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The Irrepressible Myth of *Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy

Adam N. Steinman*

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I. Introduction

This year marks the twentieth anniversary of three important cases on federal summary judgment. Known as the "trilogy,"¹ *Matsushita Electric Industries Co. v. Zenith Radio Corp.*,² *Anderson v. Liberty Lobby, Inc.*,³ and *Celotex Corp. v. Catrett*⁴ have had a profound impact on federal litigation. Federal courts have cited these three cases more than any other U.S. Supreme Court decisions.⁵ Collectively, the trilogy is viewed as a "celebration of

1. E.g., Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993) (asserting that these three cases "changed the manner in which courts approach summary judgment").

2. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

3. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

4. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

5. See *infra* notes 24–27 and accompanying text (discussing the frequency with which federal courts cite the trilogy cases). If citations by both state and federal courts are counted,

summary judgment"⁶ and a mandate for federal courts to embrace the use of summary judgment to dispose of cases before trial.⁷ Among the trilogy, *Celotex* is widely perceived as the most significant. Martin Redish recently wrote "[o]f the three, *Celotex* most clearly altered well-established summary judgment practice, and in any event, *Celotex*, far more than the others, decisively opened the eyes of the federal courts to the propriety of summary judgment in certain cases."⁸

Celotex dealt with the most common summary judgment scenario: when the defendant moves for summary judgment, seeking to win the case without having to endure a potentially costly and risky trial. *Celotex*'s immediate impact was to expand the availability of summary judgment as a means for disposing of a plaintiff's claims prior to trial. In particular, *Celotex* recognized that a defendant could obtain summary judgment not only by putting forth affirmative evidence that the plaintiff's case was meritless, but also by showing that the plaintiff would lack evidence to prove some essential element of her claim.⁹ *Celotex* also spoke more generally to how burdens are allocated between the party seeking and the party opposing summary judgment and what materials may be considered in connection with these burdens.¹⁰ To this day, *Celotex* provides the Court's most current instructions on these important questions.

Anderson and *Celotex* are still the two most frequently cited Supreme Court cases in history, with *Matsushita* comfortably in sixth place. See *infra* notes 28–33 and accompanying text (discussing the frequency with which the trilogy cases have been cited by all courts, state and federal).

6. Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1114–15 (1986).

7. See *Celotex*, 477 U.S. at 327 ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" (citing FED. R. CIV. P. 1)). *But cf.* Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 474 (1987) (arguing that the trilogy has "further enfeebled the efficacy of the summary adjudication procedure").

8. Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1348 (2005); see also John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problems Under Rule 56*, 6 REV. LITIG. 227, 228 (1987) (calling *Celotex* the "most important for procedural purposes"); Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 54 (1988) (calling *Celotex* "the broadest of the three cases").

9. See *infra* notes 109–13 and accompanying text (providing an in-depth discussion of then-Associate Justice Rehnquist's majority opinion in *Celotex*).

10. See *infra* notes 123–30 and accompanying text (summarizing the main principles derived from *Celotex*).

Anniversaries are times for reflection.¹¹ *Celotex* is a significant decision from both theoretical and practical standpoints. It impacts core questions of procedural fairness,¹² the proper roles of judges and juries in the federal system,¹³ the increasing caseloads of the federal judiciary,¹⁴ and distributive justice in the federal court system.¹⁵ It also provides the blueprint for the basic mechanics of litigating and adjudicating summary judgment motions.¹⁶ Over the past two decades, *Celotex* has become the subject of sustained academic commentary,¹⁷ as well as a vital part of any first-year civil

11. Cf. David J. Garrow, "Happy" Birthday, *Brown v. Board of Education?: Brown's Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693, 693 (2004) (reviewing MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1914–17 (1998) (discussing increased use of summary judgment sixty years after the adoption of the Federal Rules of Civil Procedure); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are The Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1901 (1989) (discussing the influence of the Federal Rules of Civil Procedure, their current role, and proposed "reforms" for the Rules fifty years after their adoption).

12. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1044–48 (2003) (questioning whether the increased use of summary judgment following *Celotex* and the trilogy is worth "negative effects on other system values, such as accuracy, fairness, the day-in-court principle, and the jury trial right").

13. See *id.* at 1074–77 (exploring the impact of Rule 56 on the jury trial guarantee); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 162–70 (1988) (explaining the change in the role and authority of the civil jury).

14. See Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1656–59 (1995) (discussing federal summary judgment and arguing that *Celotex* was "an effort by a majority of the Court to encourage active policing of the docket").

15. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990) (noting that the trilogy's effect on summary judgment practice "results in a wealth transfer from plaintiffs as a class to defendants as a class").

16. See *infra* notes 123–30 and accompanying text (summarizing the main principles derived from *Celotex*).

17. E.g., Redish, *supra* note 8, at 1333–35, 1342–48, 1355–57 (discussing *Celotex*); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 777–87 (1988) (same); Issacharoff & Loewenstein, *supra* note 15, at 78–90, 108–19 (same); Kennedy, *supra* note 8, at 234–59 (same); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1043–50 (1989) (same); Miller, *supra* note 12, at 1037–50, 1132–34 (same); Nelken, *supra* note 8, at 54–85 (same); Sinclair & Hanes, *supra* note 14, at 1653–63 (same); Stempel, *supra* note 13, at 99–100, 105–08, 157–63, 189–92 (same); Wald, *supra* note 11, at 1907–15, 1941–44 (same). See generally David L. Shapiro, *The Story of Celotex: The Role of Summary Judgment in the Administration of Civil Justice*, in CIVIL

procedure course¹⁸ or federal courts treatise.¹⁹ While *Celotex* is a necessary authority and indispensable guide for the judges who must resolve summary judgment motions on a day-to-day basis, it remains the subject of conflicting interpretations by federal trial and appellate courts.²⁰

