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## Screening Out Innovation: The Merits of Meritless Litigation

Alexander A. Reinert

*Benjamin N. Cardozo School of Law, Yeshiva University*, areinert@yu.edu

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## **Screening Out Innovation: The Merits of Meritless Litigation**

ALEXANDER A. REINERT\*

*Courts and legislatures often conflate meritless and frivolous cases when balancing the desire to keep courthouse doors open to novel or unlikely claims against the concern that entertaining ultimately unsuccessful litigation will prove too costly for courts and defendants. Recently, significant procedural and substantive barriers to civil litigation have been informed by judicial and legislative assumptions about the costs of entertaining meritless and frivolous litigation. The prevailing wisdom is that eliminating meritless and frivolous claims as early in a case's trajectory as possible will focus scarce resources on the truly meritorious cases, thereby ensuring that available remedies are properly distributed to deserving plaintiffs.*

*Frivolous and meritless litigation are not the same, however. Frivolous claims are easier to identify at the outset of litigation because they rest on unrecognizable legal theories or fantastical factual allegations. More importantly, meritless litigation has a distinct and identifiable value that is obscured by conflating meritless claims with frivolous ones. Unlike frivolous litigation, meritless litigation can bring to light facts that may lead to systematic reform (even where no legal cause of action lies), lead to legal innovation by announcing new interpretations of common law and statutory and constitutional texts, and pave the way for future changes in the law. Recognizing the value of meritless litigation and distinguishing meritless from frivolous cases therefore raises questions about the recent barriers that have been imposed to civil litigation. Taking the value of meritless litigation into account is essential if we are to strike the correct balance between the costs and benefits of keeping courthouse doors open.*

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\* Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. E-mail: areinert@yu.edu. This paper has benefited greatly from the close reading offered by participants in the Benjamin N. Cardozo School of Law's Junior Faculty and Full Faculty Workshops, Seton Hall University School of Law's Faculty Workshop, and the Southeastern Association of Law Schools' Discussion Group on the Impact of Remedies on Constitutional Law. In particular, I thank the following individuals for their insightful comments: Michelle Adams, Richard Bierschbach, Michael Burstein, Annie Decker, Brett Frischmann, Myriam Gilles, Brandon Garrett, Lonny Hoffman, Jennifer Laurin, Margaret Lemos, Max Minzner, David Rudenstine, Joanna Schwartz, Anthony Sebok, Kevin Stack, Colin Starger, Adam Steinman, Stewart Sterk, Julie Suk, Stephen Vladeck, Howard Wasserman, and Charles Yablon.

INTRODUCTION .....	1192
I. DISTINGUISHING THE FRIVOLOUS CASE.....	1198
II. JUDICIAL AND LEGISLATIVE FAILURE TO DISTINGUISH BETWEEN FRIVOLOUS AND MERITLESS LITIGATION .....	1204
A. TRANSSUBSTANTIVE CONFLATION .....	1204
B. CONTEXT-SPECIFIC CONFLATION .....	1215
III. THE VALUE OF MERITLESS LITIGATION.....	1225
A. THE FRAMEWORK FOR APPRECIATING THE VALUE OF MERITLESS LITIGATION .....	1225
B. BARRIERS TO OBTAINING VALUE FROM MERITLESS CASES.....	1231
CONCLUSION.....	1234

### INTRODUCTION

The language of legal innovation is often expressed in biological terms. Thus, law is said to “evolve,” according to judges and commentators.<sup>1</sup> Similarly, law “adapts” or makes “adaptations” to new contexts and circumstances.<sup>2</sup> There are some doctrines, like the Eighth Amendment, that are judged specifically according to “evolving standards.”<sup>3</sup> These words have a biologic, if not progressive, tilt—in the life sciences, evolution and adaptation are the words most commonly used to describe the change in species over time.

But although the law has embraced this metaphor of biology, it has not embraced a critical aspect of evolutionary theory: the value of failure. As Stephen Jay Gould famously wrote, “[H]onorable errors do not count as failures in science, but as seeds for progress in the quintessential activity of correction.”<sup>4</sup> In biology, it is understood that innovation is the product of many errors or mistakes. With their view from a multimillennial perspective, paleontologists in particular might note that life is principally a story of extinction: 99% or more of all species that ever

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1. Indeed, the use of the term “evolve” with respect to law is so common as to be clichéd. According to a search of the JLR database, the word “law” and “evolve” or “evolution” occur within three words of each other in more than 10,000 articles. According to a search of the “ALLFEDS” database, 783 federal opinions contain that language (including 33 Supreme Court opinions). And 1072 state court opinions contain that formulation.

2. Like evolve or evolution, the word “law” appears quite often accompanied by “adapt” or “adaptation.” There are 4169 journal articles, 148 federal court opinions (including 24 Supreme Court decisions), and 467 state court opinions in which the word “law” occurs within three words of “adapt” or “adaptation.”

3. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (introducing term “evolving standards of decency”); see also *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976) (applying *Trop* in context of prisoner medical care); Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 *FORDHAM URB. L.J.* 53, 64–66 (2009) (describing development of doctrine).

4. STEPHEN JAY GOULD, *LEONARDO’S MOUNTAIN OF CLAMS AND THE DIET OF WORMS: ESSAYS ON NATURAL HISTORY* 163 (1998).

roamed the earth are no longer extant.<sup>5</sup> Traits that are maladaptive in one context can become advantageous in another.<sup>6</sup>

In the law, however, value is generally measured by outcome. A case is successful and therefore valuable if it alters the status quo with respect to the relationship between plaintiff and defendant (e.g., payment of money or an agreement to do or cease to do something).<sup>7</sup> If it does not, it is easy to write off as a failure and simply a burden to the legal system. My project in this Article is to show that this assumption is costly and wrong. It imposes costs because assumptions about the burden of what is called “meritless” litigation have led to the adoption of legal rules that inhibit innovation by treating all unsuccessful litigation as presumptively frivolous. It is wrong because even patently unsuccessful litigation can contribute to positive legal change. Indeed, as in the context of evolution, such litigation may be necessary to accomplish legal innovation.

Take our modern understanding of the constitutional limitations on sex classifications, informed by a series of cases that began with *Reed v. Reed* and culminated in *Craig v. Boren*.<sup>8</sup> By the end of this series, one could make two observations: first, intentional sex classifications would be judged under “intermediate scrutiny”; and second, the State would have more leeway to make classifications based on “real” and not stereotyped differences. But one would not be able to understand this framework without both the meritorious and meritless cases. As just one example, because of an unsuccessful constitutional challenge, we know that a “real” difference between sexes that can justify a facial sex-based classification is past discrimination against women in the workplace; because of a successful challenge, we know that generalizations about the bonds formed by mothers and fathers with their children cannot justify a facial classification.<sup>9</sup> As regards innovation in the law, both principles have value.

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5. See Stephen Jay Gould, *The Golden Rule: A Proper Scale for Our Environmental Crisis*, in EIGHT LITTLE PIGGIES 41, 46 (1993).

6. In other words, degrees of maladaptation are relative. Traits that are neutral in one context can be adaptive or maladaptive in another. See generally Bernard J. Crespi, *The Evolution of Maladaptation*, 84 HEREDITY 623 (2000).

7. Some will argue that even cases that result in the payment of money may be frivolous or meritless. For reasons that I explain below, this Article rests on the assumption that a case that results in a positive outcome for the plaintiff is meritorious. See *infra* notes 41–46 and accompanying text.

8. See *Craig v. Boren*, 429 U.S. 190 (1976) (striking down statute that provided different drinking ages for men and women); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down Social Security Act provision that differentiated based on sex of wage-earning spouse); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding preferences for women in Navy’s promotion system); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding classification based on pregnancy in California’s disability insurance program); *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding state property tax exemption for widows but not widowers); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down provision of military benefits statute that disfavored spouses of women service members); *Reed v. Reed*, 404 U.S. 71 (1971) (rejecting sex classification in estate proceedings); see also *Califano v. Webster*, 430 U.S. 313 (1977) (sustaining preference for women in calculation of social security benefits).

9. Compare *Webster*, 430 U.S. 313, with *Caban v. Mohammed*, 441 U.S. 380 (1979).

There will be an immediate rejoinder, informed by a legitimate concern about resources. Our procedural regime relies on a number of filters that funnel an ever-narrowing set of cases toward trial: pre-answer screening, pre-discovery motion practice, and summary judgment are the most prominent examples. Meritless cases that remain in the system impose burdens on both defendants and courts that we must consider as we arrive at the proper standard for each filter.<sup>10</sup> If one only focuses on the burdens of adjudicating weak or meritless cases, however, it is easy to lose sight of the reality that even ultimately unsuccessful cases can offer benefits to the legal system. Arriving at the right standard for each procedural filter requires accounting for both the burdens and potential benefits of litigation with varying merit. Academics, judges, and legislators have single-mindedly concentrated only on burdens.<sup>11</sup> This Article shifts the focus to more completely address the benefits of meritless litigation.

The need for intervention is most critical when policing the often-ignored line between frivolous and meritless litigation. Frivolous litigation is one of the few problems that invites universal scorn by legislators, judges, and academics.<sup>12</sup> But this superficial agreement obscures an important question: Just what is “frivolous” litigation? And, relatedly, how is frivolous litigation different from meritless litigation? The failure to precisely answer this latter question makes it too easy to conflate the categories and therefore too easy to see both kinds of cases as equally valueless. After all, if one contemplates only the burdens of unsuccessful litigation, there is little if any difference between frivolous and meritless claims. As I argue in this Article, however, meritless litigation, doomed as it may be, has much more to offer the legal system.

Legislators, judges, and academics have paid varying attention to the question of what constitutes a frivolous case and how it might be distinguished from a meritless one. Congress has tended to treat meritless and frivolous cases as substantially overlapping categories of the same subset. The Prison Litigation Reform Act (PLRA), for example, targets both meritless and frivolous litigation as equally problematic.<sup>13</sup> Similarly, the Private Securities Litigation Reform Act (PSLRA) treats abusive, frivolous, and meritless lawsuits together as equally damaging to the public, the courts, investors, and issuers of securities.<sup>14</sup> Many states have introduced legislation targeting meritless and frivolous litigation as well.<sup>15</sup> Thus,

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10. See Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1218 (2008).

11. For examples from academic writing, see generally *infra* notes 22–25. For examples from judicial opinions, see *infra* Parts II.A.1 and II.A.3. The Prison Litigation Reform Act and the Private Securities Litigation Reform Act are prime examples of the legislative focus on the burdens of meritless litigation. See *infra* Parts II.B.1 & II.B.2.

12. As Suja Thomas writes, “It seems that everyone is against frivolous cases. How can you not be?” Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633, 634 (2010).

13. See 42 U.S.C. § 1997e (2006); *infra* notes 138–65 and accompanying text.

14. The PSLRA introduced a heightened pleading requirement for securities litigation, among many other barriers to success. See *infra* Part II.B.2.

15. States have adopted their own versions of the PLRA, for example. See *infra* Part II.B.1. And states have attempted to stem the tide of frivolous litigation by extending some of the PLRA’s limitations to all “vexatious” litigants. See generally Erin Schiller &

for state and federal legislators, purging the judicial docket of both meritless and frivolous cases often is seen to advance the same goals. And most of this legislation does not contemplate the possibility that meritless cases make positive contributions to the law.<sup>16</sup>

Similarly, judges tend to regard both frivolous and meritless cases as drags on the legal system, offering no offsetting benefits. Qualified immunity doctrine in civil rights cases has been modified to make it more difficult overall to obtain damages remedies against government officials, on the logic that it is necessary to deter frivolous or insubstantial cases.<sup>17</sup> The Supreme Court has gradually reduced the availability of damages remedies against federal officials because of the perception that such litigation is primarily frivolous.<sup>18</sup> More broadly, the Supreme Court recently adopted substantial changes to federal pleading doctrine to reduce the risk that litigants with frivolous and meritless claims will take advantage of the high cost of discovery to extract nuisance settlements from innocent defendants.<sup>19</sup> Similar changes have been embraced at the summary judgment stage.<sup>20</sup> Although all of these changes impact meritless cases overall, and not just frivolous ones, courts generally justify them as necessary to deter the filing of frivolous cases.<sup>21</sup> And like legislators, courts rarely acknowledge any benefit from adjudicating meritless cases (even when such cases are resolved at an early procedural stage).

Legal scholars have recognized that the term “frivolous” is ill-defined and that there are costs to failing to differentiate the frivolous from the nonfrivolous.<sup>22</sup> But even so, most commentators have failed to adequately distinguish between frivolous and meritless cases.<sup>23</sup> This is particularly vexing in discussions of

Jeffrey A. Wertkin, Note, *Frivolous Filings and Vexatious Litigation*, 14 GEO. J. LEGAL ETHICS 909 (2001) (discussing litigation introduced in California, Texas, and Hawaii).

16. As I discuss below, Congress could, and occasionally has, recognized the value of meritless cases. See, e.g., *infra* notes 254, 256–58 and accompanying text.

17. See *infra* Part II.A.2.

18. See generally Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2007 CATO SUP. CT. REV. 23 (arguing that *Bivens* remedy has been gradually undermined and is currently endangered).

19. See *infra* Part II.A.1.

20. See *infra* note 106 and accompanying text.

21. See *infra* notes 99–103 and accompanying text.

22. See, e.g., Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997) (“We have no . . . common agreement on what constitutes a ‘frivolous suit.’”); Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353, 378 (1987) (stating that it is difficult to distinguish between “weak” and “frivolous” cases); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 81–82 (2010) (decriing lack of common definition of “frivolous” litigation); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 449–50 (2004) (giving examples of public, judicial, and jury disagreement over what is frivolous); Thomas, *supra* note 12, at 634.

23. See Lucian Ayre Bebbchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371, 373 (1996) (equating frivolous with non-meritorious); Geoffrey Miller, *A Modest Proposal for Securities Fraud Pleading After Tellabs*, 75 LAW & CONTEMP. PROBS., no. 1, 2012, at 93, 98; Rhode, *supra* note 22, at 449–50 (same); Thomas, *supra* note 12, at 634–35 (recognizing vagueness of term but failing to distinguish frivolous from meritless).

procedural tools for filtering between frivolous, meritless, and meritorious cases.<sup>24</sup> As just one concrete example, in the context of qui tam litigation, commentators and courts alike often conflate the problem of frivolous litigation with meritless litigation.<sup>25</sup> Thus, many commentators appear to assume that False Claims Act cases in which the Attorney General moves to dismiss or fails to intervene are both frivolous and meritless.<sup>26</sup> Even critics of judicial innovations such as heightened pleading divide cases into two camps—the frivolous or meritless strike suit and the meritorious claim.<sup>27</sup>

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24. See Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 976–89 (1990) (describing various rules that filter out frivolous and meritless cases, without distinguishing between the two); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 870 & n.106 (2010) (equating “truly meritless” with “frivolous”); Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 226 & n.354 (2010) (conflating meritless and frivolous); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 432, 486 (2008) (describing rules that ensure the dismissal of meritless and frivolous claims, without distinguishing between the two). *But see* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 20–21 (2000) (making distinction between frivolous ADA claims and claims dismissed because of particular interpretation of the statute).

25. See John T. Boese & Beth C. McClain, *Why Thompson Is Wrong: Misuse of the False Claims Act to Enforce the Anti-kickback Act*, 51 ALA. L. REV. 1, 49 (1999) (arguing that frivolous suits are insufficiently filtered by the False Claims Act because the Department of Justice must “affirmatively move for the dismissal of meritless suits, a process that requires a modest commitment of prosecutorial resources”); Joan H. Krause, *Regulating, Guiding, and Enforcing Health Care Fraud*, 60 N.Y.U. ANN. SURV. AM. L. 241, 281 (2004) (“[A] successful system must generate primarily meritorious suits, and weed out frivolous ones. To achieve this goal, the incentives must be generous enough to induce participation by insiders, yet not so tempting as to engender meritless suits.” (emphasis omitted) (footnote omitted)); Christopher W. Myers, *The False Claims Act Clarification Act: An End to the FCA’s Bar on Parasitic Qui Tam Actions?*, PROCUREMENT LAW., Spring 2009, at 7, 10 (“The infrequency of government dismissals under section 3730(c)(2)(A) is not for lack of frivolous FCA suits. Indeed, statistics published by the DOJ suggest that a large percentage of FCA suits are meritless, especially those in which the government declines intervention.”); Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 995 (2007) (“[T]here appears to be a significant number of frivolous qui tam actions. . . . [T]he fact that the Attorney General has only intervened in just over 10% of the qui tam actions filed with the office since 1999 shows that it is likely to be large.”); see also *United States ex rel. Joshi v. St. Luke’s Hosp., Inc.*, 441 F.3d 552, 559 (8th Cir. 2006).

26. See, e.g., Boese & McClain, *supra* note 25, at 49; Myers, *supra* note 25, at 10. The decision not to intervene, however, does not necessarily reflect the Department of Justice’s view that the case is frivolous. See Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein In Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1261, 1263–64 (2008) (discussing intervention decision and its relationship to prospect of recovery and noting that relators sometimes prevail even in cases in which there is no intervention).

27. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1059–60 (2003) (criticizing substance-specific heightened pleading standards on the grounds that they are based on anecdotes and that they may lead to the “improper dismissal of potentially meritorious cases”).

