Sowards had a gun was highly disputed).

116 *Sowards*, No. 02-CV-71899-DT, at 20–21.

117 *Sowards v. City of Trenton*, 125 F. App'x 31, 38 (6th Cir. 2005).

118 Friedenthal, *supra* note 8, at 782.

wards from his apartment could have come from another room in the building.<sup>119</sup>

Ironically, then, and in direct contradiction to the conclusions reached by the district court and court of appeals, Sowards's counsel characterized the dispute as a matter of whether to believe "the four officers versus the substantially contradicting physical evidence."<sup>120</sup> However, the divergence in how the court, which opted to grant summary judgment with respect to the excessive force claim, and Sowards's counsel characterized the facts is hardly surprising. Sowards's counsel believed that the circumstantial evidence adduced, when viewed favorably to the plaintiff, created a strong jury case while the court did not.

But while the defendants' evidence—that of the only surviving witnesses from the scene and physical circumstantial evidence pointing in favor of the defendants' account—seems, on balance, stronger than the plaintiff's, can it really be said that a jury could not find in favor of the plaintiff if it did "not believe any of the moving party's witnesses [or evidence?]"<sup>121</sup> Probably not.<sup>122</sup> So, if nothing else, *Sowards* is a close enough case to be construed as a weak application of the summary judgment standard.

### 3. *Bender v. Monroe Township*

In *Bender v. Monroe Township*,<sup>123</sup> the plaintiffs, Mr. and Mrs. Bender, sued several police officers for excessive force following a police response to a domestic dispute. The police officers moved for summary judgment on qualified immunity grounds. The police had been summoned to the plaintiffs' home by the plaintiffs' daughter. The call involved screaming and pleas for help, indicating that Mr. Bender had struck Mrs. Bender.<sup>124</sup>

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119 Plaintiff's Response to Defendant's Motion for Summary Judgment, *supra* note 115, at 12–13.

120 *Id.* at 13.

121 Friedenthal, *supra* note 8, at 781.

122 *Cf.* Wilhelm v. Knox County, No. 2:03-CV-786, 2005 WL 1126817, at \*15 (S.D. Ohio May 12, 2005) (denying summary judgment as to excessive force claim "[a]lthough cognizant of the lack of much detail in [the] evidence" because "the evidence presents a scenario in which the force used by [the officer] may or may not have been appropriate and, resolving all inferences in favor of the non-moving party, the Court must conclude that [the plaintiff's] claim survives summary judgment").

123 No. 05-cv-216, 2007 WL 836865 (D.N.J. Mar. 14, 2007) [hereinafter *Bender I*].

124 *Id.* at \*1.

At least three police officers arrived on the scene.<sup>125</sup> Upon arrival, they observed Mrs. Bender and one of her daughters standing outside of their locked residence.<sup>126</sup> Mrs. Bender informed the officers that Mr. Bender was in the home with the couple's other two daughters, "and asked the Officers to enter the house by breaking down the front door."<sup>127</sup> Before they did so, Mr. Bender briefly opened the door voluntarily, but immediately closed it upon observing the police officers. The officers informed Mr. Bender that he was under arrest through the door, and demanded he open the door for them. He refused to do so.<sup>128</sup>

As the district court explained, the parties' accounts of what transpired next differ considerably:

Plaintiffs claim that Mr. Bender raised both of his empty hands in the air [and] that Mr. Bender was tackled without provocation by the Officers. Plaintiffs further claim that the Officers assaulted Mr. Bender both inside the house and on the front yard when they were transporting him to a patrol car. . . . Defendants claim that when they entered Plaintiffs' residence, Mr. Bender took a 'boxer's stance' and held an Allen wrench in a threatening manner. Defendants also claim that Mr. Bender resisted arrest, which compelled them to forcefully detain him.<sup>129</sup>

While the plaintiffs ascribed Mr. Bender's alleged injury—a broken face bone—to the defendants' actions, the defendants claimed any injuries resulted from Mr. Bender "repeatedly hitting his face against the partition in the patrol car in a fit of rage, and hitting his face against a table in the house while he was resisting arrest."<sup>130</sup>