The twentieth anniversary of the trilogy provides an important opportunity to reconsider *Celotex* and its impact on summary judgment burdens. The recent passing of Chief Justice William Rehnquist, who authored the *Celotex* majority opinion as an Associate Justice, makes this a particularly appropriate time to revisit *Celotex*. If the empirical evidence is any indication, history will recognize *Celotex* as among his most significant contributions.²¹ Like many watershed cases, *Celotex* raised questions as well as answered them. Although *Celotex* appeared to establish an orderly sequence of burdens for the moving defendant and the nonmoving plaintiff, it left numerous ambiguities concerning the precise contours of these burdens and what materials may be used to satisfy them. These unanswered questions have given rise to competing myths about *Celotex* and summary judgment burdens. The justifications offered for the prevailing myths are principally each proponent's policy preferences about how summary judgment procedure ought to operate in the federal system.

This Article treats *Celotex* not as an empty vessel for achieving optimal policy but rather as an object of interpretation. Thus, it takes a more traditional approach—long overdue in this area—that emphasizes what we customarily value when interpreting a decision. Specifically, this Article seeks an interpretation of *Celotex* that is consistent with prior cases, consistent with the governing textual sources, and coherent in light of its own factual and procedural posture. These values may seem simple, but taking them seriously points toward a fresh approach to summary judgment burdens that is a better reading of *Celotex* as a matter of case-interpretation.

By contrast, the prevailing myths of *Celotex* are not true to these interpretive values. They assume that *Celotex* intended to silently contradict

PROCEDURE STORIES: AN IN-DEPTH LOOK AT THE LEADING CIVIL PROCEDURE CASES 343 (Kevin M. Clermont ed., 2004) (discussing the impact of *Celotex*).

18. See JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 925 (8th ed. 2001) (discussing *Celotex*); RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 414 (3d ed. 2000) (same).

19. E.g., 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2727 (3d ed. 1998) (discussing *Celotex*); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 56.03, 56.13 (3d ed. 1997) (same).

20. See *infra* notes 252–64 and accompanying text (discussing the lower courts' conflicting interpretations of both defendants' and plaintiffs' burdens under *Celotex*).

21. See *infra* notes 34–39 and accompanying text (establishing *Celotex* as one of Chief Justice Rehnquist's most significant contributions).

what the Supreme Court held sixteen years earlier in *Adickes v. S. H. Kress & Co.*²² Or they suffer from glaring inconsistencies with Federal Rule of Civil Procedure 56, the textual authority for summary judgment in the federal system. Or they proffer readings of *Celotex* that make little sense given the actual posture of that case. This Article provides—for the first time—an interpretation of *Celotex* that is consistent with prior case law, including *Adickes*, and with the text of Rule 56. My view also renders the majority opinion a coherent whole that fits with the case's factual and procedural posture.

Part II of this Article examines the staggering empirical evidence of the summary judgment trilogy's influence and argues that *Celotex* is an important part of Chief Justice Rehnquist's judicial legacy. Part III describes the history of summary judgment prior to *Celotex*. Part IV details the *Celotex* case in both the lower courts and the Supreme Court. In addition to summarizing the Supreme Court's instructions on summary judgment burdens, this Part identifies important issues that the *Celotex* majority failed to clarify.

Part V undertakes both a descriptive account and normative critique of the myths surrounding the *Celotex* decision. It first articulates three interpretive values: (1) consistency with prior cases; (2) consistency with the text of the governing statutes or rules; and (3) internal coherence with the decision itself and the case's factual and procedural posture. This Part then summarizes and evaluates the current understandings of *Celotex*, and describes the conflict in the lower federal courts about what *Celotex* requires of litigants. Part VI proposes a new approach to *Celotex* that is consistent with past precedent, fits with the text of Rule 56, and makes sense in light of the factual and procedural posture of *Celotex* when it reached the Supreme Court. This Part also explains how this approach would achieve a reasonable middle ground between the two most common myths of *Celotex* and would resolve a long-standing misperception about the relationship between the *Celotex* majority opinion and the concurrence by Justice White. Finally, this Part responds to some likely critiques of the approach I propose.

II. An Empirical Tribute to the 1986 Trilogy

One measure of a decision's impact and influence is the frequency with which other courts cite it.²³ The empirical evidence of the trilogy's impact is

22. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

23. See Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333, 334–49 (1998) (using citation as "a proxy for an opinion's value"); William

impressive indeed. Federal courts cite *Matsushita*, *Anderson*, and *Celotex* more than any decisions ever issued by a federal tribunal.²⁴ *Anderson* and *Celotex* are by far the top-two cases in terms of federal court citations, each with over 70,000.²⁵ *Matsushita*, cited by over 31,000 federal opinions, is an admittedly distant third, but it is still more than 3000 citations ahead of *Conley v. Gibson*,²⁶ the case with the fourth-highest number of federal court citations.²⁷

Measuring citations by all courts, state and federal, *Anderson* and *Celotex* are still the two most frequently cited Supreme Court cases, again by a staggering margin.²⁸ *Anderson* and *Celotex* each have over 72,000 citations by federal and state courts.²⁹ This places them more than 20,000 citations ahead of *Strickland v. Washington*,³⁰ the third-most-cited case.³¹ *Matsushita* is the sixth-most-cited case with over 32,000 citations by state and federal courts, more than 2000 citations ahead of *Anders v. California*,³² the seventh-most-cited case.³³

The empirical data also tell us something quite surprising about the legacy of Chief Justice William Rehnquist. Most posit that Rehnquist's greatest

M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 271 (1998) (using the number of citations to published opinions to measure the influence of individual judges); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250 (1976) ("Where, however, the rule has been solidified in a long line of decisions, the authority of the rule is enhanced."); see also Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1332 n.7 (2005) (noting that "[v]arious types of citation analysis have been used for decades in the legal community to gauge the impact of books, law review articles, court decisions, or judges, among other things").