The exception to this general trend is in discussions of Federal Rule of Civil Procedure 11, which is the most recognizable tool for addressing frivolous but not meritless claims. In this context, Robert Bone has been a leading voice, defining a frivolous claim as one in which “a plaintiff files suit knowing facts that decisively establish little or no chance of the defendant’s objective liability on the basis of any of the legal theories plaintiff alleges” or “without conducting a reasonable pre-filing investigation when such an investigation would have revealed facts establishing little or no chance that the defendant was actually liable on any of the legal theories alleged.”<sup>28</sup> This is a useful starting point, but Bone’s definition is meant to help decide when a lawyer or party should be sanctioned for litigation behavior, not to resolve how a case should be adjudicated. Relatedly, Bone and most other commentators on Rule 11 standards have not sought to elaborate the value of adjudicating meritless cases.<sup>29</sup> This Article articulates the values of meritless litigation and also frames the problem in the broader context of case disposition, not the Rule 11 context of sanctions.

In Part I, I explain why, for the purpose of this Article, it is useful to have a modified version of Bone’s definition of a frivolous case. Because the focus of this Article is case disposition, not independent sanctions, I propose that our understanding of “frivolous” should revolve around timing and substance. By timing, I mean that judges should have a conception of frivolous that permits application at the moment of filing. By substance, I mean that our definition should exclude only those cases that, by their substantive claims or allegations, can safely be said to have a zero chance of success. If we cannot determine at filing that a case has a zero chance of success, then the case may be meritless or meritorious, and permitting the case to proceed through subsequent procedural steps (answer, motion practice, and possibly discovery followed by summary judgment) has the potential to add value to the legal system. In Part II, I turn to demonstrating the many ways in which legislatures and courts fail to narrowly define “frivolous,” and in so doing merge frivolous with meritless. My goal is to demonstrate, even to those readers who would adopt a different definition of “frivolous,” that legislators and judges have failed to clearly articulate the distinction between meritless and frivolous cases.

In Part III, I explain the many ways in which nonmeritorious, but nonfrivolous cases can contribute to the law and how the dynamics explored in Part II undermine these contributions. Some meritless cases contribute by revealing facts that otherwise would remain private: facts that expose wrongdoing that is not remediable under law, facts that lead to other legal actors instituting action, and facts that lead to legal reform. Some meritless cases contribute by clarifying existing law or by announcing new legal principles. Some of these benefits have been recognized, at least implicitly, before. John Jeffries, for instance, has pointed out that qualified immunity doctrine gives courts leeway to announce new legal principles without holding government officials retroactively accountable.<sup>30</sup> But

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28. Bone, *supra* note 22, at 531–32 (emphasis omitted).

29. Also writing in the context of Rule 11, Charles Yablon has offered a defense of at least some meritless cases. See Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 94, 104–06 (1996).

30. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE



Jeffries has done so to defend the gap that qualified immunity creates between rights and remedies, not to defend the value of meritless litigation.<sup>31</sup> And other scholars who have accepted the prospect that meritless cases could provide value that frivolous cases do not have limited their comments to the Rule 11 context and its potential deterrence of novel legal arguments.<sup>32</sup> My concern here is the extent to which the value of meritless cases is underappreciated throughout civil litigation, as reflected in the legislative and judicial trends I identify in Part II.

I briefly conclude with a discussion about what it might mean to better account for the distinction between meritless and frivolous litigation. In some limited circumstances, it should result in a wholesale revision of how we treat certain categories of cases, such as prisoners' rights litigation. More broadly, however, it should enable us to strike the correct balance between keeping our courthouse doors open to potentially transformative legal claims on one hand and minimizing the costs of entertaining losing cases on the other. Achieving the proper balance will always require recalibration over time, but we cannot hope to be on the best path without acknowledging the potential benefits of meritless litigation.

#### I. DISTINGUISHING THE FRIVOLOUS CASE

To appreciate the value of meritless (as opposed to frivolous) claims, it is necessary first to have a working conception of both terms that will serve a useful purpose when adjudicating cases (rather than, as in the Rule 11 context, when assessing sanctions). A definition of frivolous and meritless that accounts for the value of entertaining such claims necessarily involves a consideration of the costs of adjudication as well. If some litigation provides no value to the legal system, then any judicial time spent adjudicating such claims is wasted.<sup>33</sup> Thus, timing is a key component of conceptions of frivolousness and meritlessness. Of course, a claim's substance also is particularly important. Some claims will be frivolous for obvious reasons—for example, the plaintiff who asks that the government construct a Statue-of-Liberty-sized statue in his likeness on Governor's Island, valued at \$100 billion, as a remedy for not receiving an unconditional pardon from the President of the United States.<sup>34</sup> Others will be frivolous because they are based on a conception of the law that is both unsupported and unsupportable under any existing principle.<sup>35</sup> And some claims will be frivolous because they are based on allegations of outlandish facts that are the stuff of science fiction.<sup>36</sup> These examples

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L.J. 87, 88–90 (1999).

31. *See id.*

32. *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 57 (1976); Yablon, *supra* note 29, at 105.

33. *See* Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 41 (2008) ("[E]arly dismissals, by eliminating low-merit claims before they become costly, offer benefits to society in comparison to late dismissals.").

34. *See* Complaint, *Hall v. Clinton*, No. 1:01-cv-06218 (N.D. Ill. 2001).

35. *See, e.g., Stanard v. Nygren*, 658 F.3d 792, 794 (7th Cir. 2011) (listing "obviously frivolous claims" such as "something called a 'direct action under [the] U.S. Constitution'" (alteration in original)).

36. *See, e.g., Qamar v. CIA*, 489 F. App'x 393, 395 (11th Cir. 2012) (finding

should make clear that most claims can be assessed for frivolousness upon the filing of a complaint. As I will explain below, however, it will usually be difficult to say that a nonfrivolous claim is meritless at the outset of litigation; assessing the merit of nonfrivolous claims will often require adversarial briefing or factual discovery.

A precise definition of both terms is not essential, because what is most important is to understand that frivolous cases may be different than meritless ones and that how we define the term “frivolous” reflects a value judgment about meritless cases. Thus, if we believe that all meritless cases are frivolous, and vice versa, then conflating the two kinds of cases in terms of their value to the legal system is unproblematic. As a formal matter, however, both courts and commentators resist this kind of definition. In *Neitzke v. Williams*,<sup>37</sup> the Supreme Court rejected the contention that all complaints that failed to state a claim were frivolous, holding instead that a frivolous claim for the purposes of case disposition “lacks an arguable basis either in law or in fact.”<sup>38</sup> Even though there was “considerable” overlap between the failure-to-state-a-claim standard and the frivolousness standard, “it does not follow that a complaint which falls afoul of the former standard will invariably fall afoul of the latter.”<sup>39</sup> And most commentators, even though they may believe that meritless and frivolous claims are equally valueless, tend to recognize that they should be defined differently at least for the purpose of Rule 11 sanctions.<sup>40</sup>

This suggests that we should have a broad taxonomy of frivolous, meritless, and meritorious cases, even as we recognize that there may be overlap between how we conceptualize the first and second categories. To start, it is useful to begin with an even broader division, between successful and unsuccessful cases, in which success is defined as the plaintiff’s recovery of something of value through litigation.<sup>41</sup>

I assume here that “successful” cases should be neither frivolous nor meritless. This is a proposition that will provoke argument, for there are some who maintain that this assumption is false: namely that settlements are obtained for claims that are clearly frivolous or at least meritless and that juries may award substantial damages for claims that lack merit. For instance, many argue that the costs of discovery and the concomitant pressure on defendants to settle otherwise meritless suits are rampant problems.<sup>42</sup> The expense of electronic discovery only amplifies

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“incredible” allegations that plaintiff was sexually assaulted by prison officials so that they could plant drugs which would then form the basis of enhanced interrogation by the CIA); *Cofield v. Ala. Pub. Serv. Comm’n*, 936 F.2d 512, 515–16 (11th Cir. 1991) (describing “fantastic” allegation of conspiracy by prison officials).

37. 490 U.S. 319 (1989).

38. *Id.* at 325.

39. *Id.* at 326.

40. See sources cited *supra* notes 22, 27–29.

41. This is the standard used by most empiricists to study success in litigation outcomes. See, e.g., Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 833 (2010); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1592–93 (2003); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 726–27 (1988).

42. See Alistair Dawson, *House Bill 4 and the Future of Class Action Litigation*, ADVOCATE (Tex.), Fall 2003, at 60, 63 (noting that “regardless of the merits,” in class action

this narrative.<sup>43</sup> Others maintain that the high cost of discovery is a double-edged sword and can force a plaintiff with little resources to settle claims for less value than they are worth.<sup>44</sup> And of course there are those who question the assertion that discovery abuse is pervasive and leads to an inordinate number of extortionate settlements.<sup>45</sup> Indeed, much of the empirical literature suggests that discovery unfolds rationally, with higher costs spent on more complex cases, while most cases generate little in the way of discovery costs.<sup>46</sup>

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cases, oftentimes defendants would prefer to settle than to bear the high cost of discovery); Cameron S. Matheson, *Transvestite Cowboys, Thieving Brokers, and the Securities Litigation Uniform Standards Act: SLUSA's Trap for the Unwary Plaintiff*, 35 MCGEORGE L. REV. 121, 126 (2004) (noting that Congress believed that the high costs associated with discovery may allow a party with a frivolous suit to force the defendant to settle securities class actions); Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2093–98 (2002) (reviewing and then debunking claim that litigants use discovery tools to harass opponents with burdensome requests); see also *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) (“[D]iscovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes.”); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (stating that expanding category of plaintiffs who could sue in securities litigation would encourage use of discovery for *in terrorem* increase of settlement value); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (citing Judge Friendly’s use of term “blackmail” for those settlements in which defendants settle weak class action claims because of risks at trial).

43. See Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 894 (2009) (“[E]-discovery can cost tens or hundreds of thousands of dollars in even fairly typical cases . . . .”); Jessica Lynn Repa, Comment, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257, 295–96 (2004) (noting that high discovery costs create incentives to settle, even for meritorious suits).

44. See Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 817 n.351 (2003) (discussing why the high costs of discovery can work against a plaintiff); Meade W. Mitchell, Comment, *Discovery Abuse and a Proposed Reform: Mandatory Disclosure*, 62 MISS. L.J. 743, 744–55 (1993) (tying discovery abuse to the adversarial system, not to abuses solely by plaintiffs’ counsel); *id.* at 751 n.41 (“Each side is motivated to hide information, especially information or witnesses exposure of which could cause severe adverse consequences to the client.”). Docket congestion may also play a role in a plaintiff’s decision to settle. George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 543 (1989) (presenting theoretical and empirical reasons to believe that settlement decisions are influenced by docket delay).

45. See Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 922–23 (2009) (arguing that cause of meritless filings leading to unjustified settlements is not discovery costs, but asymmetric information); Silver, *supra* note 42, at 2093 (reviewing empirical data that undermine given wisdom that discovery costs force defendants to settle meritless suits).

46. See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 769–76 (2010) (reporting data that show that discovery costs are not high and that the most important variable contributing to discovery costs is the amount at stake in the litigation); Silver, *supra* note 42, at 2096–97.

Whatever the strength of these arguments in specific cases, there are no compelling data to suggest that there is a widespread problem of plaintiffs prevailing in meritless cases more often than defendants prevailing when they should not. And as for the role of settlement, precisely because the facts that undergird such cases are undeveloped and unadjudicated, claims about the extent to which defendants routinely settle frivolous or meritless cases are claims that at this point lack substantiation. Thus, I will limit my discussion of frivolous and meritless cases to those instances in which claimants are unsuccessful in obtaining anything of value through litigation, whether by trial or settlement.

The next related question is whether *all* unsuccessful cases are also meritless (and, in some cases, frivolous). To answer it, one must break down the category of unsuccessful cases even further. In some cases, a plaintiff will be victorious at trial but have the outcome overturned on appeal. These cases, while ultimately unsuccessful, should not be considered meritless. Indeed, it is difficult to characterize any case that proceeds to trial, at least after a summary judgment adjudication, as meritless.<sup>47</sup> If a reasonable jury *could* find in favor of the plaintiff, the case is not rendered meritless by the fact that the specific jury called to adjudicate a plaintiff's case found for the defendant. After all, in most civil cases in which the burden of proof is a preponderance of the evidence, a plaintiff who loses at trial may have failed to convince the fact-finder by a very slim margin.<sup>48</sup> If, however, a reasonable jury could not find in favor of the plaintiff, either for legal or factual reasons, her case should be considered meritless. Similarly, if a complaint does not state a claim for relief, for either legal or factual reasons, it should be considered meritless. And, clearly, if a complaint fails to meet pre-answer screening thresholds imposed by some specific statutes,<sup>49</sup> it also should be considered meritless.

There are some claims that do not easily fit into this universe. For instance, claims that are dismissed as a sanction for litigation-related conduct or as a consequence of the failure to prosecute are unsuccessful but have not had a merits adjudication.<sup>50</sup> And claims that are ultimately unsuccessful because of an intervening change in law may not fairly be called meritless, at least at their inception.<sup>51</sup> But these exceptions do not undermine the basic point that meritless and unsuccessful litigation are distinct.

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47. An exception might be if an appellate court determines that the case never should have been sent to the jury.

48. Empirical data regarding jury deliberations is difficult to come by, but some studies suggest that where jurors disagree about liability, they may mediate their disagreement by coming to a compromise on damages awards. See Meiring de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 153, 177–82. This does not mean that the juries compromise in meritless cases, but only that a verdict may not reflect unanimity.

49. See 28 U.S.C. §§ 1915–1915A (2006).

50. For the purpose of preclusion doctrine, such claims will be considered to have been resolved “on the merits.” But preclusion doctrine is not the subject of this Article.

51. For instance, a prisoner in the Second Circuit who failed to exhaust his administrative remedies prior to filing a complaint regarding the use of excessive force would have had a viable claim at the inception of the lawsuit, but not after 2002 when the Supreme Court rejected the Second Circuit's exception for exhaustion of excessive force claims. *Hernandez v. Coffey*, No. 99 Civ. 11615(WHP), 2003 WL 22241431, at \*2 (S.D.N.Y. Sept. 29, 2003) (applying the

If we were to sketch out the landscape I have described so far, it would look like this: all successful cases are meritorious, most unsuccessful cases are meritless,<sup>52</sup> but some meritorious cases are unsuccessful. It remains to be determined where to place frivolous litigation. As I have suggested earlier, in an ideal procedural system frivolous claims are not successful. Nor should frivolous claims proceed to trial. And they typically should be resolved before summary judgment and discovery. The hardest line to draw, however, may be between frivolous claims and those that do not meet a pre-discovery threshold.<sup>53</sup> In both federal and state systems, this typically involves some assessment of the complaint and whether it states a claim for relief.<sup>54</sup> Many, if not all, frivolous complaints will not state a claim for relief, but a complaint that fails to state a claim is not by definition frivolous.

What, then, distinguishes a frivolous claim from a meritless one? As noted in the introduction, Robert Bone defines a frivolous action as one in which “a plaintiff files suit knowing facts that decisively establish little or no chance of the defendant’s objective liability on the basis of any of the legal theories plaintiff alleges” or “without conducting a reasonable prefiling investigation when such an investigation would have revealed facts establishing little or no chance that the defendant was actually liable on any of the legal theories alleged.”<sup>55</sup> Bone’s definition, however, is focused on identifying frivolous litigation so as to regulate it and therefore hopefully deter its filing.<sup>56</sup> Thus, Bone understandably gives great weight to the litigant or attorney’s state of mind. For the purposes of this Article, however, it is more useful to look to a definition that focuses on a court’s ability to distinguish frivolous cases for the purposes of case disposition.

For the Supreme Court, a frivolous claim is one that lacks an arguable basis in fact or law.<sup>57</sup> That is, a frivolous claim is one that relies on factual allegations or legal theories so outlandish as to be inarguably insufficient. By incorporating concerns of timing, I propose a conception that incorporates some of Bone’s and some of the Court’s: for the purpose of case disposition, a frivolous suit is one in which a judge determines that the plaintiff has no arguable basis to believe that she may establish the defendant’s liability on the basis of any of the legal theories she alleges. This modification is significant on several different levels. First, it focuses on what a judge may determine at any procedural stage. Most frivolous litigation is disposed of upon the filing of a complaint, when a judge may promptly determine

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rule of *Porter v. Nussle*, 534 U.S. 516 (2002), to lawsuit filed in 1999).

52. This contention is based on the fact that most cases are resolved prior to trial. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (“The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002.”); see also Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142–43 (2002) (citing statistics of the Administrative Office of the United States Courts showing decline in number of jury trials). Thus, most unsuccessful cases will not be resolved at trial; they will be resolved at the motion to dismiss or summary judgment stage. These cases will fall into the conception of meritless proposed here.

53. See *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (recognizing “overlap” between frivolous standard and failure-to-state-claim standard).

