

# The Unconstitutionality of Summary Judgment: A Status Report

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*ABSTRACT: Summary judgment is unconstitutional. This Symposium Article summarizes this thesis, which was first set forth in Why Summary Judgment Is Unconstitutional, published by the Virginia Law Review. This Article also describes the attention that the thesis has begun to receive in the federal courts and in the media.*

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Summary judgment is unconstitutional. I have argued this thesis since February 2006, when I first posted my article *Why Summary Judgment Is Unconstitutional*<sup>1</sup> on the Social Sciences Research Network (“SSRN”). Here, I will briefly explain what I argued in that article and then tell what has happened since February 2006.

Before I explain my thesis, let me start with the status of summary judgment before February 2006. Before February 2006, federal courts used summary judgment to dismiss many cases, most prominently employment discrimination and other civil rights cases.<sup>2</sup> Before February 2006, summary judgment was constitutional in almost everyone’s eyes. It was obvious. This procedure had been around for a long time and was an effective manner to dismiss a non-meritorious case. Besides that, it had to be constitutional. The procedure was necessary to the proper functioning of the federal courts. The system would break down without summary judgment. Academics like Professors Kozel and Rosenberg had even argued for the mandatory use of summary judgment.<sup>3</sup> Other academics, on the other hand, argued that judges overused summary judgment in certain types of cases, including employment discrimination cases.<sup>4</sup>

Prior to February 2006, the constitutional basis for summary judgment was in fact shaky, but this had not been fully realized. The Court and scholars cited *Fidelity & Deposit Co. v. United States*<sup>5</sup> for the constitutionality of summary judgment even though the rule in *Fidelity* was comparable only to the motion to dismiss.<sup>6</sup> Moreover, some well-known academics, including Arthur Miller and coauthors Marty Redish and Ed Brunet, had

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1. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

2. *See id.* at 141 & n.5; Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 868, 881 & n.60, 887, 906 (2007).

3. *See* Thomas, *supra* note 1, at 141 (citing Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004)).

4. *Id.* at 141 n.5 (citing Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 71 (1999); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101–02 (1999); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206–07 (1993)); *cf.* Rebecca Silver, Comment, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV. 731, 757 (2006) (arguing that summary judgment may be overused in FOIA cases).

5. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902).

6. Thomas, *supra* note 1, at 163–66 (discussing the motion to dismiss standard under *Conley v. Gibson*, 355 U.S. 41 (1957)); *cf.* Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) (discussing changes in the motion to dismiss standard after *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007)).

acknowledged, albeit briefly, possible Seventh Amendment problems with summary judgment.<sup>7</sup>

In February 2006, I presented the argument that summary judgment is unconstitutional.<sup>8</sup> Under summary judgment, a court decides that “no genuine issue as to any material fact” exists.<sup>9</sup> This has been interpreted to mean that no reasonable jury could find for the nonmoving party.<sup>10</sup> My argument that summary judgment is unconstitutional is based on the Seventh Amendment right to a jury trial.<sup>11</sup> As a preliminary matter, the Supreme Court has held that the Seventh Amendment applies only to federal courts.<sup>12</sup> Many states have constitutionalized significant jury trial rights and thus my argument that summary judgment is unconstitutional may apply to those states dependent upon the text of their constitutions. Here, though, I speak only of the federal right to a jury trial and the constitutionality of summary judgment in the federal courts.

The Seventh Amendment provides that “[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”<sup>13</sup> One of the least known facts about the Constitution is that the Seventh Amendment is the only part of the Constitution that explicitly includes the words “common law.”<sup>14</sup> The significance of this fact is that this usage in the Seventh Amendment requires the common law to govern the right to a civil jury trial. There is often talk of what role originalism should play in the interpretation of the

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7. Thomas, *supra* note 1, at 142 (citing 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, 1074–1132 (2003)); *see also* EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 14 (3d ed. 2006).