Despite the vast differences in the accounts of the respective parties, the district court granted summary judgment in favor of the defendants.<sup>131</sup> It predicated its holding on the fact that Mr. Bender had (1) refused to allow the officers to enter after being placed under arrest, and (2) pled guilty to assaulting a police officer.<sup>132</sup> These facts, it suggested, precluded a reasonable jury from finding that the force utilized by the police was excessive in relation to that reasonably necessary under the circumstances.<sup>133</sup> Therefore, it found it unnecessary

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125 The plaintiffs alleged a fourth officer had been present, but the defendants denied this contention. *Id.* at \*2.

126 *Id.* at \*2.

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* at \*3.

132 *Id.*

133 *Id.*

to address the second-step question of whether the officers would be entitled to qualified immunity for their actions.<sup>134</sup>

That Mr. Bender had resisted arrest before the officers entered the home and that he had pled guilty to assault on an officer should not have been grounds for granting summary judgment in the defendants' favor, however. It is certainly unlikely that Mr. Bender, who was engaged in a drunken altercation with his family<sup>135</sup> and vehemently resisted arrest before the police broke down the door, suddenly "surrendered" and was fully compliant once the police entered his residence.<sup>136</sup> But while Mr. Bender *likely* resisted arrest—thereby warranting some degree of force—and would *likely* lose before a jury based on the (therefore) dubious factual claims his case necessarily rested on, the fact remains that the jury *could* find for him if it believed the plaintiffs' account of the facts rather than the defendants'.

Indeed, the plaintiffs' characterized the defendants' actions in their court briefing as "[b]eating a handcuffed and injured individual who [was] offering no resistance."<sup>137</sup> They corroborated this account by attaching their own depositions, along with those of their daughters who were present during the incident.<sup>138</sup> Accordingly, a reasonable jury could find that the plaintiffs were entitled to a verdict notwithstanding the defendants' qualified immunity defense, because the officers could not possibly have believed their mistake as to the degree of force was "reasonable" if the plaintiffs' account of the facts was true.<sup>139</sup>

Recognizing as much, the Third Circuit reversed the district court, and remanded for further proceedings.<sup>140</sup> The court noted that the "depositions of family members support[ed] Mr. Bender's

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134 *Id.* at \*4 n.6. When *Bender I* was decided, the two-step protocol of *Saucier* was compulsory. *See supra* note 72.

135 *See Bender v. Twp. of Monroe*, 289 F. App'x 526, 527 (3d Cir. 2008) [hereinafter *Bender II*] (noting that the domestic dispute began when Mr. Bender was drunk).

136 Mr. Bender conceded to the Third Circuit that he, after being handcuffed, "kicked an officer in the groin." *Id.* The extent to which this renders the force utilized by the officers "reasonable," however, hinges on whether or not Mr. Bender was beaten to the degree he alleged and averred via deposition testimony. That is, the mere fact that Mr. Bender physically assaulted an officer would not mean that any degree of force utilized in response would be appropriate under excessive force analysis. *See supra* note 68 and accompanying text.

137 Brief in Opposition to Motion for Summary Judgment at 6, *Bender I*, 2007 WL 836865 (No. 05-cv-216).

138 *Id.*

139 *See supra* note 77 and accompanying text. Indeed, the possibility of a summary judgment grant in a case with facts analogous to those in *Bender* seems to be exactly what concerned Justice Ginsburg in *Saucier*.

140 *Bender II*, 289 F. App'x at 529.

version of the [facts]” and that the district court should thus have “allowed a jury to determine which version [was] to be believed.”<sup>141</sup>

The Third Circuit’s decision in *Bender II* reflects the functionality and continued vitality of the summary judgment standard.<sup>142</sup> Although the plaintiffs had a weak jury case, the Third Circuit appropriately recognized that the record’s disputed historical facts presented a scenario in which a reasonable jury could, contrary to the district court’s holding, find for the plaintiffs. By reversing the district court’s summary judgment grant, the Third Circuit implicitly recognized (and reaffirmed) the premium the Constitution continues to place on providing litigants their day before the jury.