54. See, e.g., FED. R. CIV. P. 12(b)(6); N.Y. C.P.L.R. 3211(a)(7) (McKinney 2006).

55. Bone, *supra* note 22, at 531–32 (emphasis omitted).

56. See *id.* at 586–96.

57. *Neitzke*, 490 U.S. at 325.

the basis for the plaintiff's claims. But some litigation may not be revealed as frivolous until later in the litigation, after discovery shows that the plaintiff has no reasonable basis to continue to pursue her claims.<sup>58</sup> Thus, in some ways, my conception is narrower than Bone's (by focusing on what a judge may determine, not on what the plaintiff knows). And in some ways it is broader, by admitting the possibility that a case may become frivolous post-filing as a result of information disclosed by the parties. The "arguable basis" for the plaintiff's belief is meant to be a combination of Bone's focus on either the plaintiff's knowledge or the plaintiff's pre-filing investigation. But the limitation of frivolous to only those cases in which a plaintiff cannot succeed (as opposed to having "little or no chance" of success) is meant also to narrow the scope of frivolous cases.<sup>59</sup>

If that conception of frivolous litigation serves the purposes of this Article, it is fair to ask what I mean by meritless litigation. A meritless claim, by contrast to a frivolous one, is a claim in which a court determines, after adversarial briefing or discovery, that a plaintiff's theory of relief is insufficient or that a reasonable jury could not find facts that would allow a plaintiff to recover. Again, this conception involves considerations of both timing and substance. At the outset of litigation, it will be difficult for a court to judge the merits of a case. It may require argument from the parties to clarify the state of the law, or discovery to clarify factual disputes.

The conception of frivolous litigation I put on the table is not without its drawbacks. First, it is important to recognize that it does not account for a defendant's perceptions or goals. I focus on judicial perceptions of merit because deterring and regulating frivolous cases are primarily questions of judicial administration. It is the judiciary that is peculiarly harmed by frivolous litigation, because such litigation imposes costs without any coordinate benefit. By contrast, meritless litigation imposes costs but has the potential to add benefit to the legal system overall (more on that below). Defendants, on the other hand, are harmed equally by both meritless and frivolous litigation. They do not receive any benefit from either one and have to pay equally to defend them. From a defendant's perspective, any meritless litigation that moves forward, whether frivolous or not, imposes a cost and provides no value.

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58. Notably, there would certainly be an argument that sanctions should issue to a litigant or lawyer who continues to prosecute a claim where discovery has revealed that there is a zero chance of success. The only point I am making here is that the case may be frivolous as a matter of adjudication as well.

59. Cf. Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 121 (2009) (defining the "paradigmatically" frivolous suit as one in which both the plaintiff and the defendant determine that there is zero risk that the defendant will be held liable). This conception to some extent assumes that there is a valid way to stochastically evaluate merit. Identifying cases with a zero percent chance of success may seem possible in the abstract, but reliably doing so may prove impossible in practice. In this sense, it might be more accurate to think of cases as having varying degrees of merit. On this account, merit becomes easier to objectively assess as one obtains more information, but ultimately one can only hope to account for a fact-bound assessment that cannot be reduced to probabilities. While this view is compelling in many respects, it is not the view that has been adopted by courts or legislators, as I will discuss below. Thus, it is not as useful to this Article's project.

Second, I began this Part with a discussion of merit that mixes both *ex ante* and *ex post* considerations. That is, I have relied on an *ex post* event (success) to define merit in part, but have proposed a standard that must be applied *ex ante*. This is not a problem that is unique to my conception of frivolous; any standard that is used to distinguish frivolous, meritless, and meritorious cases prior to submitting the claim to a finder of fact will suffer from the same difficulty. And to the extent that using *ex ante* assessments to evaluate merit is problematic, it is worth noting that courts and legislators, in imposing the rules I describe below, appear to be operating from the same rationale. Their goal has been to tighten the standards *ex ante* so as to reduce, *ex post*, the number of unsuccessful suits. Thus, for the purpose of this Article's intervention, the difficulty of using an *ex ante* standard to make an *ex post* prediction is not troubling.

## II. JUDICIAL AND LEGISLATIVE FAILURE TO DISTINGUISH BETWEEN FRIVOLOUS AND MERITLESS LITIGATION

Having put a conception of frivolous and meritless litigation on the table that distinguishes between the two categories, I will now turn to the world of legislators and judges, in which all nonmeritorious litigation is often treated as similarly burdensome and valueless. Thus, even if one had quibbles with the position I staked out in the previous Part, I will show in this Part how recent legislative and judicial changes have been premised on the conflation of meritless and frivolous litigation. Be it in subject-specific areas, such as civil rights or securities litigation, or in transsubstantive rules of pleading and summary disposition, judges and legislators enact rules that assume that meritless and frivolous litigation are nearly identical species of the same nonmeritorious genus.

### *A. Transsubstantive Conflation*

For the most part, the judiciary is the source of most transsubstantive conflation of the benefits and burdens of meritless and frivolous litigation. Perceptions about frivolousness have influenced both courts and lawmakers to reduce affirmative incentives to sue, a reaction that cuts across lines of frivolous, meritless, and meritorious claims.<sup>60</sup> The Supreme Court, for instance, has limited recovery of attorneys' fees in civil rights cases, in part because of the assumption that the prospect of fee awards was generating frivolous litigation.<sup>61</sup> State courts have done the same.<sup>62</sup> To some extent all of these restrictions can be seen as a function of

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60. See Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 826–28 (2011) (discussing judicial tools to respond to perception of frivolous litigation).

61. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 618 (2001) (Scalia, J., concurring) (comparing payment of attorneys' fees to extortion); Annabelle Chan, Comment, *The Buckhannon Stops Here: Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources Should Not Apply to the New York Equal Access to Justice Act*, 72 FORDHAM L. REV. 1341, 1358 (2004).

62. See Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2038 (2008) (describing trends in state and federal courts toward limiting fees); Andrea Saltzman, *Incorporating Statutes into the Common Law: The Judicial Response to*

judicial management of heavy caseloads.<sup>63</sup> But the judicial and public perception of the strength of particular kinds of cases also inevitably plays a role.<sup>64</sup> In this Subpart, I begin with a discussion of the Supreme Court's recent transition in pleading doctrine, and then move to judicial innovation in the area of qualified immunity, before closing with legislatively imposed barriers to litigation by plaintiffs in poverty.

### 1. Pleading Doctrine's Response to Frivolous and Meritless Cases

In all civil cases, the rules that govern pleading guide courts in conducting an initial assessment of merit. Although pre-answer screening for frivolousness is mandated for claims brought by certain categories of plaintiffs—discussed in more detail in other parts of this paper—even those procedures are informed by rules of pleading. Thus, whether through pre-answer screening or resolution of motions to dismiss, a court typically has its first opportunity to evaluate merit by reviewing the pleadings.

As any casual reader of federal cases can attest, pleading jurisprudence has been indelibly marked by two recent Supreme Court decisions—*Ashcroft v. Iqbal*<sup>65</sup> and *Bell Atlantic Corp. v. Twombly*.<sup>66</sup> Although the extent of change wrought by these two decisions is subject to some debate,<sup>67</sup> the notoriety of the cases is not.<sup>68</sup>

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*Statutes Shifting Attorneys' Fees*, 30 ST. LOUIS U. L.J. 1103, 1142 (1986) (describing state court hostility in Illinois to fee-shifting); see also John Leubsdorf, *Towards a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS., no. 1, 1984, at 9, 23 (describing judicial resistance to including legal expenses as a component of damages).

63. See Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 800 (1967) (noting that judges may react to caseload pressures with the “adoption of ‘hostile’ substantive rules” effectively discouraging “litigants from using the courts”).

64. See Lemos, *supra* note 60, at 837 (“The risk of judicial backlash, then, depends to a large degree on judges’ views about the claims that Congress is seeking to encourage.”); Laura Beth Nielsen & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL’Y REV. 237, 243 (2004) (“In the aggregate, the media represents plaintiff victories in tort cases far more frequently than they actually occur and jury awards as far greater than they actually are.”).

65. 556 U.S. 662 (2009).

66. 550 U.S. 544 (2007).

67. Compare, e.g., Bone, *supra* note 45, at 875 (“Many judges and academic commentators read the decision as overturning fifty years of generous notice pleading practice . . .”), Alexander A. Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS., no. 1, 2012, at 1 (arguing that *Iqbal* and *Twombly* represent a shift in the goals of pleading doctrine), and Spencer, *supra* note 24, at 432 (arguing that *Twombly* “represents a break from the Court’s previous embrace of notice pleading”), with Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010) (arguing that *Iqbal* and *Twombly* are not a sea change in pleading).

68. As of this writing, *Twombly* has been cited in over 65,000 published cases and over 1100 law review articles; *Iqbal* has been cited in over 43,000 cases and over 750 law review articles. Both *Iqbal* and *Twombly* have been cited more than twice as often as several other important cases that have dominated the legal landscape for decades, including *Conley v. Gibson*, 355 U.S. 41 (1957), the seminal pleading case for five decades before *Twombly* and *Iqbal*, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the defining case for choice of



Understanding the significance of *Iqbal* and *Twombly* to the subject of this Article requires some recourse to history.

The notice pleading standard was one of the most significant innovations of the Federal Rules of Civil Procedure, adopted in 1938.<sup>69</sup> As many commentators have observed, the Rules eradicated the technicalities of claim-specific pleading that had dominated legal practice for decades in favor of reliance on discovery and trial to determine merit.<sup>70</sup> Rule 8, requiring only a “short and plain statement of the claim showing that the pleader is entitled to relief,”<sup>71</sup> was a key intervention.<sup>72</sup> Fact pleading, which the Federal Rules were meant to displace, too often “led to wasteful disputes about distinctions that [the drafters] thought were arbitrary or metaphysical, too often cutting off adjudication on the merits.”<sup>73</sup> As originally conceived, Rule 12(b)(6) motions would test the sufficiency of complaints not by reference to the facts alleged in the complaint, but by reference to whether there was a legal claim that could be supported by the facts alleged.<sup>74</sup>

The Supreme Court’s decision in *Conley v. Gibson*<sup>75</sup> was the seminal pleading case for the five decades prior to *Iqbal* and *Twombly*. In *Conley*, the Court saw pleading as a way of “facilitat[ing] a proper decision on the merits”<sup>76</sup> by giving a defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>77</sup> Thus, according to *Conley*, a complaint satisfied Rule 8 without “set[ting] out in detail the facts upon which [the claimant] bases his claim.”<sup>78</sup> To the extent that a defendant sought additional facts, the *Conley* Court was satisfied that Rule

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law in diversity jurisdiction cases, and *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), easily the most important administrative law case in the past fifty years.

69. See FED. R. CIV. P. 8(a)(2) (requiring a “short and plain statement of the claim showing that the pleader is entitled to relief”).

70. See Fairman, *supra* note 27, at 990–91; see also Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438–40 (1986); Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 76–77 (2008) (summarizing history of pleading standards and functions from medieval origins onward). For an overall history of the Federal Rules, see generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

71. FED. R. CIV. P. 8(a)(2).

72. The goal of the Federal Rules was to create both simplicity and uniformity in pleading and to prevent premature dismissals. See Marcus, *supra* note 70, at 439 (“Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases ‘fact,’ ‘conclusion,’ and ‘cause of action.’”).

73. See Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 148 (2009), <http://www.pennlawreview.com/online/158-U-Pa-L-Rev-PENnumbra-141.pdf> (Burbank, Rebuttal).

74. As such, Rule 12(b)(6) motions were meant to address the rare circumstance in which a plaintiff’s claim for relief could be supported by no valid legal theory. See, e.g., Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 407 (2011).

75. 355 U.S. 41 (1957).

76. *Id.* at 48.

77. *Id.* at 47.

78. *Id.*

12(e), among other devices, would suffice.<sup>79</sup> As for the role of Rule 12(b)(6) motions, true to the original understanding of the drafters of the Federal Rules, the *Conley* Court referred to “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>80</sup>

Rule 8’s notice pleading standard dominated the resolution of pre-discovery motions, at least rhetorically, for decades.<sup>81</sup> Until *Twombly* and *Iqbal*, the Supreme Court maintained a relatively consistent commitment to *Conley*’s notice pleading rule, twice unanimously rejecting heightened pleading standards in civil rights and employment discrimination cases.<sup>82</sup> The Court acknowledged that there might be “practical merits” to heightened fact pleading,<sup>83</sup> but maintained that such changes may be obtained only “by the process of amending the Federal Rules,” not by judicial decree.<sup>84</sup>

The role of pleading changed with the Court’s decisions in *Twombly* and *Iqbal*. In the former, the Court adopted a “plausibility” standard in an antitrust case, expressing its concern, specifically in the antitrust context, that liberal pleading rules combined with expansive discovery would pressure defendants to settle meritless cases.<sup>85</sup> In the Court’s view, careful case management by district courts had not proven successful at reducing these risks.<sup>86</sup> Although many lower courts took note of *Twombly*, substantial questions lingered. Some lower courts considered the possibility that *Twombly* was limited to cases in which the costs of discovery were likely to be high and settlement-forcing.<sup>87</sup> For others, *Twombly* was

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79. *Id.* at 48 n.9.

80. *Id.* at 45–46.

81. Christopher Fairman has argued that notice pleading has rarely been the rule, at least in practice, pointing to examples from antitrust, RICO, environmental, civil rights, intellectual property, and defamation cases, among others, in which lower courts have constructed a variety of heightened pleading standards. *See* Fairman, *supra* note 27, at 998–1011 (summarizing different categories of heightened pleading).

82. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (2002) (employment discrimination); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (civil rights); *see also Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (“[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.”).

83. *Swierkiewicz*, 534 U.S. at 515.

84. *Id.* (quoting *Leatherman*, 507 U.S. at 168).

85. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559–60 (2007); *see also* Randal C. Picker, *Twombly*, Leegin, and the Reshaping of Antitrust, 2007 SUP. CT. REV. 161, 177 (arguing *Twombly* was motivated by concern about discovery “run amok”); Spencer, *supra* note 24, at 432, 477 (2008) (describing *Twombly* as indicative of the Court’s concern in screening frivolous filings).

86. *Twombly*, 550 U.S. at 559.

87. *E.g.*, *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488–89 (6th Cir. 2009) (suggesting that *Twombly* was limited to “expensive, complicated litigation” (internal quotation marks omitted)).

interpreted to apply broadly to all civil actions.<sup>88</sup> The Court's decision in *Iqbal* resolved this short-lived dispute by making it clear that plausibility pleading applied in all civil cases, not just antitrust claims.<sup>89</sup>

*Iqbal* also articulated a two-step process for evaluating the sufficiency of a complaint.<sup>90</sup> First, courts must review each allegation in a complaint and exclude from consideration those allegations that are stated in a "conclusory" fashion.<sup>91</sup> In announcing this new gloss on pleading, the Court also held that allegations of state of mind, despite the explicit language of Rule 9(b),<sup>92</sup> must be alleged with some factual detail.<sup>93</sup> After disregarding conclusory allegations, *Iqbal*'s second step assesses whether there is a plausible fit between the nonconclusory facts alleged and the relief claimed.<sup>94</sup> Courts applying the plausibility analysis are now instructed to rely on their "judicial experience and common sense,"<sup>95</sup> a surprising turn from the limited judicial role contemplated in *Conley*.<sup>96</sup>

The effect of *Iqbal* and *Twombly* taken together is to increase the potential opportunity to dismiss complaints prior to discovery by application of a test that assesses the merits of a claim prior to any discovery.<sup>97</sup> This in and of itself is

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88. See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 172 n.6 (2d Cir. 2009); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 n.2 (6th Cir. 2008).

89. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

90. *Id.*

91. *Id.*

92. *Id.* at 686–87 (interpreting FED. R. CIV. P. 9(b) to require more than "general" allegations for state of mind even where neither fraud nor mistake is alleged).

93. *Iqbal*, 556 U.S. at 678. Notably, the Court had previously distinguished between the standard for failure to state a claim and the standard for judging frivolousness precisely on the ground that in the latter, courts may dismiss "based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). The power to look behind factual allegations did not exist (at least until *Iqbal*) under Rule 12(b)(6). See *id.*

94. *Iqbal*, 556 U.S. at 679.

95. *Id.*

96. See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

97. There is ample empirical evidence demonstrating that defendants file motions to dismiss more often post-*Iqbal* as compared to pre-*Twombly*. See JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, FED. JUD. CENTER, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* 8 (2011), available at [http://www.fjc.gov/library/fjc\\_catalog.nsf](http://www.fjc.gov/library/fjc_catalog.nsf) (reporting a 55% increase in the rate at which defendants filed motions to dismiss between January and June 2010 as compared to January and June 2006). There also is evidence that the dismissal rate has increased post-*Iqbal*. See, e.g., Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235 (2011–2012) (reporting that dismissal rates in housing and employment discrimination cases increased after *Iqbal*, but not after *Twombly*); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (estimating that motions to dismiss with leave to amend were four times more likely to be granted after *Iqbal* as they were during the *Conley* era, after controlling for relevant variables); Alexander A. Reinert, *Measuring Iqbal* (August 3, 2013) (unpublished manuscript) (on file with author) (reporting data from eleven district courts showing a significant increase in dismissal rates). But see CECIL ET AL., *supra*, at 13–14 (reporting an increase in dismissal rates, but finding that increase was not statistically significant).

significant because there is no evidence to support the proposition that heightened pleading standards like those announced in *Iqbal* and *Twombly* will serve as an accurate filter for merit.<sup>98</sup> Courts may not be adequately positioned to sort out the multidimensional balancing necessary to arrive at an optimal pleading standard.<sup>99</sup> In other words, one harm flowing from *Iqbal* and *Twombly* is that the new pleading standard will result in dismissal of meritorious cases without the benefit of a more accurate determination of the meritless case.<sup>100</sup> But, as I will expand upon in detail below, the plausibility pleading standard also will dispose of some meritless cases in ways that make it harder for those cases to add value to the legal system. That is, premature dismissal of even meritless cases has harmful legal consequences beyond the fact that courts will err in predicting ultimate merit.