8. *See* Thomas, *supra* note 1. Although the Article was published in 2007, I originally posted it on SSRN ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=886363](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886363)) on February 22, 2006. Various internet blogs immediately commented on the Article. *See, e.g.*, How Appealing, <http://howappealing.com/022206.html> (Feb. 22, 2006, 21:50 EST); Legal Theory, [http://lsolum.blogspot.com/archives/2006\\_02\\_01\\_lsolum\\_archive.html#114064785816406924](http://lsolum.blogspot.com/archives/2006_02_01_lsolum_archive.html#114064785816406924) (Feb. 22, 2006, 16:33 CST). This commentary has continued. *See infra* note 75 (citing other blog commentary).

9. Thomas, *supra* note 1, at 145 (quoting FED. R. CIV. P. 56(c), which states that “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law”).

10. *Id.* at 143 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

11. U.S. CONST. amend. VII.

12. *Edwards v. Elliott*, 88 U.S. 532, 557 (1874).

13. U.S. CONST. amend. VII.

14. *Id.*

Constitution.<sup>15</sup> Originalism is defined as the original intent of the Founders or, more recently, defined as original public meaning.<sup>16</sup> The Supreme Court has used originalism to inform the interpretation of various parts of the Constitution, using the English common law at the time of the founding.<sup>17</sup> The Seventh Amendment, however, is the only part of the Constitution that explicitly, through the text, requires this application of originalism.<sup>18</sup> Indeed, the Supreme Court has said that “common law” in the Seventh Amendment means the English common law in 1791 when the Seventh Amendment was adopted.<sup>19</sup> While the Court has stated that “[t]he common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions,” the Court has also stated that “here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791.”<sup>20</sup> The Court has also stated that “[t]o effectuate any change in these rules is

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15. See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437 (2007); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 1919 (2007); David S. Law & David McGowan, *There Is Nothing Pragmatic About Originalism*, 102 NW. U. L. REV. COLLOQUY 86 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/27>; Mitchell N. Berman, *Originalism is Bunk* (Dec. 30, 2007), available at <http://ssrn.com/abstract=1078933>.

16. See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 9 (2006).

17. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 589 (2006) (Fourth Amendment); *Deck v. Missouri*, 544 U.S. 622, 626–28 (2005) (due process); *Roper v. Simmons*, 543 U.S. 551, 626 (2005) (Scalia, J., dissenting) (“It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought.”); *United States v. Booker*, 543 U.S. 220, 238–39 (2005) (Sixth Amendment); *Rasul v. Bush*, 542 U.S. 466, 473–74, 481–82 & nn.12–14 (2004) (habeas corpus).

18. U.S. CONST. amend. VII; see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 164 n.59 (1996) (Souter, J., dissenting). Souter wrote:

The Seventh Amendment, after all, was adopted to respond to Antifederalist concerns regarding the right to jury trial. . . . Indeed, that Amendment vividly illustrates the distinction between provisions intended to adopt the common law (the Amendment specifically mentions the “common law” and states that the common-law right “shall be preserved”) and those provisions, like the Eleventh Amendment, that may have been inspired by a common-law right but include no language of adoption or specific reference.

*Id.*

19. See Thomas, *supra* note 1, at 146 & n.25 (citing, among other cases, *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, J.) and *Thompson v. Utah*, 170 U.S. 343, 350 (1898)); Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 799 (2005) (discussing *Parsons v. Bedford*, 28 U.S. 433 (1830) (Story, J.)).

20. Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 750 (2003) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935)).

not to deal with the common law, *qua* common law, but to alter the Constitution.”<sup>21</sup>

Accordingly, the Court has interpreted the first clause of the Amendment, which states that “[i]n Suits at common law, . . . the right of trial by jury shall be preserved,” to mean that there is a jury trial right today in cases with legal rights and remedies, just as there was a jury trial under the common law for all cases with legal remedies.<sup>22</sup> This contrasts with cases with equitable remedies and admiralty cases under which there was no jury trial under the common law.<sup>23</sup> The Court has also emphasized that the substance of the common law, not the form, should be satisfied.<sup>24</sup> In *Curtis v. Loether* the Court stated that there was a jury trial right for housing discrimination, a congressionally created cause of action that gave a right to damages.<sup>25</sup> This was so because it was a tort-like right and remedy tried to juries in England at the time that the Seventh Amendment was adopted.<sup>26</sup>