24. See *infra* app. tbl.1 (ranking cases in terms of most citations by federal courts and tribunals). The citation counts described in this Part and in the appendix are based on the Shepard's citation service.

25. *Id.*

26. *Conley v. Gibson*, 355 U.S. 41 (1957).

27. *Infra* app. tbl.1.

28. See *id.* tbl.2 (ranking cases in terms of most citations by all courts and tribunals).

29. *Id.* It is interesting that *Anderson* and *Celotex*, which address a Federal Rule of Civil Procedure, have so many citations by state courts. One state's highest court explained: "[W]e are not bound to apply the summary judgment standard articulated by the United States Supreme Court in *Celotex*. However, we think it makes eminent good sense to do so." *Kourouvacilis v. Gen. Motors Corp.*, 575 N.E.2d 734, 738 (Mass. 1991) (citations omitted); see also MICHAEL E. SOLIMINE, *ANDERSON'S OHIO CIVIL PRACTICE* § 171.08 (2003) (noting that the Ohio Supreme Court explicitly adopted the U.S. Supreme Court's *Celotex* standards).

30. *Strickland v. Washington*, 466 U.S. 668 (1984).

31. *Infra* app. tbl.2.

32. *Anders v. California*, 386 U.S. 738 (1967).

33. *Infra* app. tbl.2.

legacy will be his decisions on federalism.³⁴ But the empirical evidence indicates that his most influential contribution during a tenure on the Court spanning four decades is his majority opinion in *Celotex*. Cases that are typically considered Justice Rehnquist's influential federalism decisions—for example, *United States v. Lopez*,³⁵ *Seminole Tribe of Florida v. Florida*,³⁶ and *United States v. Morrison*³⁷—each have considerably fewer than 2000 citations by federal and state courts.³⁸ While *Celotex* may have enjoyed a chronological head-start, a 70,000-citation deficit will be hard to overcome. The data confirm that any assessment of Chief Justice Rehnquist's judicial legacy must consider seriously the profound impact of his *Celotex* decision on civil litigation.³⁹

III. A Brief History of Summary Judgment

Prior to the 1938 adoption of the Federal Rules of Civil Procedure, a number of states, as well as England and some British colonies, had adopted summary judgment procedures.⁴⁰ England introduced summary judgment in 1855.⁴¹ At the time, England authorized summary judgment only for claims on bills of exchange and promissory notes.⁴² Only a plaintiff could seek summary judgment, as the drafters intended for the procedure to weed out "frivolous or fictitious Defences."⁴³ In the United States, several states adopted summary judgment procedures in the late nineteenth and early twentieth century,

34. See, e.g., Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 11–13 & n.58 (2003) ("[I]t is a hallmark—and perhaps the legacy—of the Rehnquist Court to have brought back to the public law table the notion that the Constitution is a charter for a government of limited and enumerated powers.").

35. *United States v. Lopez*, 514 U.S. 549 (1995).

36. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

37. *United States v. Morrison*, 529 U.S. 598 (2000).

38. Chief Justice Rehnquist's second-most cited opinion, in all courts and tribunals, is *Illinois v. Gates*, 462 U.S. 213 (1983), which ranks thirtieth overall with approximately 9000 citations. *Infra* app. tbl.2. *Gates* is a Fourth Amendment case concerning the exclusionary rule and the use of confidential informants to obtain a search warrant. *Gates*, 462 U.S. at 216.

39. Justice Rehnquist's majority decision in *Celotex* is described *infra* notes 109–30 and accompanying text.

40. See Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 423 (1929) (listing jurisdictions that had developed summary judgment procedures by the time the Article was written). See generally *id.* (providing a history of summary judgment); Robert W. Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193 (1928) (same).

41. Clark & Samenow, *supra* note 40, at 424.

42. *Id.*

43. *Id.*

including Connecticut, Delaware, New Jersey, Illinois, Michigan and New York.⁴⁴ As in England, only plaintiffs could seek summary judgment, and then only as to particular enumerated claims.⁴⁵

A. *The Federal Rules of Civil Procedure*

In 1938, the Supreme Court adopted the Federal Rules of Civil Procedure pursuant to the Rules Enabling Act.⁴⁶ Rule 56 authorized either a plaintiff or a defendant to seek summary judgment.⁴⁷ The text of Rule 56 has remained remarkably constant since its initial promulgation. Then, as now, Rule 56(c) set forth the general standard for granting summary judgment motions:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.⁴⁸

The text of Rule 56(c) provided no further guidance on how courts should assess whether the documents listed "show that there is no genuine issue [of] material fact." It thus relied on the courts to develop the details and analytical structure for adjudicating summary judgment motions.

Rule 56 did, however, impose specific requirements for any affidavits used to support or oppose summary judgment. Rule 56(e) provided:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

44. *Id.* at 423.

45. *E.g., id.* at 440–41 (quoting nine types of actions for which summary judgment could be sought under CONN. RULE OF CIVIL PRACTICE § 14(A)(1) as of 1929). As compared to other summary judgment procedures at the time, Connecticut's was described as "most extensive" in terms of the types of actions for which it was available. *Id.* at 423.

46. *See Weinstein, supra* note 11, at 1901 & nn.1–3 (discussing the history of the Federal Rules of Civil Procedure).