Like those courts that had flirted with heightened pleading since *Conley*,<sup>101</sup> the Supreme Court's decisions in *Iqbal* and *Twombly* can be attributed in large part to the perception that meritless and frivolous cases were proceeding to discovery too easily under notice pleading.<sup>102</sup> Thus, in *Twombly* the Supreme Court spoke of the

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98. See Miller, *supra* note 22, at 49 (“It seems obvious that in many contexts attempting to distinguish the frivolous from the potentially meritorious on the basis of a single pleading is a dangerously uncertain endeavor.”); Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 994 & n.102 (2011) (acknowledging that *Iqbal* and *Twombly* may have been directed towards frivolous lawsuits but that there is, “at best, mixed empirical support” to suggest that heightened pleading “weeds out the frivolous suits while allowing the weak but potentially meritorious suits to proceed”); Steinman, *supra* note 67, at 1312 (questioning presumption that “stricter pleading standards are, in fact, well-suited to identifying which claims are meritorious enough to justify the costs of the discovery process”).

99. See Miller, *supra* note 22; Howard M. Wasserman, *Iqbal*, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 164 (2010).

100. Robert Bone recognized this tradeoff well before *Iqbal* and *Twombly*, although in so doing he tended to conflate the meritless and frivolous case category. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 911 (1999). For instance, in describing the tradeoff between notice pleading and “strict pleading,” Bone treated meritorious and frivolous as the two relevant categories of cases, implying that frivolous and meritless cases are one and the same. Notice pleading, he argued, will make it easier for both meritorious and frivolous claims to move forward, while a heightened pleading regime will make it harder on both categories. *Id.* Thus, “[t]o choose between notice pleading and strict pleading . . . [a rulemaker] must compare the seriousness of preventing a meritorious suit with the seriousness of allowing a frivolous suit.” *Id.*

101. See, e.g., Blaze, *supra* note 24, at 948–51 (describing development of heightened pleading in civil rights cases as a response to perception of frivolousness); Bone, *supra* note 45, at 889–90 (discussing history of using heightened pleading standards in areas where problem of frivolous filing was thought to be high); Fairman, *supra* note 27, at 1059 (discussing use of heightened pleading where perception of frivolousness was high); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 575–76 (2002) (describing history of heightened pleading in civil rights cases as means of reducing frivolous claims); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 657 (1989) (noting that some courts have imposed fact pleading to address perception that many constitutional torts are frivolous).

102. See Spencer, *supra* note 24, at 450–54 (discussing the “pleading policy” in *Twombly* of “screening of frivolous cases”); Benjamin P. Cooper, *Iqbal’s Retro Revolution*, 46 WAKE

“threat [that] discovery expense will push cost-conscious defendants to settle even anemic cases.”<sup>103</sup> And in *Iqbal* the Court appealed to the imagery of a felonious plaintiff, “unlock[ing] the doors of discovery . . . armed with nothing more than conclusions.”<sup>104</sup> Moreover, the Supreme Court was concerned that in the specific context of cases against federal officials, litigation and discovery were time and resource intensive, undermining “proper execution of the work of the Government.”<sup>105</sup> Notably, the concerns expressed in *Iqbal* and *Twombly* mirror those voiced twenty years earlier, when the Supreme Court modified summary judgment as a result of concerns about meritless and frivolous litigation.<sup>106</sup>

*Iqbal* and *Twombly* have sparked a vigorous debate about the proper role of pleading. Those who defend the new rules often point to the increased costs that meritless and frivolous cases place on the judicial system and defendants.<sup>107</sup> Others support the new pleading standards because they increase efficiency by eliminating baseless claims as early as possible.<sup>108</sup> Detractors have argued that the Court,

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FOREST L. REV. 937, 961 (2011) (describing *Iqbal* and Rule 11 as addressed to problem of frivolous cases).

103. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). The Court also referred back to its decision in *Dura Pharmaceuticals*, which expressed the fear that a plaintiff with “a largely groundless claim” will be able to extract “an *in terrorem* increment of the settlement value.” *Id.* at 557–58 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

104. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (emphasis added).

105. *Id.* at 685.

106. *See generally* Bone, *supra* note 22, at 521 (describing the Court’s emphasis on summary judgment and case management as proper tools to eliminate frivolous suits); Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 375 (1990) (discussing how the summary judgment trilogy was aimed at eliminating meritless litigating earlier in process in the name of efficiency); *see also* Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 78–79 (2008) (mentioning Rules 11, 12, and 56 as solutions for frivolous cases); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004) (discussing the problem of frivolous cases and advocating mandatory summary judgment such that settlements can occur only after summary judgment review); Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1684 (2008) (noting that summary judgment, among other methods, is used by courts to dispose of supposed frivolous civil rights claims).

107. *See, e.g.*, Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1067 (2009); Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court’s ‘Iqbal’ Ruling*, NAT’L L.J. (N.Y.C.), Sept. 21, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202433931370> (“Business advocates say that *Iqbal* weeds out weak or frivolous lawsuits and is a much-needed standard that will reduce federal court caseloads.”); Lisa A. Rickard, *Repealing Iqbal and Twombly: Understanding the Physics of Politics*, TOWNHALL.COM (July 15, 2010), [http://townhall.com/columnists/lisaarickard/2010/07/15/repealing\\_iqbal\\_and\\_twombly\\_understanding\\_the\\_physics\\_of\\_politics/page/full](http://townhall.com/columnists/lisaarickard/2010/07/15/repealing_iqbal_and_twombly_understanding_the_physics_of_politics/page/full) (“Reversing *Iqbal* and *Twombly* would increase the already-excessive litigation burdens on businesses in this country—small and large alike—diverting resources that would otherwise be used to create jobs and strengthen our nation’s economy.”).

108. *See* Andrew Blair-Stanek, *Twombly Is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1, 22–23 (2010) (maintaining that plaintiff’s interest in cases like *Twombly* is minimal because it is unlikely plaintiff has a valid claim); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 465

perhaps inadvertently, has imported standards from Rule 11 into the Rule 12(b)(6) context.<sup>109</sup> And given the Court's skepticism in *Iqbal* towards the effectiveness of Rule 11 as a deterrent to frivolous filings, perhaps it should be no surprise that it has recruited Rules 8 and 12 to solidify the barricades against baseless claims.<sup>110</sup> Some critics of *Iqbal* and *Twombly* acknowledge the potential efficiency benefits to heightened pleading but are doubtful that the decisions strike the right balance.<sup>111</sup> Even in their critiques, however, these commentators elide the distinction between meritless and frivolous claims.<sup>112</sup>

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(2010) (citing efficiency goals as one justification for fact pleading); Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 167 (listing heightened pleading as one approach for filtering "weak or frivolous cases"); Smith, *supra* note 107, at 1067; Stancil, *supra* note 59, at 169 (suggesting that for certain kinds of cases heightened pleading can "reduce the cost disparities that can sometimes induce plaintiffs to file frivolous claims").

109. See Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 489 (2011) ("[O]ne almost gets the sense that the Court's plausibility standard, perhaps inadvertently, is intended to serve as a sort of proxy for a plaintiff's obligations under Rule 11."). As Shannon notes, if the problem in *Iqbal* and *Twombly* was whether the plaintiffs' allegations were sufficiently supported by facts, Rule 11(b)(3) should suffice. *Id.* at 489–90.

110. The following colloquy from oral argument in *Iqbal* is revealing:

JUSTICE GINSBURG: How about Rule 11 to take care of Justice Breyer's problem? The judge would say to the lawyer: Now, you signed this pleading, and when you made—you signed it, you made certain representations, and I'm going to read the Riot Act to you if it turns out that this is a frivolous petition.

GENERAL GARRE: Sure. That's one protection, Justice Ginsburg. . . .

. . .

. . .

CHIEF JUSTICE ROBERTS: Reading the Riot Act to the lawyer is protection against the Attorney General and the Director of the FBI after they're hauled in for discovery or subjected to depositions and the judge finds out—

GENERAL GARRE: We—

CHIEF JUSTICE ROBERTS: I'm sorry, Mr. Garre.

—the judge finds out that there wasn't in fact a sufficient basis for it, and that—that will show them, if they get read the Riot Act by a judge?

GENERAL GARRE: It's certainly not adequate protection, Mr. Chief Justice.

JUSTICE GINSBURG: I was responding to Justice Breyer's Coca-Cola president. I think Rule 11 would work quite well to answer that.

GENERAL GARRE: I would have thought that this Court's decision in *Bell Atlantic* put an end to those sorts of claims. . . .

Transcript of Oral Argument at 20–21, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015).

111. See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 18 (2009) (stating that one principle that might justify heightened pleading is efficiency, which "acknowledges that litigating meritless claims beyond the pleading stage wastes valuable time and money and thus it is important to screen out such claims at the earliest possible stage of the litigation").

112. For instance, A. Benjamin Spencer has argued that *Twombly* (and by extension *Iqbal*) erred in its calibration between efficiency and justice for several reasons, including that the instability created by the plausibility standard will "underdeter frivolous claims and overencourage motions to dismiss," and that the plausibility standard will bar truly meritorious claims. *Id.* at 26–30.

What everyone seems to agree on is that *Iqbal* and *Twombly* were motivated by the specter of frivolous and meritless litigation.<sup>113</sup> But true to many of the changes I will discuss in this Article, the Court's holdings treat both categories of cases as equally harmful. The highest priority is eliminating such cases from the federal docket as soon as possible. As the Court sees it, judicial resources should be reserved instead for the deserving plaintiffs with meritorious claims.<sup>114</sup>

## 2. Conflation in Qualified Immunity Doctrine

Qualified immunity in constitutional tort suits, a judicially created doctrine, also tends to conflate the frivolous with the meritless suit. Qualified immunity is a common-law concept, initially applied in the *Bivens* context, that offers protection from personal liability to government defendants who have not had "fair warning" that their conduct violated the law.<sup>115</sup> The doctrine originally required that the plaintiff establish that the defendant officer acted in bad faith before imposing damages liability.<sup>116</sup> But in the 1980s, it shifted from this subjective standard to a defense based on objective reasonableness, precisely because the defense was perceived to have been ineffective in reducing both frivolous and meritless claims against government officials.<sup>117</sup> In justifying this shift, the Supreme Court

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113. See Bone, *supra* note 24, at 851 (arguing that *Iqbal* extends *Twombly* because "*Twombly* uses plausibility to screen only for truly meritless suits, but *Iqbal* uses it to screen for weak lawsuits too"); Hoffman, *supra* note 10, at 1231–33 (describing "high discovery expenses" and "nonmeritorious litigation" as *Twombly*'s "animating policy purposes"); Kenneth S. Klein, *Removing the Blindfold and Tipping the Scales: The Unintended Lesson of Ashcroft v. Iqbal Is that Frivolous Lawsuits May Be Important to Our Nation*, 41 RUTGERS L.J. 593, 605 (2010) [hereinafter Klein, *Removing the Blindfold*] (arguing that the Court in *Iqbal* was attempting to regulate frivolous lawsuits); Kenneth S. Klein, *Is Ashcroft v. Iqbal the Death (Finally) of the "Historical Test" For Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467, 469 (2010) ("*Iqbal* is a none-too-subtle signal from the Court that it is interested in utilizing Rule 12(b)(6) motions as a gate-keeping device to regulate potentially frivolous litigation . . ."); Lemos, *supra* note 60, at 829–30 (characterizing *Iqbal* and *Twombly* as responses to concerns about "meritless strike suits"); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107, 1109 (2010) (describing *Iqbal* and *Twombly* as reflecting the purpose of protection "against frivolous and purely speculative lawsuits" because such claims burden the judicial system and defendants, and "delay[] justice for meritorious cases").

114. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007) (discussing burden on judges of managing discovery flowing from insubstantial claims).

115. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Hope v. Pelzer*, 536 U.S. 730, 739–40 (2002) ("[T]he defendant [is] entitled to 'fair warning' that his conduct deprived his victim of a constitutional right . . ."); *Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."); *Wilson v. Layne*, 526 U.S. 603, 621 (1999) (Stevens, J., concurring in part and dissenting in part) (discussing a state judge who had fair warning when eliciting sexual favors from a potential litigant).

116. See *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

117. *Harlow*, 457 U.S. at 816–19; see also Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 930–31 (2009).

emphasized its concern with frivolous and meritless cases, noting that constitutional tort claims “frequently run against the innocent as well as the guilty,”<sup>118</sup> that “ingenious plaintiff’s counsel” are able to create material issues of fact based on scant evidence,<sup>119</sup> and that immunity is necessary to terminate “insubstantial” suits.<sup>120</sup> The defense now protects “all but the plainly incompetent” officers from a damages suit for constitutional violations.<sup>121</sup>

Qualified immunity thus plays two significant roles in mapping the terrain of frivolous and meritless cases. First, as noted above and as commentators have recognized, qualified immunity is premised largely on the assumption that many constitutional tort claims are frivolous or meritless.<sup>122</sup> At the same time, qualified immunity transforms an otherwise meritorious claim of constitutional violation into a meritless one. Under *Harlow* and its progeny, defendants can establish the

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118. *Harlow*, 457 U.S. at 814; cf. *Smith v. Wade*, 461 U.S. 30, 91 (1983) (Rehnquist, J., dissenting) (describing “torrent of frivolous” constitutional tort claims); *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976) (reasoning that in the absence of immunity, suits against prosecutors “could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate”).

119. *Harlow*, 457 U.S. at 817 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), *aff’d by an equally divided court*, 452 U.S. 713 (1981)).

120. *Butz v. Economou*, 438 U.S. 478, 507–08 (1978); see also *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (using same language); *Wyatt v. Cole*, 504 U.S. 158, 165–166 (1992) (same); *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (same); *Harrison v. Ash*, 539 F.3d 510, 523 (6th Cir. 2008) (qualified immunity protects against frivolous litigation); *Gregoire v. Class*, 236 F.3d 413, 417 (8th Cir. 2000) (same); *Hemphill v. Schott*, 141 F.3d 412, 420 (2d Cir. 1998) (same); *Austin Mun. Sec., Inc. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 757 F.2d 676, 686 (5th Cir. 1985) (same); *Maiorana v. MacDonald*, 596 F.2d 1072, 1077 (1st Cir. 1979) (“There are two competing considerations bearing on whether summary judgment should be granted in civil rights cases where qualified immunity is asserted. The traditional reluctance to grant summary judgment in cases involving state of mind issues (such as good faith) is counterbalanced by the desirability of screening out frivolous actions through the summary judgment filter so as not to discourage officials from taking necessary and decisive action.”). The need to protect defendants from the burdens of meritless and frivolous suits has additionally been used to justify interlocutory appeals of qualified immunity decisions at every procedural stage, thus guaranteeing that a plaintiff must be patient to dream of achieving a favorable judgment. See *Behrens v. Pelletier*, 516 U.S. 299 (1996).

121. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

122. See Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 14 (1997); Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 131 (1999); Courtney W. Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 IOWA L. REV. 93, 151–52 (1985); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 143; Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 611 (1989); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279, 287 (2010); H. Allen Black, Note, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733, 748–49 (1991); Chad Howell, Note, *Qualified Discovery: How Ashcroft v. Iqbal Endangers Discovery When Civil Rights Plaintiffs File Suit Against Government Officials*, 21 GEO. MASON U. C.R. L.J. 299, 302 (2011).



affirmative defense of qualified immunity through one of two routes: (1) by showing that the defendant's conduct did not violate law that was clearly established at the time she acted; or (2) by showing that the defendant reasonably believed that her conduct did not violate clearly established law.<sup>123</sup> If a defendant can prevail on either prong, then she is entitled to qualified immunity.<sup>124</sup> In other words, a plaintiff may be able to show that the defendant violated the Constitution, but if the law was not clearly established at the time of the violation, the plaintiff's complaint will be dismissed.<sup>125</sup>

The relationship between clearly established law and the underlying constitutional violation is the aspect of qualified immunity that relates most directly to the argument pursued in this Article. If a court finds that particular law is not clearly established, it need never decide whether a particular set of allegations states a claim for a violation of the Constitution. This tension was less of a concern when the Supreme Court adhered to a "rigid order of battle" that required lower courts to first decide whether the plaintiff had established a violation of the Constitution before addressing whether the law was clearly established at the time of the violation.<sup>126</sup> But in 2009 the Court changed course, holding that lower courts are free to decide first the state of clearly established law.<sup>127</sup> The Court recognized that this shift had the potential to stunt the development of constitutional law but justified the shift in part on the original grounds for the qualified immunity defense: the need to protect defendants from the burdens of meritless litigation.<sup>128</sup>

### 3. Conflation in *In Forma Pauperis* Litigation

One final example of transsubstantive conflation of frivolous and meritless litigation can be found in legislative changes to screening of complaints filed *in forma pauperis*. Prior to 1996, cases filed in federal court by individuals who could

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123. See *Malley*, 475 U.S. at 341.

124. At least superficially, qualified immunity is an affirmative defense. See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The defendant always has some minimal burden to establish an entitlement to the defense, but some circuits, as discussed in greater detail below, have adopted variations of a burden-shifting scheme that places much of the burden of rebutting the defense on the plaintiff.