#### 4. *Gonzalez v. City of Santa Monica*

Finally, *Gonzalez v. City of Santa Monica*<sup>143</sup> involved an altercation between several police officers and the plaintiff. While the reported account of the facts that gave rise to the suit is necessarily limited,<sup>144</sup> discussion of the case in this Part is warranted because *Gonzalez* represents the type of case alluded to in Part I.A. whereby a plaintiff seeks to defeat a defendant’s summary judgment motion exclusively on the basis of his or her say-so.<sup>145</sup>

The plaintiff in *Gonzales* sued for excessive force, alleging that the police (1) sprayed him in the face with pepper spray, (2) beat him with a baton and (3) pulled his hair and arm during an encounter in which they arrested his brother.<sup>146</sup> The police denied these contentions and moved for summary judgment on qualified immunity grounds. The district court granted summary judgment in favor of the officers.<sup>147</sup>

In a cursory opinion, the Ninth Circuit reversed. Noting that the district court had erroneously “resolved virtually all material disputes in favor of the officers,” the court held that summary judgment was inappropriate with respect to the excessive force claim.<sup>148</sup> Specifically, it noted that the plaintiff’s account of the facts—supported solely by

141 *Id.* at 528.

142 *Cf.* Thomas, *supra* note 63, at 759–60 (suggesting that the “reasonable jury” standard used to weigh on summary judgment motions is fatally flawed).

143 88 F. App’x 161 (9th Cir. 2004).

144 The district court’s opinion in *Gonzalez* is unreported, and—unfortunately—unavailable as a slip opinion. Accordingly, all discussion of this case relates to the Ninth Circuit’s opinion which handily reversed the district court. *Id.* at 163.

145 *See supra* note 49 and accompanying text.

146 *Gonzalez*, 88 F. App’x at 162.

147 *Id.*

148 *Id.*

his own affidavit—entailed him being beaten by the officers for essentially no reason, and that a jury could thus find excessive force had been utilized if it believed the plaintiff at trial.<sup>149</sup> As the Court explained:

In his affidavit, Gonzalez states, among other things, that although he was shouting at the officers to put their guns away, he at no time touched an officer or otherwise interfered with the arrest of his brother. He further states . . . that Officer Legerski sprayed him in the face with pepper spray, and that Officer Carranza beat him on the leg and knee with his baton while Officer Bickler pulled his hair and Officer Lucio pulled him by his arm.<sup>150</sup>

This account of the facts, as the court noted, precluded the qualified immunity defense and rendered the district court's summary judgment grant inappropriate.<sup>151</sup> Thus, the Ninth Circuit found it irrelevant, for summary judgment purposes, that the evidence adduced in opposition to summary judgment was the plaintiff's own testimony; it, unlike the district court, properly assumed the plaintiff's story was the true one when weighing whether to grant the defendants' summary judgment motion.<sup>152</sup>

### C. *Summary Judgment in the Selected Cases*

The rules associated with summary judgment are easy to state, but application of the standard is necessarily complex, as it involves a legal determination about a set of facts. This characteristic makes the standard malleable in factually intensive cases, and provides an avenue by which judges can conceivably frame the summary judgment question in terms of the strength of a claim rather than the presence or absence of material factual issues. Such efforts, however, are not necessarily deliberate distortions of the standard. Indeed, judges may perceive the standard to provide a legally appropriate basis by which to deprive litigants of the right to jury trial in cases where the summary judgment standard would—strictly speaking—not permit as much.<sup>153</sup> The summary judgment grants discussed in this Part all re-

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149 *Id.* at 162–63.

150 *Id.* at 162.

151 *Id.* at 163.

152 This decision, like the Third Circuit's holding in *Bender II*, 289 F. App'x 526 (3d Cir. 2008), shows that the summary judgment standard, although subject to improper application, ultimately remains functional.