47. FED. R. CIV. P. 56(a)–(b).

48. FED. R. CIV. P. 56(c). The quoted material includes the one change that has been made to this language since its initial promulgation in 1938. The reference to "answers to interrogatories" was added by a 1963 amendment. FED. R. CIV. P. 56 advisory committee's note (1963 amendment). The advisory committee explained that this phrase had been "inadvertently omitted" from the rule as initially drafted. *Id.*

therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.⁴⁹

Rule 56 did not impose corresponding standards for the other documents listed in Rule 56(c)—pleadings, depositions, answers to interrogatories, and admissions—perhaps because the standards governing these materials were addressed elsewhere in the Federal Rules.

In certain circumstances, even where the standard for summary judgment was otherwise met, Rule 56 gave the court discretion to relax Rule 56(c)'s mandate that summary judgment "shall be rendered forthwith." Rule 56(f) provided:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.⁵⁰

A plaintiff typically uses Rule 56(f) when she is depending on the discovery process to uncover evidence to support her allegations. If the defendant moves for summary judgment before the plaintiff has had an opportunity to conduct discovery, she may invoke Rule 56(f).

B. The 1963 Amendment to Rule 56(e)

In 1963, Rule 56(e) was amended in response to a series of cases that, according to the Advisory Committee, had "impaired the utility of the summary judgment device."⁵¹ The Committee was concerned with the scenario where a party supported its motion for summary judgment with affidavits that, if accepted as true, would establish facts warranting judgment in its favor but the opposing party presented no evidentiary material sufficient to refute the movant's affidavits.⁵² A number of Third Circuit cases took the position that courts should not grant summary judgment in that situation as long as factual allegations contained in the nonmovant's pleadings refuted the movant's affidavits.⁵³

49. FED. R. CIV. P. 56(e).

50. FED. R. CIV. P. 56(f).

51. FED. R. CIV. P. 56 advisory committee's note (1963 amendment).

52. *See id.* (explaining the reason for the amendment).

53. *See id.* (citing, *inter alia*, *Frederick Hart & Co. v. Recordgraph Corp.*, 169 F.2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern*, 260 F.2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co.*, 191 F. Supp. 383 (D. Del. 1961)); *see, e.g.*,

The Advisory Committee found the Third Circuit's approach "incompatible with the basic purpose" of summary judgment.⁵⁴ It explained that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."⁵⁵ In order to "overcome" this line of cases,⁵⁶ the following language was added to Rule 56(e):

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.⁵⁷

By preventing the nonmoving party from opposing a properly supported summary judgment motion with "mere allegations or denials" in its pleading, the 1963 amendment confirmed that a critical function of summary judgment was to look beyond the parties' allegations to the question of whether there would be evidence to support those allegations. The amendment "recognize[d] that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary."⁵⁸

C. *The Adickes Case*

One of the most significant pre-trilogy summary judgment cases was *Adickes v. S. H. Kress & Co.*⁵⁹ In 1964, Sandra Adickes taught at a "Freedom School" in Hattiesburg, Mississippi.⁶⁰ Adickes, who was white, and six of her black students went to have lunch at a store operated by S. H. Kress &

United States ex rel. Nobles, 191 F. Supp. at 384 ("An issue of fact being well pleaded by the third affirmative defense, I am not aware of any rule or decision requiring the defendant to file any additional affidavits or to take any other step in the matter.").

54. FED. R. CIV. P. 56 advisory committee's note (1963 amendment).

55. *Id.*

56. *Id.*

57. FED. R. CIV. P. 56(e).

58. FED. R. CIV. P. 56 advisory committee's note (1963 amendment).

59. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

60. *Id.* at 146-47.

Co.⁶¹ The store refused to serve her, and Hattiesburg police arrested her for vagrancy after she left.⁶²

Adickes sued Kress under 42 U.S.C. § 1983, alleging that Kress's refusal to serve her violated the Fourteenth Amendment's Equal Protection Clause.⁶³ In order to prevail on this claim, Adickes had to show that Kress acted "under color of law."⁶⁴ On this issue, Adickes presented two theories. She first contended that Kress refused her service because of a "custom of the community to segregate the races in public eating places."⁶⁵ This theory went to trial, where the district court directed a verdict for Kress.⁶⁶ The Supreme Court ultimately reversed this directed verdict, ordering a new trial on Adickes's "custom of the community" claim.⁶⁷

Adickes's second contention—the one more significant in terms of summary judgment—was that the refusal to serve her was the result of a conspiracy between Kress and the Hattiesburg police.⁶⁸ On this claim, the district court granted summary judgment for Kress.⁶⁹ In support of its motion, Kress had submitted the following documents: (a) deposition testimony from Mr. Powell, the store's manager, stating that he had not communicated with the police about refusing service to Adickes; (b) affidavits from the chief of police and the two arresting officers stating that Mr. Powell had not asked them to arrest Adickes; and (c) deposition testimony from Adickes, stating that she did not know of any communication between any Kress employee and the Hattiesburg police.⁷⁰ In opposing the motion for summary judgment, Adickes had relied on (a) her own deposition testimony that Carolyn Moncure, one of her students, had seen a policeman come into the store; and (b) an unsworn statement by Irene Sullivan, a Kress employee, stating that she had seen a policeman enter the store while Adickes and her students were there.⁷¹

The Supreme Court reversed the grant of summary judgment, stating that Kress "failed to carry its burden of showing the absence of any genuine issue of

61. *Id.*

62. *Id.* at 146.

63. *Id.* at 147.

64. *Id.* at 150–52.

65. *Id.* at 147.

66. *Id.* at 147–48.

67. *Id.* at 148, 174.

68. *Id.* at 148.

69. *Id.*

70. *Id.* at 153–55 & nn.8–12.