The Court has interpreted the second clause of the Amendment, which states that “no fact tried by a jury, shall be otherwise re-examined by any Court of the United States, than according to the rules of the common law,”<sup>27</sup> to require that where a jury trial right exists, any new procedure which permits the re-examination of facts must comport with the substance of the English common law jury trial.<sup>28</sup> The Court never has described the substance of the English common law jury trial.<sup>29</sup> Instead, the Court has compared new procedures piecemeal to procedures under the common law.<sup>30</sup> Under this analysis, the Court has approved every new procedure that takes power from the jury before, during, and after trial.<sup>31</sup>

In *The Seventh Amendment, Modern Procedure, and the English Common Law*<sup>32</sup> and in my subsequent article *Why Summary Judgment Is Unconstitutional*,<sup>33</sup> I examined all of the major common law procedures by which the jury trial right was affected to see if any core principles emerged

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21. *Id.*

22. Thomas, *supra* note 6, at 1854.

23. *Id.*

24. *Id.* (citing *Galloway v. United States*, 319 U.S. 372, 392 (1943)).

25. *Id.* (citing *Curtis v. Loether*, 415 U.S. 189, 192–94 (1974)).

26. *Id.*

27. U.S. CONST. amend. VII.

28. Thomas, *supra* note 1, at 146–47 (citing, among other cases, *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497–98 (1931)).

29. *Id.* at 147.

30. *Id.*

31. *Id.*

32. Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687 (2004).

33. Thomas, *supra* note 1.

from the common law. The substance of the common law jury trial was apparent.

First . . . under the common law, the jury or the parties determined the facts. One party could admit the allegations or the conclusions of the evidence of the other party, or the parties could leave the determination of the facts to the jury. A court itself never decided the case without a determination of the facts by the parties or the jury, however improbable the evidence might be. Second, only after the parties presented evidence at trial and only after a jury rendered a verdict, would a court ever determine whether the evidence was sufficient to support a jury verdict. Where the court decided that the evidence was insufficient to support the verdict, the court would order a new trial. Another jury would determine the facts and decide which party won. The court itself would never determine who should win if it believed the evidence was insufficient. Third, a jury would decide a case with any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party, including the improbable facts and conclusions.<sup>34</sup>

In *Why Summary Judgment Is Unconstitutional*, I argued that summary judgment is unconstitutional under this governing jurisprudence. No procedure similar to summary judgment existed under the common law.<sup>35</sup> Moreover, summary judgment violates these core principles or the substance of the common law jury trial.<sup>36</sup> Under summary judgment, a judge decides whether a reasonable jury could find for the nonmoving party, taking into account only factual inferences from the evidence that the judge deems “reasonable.”<sup>37</sup> There was no such determination by a court under the common law.<sup>38</sup> Under summary judgment upon a decision that “a reasonable jury” cannot find for the nonmoving party, the case is dismissed.<sup>39</sup> At common law, a judge could dismiss a case only if the parties agreed to the facts and the judge found that no claim existed on those facts.<sup>40</sup> A court could determine whether the evidence was sufficient only

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34. *Id.* at 147–48; Thomas, *supra* note 32, at 751–53.

35. Thomas, *supra* note 1, at 148–60 (describing the demurrer to the pleadings, the demurrer to the evidence, the nonsuit, the special case, and the new trial); *see also* Thomas, *supra* note 32, at 704–48 (describing additional common law procedures).

36. Thomas, *supra* note 1, at 145–60.

37. *Id.* at 145–46 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149–50 (2000)).

38. *Id.* at 145–60.

39. *Id.* at 145 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

40. *Id.* at 145–60; Thomas, *supra* note 32, at 751–53.

after a jury trial upon a motion for a new trial, and if the court decided that the evidence was insufficient, a new trial would occur.<sup>41</sup> As a result of these differences between summary judgment and the common law, I argued that summary judgment is unconstitutional under the Seventh Amendment.<sup>42</sup>

Some may attempt to characterize the decisions of courts regarding summary judgment as “legal” questions and thus appropriate for courts.<sup>43</sup> Regardless of this attempted characterization, the issue of the constitutionality of summary judgment must necessarily be governed by the common law.<sup>44</sup> As described above, no procedure similar to summary judgment existed under the common law, and the procedure violates the substance of the common law.<sup>45</sup> Accordingly, summary judgment is unconstitutional.