153 This perspective would be the manifestation of the “extreme” pro-summary judgment position that has survived the Frank-Clark debate. *See supra* note 25 and accompanying text.

flect the consequences of doing so—namely, the loss of the right to a jury trial where there would otherwise be a right to one.<sup>154</sup>

Moreover, the fact that the cases surveyed involve summary judgment grants in favor of defendant-police officers does not prompt any sample-bias concerns. The propriety of the summary judgment standard in light of the Seventh Amendment—which I, unlike others,<sup>155</sup> continue to believe is possible<sup>156</sup>—depends on the ability of a jurist weighing a summary judgment motion to objectively determine whether a reasonable jury could find for the non-moving party by reference to that party's burden of production.<sup>157</sup> Thus, while the summary judgment grants in the cases surveyed may reflect generalized deference to police officers, the extent to which they do lends support to the conclusion that the summary judgment standard was improperly applied.<sup>158</sup> When the standard is distorted to deprive liti-

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154 It is worth noting that the cases surveyed—and the vast majority of those considered for discussion in this Part—are non-precedential opinions. Some have noted a propensity for such opinions to create inconsistencies in the law. See Sarah E. Ricks, *The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit*, 81 WASH. L. REV. 217, 217 (2006) (noting that the Third Circuit “created inconsistent non-precedential opinions” on a particular legal doctrine in a six-year interval between binding decisions on that doctrine).

There are precedential opinions that support the arguments advanced in this Part, too. In *Colston v. Barnhart*, 130 F.3d 96 (5th Cir. 1997), a divided court granted summary judgment for the defendants on fairly tenuous grounds. The *Colston* court granted summary judgment where an unarmed black plaintiff was shot in the back, reasoning that the defendants' behavior was objectively reasonable because the officers could have believed the plaintiff posed an “imminent danger of serious bodily harm.” *Id.* at 100. The dissenting judge argued, however, that a reasonable jury could find for the plaintiff given that he had no weapon during the encounter with the officers and only inflicted minimal injuries upon them after they had—viewing the facts in the light most favorable to the plaintiff—unnecessarily provoked an altercation with him. *Id.* at 103 (DeMoss, J., dissenting). Discussing the case at length as an example of the liberalized approach some courts take to summary judgment, Professor Miller criticizes the *Colston* court's “questionable” treatment of the summary judgment standard, pointing to the vastly different conclusions reached by the majority, who determined that no reasonable jury could find the officers to have acted unreasonably by firing shots at the plaintiff, and the dissent who reached the exact opposite conclusion. See Miller, *supra* note 3, at 1131 (explaining that “the clear disagreement among ‘reasonable people’ . . . suggests that . . . the merits should have been left until trial”).

155 See generally Thomas, *supra* note 63, at 774–83 (arguing that it is impossible for a judge to apply the reasonable jury standard without offending the Constitution).

156 See *supra* notes 142 and 152 and accompanying text.

157 See *supra* notes 44–49 and accompanying text.

158 While qualified immunity would ordinarily justify this kind of deference, it would not do so in cases where—as in the cases surveyed in this Part—the disputes as to historical fact are vast and material. See *supra* note 77.

gants of their jury trial right in this manner, its purportedly settled constitutional basis is vastly weakened.<sup>159</sup>

This is not to say, of course, that there is an absolute right to trial by jury in all excessive force suits. This Comment has focused exclusively on cases in which there were disputes as to historical facts. Where the disputes are material in such cases, the Seventh Amendment unquestionably provides the right to a jury trial that this Comment has argued was erroneously deprived in the illustrative cases.<sup>160</sup> Whether the jury is entitled to determine the factually driven excessive force question when the parties agree on the facts giving rise to the suit is an altogether different question, the resolution of which is a subject for a different article.

It suffices to note, then, that some courts have adamantly rejected the traditional view that “reasonableness” tests are fundamentally for the jury to decide<sup>161</sup> in the excessive force context.<sup>162</sup> Thus, although an excessive force claim hinges on a factually intensive objective reasonableness standard, it is not necessarily the case that the Seventh Amendment categorically provides a jury trial right. Accordingly, a judge may well be entitled to determine whether an officer acted “reasonably” or not in cases different than those discussed in this Comment. Although the Constitution plainly does not contemplate such a role for judges in the cases this Comment focuses on,<sup>163</sup> it is nevertheless worth considering how efficiency concerns bear on the issue of disposing weak jury cases via summary judgment. This Comment thus turns to address this question.