71. *Id.* at 156–57 & nn.13–14.

fact."⁷² The Court reasoned that "[Kress] did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served."⁷³ As the Court explained, Mr. Powell's testimony that he had not communicated with a police officer about refusing to serve Adickes did not foreclose the possibility that another Kress employee had done so.⁷⁴ And the affidavits from the police officers, which had addressed only the arrest, not the refusal to serve, did not foreclose the possibility that either of them had been in the store and had communicated with a Kress employee in a way that influenced the decision not to serve Adickes.⁷⁵ The Court concluded:

[Kress] failed to fulfill its initial burden of demonstrating what is a critical element in this aspect of the case—that there was no policeman in the store. If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a "meeting of the minds" and thus reached an understanding that petitioner should be refused service.⁷⁶

The Court acknowledged that there were problems with the documents Adickes had submitted in opposition to Kress's motion. Adickes's deposition testimony that her student Carolyn Moncure had seen a police officer in the store was hearsay, and the unsworn statement of Irene Sullivan did not comply with Rule 56(e)'s requirements for affidavits.⁷⁷ Rule 56(c), however, required the party moving for summary judgment "to show initially the absence of a genuine issue concerning any material fact."⁷⁸ Because Kress had failed to meet this initial burden, there was no need for Adickes "to come forward with suitable opposing affidavits."⁷⁹ Nonetheless, the Court stated in dicta that if Kress had met its initial burden, such as by "submitting affidavits from the policemen denying their presence in the store," Adickes "would have had to come forward with either (1) the affidavit of someone who saw the policeman in the store or (2) an affidavit under Rule 56(f) explaining why at that time it was impractical to do so."⁸⁰

72. *Id.* at 153.

73. *Id.* at 157.

74. *Id.* at 157–58.

75. *Id.* at 155 n.12, 158.

76. *Id.* at 158.

77. *Id.* at 159 n.19.

78. *Id.* at 159.

79. *Id.* at 160.

80. *Id.*

The most significant aspect of *Adickes* for summary judgment burdens was the conclusion that Kress had failed to meet its burden because its supporting documents did not "foreclose the possibility" of a conspiracy between Kress and the police. If the existence of a conspiracy was "X," the *Adickes* Court held that Kress was required to produce affirmative evidence showing "not-X" (that is, that "X" is false).⁸¹ Only then would *Adickes* have had to come forward with evidence of a genuine issue regarding the relevant fact.

D. Celotex's Trilogy Companions: Matsushita and Anderson

Matsushita, decided in March of 1986, involved an antitrust claim against Japanese television manufacturers.⁸² The plaintiffs alleged that the defendants had conspired to sell televisions to the United States at artificially low prices in order to force American manufacturers out of the market.⁸³ In concluding that the lower court should have granted summary judgment in favor of the defendants, the Supreme Court stated: "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."⁸⁴ Furthermore, "if the factual context renders [plaintiffs'] claim implausible . . . [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."⁸⁵

The Court decided *Anderson* on June 25, 1986, the same day as *Celotex*.⁸⁶ The defendant in *Anderson* moved for summary judgment on the plaintiff's defamation claim, arguing that it had not acted with "actual malice" as required for defamation claims by public figures.⁸⁷ Because a plaintiff must establish actual malice by "clear and convincing" evidence, *Anderson* raised the narrow issue of the proper approach to summary judgment motions when the dispositive issue is subject to a heightened standard of proof.⁸⁸ Nonetheless,

81. Cf. Shapiro, *supra* note 17, at 367 (using "X" and "not-X" terminology to illustrate basic summary judgment mechanics).

82. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577-78 (1986) (describing the parties and the nature of the plaintiffs' claim).

83. *Id.* at 578.

84. *Id.* at 586 (footnote omitted).

85. *Id.* at 587.

86. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242 (1986).

87. *Id.* at 245.

88. *Id.* at 247.

the Court made several important statements about summary judgment generally. In particular, *Anderson* stated that the summary judgment standard "mirrors the standard for a directed verdict"⁸⁹ and thus depends on whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."⁹⁰ *Anderson* also instructed that courts may grant summary judgment when the evidence supporting the plaintiff's claim "is merely colorable or is not significantly probative."⁹¹

Matsushita and *Anderson* helped to illuminate the general concept of what a "genuine issue" is for the purpose of Rule 56, with *Anderson* explicitly linking the "genuine issue" standard to the standard for a directed verdict at trial.⁹² However, *Matsushita* and *Anderson* provided little guidance on the details of each party's summary judgment burden.⁹³ That guidance was left to the Court's *Celotex* decision.

IV. *Celotex* and Summary Judgment Burdens

Myrtle Catrett sued Celotex Corporation and several other defendants in the U.S. District Court for the District of Columbia for the wrongful death of her husband, Louis Catrett.⁹⁴ Catrett alleged that her husband had died due to exposure to Celotex's asbestos products. During discovery, Celotex served

89. *Id.* at 250.

90. *Id.* at 249.

91. *Id.* at 249–50 (citation omitted).

92. As to these issues, the holdings of *Matsushita* and *Anderson* were arguably no different than what the Supreme Court had said in prior cases. See Mullenix, *supra* note 7, at 456–57 & nn.130–32 (stating that *Matsushita*'s "articulation of summary judgment principles largely coincided with existing precedent" and that *Matsushita* "rel[ie]d heavily" on *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984)); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 36 & n.9 (1988) ("The application of directed verdict sufficiency standards to summary judgment in [*Anderson v. Liberty Lobby*] was hardly a radical idea." (citing *Sartor v. Ark. Gas Corp.*, 321 U.S. 620 (1944))).

93. In both cases, the Court assumed without deciding that the moving defendants had met their burdens under Rule 56. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.4 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.10 (1986). In *Anderson*, the Court simply remanded so the lower court could apply the "correct standard." *Anderson*, 477 U.S. at 257. In *Matsushita*, the Court concluded that the materials on which the plaintiffs relied in their argument to the Supreme Court would be insufficient to create a genuine issue of material fact, but it allowed the lower courts to consider whether other evidence existed that would be sufficient. *Matsushita*, 475 U.S. at 597–98.

94. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986) (describing the prior history of the case).

interrogatories on Catrett asking her, among other things, for an identification of potential witnesses supporting her claim and for detailed information about any work Mr. Catrett did with asbestos.⁹⁵ Catrett's answers to these interrogatories failed to identify any such witnesses or information, stating that she would respond later with supplemental answers.⁹⁶

In September 1981, Celotex filed a motion for summary judgment contending that there was no evidence that Mr. Catrett had been exposed to any Celotex asbestos product.⁹⁷ Celotex withdrew this motion six weeks later but then filed a second summary judgment motion in December 1981.⁹⁸ This motion asserted that the court should grant summary judgment because Catrett had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional limits of [the District] Court."⁹⁹ At the time of his alleged exposure, Mr. Catrett had apparently worked not in the District of Columbia, but in Illinois, for a company called Anning & Johnson.¹⁰⁰

In opposing the summary judgment motion, Catrett relied on three documents: (a) a letter from William O'Keefe of Aetna Casualty & Surety, Anning & Johnson's insurer, stating that Anning & Johnson had acquired asbestos from a company that Celotex later purchased; (b) a letter from T.R. Hoff, Anning & Johnson's assistant secretary, describing Mr. Catrett's duties there and stating that Anning & Johnson had purchased an asbestos product from a company Celotex now owned; and (c) deposition testimony by Mr. Catrett in an earlier workers' compensation proceeding stating that his duties with Anning & Johnson involved direct contact with asbestos products.¹⁰¹

95. See *Catrett v. Johns-Manville Sales Corp. (Catrett II)*, 826 F.2d 33, 34 (D.C. Cir. 1987) (reviewing Celotex's interrogatories and Catrett's responses), *on remand from Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). One interrogatory asked Mrs. Catrett to identify "persons having knowledge of facts relevant to the subject matter in this lawsuit" and to indicate whom she planned "to produce as witnesses in the trial in this action." *Id.* (quoting interrogatory number 26). Other interrogatories asked for information concerning Mr. Catrett's work with asbestos, including the "type and identity of each such asbestos material" with which he worked. *Id.* (quoting interrogatories number 51 and 52).

96. *Id.*

97. Shapiro, *supra* note 17, at 348.

98. *Catrett v. Johns-Manville Sales Corp. (Catrett I)*, 756 F.2d 181, 183 & n.2 (D.C. Cir. 1985), *rev'd sub nom. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

99. *Celotex*, 477 U.S. at 319–20 (alteration in original) (quoting Celotex's second motion for summary judgment).

100. *Catrett I*, 756 F.2d at 183.

101. *Id.*; Shapiro, *supra* note 17, at 348. One month after filing her opposition to summary judgment but before the district court ruled, Catrett also filed supplemental interrogatory answers that listed T. R. Hoff as a person with "knowledge of facts relevant to the subject matter

The district court granted Celotex's summary judgment motion, stating at the close of oral argument that there had been no showing of exposure to a Celotex product "within the District of Columbia *or elsewhere*."¹⁰² A divided panel of the D.C. Circuit reversed.¹⁰³ Judge Starr, joined by Judge Wald, held that Celotex had not met its burden under *Adickes* because it had "offered *no* affidavits, declarations or evidence of any sort whatever in support of its summary judgment motion. To the contrary, Celotex's motion was based solely on the plaintiff's purported failure to produce credible evidence to support her claim."¹⁰⁴ Relying on *Adickes*, the majority explained:

In this case Celotex proffered nothing. It advanced only the naked allegation that the *plaintiff* had not come forward in discovery with evidence to support her allegations of the decedent's exposure to the defendant's product. Under settled rules, that barebones approach will not do. Mrs. Catrett was simply not required, given this state of the record, to offer any evidence in response.¹⁰⁵

Judge Bork dissented, arguing that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute."¹⁰⁶

The Supreme Court granted Celotex's petition for a writ of certiorari.¹⁰⁷ On June 25, 1986, the Supreme Court issued its decision.¹⁰⁸ *Celotex* generated four separate opinions: (1) a majority opinion by then-Associate Justice Rehnquist, joined by Justices White, Marshall, Powell, and O'Connor; (2) a concurring opinion by Justice White; (3) a dissenting opinion by Justice Brennan, joined by Chief Justice Burger and Justice Blackmun; and (4) a dissenting opinion by Justice Stevens. The net result, by a 5-4 margin, was to reverse the D.C. Circuit's decision and to remand for further proceedings.

in this lawsuit" who would be called as a witness at trial. *Catrett v. Johns-Manville Sales Corp. (Catrett II)*, 826 F.2d 33, 36 (D.C. Cir. 1987), *on remand from Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

102. *Catrett I*, 756 F.2d at 183 n.3.

103. *Catrett II*, 826 F.2d at 33.

104. *Catrett I*, 756 F.2d at 184.

105. *Id.* at 185 (footnotes omitted).

106. *Id.* at 188 (Bork, J., dissenting).

107. *Celotex Corp. v. Catrett*, 477 U.S. 317, 319 (1986).

108. *Id.* at 317.

A. *Justice Rehnquist's Majority Opinion*

At the outset, it is worth noting the majority's general comments on the goals and virtues of summary judgment:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.¹⁰⁹

As for the specific issues presented in *Celotex*, the majority rejected the D.C. Circuit's premise that Celotex had to present affirmative evidence that Mr. Catrett had not been exposed to its asbestos products. "[U]nlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim."¹¹⁰ Rather, a defendant moving for summary judgment may discharge its burden by showing that there is "an absence of evidence" to support an essential element of plaintiff's case when the plaintiff will bear the burden of proof at trial (as is typical).¹¹¹

The majority also rejected the notion that *Adickes* imposed a heavier burden on a moving defendant. Although the majority agreed that the Court in *Adickes* reached the correct result,¹¹² it stressed that *Adickes* should not "be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof."¹¹³ In other words, if "X" is a necessary element of the plaintiff's claim, the defendant is not required to produce affirmative evidence showing "*not-X*"; the defendant can also meet its burden by showing that the plaintiff lacks sufficient evidence to prove "X" at trial.