125. For some commentators, this is sufficient to treat cases dismissed on qualified immunity grounds as frivolous. See Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 *FORDHAM L. REV.* 479, 503–05 (2011). In my view, it is more accurate to say that qualified immunity redistributes the burdens of constitutional violations by making otherwise meritorious constitutional claims unsuccessful.

126. *Brosseau v. Haugen*, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring) (internal quotation marks omitted) (describing qualified immunity analysis adopted in *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001)).

127. *Pearson v. Callahan*, 555 U.S. 223 (2009).

128. *Id.* at 237 (noting that the *Saucier* rule "disserves the purpose of qualified immunity when it forces the parties to endure additional burdens of suit . . . when the suit otherwise could be disposed of more readily" (internal quotation marks and alterations omitted)). This was not the only reason for the Court's shift from *Saucier* to *Pearson*: the Court also was concerned with the problem of advisory opinions and, more broadly, deciding difficult constitutional questions prematurely. *Id.* at 237–38.

not afford the filing fee were screened (pre-filing and pre-answer) for frivolousness.<sup>129</sup> When the Supreme Court interpreted this provision in 1992, it specifically held that frivolous claims were distinct from claims that failed to state a claim for relief within the meaning of Rule 12(b)(6).<sup>130</sup> In *Neitzke*, the Court held that although there was “considerable” overlap between the failure-to-state-a-claim standard and the frivolousness standard, “it does not follow that a complaint which falls afoul of the former standard will invariably fall afoul of the latter.”<sup>131</sup>

There were three reasons that the Court cautioned against the “conflat[ion of] the standards of frivolousness and failure to state a claim.”<sup>132</sup> First, the Court distinguished between the ability of courts to dismiss for frivolousness “based on a judge’s disbelief of a complaint’s factual allegations,” power that did not exist (at least until *Iqbal*) under Rule 12(b)(6).<sup>133</sup> Second, the Court recognized that substantial legal questions could exist in cases resolved under Rule 12(b)(6) motions: “To term these claims frivolous is to distort measurably the meaning of frivolousness both in common and legal parlance.”<sup>134</sup> Finally, *Nietzke* emphasized that the procedural protections provided at the Rule 12(b)(6) stage—notice, an opportunity to oppose the motion, and an opportunity to amend or clarify a complaint—ensure a complete record and careful and thorough decision making.<sup>135</sup>

In 1996, Congress amended the *in forma pauperis* statute.<sup>136</sup> Whereas the statute previously had required courts to screen solely for frivolous or malicious filings, now such cases are screened for being frivolous, for failing to state a claim, and for seeking damages from a defendant who is immune from liability.<sup>137</sup> In other words, Congress legislated to conflate meritless and frivolous litigation in the same way rejected by the Court in *Nietzke*.

### B. Context-Specific Conflation

Contrary to the transsubstantive rules reviewed above, many of the rules adopted by legislators and judges are subject-matter specific. The area that has received perhaps the most attention in federal courts has been prisoners’ rights litigation, and I will begin there before moving to examples from securities litigation and antitrust. This review demonstrates that both Congress and the courts have constructed procedural and substantive rules that treat meritless and frivolous litigation as equally troublesome.

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129. See 28 U.S.C. § 1915(e)(2)(B)(i) (1996) (providing that cases could be dismissed sua sponte for being frivolous or malicious).

130. *Neitzke v. Williams*, 490 U.S. 319, 325–27 (1992).

131. *Id.* at 326.

132. *Id.* at 330.

133. *Id.* at 327.

134. *Id.* at 328–29.

135. *Id.* at 329–30.

136. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 804(a)(5), 110 Stat. 1321, 1321-74 (2006).

137. 28 U.S.C. § 1915(e)(2) (2006).

## 1. Prisoners' Rights Litigation

It is not hard to find examples of conflation of the meritless with the frivolous in the area of prisoners' rights. At the federal level, the Prison Litigation Reform Act (PLRA) accomplishes this in at least three ways.<sup>138</sup> First, the PLRA has pre-answer screening procedures that treat both categories of cases the same.<sup>139</sup> Second, the PLRA contains a repeat filer provision that penalizes prisoners for filing previously dismissed litigation, whether frivolous or simply meritless.<sup>140</sup> And finally, the PLRA imposes an exhaustion requirement that was prompted by concerns about frivolous litigation but functions to filter out cases of all types.<sup>141</sup> Importantly, each of these provisions, like the PLRA itself, was intended to reduce frivolous filings by prisoners.<sup>142</sup>

Like the *in forma pauperis* statute already discussed, the PLRA's screening procedure mandates that courts examine all prisoner filings before docketing or as soon as possible to determine whether they are frivolous, fail to state a claim for relief, or seek damages from a defendant who is immune from damages suits.<sup>143</sup> One can appreciate the need to screen complaints for frivolousness as soon as possible—after all, frivolousness should, in some cases, be capable of being determined on the face of a complaint. But screening for meritlessness—either because a complaint fails to state a claim or because it seeks a remedy against a defendant who is immune from suit—suggests that from the legislation's perspective such claims are as harmful as frivolous claims and offer no benefit.<sup>144</sup>

The advantages of having a judge resolve the merit of a case by motion are manifold. First of all, a judge might, by screening for failure to state a claim or for substantive immunity, end up adjudicating an affirmative defense before a defendant has even shouldered the burden of establishing it.<sup>145</sup> Qualified immunity

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138. See Prison Litigation Reform Act of 1995 §§ 801–810, 110 Stat. at 1321-66 to -77 (1996) (codified as amended at 11 U.S.C. § 523 (2012); 18 U.S.C. §§ 3624, 3626 (2012); 28 U.S.C. §§ 1346, 1915, 1915A (2006); 42 U.S.C. §§ 1997–1997h (2006)). As I will discuss below, many states also have adopted analogs to the Federal PLRA. See *infra* notes 162–65 and accompanying text.

139. 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b).

140. 28 U.S.C. § 1915(g).

141. 42 U.S.C. § 1997e(a).

142. See *Skinner v. Switzer*, 131 S. Ct. 1289, 1299 (2011) (describing three-strikes provision and exhaustion provision as intended to “prevent sportive filings in federal court”); *Woodford v. Ngo*, 548 U.S. 81, 97 (2006) (“[T]he PLRA . . . was intended to deal with what was perceived as a disruptive tide of frivolous prisoner litigation . . . .”); *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002) (noting that Congress enacted the PLRA “to reduce the quantity and improve the quality of prisoner suits”); *Booth v. Churner*, 532 U.S. 731, 737 (2001) (explaining that exhaustion provision designed to filter frivolous claims).

143. This provision applies regardless of whether the prisoner has paid the full filing fee or is proceeding *in forma pauperis*. 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b).

144. Indeed, it is unclear that courts are even distinguishing frivolousness from failure to state a claim in their screening function. See, e.g., *Thorpe v. Little*, 804 F. Supp. 2d 174, 185 (D. Del. 2011).

145. See, e.g., *LeBlanc v. Snavely*, 453 F. App'x 140 (3d Cir. 2011) (affirming § 1915A dismissal based on statute of limitations); *Terry v. Bailey*, 376 F. App'x 894, 895 n.2 (11th

is an affirmative defense that typically must be asserted and shown by the defendant.<sup>146</sup> The same goes for some defenses that are adjudicated as Rule 12(b)(6) motions, such as statute of limitations or res judicata.<sup>147</sup> Importantly, the establishment of either of these defenses does not necessarily detract from the underlying merit of a plaintiff's complaint. And if a defendant consciously or erroneously forfeits any of these defenses, a plaintiff's suit may go forward for a determination of the merits. Accordingly, the PLRA encourages courts to prematurely resolve cases involving prisoners' rights because of the overriding goal of eliminating frivolous litigation.

Moreover, pre-screening complaints for failure to state a claim for relief may lead to worse decision making. After *Iqbal* and *Twombly*, resolving failure to state a claim issues is notoriously complex.<sup>148</sup> Doing so in the absence of any briefing by the parties creates an unnecessary risk of error. Even before those cases, the Supreme Court adverted to the importance of adjudicating failure-to-state-a-claim dismissals in the context of adversarial briefing because of the opportunity it provides a litigant to amend or otherwise clarify his complaint.<sup>149</sup> Finally, pre-screening tends to occur under the radar of reported decisions or even fully reasoned written opinions.<sup>150</sup> Thus, to the extent that the adjudication of meritless cases can provide guidance to future actors within the legal system, pre-screening deprives the legal universe of that benefit.

Perhaps even more indicative of legislative conflation of frivolous and meritless cases in the PLRA is the statute's three-strikes provision, which bars a plaintiff from filing a lawsuit *in forma pauperis* if he has previously had three complaints dismissed for being frivolous, failing to state a claim, or for seeking damages from an immune defendant.<sup>151</sup> Thus, whatever the merits of a particular plaintiff's lawsuit, a dismissal on statute of limitations grounds, exhaustion grounds, or immunity will be treated as equivalent to a claim that was frivolous. The implication of the three-strikes provision is clear: from Congress's perspective, a meritless claim is just as harmful as a frivolous one and to be equally sanctioned.

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Cir. 2010) (affirming on alternative grounds lower court decision that entered § 1915A dismissal based on qualified immunity); *Okpala v. Drew*, 248 F. App'x 72 (11th Cir. 2007) (affirming § 1915A dismissal on exhaustion grounds because the affirmative defense appeared on the face of the complaint); *Tijerina v. Patterson*, 244 F. App'x 235 (10th Cir. 2007) (affirming § 1915A dismissal based on qualified immunity); *Butts v. Wilkinson*, No. 96-4280, 1998 WL 152778, at \*1 (6th Cir. 1998) (affirming § 1915A dismissal on res judicata and statute of limitations grounds).

146. *See Gomez v. Toledo*, 446 U.S. 635, 639–41 (1980); *cf. Crawford-El v. Britton*, 523 U.S. 574, 586–87 (1998).

147. *See* FED. R. CIV. P. 8(c).

148. *See supra* notes 90–101 and accompanying text.

149. *See Neitzke v. Williams*, 490 U.S. 319, 329–30 (1989) (summarizing advantages of procedures provided in ordinary Rule 12(b)(6) motion practice).

150. *See* Henry F. Fradella, *In Search of Meritorious Claims: A Study of the Processing of Prisoner Civil Rights Cases in a Federal District Court*, 21 JUST. SYS. J. 23, 27 (1999) (“The overwhelming majority of prisoner civil rights cases are disposed by unpublished memorandum decisions . . .”).

151. 28 U.S.C. § 1915(g) (2006). This provision contains an exception for prisoners under “imminent danger of serious physical injury.”

Finally, the PLRA imposes an exhaustion requirement in prison cases that distinguishes prisoner litigation from all other civil rights claims.<sup>152</sup> Exhaustion of administrative remedies is typically not required in most civil rights litigation.<sup>153</sup> The principal articulated reason for imposing this mandatory requirement on prisoners was to reduce the quantity of “frivolous” prisoner suits.<sup>154</sup> Even before the PLRA was enacted in 1996, federal courts viewed exhaustion as a means to separate out the meritorious cases from the “frivolous” ones.<sup>155</sup> As many judges and legislators saw it, adjudicating prisoner suits was like looking for the one meritorious needle in the haystack of frivolous litigation.<sup>156</sup>

The PLRA’s exhaustion requirement, however, does not distinguish between frivolous and nonfrivolous cases. No exception exists for cases that a judge believes are likely to have merit, and even where a prisoner seeks remedies that cannot be provided by a prison’s internal grievance procedure, the exhaustion requirement is strictly imposed.<sup>157</sup> The result is a scattershot approach to reducing prison litigation, likely to equally limit frivolous, meritless, and meritorious litigation. The Supreme Court has assumed, however, that exhaustion and other PLRA provisions will draw a useful line between frivolous/meritless claims on one hand and meritorious claims on the other.<sup>158</sup>

Exhaustion requirements are not unique to prison cases. They have been legislatively imposed in employment discrimination cases, challenges to agency determinations, and for tort claims against federal, state, and local government entities, among others.<sup>159</sup> Exhaustion has been judicially imposed in ERISA cases and some agency proceedings.<sup>160</sup> In general, however, the justification for

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152. See 42 U.S.C. § 1997e(a) (2006); see also Schlanger, *supra* note 41, at 1635 n.272 (listing states that had enacted statutes similar to the PLRA as of 2003). As of 2003, only Alabama, Connecticut, the District of Columbia, Nebraska, North Dakota, Rhode Island, Vermont, and Wyoming had failed to pass a state analog to the PLRA. Since then, none of these states has imposed a state-based exhaustion requirement for prisoners.

153. See *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982).

154. *Woodford v. Ngo*, 548 U.S. 81, 97 (2006) (“[T]he PLRA . . . was intended to deal with what was perceived as a disruptive tide of frivolous prisoner litigation . . . .”); *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002) (noting that Congress enacted the PLRA “to reduce the quantity and improve the quality of prisoner suits”); *Booth v. Churner*, 532 U.S. 731, 737 (2001) (explaining that exhaustion provision designed to filter frivolous claims).

155. *Patsy*, 457 U.S. at 535 (Powell, J., dissenting) (discussing motivation for predecessor to PLRA).

156. See Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520–22 (1996).

157. *Ngo*, 548 U.S. at 97; *Booth*, 532 U.S. at 737.

158. See *Jones v. Bock*, 549 U.S. 199, 203 (2007) (observing that most prison litigation cases, which as of 2005 accounted for almost ten percent of all civil cases filed in federal court, “have no merit” and “many are frivolous,” and that “[t]he challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit”).

159. See *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 n.6 (1952) (collecting statutes); *Wash. Ass’n for Television & Children v. FCC*, 712 F.2d 677, 681–82 & n.6 (D.C. Cir. 1983) (collecting statutes).

160. See, e.g., *L.A. Tucker Truck Lines*, 344 U.S. at 33 (Interstate Commerce

exhaustion in these contexts has not revolved around the reduction of frivolous litigation, and the exhaustion requirements are much less draconian than the parallel PLRA requirements.<sup>161</sup> As such, exhaustion in these contexts poses less of a risk of blindly condemning frivolous and nonfrivolous litigation.

These restrictions on prisoner litigation are not limited to the federal courts. Many of the provisions found in the PLRA have been adopted in states that seek to limit prisoners' rights litigation. Thus, many states have pre-screening provisions that are identical to the PLRA.<sup>162</sup> And three-strikes provisions are common at the state level as well.<sup>163</sup> Indeed, in South Carolina, a prisoner who violates the three-strikes provision may be sentenced to a year's imprisonment, in addition to the prisoner's current sentence.<sup>164</sup> Finally, many states also have exhaustion requirements that are similar to the PLRA's.<sup>165</sup>

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Commission); *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143 (1946) (unemployment compensation commission); *Hormel v. Helvering*, 312 U.S. 552, 557–59 (1941) (Board of Tax Appeals); *Paese v. Hartford Life & Acc. Ins.*, 449 F.3d 435, 445 (2d Cir. 2006) (ERISA); *see also* Gregory C. Braden, Andrew G. Sakallaris & Michael R. Maryn, *What's New in Employee Benefits in 2008: A Summary of Current Case Law Developments*, in PENSION, PROFIT-SHARING, WELFARE, AND OTHER COMPENSATION PLANS 1, 108 (ALI-ABA Course of Study, 2009) (enumerating ERISA cases requiring plaintiffs to exhaust administrative remedies).

161. Judicially imposed exhaustion requirements are typically based on an analogy to appellate courts refraining from passing on issues not raised in the court below. *See Sims v. Apfel*, 530 U.S. 103, 109–10 (2000) (describing situations in which judicially imposed exhaustion requirements are appropriate); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 878–79 (1998) (rejecting efficiency argument for exhaustion). As such, courts are more likely to impose exhaustion where there is no legislative intent to preclude exhaustion and where an administrative proceeding is adversarial. *Sims*, 530 U.S. at 109–10; *Darby v. Cisneros*, 509 U.S. 137, 144–46 (1993) (finding that APA precluded exhaustion). For instance, traditional exceptions to the exhaustion requirement in other contexts—futility, bias of the ultimate decision maker, hardship, and inadequate remedies—do not apply in PLRA cases. *Compare Booth*, 532 U.S. at 737 (rejecting futility exception to exhaustion), *and Ngo*, 548 U.S. at 97 (requiring “proper” exhaustion under PLRA), *with Sims*, 530 U.S. at 115 (Breyer, J., dissenting) (constitutional claims), *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (futility), *McCarthy v. Madigan*, 503 U.S. 140, 147–48 (1992) (futility and biased decision maker), *and McKart v. United States*, 395 U.S. 185, 197–201 (1969) (balancing interests in applying exhaustion rule against hardship imposed as a result).

162. *See* ARK. CODE ANN. § 16-106-302(b) (2006); FLA. STAT. ANN. § 57.085(6)(a), (6)(d) (West 2006); IDAHO CODE ANN. § 31-3220A(14) (2006); IND. CODE ANN. § 34-13-7-1(c) (West 2011); LA. REV. STAT. ANN. § 15:1188(A) (2005); MD. CODE ANN., CTS. & JUD. PROC. § 5-1004(b) (LexisNexis 2013); MO. ANN. STAT. § 506.381 (West 2003); WIS. STAT. ANN. § 802.05(4)(b) (West 2013).