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159 See *supra* note 11.

160 See, e.g., *Bell v. Irwin*, 321 F.3d 637, 640 (7th Cir. 2003) (“When material facts are in dispute [in an excessive force suit], then the case must go to a jury . . .”).

161 See *Struve*, *supra* note 59, at 704 (explaining that reasonableness tests in tort law traditionally “go to the jury even in the absence of a dispute of historical fact”).

162 See, e.g., *Bell*, 321 F.3d at 640 (distinguishing between constitutional torts and ordinary torts, and explaining that the former creates “legal rules” such that “when material facts . . . are undisputed” the question of liability is outside the jury’s permissible ambit). For a brief analysis of the *Bell* court’s conclusion, see *Struve*, *supra* note 59, at 705–06. For a more general survey of cases from the different circuits discussing the role of the judge vis-à-vis the jury in resolving excessive force suits with undisputed historical facts, see Karen M. Blum, *Section 1983: Qualified Immunity*, in 1 PRACTICING LAW INSTITUTE: 25TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 750–819 (2008).

163 See *supra* note 12 and accompanying text.

### III. COULD UNCONSTITUTIONAL APPLICATIONS OF THE SUMMARY JUDGMENT STANDARD BE JUSTIFIED ON POLICY GROUNDS?

As advanced in Part II, summary judgment has the capacity to be granted inappropriately, thereby violating the Seventh Amendment. While it is difficult to ascertain precisely why summary judgment is sometimes granted in the face of material factual disputes, it stands to reason that inappropriate grants are sometimes utilized for docket-clearing purposes.<sup>164</sup> Given the Seventh Amendment interests at stake, this concern has prompted some to conclude that “appellate supervision of the motion’s administration seems especially appropriate to prevent Rule 56 from becoming an inappropriate docket-clearing mechanism or a way of preempting trial and jury determination.”<sup>165</sup>

On the other hand, a strong (if unconstitutional) argument could be lodged against allowing “losing” cases to proceed to trial when there are material factual disputes. While adjudicating such cases at the summary judgment stage would unquestionably violate a constitutional right,<sup>166</sup> the Seventh Amendment is not, as a general matter, sacrosanct. Indeed, the Seventh Amendment can be easily waived,<sup>167</sup> does not—unlike almost all of its counterparts in the Bill of Rights—apply against the states,<sup>168</sup> and is fundamentally limited in terms of its applicability.<sup>169</sup>

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164 In *Bennett v. Schmidt*, 153 F.3d 516 (7th Cir. 1998), for example, Judge Easterbrook recognized that summary judgment and other pre-trial adjudication procedures made sense as a matter of judicial economy given the burdens of the federal judicial docket. He noted, “Pressure from the flux of cases makes early disposition of weak claims attractive, freeing judicial time for others that appear to have superior prospects.” *Id.* at 519.

165 Miller, *supra* note 3, at 1041–42.

166 See *supra* notes 11–12 and accompanying text.

167 See *supra* note 60 and accompanying text.

168 See, e.g., Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 78 (2008) (noting that the Seventh Amendment was never incorporated against the states while “almost all of the rest of the Bill of Rights” were).

169 As mentioned, *supra* note 57, complexity is a potential grounds for depriving a litigant of a jury trial. The Supreme Court has held, for example, that the Seventh Amendment does not provide a right to jury fact-finding in the complex determinations of patent construction. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). The discussion, *supra* notes 160–62, concerning whether a judge or jury should determine whether a defendant’s force was excessive in cases of undisputed historical fact can be seen as a manifestation of this limitation. For a broader discussion of how issue complexity impacts the Seventh Amendment jury trial right, see George K. Chamberlin, *Complexity of Civil Action as Affecting Seventh Amendment Right to Trial by Jury*, 54 A.L.R. FED. 733 (1981).