109. *Id.* at 327 (citations and internal quotation marks omitted).

110. *Id.* at 323.

111. *Id.* at 325.

112. *See id.* ("It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied.")

113. *Id.*

The majority explained that when the defendant meets its burden, that is, when its motion is "made and supported as provided in this rule,"¹¹⁴ Rule 56(e) requires the plaintiff "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"¹¹⁵ A plaintiff must "make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."¹¹⁶ This "showing, if reduced to admissible evidence," must be "sufficient to carry [the plaintiff's] burden of proof at trial."¹¹⁷

As for the materials with which a plaintiff might make such a showing, the majority wrote that a plaintiff is not required to use materials that are "in a form that would be admissible at trial."¹¹⁸ The majority noted that "Rule 56 does not require the nonmoving party to depose her own witnesses."¹¹⁹ Rather:

Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would *normally* expect the nonmoving party to make the showing to which we have referred.¹²⁰

In articulating all of these principles, the majority did little to illustrate how they applied to the record presented in *Celotex*. Interestingly, the majority opinion never explicitly stated that *Celotex* met its burden. That finding is implicit, however, because the Court remanded the case solely to determine whether Catrett's showing in response to the summary judgment motion was sufficient.¹²¹ Because the majority left that ultimate determination up to the

114. *Id.* at 324 (quoting FED. R. CIV. P. 56(e)).

115. *Id.* (quoting FED. R. CIV. P. 56(c), (e)).

116. *Id.* at 323.

117. *Id.* at 327.

118. *Id.* at 324.

119. *Id.*

120. *Id.* (emphasis added).

121. *Id.* at 327. The Court stated:

[T]he Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

Id.

lower courts, one cannot infer whether Catrett's showing was, in the Supreme Court's view, sufficient to avoid summary judgment.¹²²

To summarize, the majority set forth the following principles in connection with the defendant's and plaintiff's summary judgment burdens:¹²³

- (1) The plaintiff is not obligated to make a responsive showing unless the defendant's motion is "made and supported as provided in [Rule 56]."¹²⁴
- (2) The defendant may discharge its burden by showing that there is "an absence of evidence" to support an essential element of the plaintiff's case on which the plaintiff will bear the burden of proof at trial.¹²⁵
- (3) The defendant can make this showing using any of the documents listed in Rule 56(c), that is, pleadings, depositions, answers to interrogatories, and admissions, "with or without supporting affidavits."¹²⁶
- (4) If the defendant meets its burden of showing an absence of evidence on an essential element of the plaintiff's case, the plaintiff must respond by making "a sufficient showing" with respect to that element.¹²⁷
- (5) The plaintiff's showing is sufficient when her supporting materials are such that, "if reduced to admissible evidence," they would be "sufficient to carry [her] burden of proof at trial."¹²⁸

122. Dividing once again 2–1, the D.C. Circuit concluded on remand that Catrett had met her burden. *See* *Catrett v. Johns-Manville Sales Corp.* (*Catrett II*), 826 F.2d 33, 33 (D.C. Cir. 1987) (Bork, J., dissenting) ("The majority finds that she has met her burden, and has made enough of a showing to defeat the motion for summary judgment. I disagree."), *on remand from Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). It thus reversed the district court's grant of summary judgment. *Id.* The case settled shortly thereafter. Shapiro, *supra* note 17, at 360.

123. As elsewhere in this Article, I assume that the defendant is the party moving for summary judgment, which is the scenario addressed in *Celotex* and *Adickes*. Consistent with the identity of the parties in both *Celotex* and *Adickes*, I use "it" as the pronoun for the defendant and "she" or "her" for the plaintiff.

124. *Celotex*, 477 U.S. at 324 (quoting FED. R. CIV. P. 56(e)).

125. *See id.* at 325 (describing the moving party's burden on a motion for summary judgment).

126. *See id.* at 323 (identifying the documents that a party seeking summary judgment may rely on to meet its burden); *see also* FED. R. CIV. P. 56(c) (listing the documents that may "show that there is no genuine issue as to any material fact").

127. *See Celotex*, 477 U.S. at 323 (stating that "Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case").

128. *Id.* at 327.

(6) In making this showing, the plaintiff is not required to use materials that are "in a form that would be admissible at trial."¹²⁹

(7) One would "normally" expect the plaintiff to make this showing from any of the documents listed in Rule 56(c) except for the pleadings, that is, depositions, answers to interrogatories, admissions, or affidavits.¹³⁰

B. Opinions by Other Justices

Justice Rehnquist's opinion was the opinion of the Court and had the support of five justices.¹³¹ Therefore, it states the *Celotex* holding for purposes of *stare decisis* and is binding on the lower federal courts.¹³² Nonetheless, the other opinions are significant, both for the sake of completeness and because some have helped to shape the competing myths of *Celotex*.

1. Justice White's Concurrence

Although Justice White joined Justice Rehnquist's majority opinion, he also wrote a separate concurrence. White reaffirmed that a moving defendant "may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case,"¹³³ but he stressed that the defendant must still "discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting

129. *Id.* at 324.