Moreover, as briefly stated above, contrary to conventional wisdom, *Fidelity*<sup>46</sup> does not support the proposition that summary judgment is constitutional under the Seventh Amendment.<sup>47</sup> In contrast to summary judgment, under the procedure held constitutional in *Fidelity*, the Court accepted the facts alleged by the nonmoving party as true.<sup>48</sup> This procedure is analogous to the judgment on the pleadings or the motion to dismiss (under *Conley v. Gibson*),<sup>49</sup> not summary judgment under which a court examines the evidence of both parties and decides whether a reasonable jury could find for the nonmoving party.<sup>50</sup>

Because the standards for dismissal under summary judgment, judgment notwithstanding the verdict, and the directed verdict are the same (no reasonable jury could find for the nonmoving party), some would argue that decisions by the Supreme Court in *Baltimore & Carolina Line, Inc. v. Redman*<sup>51</sup> and *Galloway v. United States*<sup>52</sup> regarding judgment notwithstanding

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41. See Thomas, *supra* note 32, at 751–53; Thomas, *supra* note 1, at 145–60.

42. Thomas, *supra* note 1, at 145–60.

43. See *id.* at 161–63 (discussing the overemphasis on the fact–law distinction in a determination of whether to grant a motion for summary judgment).

44. *Id.* (“The common law governs whether an issue is for a judge or a jury and whether an issue is one of fact or one of law.”).

45. *Id.* at 145–60 (discussing the conflict of summary judgment with the substance or “core principles” of common law procedures).

46. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902).

47. Thomas, *supra* note 1, at 163–66 (discussing how the procedure in *Fidelity* differs from summary judgment).

48. *Id.*

49. Thomas, *supra* note 6, at 1871–72.

50. See Thomas, *supra* note 1, at 163–66 (stating that the Court in *Fidelity* did not analyze the evidence of both parties but rather looked only at whether the defendant had pled a defense).

51. *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935).

52. *Galloway v. United States*, 319 U.S. 372 (1943).

the verdict and the directed verdict support the constitutionality of summary judgment.<sup>53</sup> In *Why Summary Judgment Is Unconstitutional*, I showed why those decisions do not support the proposition that summary judgment is constitutional.<sup>54</sup> In those cases, the Court did not give sufficient importance to significant differences between judgment notwithstanding the verdict and the directed verdict and the common law jury trial. The Court also inaccurately described some of the common law procedures. Additionally, judgment notwithstanding the verdict and the directed verdict are significantly different than summary judgment.<sup>55</sup> Both, for example, occur after one or both parties have presented evidence at trial.<sup>56</sup> Thus, Supreme Court jurisprudence on judgment notwithstanding the verdict and the directed verdict could be considered inapposite for that reason alone.<sup>57</sup> Moreover, the earlier decision by the Court in *Slocum v. New York Life Insurance Co.*,<sup>58</sup> in which the Court found judgment notwithstanding the verdict unconstitutional, supports the argument that summary judgment is unconstitutional.<sup>59</sup>

Another point I made regarding summary judgment is that summary judgment is not necessary to the proper functioning of the federal courts.<sup>60</sup> Indeed, summary judgment imposes significant burdens on the court system.<sup>61</sup> District and appellate courts alike use significant resources to decide motions for summary judgment.<sup>62</sup> The resources that courts use to decide such motions might be even greater than the resources that would be used if the cases were actually tried.<sup>63</sup> Additionally, if summary judgment was eliminated, many cases would continue to settle and not be tried because litigants on both sides would want to settle to remove the risk of a loss before a jury.<sup>64</sup> For these reasons, I argued that summary judgment is not necessary to the proper functioning of the court system.<sup>65</sup>

I have now discussed summary judgment prior to February 2006, and I have discussed my argument of *Why Summary Judgment Is Unconstitutional*,

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53. Thomas, *supra* note 1, at 166–73.