163. *See* ARK. CODE ANN. § 16-68-607 (2006); COLO. REV. STAT. ANN. § 13-17.5-102.7(1) (West 2005); DEL. CODE ANN. tit. 10, § 8804(f) (Supp. 2012); IOWA CODE ANN. § 610A.1(1)(e) (West Supp. 2013); LA. REV. STAT. ANN. § 15:1187 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 5-1004(b) (LexisNexis 2013); MISS. CODE ANN. § 47-5-76(1) (West 2012); OKLA. STAT. ANN. tit. 57, § 566.2(A) (West 2004); OR. REV. STAT. § 30.645(1) (limited to IFP plaintiffs); S.C. CODE ANN. § 24-27-300 (2007); TENN. CODE ANN. § 41-21-807(c) (2010); VA. CODE ANN. § 8.01-692 (2007) (limited to IFP plaintiffs); W. VA. CODE, § 25-1A-4(a) (LexisNexis 2013).

164. S.C. CODE ANN. § 24-27-300.

165. *See* ALASKA STAT. § 09.19.200(a) (2012) (requiring exhaustion for prospective

## 2. Securities Litigation

Although prisoners' rights litigation has been a source of much legislation that treats meritless and frivolous litigation as one and the same, there are other areas of substantive law that Congress has deemed appropriate for similar treatment. The Private Securities Litigation Reform Act (PSLRA), for example, was passed because of the perception that frivolous and meritless securities class action claims were pressuring defendants into unjust settlements.<sup>166</sup> When it summarized the logic behind the PSLRA, Congress lumped abusive, frivolous, and meritless lawsuits together as equally damaging to the public, the courts, investors, and issuers of securities.<sup>167</sup> Legislators thought that Rule 11 was not used sufficiently often to deter such lawsuits.<sup>168</sup> Accordingly, the PSLRA set out to increase

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relief); ARK. CODE ANN. § 16-106-301; COLO. REV. STAT. ANN. § 13-17.5-102.3(1); DEL. CODE ANN. tit. 10 § 8804(g); IDAHO CODE ANN. § 19-4206(1); LA. REV. STAT. ANN. § 15:1184(A)(2); MD. CODE ANN., CTS. & JUD. PROC. § 5-1003(a)(1); MICH. COMP. LAWS ANN. § 600.5503(1) (West 1996); MO. REV. STAT. § 510.125(1) (2013); N.C. GEN. STAT. § 148-118.2(b) (West 2009); OKLA. STAT. ANN. tit. 57 § 564.1(A) (West Supp. 2013) (requiring exhaustion for challenges to rescission of good-time credits); OKLA. STAT. ANN. tit. 57 § 566.3(G) (West 2004 & Supp. 2013) (requiring exhaustion for all prisoner claims); S.D. CODIFIED LAWS § 21-62-2 (Supp. 2013); WIS. STAT. ANN. § 801.02(7)(b).

166. See Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 51–53 (1998).

167. See H.R. REP. NO. 104-369, at 31–32 (1995), reprinted in 1995 U.S.C.C.A.N. 730 (justifying the PSLRA by reference to "abusive and meritless suits," "abusive and manipulative securities litigation," and "frivolous litigation," none of which was thought to be sufficiently managed by Rule 11). There was, as to be expected, some disagreement about the extent of the problem of frivolous litigation in the area of securities law. *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs*, 103d Cong. 280 (1993) (statement of Sen. Dodd) ("[A]fter a long hearing that lasted well into the afternoon, we found no agreement on whether there is in fact a problem, the extent of the problem, or the solution to the problem."). Compare Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (reporting a study of nine settlements in cases filed related to IPOs of computer and computer-related companies and concluding that the settlement value of litigation is related more to the nuisance value of litigation than to its merits), with Joel Seligman, Commentary, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority"*, 108 HARV. L. REV. 438, 445–48 (1994) (arguing that federal courts did not need additional tools to address meritless securities litigation), and *id.* at 449–55 (criticizing studies that purport to show companies settling regardless of merit, including Alexander's, on both methodological and analytical grounds). Subsequent empirical analyses have cast doubt on the proposition that settlement of securities actions is unrelated to merit. See Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2007) (concluding that despite Congress's intent the PSLRA likely deterred the filing of a substantial number of meritorious cases); James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1631 n.153 (2006).

168. H.R. REP. NO. 104-369, at 39.

obstacles to securities litigation so as to reduce the quantity and improve the quality of filed cases.<sup>169</sup>

Most significantly, the PSLRA heightened pleading standards for securities class actions based on fraud, on the theory that it was too easy to allege fraud in the context of securities class actions. Any claim involving fraud must provide certain specific allegations about the statements alleged to have been misleading and also “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”<sup>170</sup> As commentators have recognized, many courts have interpreted this pleading standard to require evidence, not simply well-pleaded allegations, and many courts have interpreted the PSLRA in ways that discount circumstantial evidence of fraud.<sup>171</sup> Altering the usual procedural course, the statute also provides for a stay of all discovery—in fraud and nonfraud cases—during the pendency of a motion to dismiss.<sup>172</sup> In addition, to prevent abusive litigation, the PSLRA imposes certain filing obligations that ensure that lead plaintiffs are not “professional plaintiffs” because of the perception that lawyers recruit plaintiffs to purchase shares of stock and then serve as named representatives to earn a higher share of any recovery.<sup>173</sup> Finally, the statute imports a loss causation element as part of any plaintiff’s burden of proof and also imposes a cap on damages.<sup>174</sup> And the statute alters the usual rule on joint and several liability to limit the pressure on “innocent” defendants to settle “meritless” litigation.<sup>175</sup>

Aside from these substantive provisions, the statute includes additional tools for courts to sanction attorneys and parties for violating Federal Rule of Civil Procedure 11. These include mandatory review of filings upon final adjudication of the action,<sup>176</sup> mandatory sanctions for any such violations,<sup>177</sup> and a presumptive

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169. *See id.* at 32–35 (describing goal of improving quality of representation in shareholder suits); *id.* at 39 (acknowledging “need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of fraud to pursue legitimate claims”).

170. 15 U.S.C. § 78u-4(b)(2)(a) (2012); *see id.* § 78u-4(b)(1) (describing pleading standard for misleading statements and omissions); *id.* § 78u-4(b)(2) (describing pleading standard for alleging required state of mind).

171. *See* Michael J. Kaufman & John M. Wunderlich, *The Judicial Access Barriers to Remedies for Securities Fraud*, 75 LAW & CONTEMP. PROBS., no. 1, 2012, at 55, 57–59.

172. *See* 15 U.S.C. § 78u-4(b)(3)(B); *id.* § 77z-1(b)(1); H.R. REP. NO. 104-369, at 37 (explaining that stay of discovery was intended to prevent the cost of discovery to pressure settlement of a “frivolous” case).

173. *See* 15 U.S.C. § 78u-4(a)(2)(A)(ii), (v), (vi) (providing that plaintiff provide a statement certifying that he did not purchase securities at direction of counsel, identifying the prior actions in which the plaintiff has sought to serve as a class representative, and promising not to accept any payment beyond his pro rata share); *id.* § 77z-1(a)(2)(A)(ii), (v), (vi) (same); *see also* H.R. REP. NO. 104-369, at 33 (“The Conference Committee believes these practices [filing by professional plaintiffs] have encouraged the filing of abusive cases.”).

174. *See* 15 U.S.C. § 78u-4(b)(4), (e)(1).

175. *See id.* § 78u-4(f); H.R. REP. NO. 104-369, at 37–39.

176. *See* 15 U.S.C. § 78u-4(c)(1); *id.* § 77z-1(c)(1).

177. *See id.* § 78u-4(c)(2); *id.* § 77z-1(c)(2).



award of attorneys' fees and costs in the event of a Rule 11 violation.<sup>178</sup> According to the legislative history, these provisions were necessary to strengthen the deterrence against the filing of "meritless" or "abusive" litigation.<sup>179</sup>

It is possible, of course, that Congress intended these provisions to be directed solely at frivolous, but not meritless, claims. But given that Congress legislated beyond the goal of giving more teeth to Rule 11, this likely only tells part of the story. It is more likely, given the legislative history, that Congress intended to treat frivolous and meritless cases the same. Pleading rules that derail a likely loser early on, class action provisions that magnify the scrutiny of plaintiffs and their counsel and limit the recovery of named plaintiffs, discovery rules that limit costs necessary to defend insubstantial claims, and damages provisions that make it more difficult to recover all have the effect of both limiting the burden of meritless claims and, to some extent, redefining the meaning of merit itself. That these new rules also appear to have made it more difficult to bring meritorious claims only heightens the extent to which legislative perception of the need to regulate frivolousness has broad and undesirable consequences.<sup>180</sup>

### 3. Antitrust Litigation

Antitrust is another substantive area in which frivolous and meritless litigation is often conflated. Courts are suspicious that run-of-the mill fraud or contract claims are sometimes framed as antitrust violations, because of the availability of treble damages that can lead to coerced settlements.<sup>181</sup> Indeed, the Court has explicitly linked the imposition of heightened pleading in all antitrust claims to the concern about groundless and frivolous litigation leading to coerced settlements.<sup>182</sup> The

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178. *See id.* § 78u-4(c)(3); *id.* § 77z-1(c)(3).

179. H.R. REP. NO. 104-369, at 39-40.

180. *See Choi, supra* note 167, at 600.

181. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1362 (Fed. Cir. 2004) ("The line between antitrust claims and ordinary business tort and contract claims is not always clear."), *rev'd on other grounds*, 546 U.S. 394 (2006); *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 4 (1st Cir. 2004) ("[A]ntitrust claims are concerned not with wrongs directed against the private interest of an individual business but with conduct that stifles competition."); *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997) (noting that standing doctrine serves goal of distinguishing ordinary tort and contract actions from true antitrust claims); *Reisner v. General Motors Corp.*, 511 F. Supp. 1167, 1178 n.25 (S.D.N.Y. 1981) ("Numerous cases are filed in the federal district courts attempting to make antitrust claims out of what are, at most, contract claims or fraud claims involving conduct between two parties."); *Bucher v. Shumway*, 452 F. Supp. 1288, 1291-93 (S.D.N.Y. 1978) (fixing the price of a particular securities purchase was not cognizable under the antitrust laws); *Madison Fund, Inc. v. Charter Co.*, 406 F. Supp. 749, 751 (S.D.N.Y. 1975) (antitrust laws "not designed to police the performance of private contracts"); Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 815 (1987) (arguing that the availability of treble damages for antitrust violations "encourages filing of claims which are at best marginal and at worst frivolous").

182. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005).

Court even has relied upon a desire not to undermine the PSLRA's specific approach to securities litigation reform, when it refused to extend antitrust liability against underwriters who market and distribute IPOs.<sup>183</sup> Similarly, the Court's standing doctrine in antitrust cases can be linked to concerns about frivolous litigation in combination with a treble damages regime.<sup>184</sup>

In addition, the Supreme Court has increasingly framed changes in substantive antitrust law—definitions of merit—as a response to perceived threats of frivolous and abusive litigation.<sup>185</sup> Take the Court's turn from *per se* rules in antitrust law to the rule of reason. On one account, the Court's transition can be seen as an embrace of neoclassical economics and the Chicago School's account that, in a competitive market, the false negatives that may increase under a rule of reason standard are less problematic than the false positives that are increased using a *per se* rule.<sup>186</sup> On the other hand, the Court also has explicitly adverted to the high cost of discovery,

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183. See *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 284 (2007) (“We also note that Congress, in an effort to weed out unmeritorious securities lawsuits, has recently tightened the procedural requirements that plaintiffs must satisfy when they file those suits. To permit an antitrust lawsuit risks circumventing these requirements by permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing.”).

184. See Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 23 n.88 (1995) (noting that predatory pricing plaintiffs “must overcome deliberately underinclusive liability rules”); Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. REV. 47, 95 (1994) (“Current antitrust standing rules eliminate not only clearly spurious lawsuits; they also bar claims having potential merit and thereby permit some likely violations to escape prosecution.”); Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1210 (2008) (“Often, concerns about the chilling effect of the treble-damages remedy and abusive private litigation influence the courts to implement underinclusive liability norms in private suits.”); Lemos, *supra* note 60, at 833–34 (tracing limitation of antitrust remedies to concern about incentives to sue created by treble damages provision); Christopher R. Leslie, *The Role of Consumers in Walker Process Litigation*, 13 SW. J.L. & TRADE AMERICAS 281, 301 (2007).

185. See, e.g., John B. McArthur & Thomas W. Paterson, *The Effects of Monsanto, Matsushita, and Sharp on the Plaintiff's Incentive to Sue*, 23 CONN. L. REV. 333, 334 (1991) (“Much of the recent change in antitrust law has been built on the theoretical speculation of a few economists, lawyers, and judges that the world is filled with plaintiffs who bring frivolous antitrust lawsuits expecting to be handed a pot of gold by defendants terrified by the threat of treble damages.”).

186. See Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1549–50 (2011); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* 551 U.S. 877, 900 (2007) (relying on adherents of Chicago School to justify overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and substituting rule of reason for *per se* ban on vertical minimum-resale-price agreements); *State Oil Co. v. Khan*, 522 U.S. 3, 15, 18 (1997) (abandoning *per se* ban on maximum resale price maintenance agreements because “a considerable body of scholarship” suggested such agreements advanced competition and provided “insufficient economic justification for *per se* invalidation” of those agreements); Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust*, 5 COMPETITION POL'Y INT'L 189, 194 (2009) (book review) (arguing that Chicago School's most significant impact has been on the *per se* rule of illegality).

the risk of coerced settlements, and a perception of increasingly frivolous litigation in antitrust.<sup>187</sup>

These examples of prisoners' rights, securities litigation, and antitrust are not exhaustive. RICO has been treated comparably to antitrust litigation by courts, wary that the treble damages provision proves too much of an incentive for novel and abusive litigation.<sup>188</sup> Judges worry over the ability of plaintiffs to "exploit" the damages and attorneys' fees provisions of RICO.<sup>189</sup> As one appellate court noted, plaintiffs have attempted to put RICO to use in "novel—and often imaginative—ways . . . in order to exploit RICO's provisions for treble damages and attorney's fees."<sup>190</sup> And courts accordingly construe RICO's liability provisions strictly,<sup>191</sup> even as Congress instructed them to "liberally construe[]" the statute's terms.<sup>192</sup> Similarly, many commentators view judicial hostility to employment discrimination litigation to reflect the perception that most such cases are weak or frivolous.<sup>193</sup> Relatedly, both judges and lawyers tend to agree that a fair proportion of employment discrimination claims are unimportant or frivolous.<sup>194</sup> Damages caps, such as those present in employment discrimination, are often justified by the perception of rampant frivolousness, but they tend to suppress litigation across the board.<sup>195</sup>

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187. See *Leegin*, 551 U.S. at 895; Reeves & Stucke, *supra* note 186, at 1550.

188. See Lemos, *supra* note 60, at 835.

189. See G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 580 (1987) (arguing that the lower courts are "hostile to civil RICO" and that "[j]udicial efforts to narrow the scope of the statute continue largely unabated"); David Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 42, 45–46 (1996).

190. *Doe v. Roe*, 958 F.2d 763, 765 (7th Cir. 1992).

191. See Blakey & Cessar, *supra* note 189, at 580–90 & nn.230–39; Kurzweil, *supra* note 189, at 70–77, 86–88.

192. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 84 Stat. 922, 947.

193. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561–69 (2001) (arguing that judges wrongly perceive employment discrimination cases as meritless and that judicial hostility interferes with recovery for meritorious claims); Lemos, *supra* note 60, at 830–31 (discussing judicial hostility to employment discrimination cases as example of concern about prevalence of weak cases). To some extent, this may reflect concern about docket load. See, e.g., Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 97–122 (1999) (arguing that courts have increased hostility to harassment cases brought under Title VII, in part because of an increase in filing of Title VII claims after 1991).

194. See EIGHTH CIRCUIT GEND. FAIRNESS TASK FORCE, FINAL REPORT & RECOMMENDATIONS (1997), reprinted in 31 CREIGHTON L. REV. 9, 72–73 (1997); see also Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 508, 555–56 (2008) (offering data suggesting that judges have negative perceptions of discrimination claims).

195. See Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 44 (2000) (discussing reforms, such as caps on damages and arguing "that suppression of complaints is an important motive for their enactment").

The examples used in this Subpart are disparate in many ways, but they reveal many overlapping assumptions about the relationship between frivolous and meritless litigation. First, there is a tendency to lump both categories of cases together, be it for pre-answer screening, adjudications of motions to dismiss, or substantive law. Second, when courts and legislators conflate the two kinds of cases, it is often because of an assumption that both categories are equally burdensome without offering any benefit. The goal of the rules discussed in this Subpart is to winnow the field to enable courts to focus on only those cases with actual merit. Third, most of the rules described in this Subpart—from the pre-answer screening for claims by prisoners and poor persons to the general and subject-matter-specific pleading rules—are founded on the view that a complaint that fails to state a claim is meritless. The rules described here do not purport to distinguish between claims that fail because of an insufficient legal theory and those that fail because of inadequate factual allegation.