Viewed in this light, principles of judicial economy make it easy to comprehend why there may be a proclivity to enter docket-clearing summary judgment grants in weak jury cases.<sup>170</sup> Every destined-to-lose litigant who gets to a jury delays the ability of those with legitimate suits to proceed with respect to their claims whilst burdening the courts.<sup>171</sup> This is particularly true given that, in some circuits, summary judgment may be denied even though it is technically appropriate because this discretion affords cautious district judges an avenue to avoid reversal by routinely denying summary judgment.<sup>172</sup>

Ultimately, however, compromising constitutional rights for efficiency's sake is an unconstitutional solution.<sup>173</sup> Especially in light of the Court's treatment of suits involving mixed questions of law and equity, which implies a preference for jury trial.<sup>174</sup> So while it is easy to be sympathetic to judges who dispose of (seemingly) frivolous suits that technically have "genuine issue[s] as to . . . material fact[s,]"<sup>175</sup> the policy justifications for doing so are not, and cannot be, sufficient grounds to overcome a constitutional requirement—albeit one that is relatively less "important" than many others.<sup>176</sup> Judges should there-

170 A more liberalized standard could also be construed as warranted by principles of judicial economy.

171 While noting that "summary judgment should never be viewed as simply a docket-clearing device," Judge Scheindlin has pointed out the extent to which meritless cases proceeding past the summary judgment stage burden the courts and other parties. Shira A. Scheindlin & John Eloffson, *Judges, Juries and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 846 (1999). Judge Scheindlin stated that "courts cannot ignore the fact that the delay caused by the trial of a meritless claim works an injustice upon other parties awaiting a trial date." *Id.* On the other hand, it seems equally plausible that—in some cases—it may be more cumbersome for a court to write an opinion granting summary judgment than to try the case by jury.

172 See Friedenthal & Gardner, *supra* note 9, at 104 (describing the split in authority over whether summary judgment grants are discretionary).

173 The Court expressly noted as much in another context when it struck down the legislative veto as constitutionally impermissible. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) (explaining that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government . . . will not save it if it is contrary to the Constitution").

174 As noted, *supra* note 57, the Court has required legal claims be tried before equitable claims in cases where legal and equitable claims are joined. In expounding this rule based on the need to "preserve jury trial," the Court noted that the "right to jury trial is a constitutional one . . . while no similar requirement protects trials by the court." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959).

175 FED. R. CIV. P. 56(c).

176 I derive the conclusion that the right may be less important than other constitutional rights from the fact that the right to jury trial (1) can be easily waived, (2) has not been incorporated against the states and (3) does not apply by virtue of complexity in certain contexts. See *supra* notes 167–69 and accompanying text. Commentators have reached similar conclusions. See David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 793 n.186 (2004) (describing the Seventh Amendment as a "weak

fore be cautious in deciding a summary judgment motion, bearing in mind the rights that could be violated by making the wrong decision.

#### IV. CONCLUSION

The summary judgment standard has evolved considerably since its inception, and the liberalization of the 1986 trilogy has transformed its previously weaker role into a powerful pre-trial tool for federal judges. While neatly defined and easy to state, summary judgment is fundamentally prone to distortion because it is ultimately a legal conclusion about a set of facts. This is particularly true in factually driven inquiries where judges must determine whether a jury could “reasonably” find a particular party’s behavior “unreasonable” (or the like).

In applying this test in the excessive force context, courts have, at least occasionally, granted summary judgment in seemingly weak cases where strict adherence to the standard would likely result in a different outcome. Given the interests associated with the Seventh Amendment right to trial by jury, such efforts amount to a violation of a constitutional right. While there are surely important efficiency considerations that militate in favor of granting summary judgment in such cases, the Seventh Amendment is ultimately paramount. Recognizing as much is an important step towards ensuring that summary judgment’s settled constitutional basis is not compromised.

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guarantee”); *see also* Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1107 (1999) (“[T]he Court treats the Seventh Amendment as if it is less important than the other rights found in the Bill of Rights . . .”).