54. *Id.*

55. *Id.* at 176–77.

56. *Id.*

57. *Id.*

58. *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364 (1913).

59. Thomas, *supra* note 1, at 174–76.

60. *Id.* at 177–79.

61. *Id.*

62. *Id.*

63. *See id.* at 178 & n.166 (describing the costs involved in deciding summary judgment motions).

64. Thomas, *supra* note 1, at 178.

65. *Id.* at 177–79; *see also* Suja A. Thomas, *Summary Judgment: We Can Live Without It*, NAT'L L.J., Apr. 10, 2006, at 26.

first set forth in February 2006. In some ways the status of summary judgment remains the same. Federal courts have continued to use summary judgment to dismiss many cases, most prominently employment discrimination and other civil rights cases.<sup>66</sup> What has changed since February 2006, however, is that the constitutionality of summary judgment is becoming an issue. Judges have cited and commented on the thesis. In an opinion citing the article, Judge Weinstein stated that the increasing use of a number of procedures including summary judgment “poses a threat to the continued viability of the Seventh Amendment jury trial.”<sup>67</sup> Another federal judge, citing the article, among others, has stated that “federal courts overuse summary judgment as a case management tool.”<sup>68</sup> Other federal judges have discussed the thesis in hearings and at law conferences. Witness this exchange between a federal judge and litigants at a summary judgment hearing in December 2007:

Judge: “Have you had a chance to read Professor Thomas’ article on summary judgment cited by Plaintiff?”

Opposing counsel chuckled, . . . and said with a dismissive laugh, “Yes, I have.”

Judge: “My question does not invite a flippant response. How do you propose that this Court grant summary judgment in this case without making determinations that should go to a jury.”<sup>69</sup>

A panel of the Sixth Circuit recently noted that the “historical examination [in the article] . . . [was] interesting,” although it rejected the plaintiff’s argument that summary judgment was unconstitutional.<sup>70</sup>

In addition to judges, as indicated by the exchange above, lawyers have reacted to the thesis. Employment discrimination lawyers who represent plaintiffs have raised the argument in briefs in responses to motions for summary judgment and on appeals.<sup>71</sup> A prominent group of attorneys,

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66. *See, e.g.*, *Wittenburg v. Am. Express Fin. Advisors, Inc.*, 464 F.3d 831 (8th Cir. 2006) (claim of sex and age discrimination); *Woodley v. Blue Cross Blue Shield*, No. 3:06-2180, 2008 WL 746996 (D.S.C. Mar. 18, 2008) (claim of employment discrimination); *Moreno v. Town of Huntington*, No. CV 05-2627, 2008 WL 746830 (E.D.N.Y. Mar. 18, 2008) (claim of employment discrimination and retaliation); *Bibby v. Commerce Bancorp, Inc.*, No. 1:06-CV-289, 2008 WL 723523 (D.N.J. Mar. 17, 2008) (claim of employment discrimination).

67. *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 263 (E.D.N.Y. 2007).

68. *In re One Star Class Sloop Sailboat Built in 1930 with Hull No. 721, Named “Flash II”*, 517 F. Supp. 2d 546, 555 (D. Mass. 2007).

69. E-mail from Tod J. Thompson, Attorney, Freking & Betz, to Suja A. Thomas, Professor of Law, University of Cincinnati College of Law (Dec. 18, 2007, 16:09 CST) (on file with author).

70. *Cook v. McPherson*, No. 07-5552, 2008 WL 904736, \*3 (6th Cir. 2008).