### III. THE VALUE OF MERITLESS LITIGATION

I have offered a conception of meritless and frivolous litigation that distinguishes between the two, and I have also shown how judges and legislators often fail to make a similar distinction. The purpose of this Part is to show why we should care about the conflation I outlined in Part II. I begin by providing a broad framework for theorizing the value of meritless litigation, using some examples that demonstrate this framework in action. I conclude with a discussion of how the legal change discussed in Part II undermines the role that meritless litigation plays in creating value. It should be said that I focus here on the value of meritless litigation in an “internal” sense. That is, my goal is to articulate what meritless litigation contributes to the law, not to institutions outside of or intertwined with the law. For instance, it goes without saying that providing access to a judicial system for all litigants ensures social stability by providing an alternative to violent self-help. It might also enhance participation and faith in other social and political institutions, or provide litigants with an avenue to tell their stories to an unbiased listener. These are all important values, but they are not the focus of this Article.

#### *A. The Framework for Appreciating the Value of Meritless Litigation*

The value of meritless litigation can be conceptualized on many levels. First, some meritless litigation will result in development or clarification of the law, even if the plaintiff herself will not benefit. Civil rights litigation is the best example, but any common law system will develop in part on the shoulders of unsuccessful plaintiffs, leading to innovation and also providing stability. Take the development of Eighth Amendment law. Perhaps the most significant case involving conditions of confinement challenges by prisoners is *Estelle v. Gamble*,<sup>196</sup> a case in which the plaintiff’s complaint was dismissed by the Supreme Court. It reflects the value of meritless litigation on two levels. First, *Estelle* announced a new legal standard for the treatment of prisoners, which has defined the contours of prisoners’ rights

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196. 429 U.S. 97 (1976).

litigation for the last forty years.<sup>197</sup> Second, in finding that the prisoner's claim did not meet that standard, *Estelle* marked the outer boundaries of the new constitutional framework.<sup>198</sup>

This second aspect of *Estelle* may be more important than the first, because courts can announce new standards governing conduct in both meritorious and meritless cases. New standards bring with them uncertainty. But this instability is offset when decisions apply the new standard in a particular factual context. The value from concrete application is created in both meritorious and meritless cases. Thus, *Estelle* is significant for the legal innovation it announced and for the stability it created by cabining the reach of its new standard.

Sometimes, meritless cases are *necessary* to the development of a doctrine. Take *Wickard v. Filburn*,<sup>199</sup> the 1942 case that was a central figure in the dispute surrounding the constitutionality of the Affordable Care Act.<sup>200</sup> In *Wickard*, Roscoe Filburn sought to enjoin enforcement of a federal law that regulated wheat production.<sup>201</sup> To decide the case, the Court adopted an expansive view of Congress's Commerce Clause power that has dominated the landscape ever since. Although the Court has recently shown some indications of limiting *Wickard*'s reach,<sup>202</sup> this only heightens the importance of *Wickard* to providing Congress with predictable contours of the breadth of Commerce Clause power. And to the point of this Article, *Wickard* was a meritless case—Filburn lost, but the legal system was the beneficiary.

We can see a similar role for meritless litigation in the development of the law of sex discrimination. Our modern understanding of the limitations imposed by the Equal Protection Clause on sex classifications is informed by a series of cases that began with *Reed v. Reed* and culminated in *Craig v. Boren*.<sup>203</sup> By the end of this series, one could make two observations about the constitutionality of sex

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197. *Id.* at 103–04 (announcing “deliberate indifference” standard).

198. *Id.* at 105–07 (describing circumstances that failed to meet deliberate indifference standard and applying them to the complaint).

199. 317 U.S. 111 (1942).

200. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012); Adam Liptak, *At Heart of Health Law Clash, a 1942 Case of a Farmer's Wheat*, N.Y. TIMES, Mar. 20, 2012, at A1.

201. 317 U.S. at 114–15.

202. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). *But see* *Gonzales v. Raich*, 545 U.S. 1 (2005).

203. See *Craig v. Boren*, 429 U.S. 190 (1976) (striking down statute that provided different drinking ages for men and women); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down Social Security Act provision that differentiated based on sex of wage-earning spouse); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding preferences for women in Navy's promotion system); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding classification based on pregnancy in California's disability insurance program); *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding state property tax exemption for widows but not widowers); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down provision of military benefits statute that disfavored spouses of women service members); *Reed v. Reed*, 404 U.S. 71 (1971) (rejecting sex classification in estate proceedings); see also *Califano v. Webster*, 430 U.S. 313 (1977) (sustaining preference for women in calculation of social security benefits).

classifications: first, intentional sex classifications would be judged under “intermediate scrutiny”; and second, the State would have more leeway to make classifications based on “inherent” and not stereotyped differences.<sup>204</sup> But one would not be able to understand the meaning of these insights without both the meritorious and meritless cases. As just one example, we know that one “inherent” difference in gender that can form the basis of state regulation is past discrimination against women in the workplace, just as we know that a difference that cannot form the basis for regulation is a generalization about the bonds formed by mothers and fathers with their children.<sup>205</sup> We know the former because of an unsuccessful challenge in *Webster*, and we know the latter because of a successful challenge in *Caban*. As regards development of the law, however, both the meritorious and meritless case has provided value.

The value of meritless litigation to legal development is not limited to public law disputes. Tort and contract doctrine often have developed as a result of both meritorious and meritless litigation. Courts have used meritless litigation to mark the boundaries of duty of care in tort law, for example.<sup>206</sup> Tort plaintiffs pursuing a public nuisance theory in novel cases such as lead poisoning and gun violence have charted a course guided by past failures, with varying degrees of success.<sup>207</sup> This has led scholars and practitioners to consider adopting a similar strategy to address climate change.<sup>208</sup> In contract law as well, legal development has been linked to past failures. The doctrine of promissory estoppel, for example, developed in part

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204. See *United States v. Virginia*, 518 U.S. 515, 531–34 (1996) (summarizing sex discrimination jurisprudence).

205. Compare *Webster*, 430 U.S. 313, with *Caban v. Mohammed*, 441 U.S. 380 (1979).

206. In California, for instance, seven cases announced over a period of about sixty years clarified a property owner’s duty of care to third parties. See *King v. Lennen*, 348 P.2d 98 (Cal. 1959) (finding liability); *Garcia v. Soogian*, 338 P.2d 433 (Cal. 1959) (rejecting liability); *Reynolds v. Willson*, 331 P.2d 48 (Cal. 1958) (finding liability); *Knight v. Kaiser Co.*, 312 P.2d 1089 (Cal. 1957) (rejecting liability); *Sanchez v. E. Contra Costa Irrigation Co.*, 271 P. 1060 (Cal. 1928) (finding liability); *Peters v. Bowman*, 47 P. 113 (Cal. 1896) (rejecting liability); *Barrett v. S. Pac. Co.*, 27 P. 666 (Cal. 1891) (finding liability); see also Allen E. Smith, *Some Realism About a Grand Legal Realist: Leon Green*, 56 TEX. L. REV. 479, 483 (1978) (“As we read cases we see that the history of tort law has been one of changes in judicial rulings and language-use in response to the changing social and physical environments.”).

207. Compare, e.g., *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (rejecting public nuisance theory as applied to handgun manufacturers), *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) (rejecting nuisance theory pursued against asbestos manufacturers), and *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (same), with *Cnty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006) (accepting public nuisance theory brought against lead paint manufacturers), and *City of Bos. v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at \*14 (Mass. Super. Ct. July 13, 2000) (accepting public nuisance theory for handgun manufacturers); see also George L. Priest, *Market Share Liability in Personal Injury and Public Nuisance Litigation: An Economic Analysis*, 18 SUP. CT. ECON. REV. 109, 121–24 (2010) (criticizing use of public nuisance theory).

208. See, e.g., David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 56–57 (2003).

because some claims were rejected through rigid application of the consideration requirement,<sup>209</sup> and the doctrine of substantial performance emerged to ameliorate the constructive conditions doctrine.<sup>210</sup> One can trace numerous developments in contract law through a common-law response to market conditions, changed social dynamics, and perceived inadequacies of the status quo doctrine.<sup>211</sup>

Second, in addition to helping develop the law, some meritless litigation will prompt more direct change in the law. The very fact that the litigation is unsuccessful may be perceived as a problem to be fixed. The most recent example of this is found in the legislative response to *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>212</sup> In *Ledbetter*, the Supreme Court rejected the employee's Title VII pay disparity case on statute of limitations grounds, holding that each paycheck constituted a discriminatory act that must be subjected to Title VII exhaustion within the period mandated by statute.<sup>213</sup> The Court rested its decision in part on a 1977 decision, *United Air Lines, Inc. v. Evans*,<sup>214</sup> offering that "[i]t would be difficult [for *Evans*] to speak to the point more directly."<sup>215</sup> Thus, *Ledbetter* can safely be classified as a meritless case. Yet it provoked significant legal change. Within two years, Congress had passed and the President had signed the Lilly Ledbetter Fair Pay Act of 2009, legislatively overruling the Court's decision.<sup>216</sup> The Civil Rights Act of 1991<sup>217</sup> and the Pregnancy Discrimination Act<sup>218</sup> similarly provide examples of a legislative response to court decisions rendering meritless litigation that the political branches deem to have merit.<sup>219</sup>

209. See Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1405 (1995); Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529, 574 (2011).

210. See *Boone v. Eyre*, (1777) 126 Eng. Rep. 160 (K.B.) (recognizing the need for substantial performance four years after prior case establishing constructive conditions); Glenn Walberg, *Just Enough: Substantial Performance, Ministerial Acts and the All Events Tests for Income and Expense Accruals*, 10 FLA. TAX REV. 459, 469 (2010) (discussing constructive conditions and substantial performance).

211. See generally E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203 (1990) (describing changes in contract doctrine brought about by meritless and meritorious litigation); Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737 (2000) (tracing developments in contract law and theory); Vincent A. Wellman, *Conceptions of the Common Law: Reflections on a Theory of Contract*, 41 U. MIAMI L. REV. 925, 958 (1987) ("If we conceive of the law of contracts as fundamentally adaptive, then we should expect that an adequate theory of the law of contracts must allow for change and should articulate the dimensions along which change will likely occur.").

212. 550 U.S. 618 (2007).

213. *Id.* at 624–26.

214. 431 U.S. 553 (1977).

215. *Ledbetter*, 550 U.S. at 626.

216. See Pub. L. No. 111-2, 123 Stat. 5 (amending 42 U.S.C. § 2000e-5(e)).

217. Pub. L. No. 102-166, 105 Stat. 1071.

218. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. 2000e(k) (2006)).

219. The Civil Rights Act was a response to several decisions. See *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (holding that Title VII does not apply extraterritorially to United States employers); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (interpreting 42 U.S.C. § 1981 not to bar racial discrimination in

One could run on with these examples. The Americans with Disabilities Act, for instance, was in part a legislative response to the failure of federal and state courts to provide adequate protection for individuals with disabilities.<sup>220</sup> In other words, the ADA stepped in to make meritorious what courts had previously deemed meritless. Moreover, after the Supreme Court interpreted the ADA narrowly to exclude many individuals from coverage,<sup>221</sup> Congress responded once again with amendments.<sup>222</sup> The path to *Brown v. Board of Education* is littered with cases in which courts adhered to *Plessy v. Ferguson*'s "separate but equal" doctrine.<sup>223</sup> But where the litigation strategy embraced education of the judiciary as the goal, even with losses along the way, change has the potential to emerge.<sup>224</sup> As Judge Robert Carter has stated, "I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal [in *Brown v. Board of Education*] would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start."<sup>225</sup>

Third, even if meritless litigation does not achieve formal legal change, it may play an important role in a discussion of proper institutional conduct and behavior. Lesley Wexler has recently argued that legal challenges to the Obama Administration's decision to target Anwar al-Aulaqi, although unsuccessful, have

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the workplace); *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting white firefighters to bring suit to challenge consent decree entered in litigation brought by black firefighters); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (imposing stringent standard of proof for plaintiff bringing disparate impact challenge); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (providing complete defense to employer in mixed-motive discrimination case). The Pregnancy Discrimination Act legislatively overruled *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (exclusion by employer of pregnancy from disability coverage did not violate Title VII), and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

220. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 379 (2001) (Breyer, J., dissenting) (describing record before Congress of inadequate judicial response to discrimination against the disabled).

221. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002) (adopting narrow interpretation of "substantially" and "major"); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (adopting narrow interpretation of "disability").

222. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.) (legislatively overruling *Sutton* and *Williams*).

223. For various failed challenges to segregation, see, for example, *Fisher v. Hurst*, 333 U.S. 147 (1948) (per curiam); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (denial of Chinese American student's admission into school for whites); *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908) (Kentucky statute mandating statewide school segregation); *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528 (1899) (closure of black high school); *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950); cf. *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 639 (1950) (invalidating segregation in two public schools as unequal under the circumstances, but without directly undermining the separate-but-equal doctrine); Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 318 (1952) ("The greatest gains from this period was the public education of school officials, the courts and the general public in the lawlessness of school officials . . .").

224. See Kenneth F. Ripple & Gary J. Saalman, *Rule 11 in the Constitutional Case*, 63 NOTRE DAME L. REV. 788, 811 (1988).

225. 151 CONG. REC. H9286 (daily ed. Oct. 27, 2005) (alteration in original).



served several important purposes.<sup>226</sup> Although failing on the immediate goals of challenging the Administration's decision, Wexler argues that the litigation provoked a public debate about the limits of the war on terror, initiated scrutiny of legal and policy decisions that the Administration has recently felt compelled to respond to,<sup>227</sup> and arguably created more transparency. Similarly, one might argue that the ongoing litigation alleging that law schools falsified employment data, while unlikely to succeed on the merits, has increased pressure on law schools and regulatory bodies to provide better information to prospective applicants. And one can look back to nineteenth-century litigators bringing uniformly unsuccessful challenges regarding slavery and women's suffrage to see the value of using litigation to generate public debate and ultimately legal change.<sup>228</sup>

I have focused much of my discussion to this point on Supreme Court precedent, which might strike some as misleading. Most meritless litigation does not reach the Court's doors, and cases selected by the Court for disposition are more likely to resolve important and disputed legal principles. But meritless litigation plays much the same role in lower court opinions as well. Thus, to the extent that lower courts play a role in drawing the boundaries of constitutional doctrine, meritless litigation can be extremely important.<sup>229</sup> This is the case even for lower courts resolving issues of common law tort liability<sup>230</sup> and for cases involving statutory interpretation.<sup>231</sup> Indeed, it might be argued that meritless cases are even more important for the development and application of law in the lower courts than in the Supreme Court. There are many more cases to resolve, and lower courts have more precedent to adhere to, making the guidance offered by meritless cases particularly critical.

Meritless litigation can also produce stability. Outside of the legal system, if the procedure for resolving disputes is perceived as fair and neutral, losers will be less likely to resort to disruptive self-help.<sup>232</sup> Within the legal system, meritless cases mark the outer boundary of success. Parties who have to decide how to resolve disputes—running the gamut from arbitration, to settlement, or trial—rely on both meritorious and meritless cases to guide their decision making. In this sense, meritless litigation is part of the stable foundation to our legal system.

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226. See Lesley Wexler, *Litigating the Long War on Terror: The Role of al-Aulaqi v. Obama*, 9 LOY. U. CHI. INT'L L. REV. 159 (2011).

227. See Charlie Savage, *U.S. Law May Allow Killings, Holder Says*, N.Y. TIMES, Mar. 6, 2012, at A18.

228. See JULES LOBEL, SUCCESS WITHOUT VICTORY 46–99 (2003).

229. See, e.g., *Colon v. Howard*, 215 F.3d 227 (2d Cir. 2000) (synthesizing successful and unsuccessful due process challenges to provide guidance to lower courts going forward).

230. See, e.g., *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 341 (1st Cir. 1980) (reviewing successful and unsuccessful negligence claims to arrive at synthesis of duty of care owed to longshoremen).

231. See, e.g., *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317–19 (Fed. Cir. 2005) (reviewing prior case law to synthesize role of extrinsic evidence in claim construction in patents).

232. See Klein, *Removing the Blindfold*, *supra* note 113, at 608–10 (arguing that the cost of easier Rule 12 dismissals under *Iqbal* is the undermining of faith in the neutrality of the judiciary).

*B. Barriers to Obtaining Value from Meritless Cases*

Many theorists have recognized that litigation is about more than simply the resolution of a dispute between two private parties. Abram Chayes introduced the term “public law” to refer to litigation that is directed toward broad, systemic, and transformative goals.<sup>233</sup> Owen Fiss and Judith Resnik have found a similar role for legal process in elaborating public values.<sup>234</sup> Embracing this role of litigation “assumes a procedural system hospitable to debate about the existence, scope, and enforcement of public rights” and “rejects as unrealistically limited the traditional model’s focus on private dispute resolution.”<sup>235</sup> In other words, for litigation to play this role we must have a procedural system that tolerates failure. If this increases burdens on courts and even institutional defendants, it is worth the deterrence and deliberative value.<sup>236</sup> Even courts have at times recognized the nonadjudicative value of litigation as a source of information that can prompt a discussion about governmental action.<sup>237</sup> As has been discussed, these values are not necessarily limited to classic public law litigation.<sup>238</sup>

The focus on efficiency that characterizes judicial and legislative conflation of meritless and frivolous litigation conflicts with this public law approach to litigation. It fails to acknowledge the contributions that litigation can make to empowering disfavored groups, encouraging deliberation about public values, and enhancing justice in the court system.<sup>239</sup> In a traditional focus on efficiency and

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233. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1303–04 (1976).

234. Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (“Adjudication is the social process by which judges give meaning to our public values.”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Yamamoto, *supra* note 106, at 398–99. Indeed, Fiss famously argued that settlements should be disfavored because of the public values at stake. Owen M. Fiss, Commentary, *Against Settlement*, 93 YALE L.J. 1073 (1984); see also William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 957–59 (1989) (book review) (suggesting that critiques of settlement may have more force where public rights are at stake).

235. Yamamoto, *supra* note 106, at 401; see also Chayes, *supra* note 233, at 1307–08.

236. Yamamoto, *supra* note 106, at 401.

237. *In re Primus*, 436 U.S. 412, 431 (1978) (noting that a lawsuit can be a “vehicle for effective political expression . . . as well as a means of communicating useful information to the public”); *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975) (“[I]n our present society many important social issues became entangled . . . in civil litigation. . . . [C]ertain civil suits may be instigated for the very purpose of gaining information for the public. . . . Civil litigation in general often exposes the need for governmental action or correction.”).

238. See *supra* notes 206–11 and accompanying text; see also Miller, *supra* note 22, at 129 (arguing invocation of heightened pleading standard “fails to recognize the democratic significance of litigation as a form of governance or oversight on bureaucratic activity, an enforcement mechanism, and a channel for citizens to express their grievances against their government or fellow citizens”).

239. See Yamamoto, *supra* note 106, at 403–21.

cost reduction, “[t]he implicit message is that meritorious claims belong in the system; those that appear likely to fail do not.”<sup>240</sup>

Even those who believe that the purpose of adjudication is limited to ensuring that meritorious claims are adjudicated correctly have recognized the failings of some of the changes discussed in Part II. Changes in pleading doctrine that emphasize “plausibility” may prematurely (and incorrectly) categorize a meritorious claim as meritless.<sup>241</sup> Even if these changes do not result in inaccurate filtering, they may deter the filing of meritorious claims.<sup>242</sup> Changes in summary judgment have prompted some of the same concerns.<sup>243</sup> And some of the subject matter specific changes, in the PSLRA and PLRA among others, have also been criticized for failing to accurately filter out frivolous and meritless cases at the correct procedural moment.<sup>244</sup>

Moreover, the judicial doctrine and legislative enactments that have been influenced by a conflation of meritless with frivolous litigation have a significant impact on the role that meritless litigation can play in the legal universe. Some of the connections are obvious. To the extent that Congress has equated frivolous and meritless litigation in the PLRA’s three-strikes and exhaustion provisions, it directly interferes with the filing of all categories of cases. But most of the developments discussed in Part II have a less direct connection to the problem described in this Article. In part this is because many of the legal rules adopted by courts and legislatures affect the timing at which cases are adjudicated. Most of the doctrine and statutory enactments introduced as a result of the conflation between frivolous and meritless emphasizes final disposition as early as possible in a civil case’s life span. But the earlier that a meritless case is dismissed, the less likely that it will create value for the legal system because early dismissals will tend to be less informed decisions to dismiss.

Additionally, to the extent that judicial and legislative responses have made it difficult to proceed with meritless litigation past the motion to dismiss stage, it

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240. *Id.* at 402; *see also* Bone, *supra* note 24, at 882–83 (noting that allowing cases to proceed on the theory that discovery may reveal useful information is insufficient because the investigation that occurs in discovery is not the “purpose of adjudication”).

241. *See* Bone, *supra* note 24, at 878–79 (describing problem with *Iqbal* standard as screening out meritorious cases, “even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery”); Miller, *supra* note 22, at 28 (“*Iqbal* may eliminate a range of arguably weak but potentially meritorious cases, not merely meritless actions.”); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (presenting data suggesting that *Iqbal* and *Twombly* will be poor filters for merit); Spencer, *supra* note 24, at 432, 481 (criticizing *Twombly* for permitting dismissal prior to discovery, which might show whether a particular claim is meritorious or “frivolous or nonmeritorious”).

242. *See* Miller, *supra* note 22, at 71–77 (discussing concern that *Iqbal* and *Twombly* will deter filing or enforcement of meritorious public law claims, which have an important regulatory and deterrent effect).

243. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990) (“[L]iberalized summary judgment inhibits the filing of otherwise meritorious suits and results in a wealth transfer from plaintiffs as a class to defendants as a class.”).

244. *See* Choi, *supra* note 167, at 602.

prevents litigants from engaging in the kind of factual discovery that can prompt future changes in legal rules.<sup>245</sup> Moreover, as cases are dismissed at earlier and earlier procedural stages, the announcement of relevant legal rules inevitably will be more generalized and less tailored to specific factual scenarios, thus depriving future litigants of meaningful guidance. And, of course, to the extent that litigants are subjected to the same sanctions for both frivolous and meritless litigation, it heightens the perception that nothing is to be gained by either.

To make some of these concerns more concrete, I will use the Court's decision in *Iqbal* as an example, but the problems I identify are equally applicable to any heightened pleading regime.<sup>246</sup> Recall that in *Iqbal*, the first principle offered by the Court was that "conclusory" factual allegations should be discarded at the motion to dismiss stage. In *Iqbal*, this meant that the Court could disregard the allegation that the defendants intentionally treated the plaintiff differently on account of his race, religion, and national origin. Had the Court credited those allegations, it would have had to confront the difficult question posed by *Iqbal*: namely, whether the circumstances of September 11 and its aftermath would justify the differential treatment challenged in that case. Instead, by construing the complaint absent those critical allegations, the Court failed to resolve an important constitutional question that could guide officials, litigants, and courts in the future.

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245. For instance, the Pregnancy Discrimination Act was enacted after the Supreme Court found that Title VII did not protect against discrimination on the basis of pregnancy. See Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)), *superseding* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976). The trial court in *Gilbert* had found, after hearing testimony and reviewing extensive discovery, that General Electric's policies constituted discrimination on the basis of sex. See *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367 (E.D. Va. 1974). More recently, the multistate litigation effort against law schools for their allegedly deceptive marketing practices has not resulted in any tangible relief for the plaintiffs, but some of the facts learned as a result of that litigation have prompted calls for regulatory bodies to adopt important changes to how law schools collect and disclose information. See Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEB. L. REV. 866, 912-23 (2013) (noting that lawsuits against law schools have not yet proven successful but proposing regulatory changes in response to disclosures about law school marketing practices). And there has been some limited progress in response. See ABA House of Delegates, Resolution 103 (Aug. 6-7, 2012), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2012\\_hod\\_annual\\_meeting\\_103.doc](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_annual_meeting_103.doc) (adopting amendments to Standard 509 and Rule 16 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*); Martha Neil, *ABA Looking for Ways to Better Monitor Employment Stats for Law Graduates*, A.B.A. J. (Feb. 22, 2013, 3:03 PM CST), [http://www.abajournal.com/news/article/aba\\_to\\_mull\\_audit\\_procedures\\_for\\_employment\\_data\\_re\\_new\\_law\\_graduates](http://www.abajournal.com/news/article/aba_to_mull_audit_procedures_for_employment_data_re_new_law_graduates) ("[T]he American Bar Association is seeking bids for what the National Law Journal calls a law school data cop."); Debra Cassens Weiss, *No Fudging: Revised Standard Bars Law Schools from Publishing Misleading Consumer Info*, A.B.A. J. (Aug. 6, 2012, 10:46 AM CST), [http://www.abajournal.com/news/article/no\\_fudging\\_revised\\_standard\\_bars\\_law\\_schools\\_from\\_publishing\\_misleadin/](http://www.abajournal.com/news/article/no_fudging_revised_standard_bars_law_schools_from_publishing_misleadin/) (reporting that ABA House of Delegates voted to require greater disclosure to consumers).

246. See *Bone supra* note 45, at 918 n.190.

As a second example, take the Court's plausibility analysis, which calls upon courts to use their "judicial experience and common sense" to determine the sufficiency of a complaint. By liberating courts to dismiss complaints on these grounds, *Iqbal* may function to make 12(b)(6) dismissals *sui generis*, thereby depriving courts and litigants of the predictability and stability that meritless litigation has provided in the past.

The qualified immunity doctrine functions in a different way to prevent meritless litigation from providing value. First, qualified immunity plays a large role in case selection. If plaintiffs' lawyers are risk averse,<sup>247</sup> they will choose cases in which qualified immunity plays a limited role in case resolution.<sup>248</sup> The result may be that the vast majority of constitutional damages cases never test the limits of existing law, because the attorneys who file them select cases that are within the "clearly established" zone that will defeat a qualified immunity defense.<sup>249</sup>

Second, as suggested in Part II, the order by which courts resolve the questions presented by the qualified immunity defense also will affect the extent to which meritless litigation can shape the law. If courts dismiss cases because the law was not clearly established at the time of an alleged violation, constitutional law will remain static. John Jeffries has argued that qualified immunity permits courts to engage in legal innovation,<sup>250</sup> but this proposition will not hold if cases are routinely dismissed after courts only answer the clearly established law question.<sup>251</sup>

#### CONCLUSION

It is somewhat surprising that courts and academics overlook the value of litigant failure. After all, judges routinely issue dissents in cases, presumably because they believe there is some benefit to articulating their own rejected position. Dissents have been said to act as a counterweight to the majority opinion, "keeping the majority accountable for the rationale and consequences of its decision" and providing guidance to future courts and litigants about how to limit

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247. See, e.g., John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 230–32 (1983); Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 453 (2010); Patrick A. Luff, *Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions*, 41 U. MEM. L. REV. 65, 80 n.59 (2010).

248. See Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L. J. 477 (2011) (reporting on results of qualitative survey suggesting that pre-filing screening by attorneys filters out claims that might be subject to a qualified immunity defense).

249. Qualified immunity may have this impact not simply because of its substantive content, but also due to the procedural obstacles that accompany invocation of the qualified immunity defense. Dealing with client expectations while a case is on interlocutory appeal and not progressing through discovery may be a deterrent to bringing particular lawsuits—even when the plaintiff's attorney thinks that the qualified immunity defense will ultimately be rejected.

250. See Jeffries, *supra* note 30, at 90.

251. See, e.g., *Pearson v. Callahan*, 555 U.S. 223 (2009).

the reach of the majority opinion.<sup>252</sup> And some, of course, chart the course for an eventual change in the law.<sup>253</sup>

Meritless litigation does not rise to the level of a dissent, but it may serve similar values. Like dissents, meritless litigation can mark the boundaries of established law, prompt legal change, or provoke a broader discussion of legal norms. But meritless litigation is undervalued by judges and legislators, leading to significant developments in statutory enactments and judicial doctrine.

It is worth taking a moment to consider what it might mean to better recognize the distinction between frivolous and meritless litigation. Some answers are obvious: the PLRA's three-strikes provision and prescreening provision should be revised to eliminate the conflation of frivolous and meritless suits; pleading doctrine should be focused on traditional measures of legal insufficiency and not the factual inquiry that *Iqbal* and *Twombly* may suggest.

Other answers may be more controversial. Incentivizing all meritless litigation might not be justified, because although it provides value it also incurs costs. But the specific category of meritless litigation created by qualified immunity may justify closer consideration. For instance, if attorneys' fees were available for plaintiffs who showed that their rights were violated, even though the rights were not clearly established, it might incentivize attorneys to represent litigants in the "gray" area of constitutional litigation. This model is not foreign to civil rights litigation—in mixed-motive employment discrimination cases, plaintiffs who prevail are not entitled to compensatory damages but may be awarded other relief, including attorneys' fees.<sup>254</sup> And the Supreme Court has recognized that attorneys' fees in civil rights litigation may far exceed a plaintiff's compensatory award because it is important to encourage the vindication of constitutional rights even when doing so is economically inefficient.<sup>255</sup> By the same token, it would be unfair to ask a defendant to bear the costs of a plaintiff's unsuccessful litigation; it may be necessary to create court-operated funds to provide such incentives.

Notably, Congress has recognized the need to incentivize meritless litigation in patent disputes. The Hatch-Waxman Act encourages generic drug manufacturers to challenge the validity of existing pharmaceutical patents, on the theory that it will result in speedier production of cheaper generic versions of brand-name pharmaceuticals. Through what is known as a "Paragraph IV" filing, the first

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252. See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986); see also Leroy Rountree Hassell, Sr., *Appellate Dissent: A Worthwhile Endeavor or an Exercise in Futility?*, 47 HOW. L.J. 383, 388 (2004) ("The most important function of a dissent, in my view, is to expose the perceived error or weaknesses in the logic that the majority has chosen to employ in its decision."); Randall T. Shepard, *What Can Dissents Teach Us?*, 68 ALB. L. REV. 337, 338–39 (2005) ("The generous view portrays the dissent as fulfilling a vital role in clarifying the law by enhancing the quality of majority opinions, stimulating the intellectual exchange among judges and, ultimately, serving as a 'safeguard of democracy.'"). For a discussion of the canonization of certain dissents and dissenters, see Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781 (2000).

253. Brennan, *supra* note 252, at 430; Hassell, *supra* note 252, at 391; Shepard, *supra* note 252, at 342–44.

254. See 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

255. See *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (rejecting proportionality test for fee awards under § 1988).

generic drug manufacturer who brings such a challenge is entitled to a 180-day exclusivity period wherein the challenging manufacturer has the sole right to market the generic version of the drug.<sup>256</sup> The challenger is the beneficiary of the 180-day exclusivity period even if there is no merit to its claim of patent invalidity. As one commentator has noted, the Paragraph IV filing “changes the ordinary risk calculus for patent litigation”—the challenger need not worry over being sued for damages for patent infringement, but stands to gain significantly from being the first to file a challenge.<sup>257</sup> At the same time, Congress believed that encouraging such suits would spark innovation among brand-name manufacturers who will create new drugs at a faster pace.<sup>258</sup>

Even if incentivizing meritless litigation is not in the cards outside of pharmaceutical production, it remains essential that courts and legislators take greater care in translating assumptions about the relative value of frivolous and meritless litigation into doctrine and statutes. Recognizing the value of meritless litigation will not always translate into adopting procedural rules that permit such litigation to proceed to discovery and trial. As I have shown in this paper, *how* we adjudicate cases can be as important as *when* we adjudicate them. Even if, for instance, courts continue to dismiss many meritless cases at the pleading stage, courts may leverage whatever value such cases have by adjusting how they resolve

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256. See 21 U.S.C. § 355(j)(5)(B)(iv) (2006). The benefit of the 180-day exclusivity period is the ability to charge near-monopoly prices. See Donna M. Gitter, *Innovators and Imitators: An Analysis of Proposed Legislation Implementing an Abbreviated Approval Pathway for Follow-On Biologics in the United States*, 35 FLA. ST. U. L. REV. 555, 573 (2008) (noting that during the 180-day period the generic drug “shares duopoly prices with the Brand-name drug” (quoting Steven W. Day, Note, *Leaving Room for Innovation: Rejecting the FTC’s Stance Against Reverse Payments in Schering-Plough v. FTC*, 57 CASE W. RES. L. REV. 223, 229–30 (2006))).

257. See David W. Opperbeck, *Rational Antitrust Policy and Reverse Payment Settlements in Hatch-Waxman Patent Litigation*, 98 GEO. L.J. 1303, 1306–07 (2010). Between 1992 and 2000, 72% of Paragraph IV challenges have resulted in litigation with the challenger prevailing 42% of the time. Shankar Nai, *The Effect of the Patient Protection and Affordable Care Act on Patent Law and Policy*, 10 LOY. L. & TECH. ANN. 62, 75 (2012) (citing Federal Trade Commission study).

258. See Bryan A. Liang, *Regulating Follow-On Biologics*, 44 HARV. J. ON LEGIS. 363, 365 (2007) (arguing that the Hatch-Waxman Act has been very successful in bringing cheaper generic versions of drugs to the market while maintaining incentives for continued innovation); Allen M. Sokal & Bart A. Gerstenblith, *The Hatch-Waxman Act: Encouraging Innovation and Generic Drug Competition*, 10 CURRENT TOPICS MEDICINAL CHEMISTRY 1950 (2010). *But see* Gitter, *supra* note 256, at 611–12 (describing Congress’s intent but questioning efficacy of Hatch-Waxman Act); Nai, *supra* note 257, at 74–75 (questioning innovation claim). An analogous example can be found in agency rulemaking. During the late 1970s the Federal Trade Commission experimented with a regime in which the agency funded public participation in agency rulemaking proceedings, on the theory that greater involvement by otherwise underrepresented groups would lead to better agency decision making. See Barry B. Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51 (1981) (assessing effectiveness of program). The effectiveness of the program is difficult to evaluate, but it did alter somewhat the makeup of the individuals who provided testimony to the FTC as well as the scope of questioning that was undertaken by counsel during hearings. *Id.* at 116–17, 128–29.

them. Providing more specificity in judgments at the motion to dismiss stage will provide more clarity and guidance in the law as we move forward. Similarly, changing how we resolve claims of qualified immunity can benefit our legal system even if it does not change the outcome of cases in which the defense is raised.

Refusing to acknowledge the distinct value of meritless litigation, by contrast, measures litigation solely by the outcome it achieves for the parties to the dispute—litigation that does not change the status quo is a failure on this account. If we expect our legal system to continue to evolve and adapt, however, this kind of failure must be tolerated, even if not embraced.