71. *See, e.g.*, Brief for Plaintiffs-Appellants at 23–24, *Sherman v. Westinghouse Savannah River Co.*, 2008 WL 344698 (4th Cir. 2008) (No. 04-2414); Final Brief of Plaintiff-Appellant at

professors, and judges who constitute the Advisory Committee of the Federal Rules of Civil Procedure has also discussed the thesis. The notes of the reporter to the meeting in January 2007 state:

The burden argument was embroidered by noting that the debates about summary judgment will be stimulated by the pending publication of two articles. One argues that summary judgment is unconstitutional. The second, agreeing with that argument, adds that it also is inefficient and unfair. Academic criticism of any draft that is seen as facilitating summary judgment will be intense. And the academic protests will spur protests by broader segments of the bar.<sup>72</sup>

As stated here, a second article *Against Summary Judgment* agreed with my thesis that summary judgment is unconstitutional and argued for additional reasons that summary judgment should be abolished.<sup>73</sup> Additional attention for the thesis that summary judgment is unconstitutional occurred in April 2007 when, in discussing the decline of the jury trial, *The New York Times* discussed my article and called the thesis “perfectly plausible.”<sup>74</sup> Blogs also continue to pick up the argument as an issue of discussion.<sup>75</sup>

Separate from the thesis that summary judgment is unconstitutional, in the last two years since the posting of the article, some federal judges have spoken and written against the use of summary judgment in fact-intensive

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18, *Skelton v. Sara Lee Corp.*, 249 Fed. Appx. 450 (6th Cir. 2007) (No. 06-4234); Memorandum in Opposition to Defendant’s Motion for Summary Judgment at 14–15, *Watson v. ABT Elecs., Inc.*, 2007 WL 79327 (N.D. Ill. 2006) (No. 06-C-1815).

72. COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 97 (May 25, 2007), available at <http://www.uscourts.gov/rules/Reports/CV05-2007.pdf>.

73. John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007).

74. Adam Liptak, *Cases Keep Flowing In, But the Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007, at A14 (discussing *Why Summary Judgment Is Unconstitutional*).

75. See, e.g., Legal Theory Blog, *Iowa Symposium on the Constitutionality of Summary Judgment*, <http://lsolum.typepad.com/legaltheory/2008/04/iowa-symposium.html> (Apr. 8, 2008, 08:01); The California Blog of Appeal, *Is Summary Judgment Unconstitutional?*, <http://www.calblogofappeal.com/2008/03/24/is-summary-judgment-unconstitutional/> (Mar. 24, 2008); Sentencing Law and Policy, *Another Amendment to Obsess Over?*, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2007/04/another\\_amendme.html](http://sentencing.typepad.com/sentencing_law_and_policy/2007/04/another_amendme.html) (Apr. 9, 2007, 14:32 EST); Deliberations, *The Case of the People Versus Summary Judgment*, [http://jurylaw.typepad.com/deliberations/2007/03/the\\_politics\\_of.html](http://jurylaw.typepad.com/deliberations/2007/03/the_politics_of.html) (Mar. 8, 2007, 08:15 CST); Posting of Danielle Citron to PrawfsBlawg, *Summary Judgment on the Line*, [http://prawfsblawg.blogs.com/prawfsblawg/2007/02/summary\\_judgmen.html](http://prawfsblawg.blogs.com/prawfsblawg/2007/02/summary_judgmen.html) (Feb. 6, 2007, 15:38); Law Librarian Blog, *Is Summary Judgment Unconstitutional?*, [http://lawprofessors.typepad.com/law\\_librarian\\_blog/2006/03/is\\_summary\\_judg.html](http://lawprofessors.typepad.com/law_librarian_blog/2006/03/is_summary_judg.html) (Mar. 7, 2006); Tax Prof Blog, *Thomas on Why Summary Judgment is Unconstitutional*, [http://taxprof.typepad.com/taxprof\\_blog/2006/02/thomas\\_on\\_why\\_s.html](http://taxprof.typepad.com/taxprof_blog/2006/02/thomas_on_why_s.html) (Feb. 23, 2006).

cases like employment discrimination cases. As an example, Judge Nancy Gertner is reported to have stated that summary judgment is the procedure of choice when it should be just the opposite in employment discrimination cases.<sup>76</sup>

In light of these developments, I look forward to hearing the responses to my argument that summary judgment is unconstitutional.

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76. Noah Schaffer, *Massachusetts Employment Bar Debates Summary-Judgment Trend*, MASS. LAW. WKLY, June 11, 2007.