130. *Id.*

131. Some have called Justice Rehnquist's opinion for the court a "plurality" opinion because of Justice White's separate concurrence. *See, e.g.,* Kennedy, *supra* note 8, at 230 ("Justice Rehnquist's plurality opinion in *Celotex* raises a number of practical questions."); *see also* Friedenthal, *supra* note 17, at 777 (stating that *Celotex* was decided "without a majority opinion"). Such statements overlook the fact that Justice White also joined Justice Rehnquist's opinion, which makes Rehnquist's opinion a majority opinion supported by five justices. For further discussion of this issue, *see infra* notes 338–44 and accompanying text.

132. *See* Max Gibbons, *Of Windfalls and Property Rights: Palazzolo and the Regulatory Takings Notice Debate*, 50 UCLA L. REV. 1259, 1289 n.187 (2003) (noting that the Court's majority opinion is binding, not any separate concurrence supporting the result); Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1409 (2000) ("Treating majority opinions as binding upon other actors is an indispensable corollary to the view that the Supreme Court sits not only to decide cases, but also to establish more generally applicable rules of law.").

133. *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986) (White, J., concurring).

the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."¹³⁴ Justice White added:

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case.¹³⁵

2. Justice Brennan's Dissent

In dissent, Justice Brennan stated that he did "not disagree with the Court's legal analysis."¹³⁶ Justice Brennan wrote that "as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record."¹³⁷ Justice Brennan explained how a moving defendant could show such an absence:

This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record.¹³⁸

Thus, according to Justice Brennan, "the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party."¹³⁹ He explained: "[i]n that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production."¹⁴⁰ Applying this standard, Justice Brennan concluded that Celotex failed to meet its burden because the three documents on which Catrett relied were already "in the record" at the time

134. *Id.* (White, J., concurring).

135. *Id.* (White, J., concurring).

136. *Id.* at 329 (Brennan, J., dissenting).

137. *Id.* at 332 (Brennan, J., dissenting).

138. *Id.* (Brennan, J., dissenting).

139. *Id.* (Brennan, J., dissenting).

140. *Id.* (Brennan, J., dissenting).

Celotex filed its second summary judgment motion.¹⁴¹ Because the record revealed at least one potential witness (Mr. Hoff), "Celotex was required, as an initial matter, to attack the adequacy of this evidence."¹⁴²

With respect to *Adickes*, Justice Brennan agreed that the D.C. Circuit was wrong to read *Adickes* as requiring Celotex "to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos."¹⁴³ Justice Brennan emphasized, however, that his approach to summary judgment was "fully consistent" with *Adickes*.¹⁴⁴ He noted that *Adickes*'s response to Kress's summary judgment motion had "pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service."¹⁴⁵ Because the presence of a policeman would allow a jury to permissibly infer a conspiracy,¹⁴⁶ Justice Brennan viewed *Adickes* as holding that these documents meant that Kress "had 'failed to fulfill its initial burden' of demonstrating that there was no evidence that there was a policeman in the store."¹⁴⁷

3. Justice Stevens's Dissent

Justice Stevens's dissent focused on the fact that Celotex's motion for summary judgment rested exclusively on "the lack of exposure *in the District of Columbia*."¹⁴⁸ Therefore, the district court's unexplained conclusion that there had been "no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere*"¹⁴⁹ was "palpably erroneous."¹⁵⁰ The best course, according to Justice Stevens, was to "affirm the reversal of summary judgment on that narrow ground."¹⁵¹ Thus, Justice Stevens disapproved "this Court's abstract exercise in Rule construction."¹⁵²

141. *Id.* at 335–36 (Brennan, J., dissenting).

142. *Id.* at 336 (Brennan, J., dissenting).

143. *Id.* at 334 (Brennan, J., dissenting).

144. *Id.* at 333 (Brennan, J., dissenting).

145. *Id.* (Brennan, J., dissenting).

146. *Id.* at 333–34 (Brennan, J., dissenting) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158 (1970)).

147. *Id.* at 334 (Brennan, J., dissenting) (quoting *Adickes*, 398 U.S. at 157–58).

148. *Id.* at 338 (Stevens, J., dissenting).

149. *Id.* (Stevens, J., dissenting).

150. *Id.* at 339 (Stevens, J., dissenting).

151. *Id.* (Stevens, J., dissenting).

152. *Id.* (Stevens, J., dissenting).

He noted, however, that Catrett had "made an adequate showing—albeit possibly not in admissible form—that her husband had been exposed to [Celotex's] product in Illinois."¹⁵³

C. *What Celotex Fails to Tell Us About Summary Judgment Burdens*

The majority opinion in *Celotex* leaves significant ambiguities with respect to both the moving defendant's burden and the nonmoving plaintiff's burden. How may a defendant show an "absence of evidence" for purposes of meeting its initial burden?¹⁵⁴ And what materials must the court consider in determining whether the defendant has met this burden? Assuming that the defendant meets its burden, what constitutes a "sufficient showing" by the plaintiff to avoid summary judgment, and on what materials may the plaintiff rely in making that showing?¹⁵⁵

1. *The Defendant's Burden*

The majority opinion did not explicitly discuss what a defendant must do to show an "absence of evidence," except to say that a defendant can use any of the documents listed in Rule 56(c) to make this showing.¹⁵⁶ While the majority seemed to conclude that Celotex met its burden of showing an absence of evidence with respect to exposure, the opinion did not explain why or how. The facts of the case suggest at least two possibilities. One is that Celotex met its burden because the Rule 56(c) documents contained no evidence of exposure to a Celotex product. Another is that Celotex met its burden because it had served interrogatories on Catrett asking her to describe and identify evidence of her husband's exposure to a Celotex asbestos product, and Catrett failed to do so.¹⁵⁷

These two possibilities suggest very different approaches to determining whether a defendant has shown an "absence of evidence." Under the first, the defendant will meet its burden as long as the Rule 56(c) documents contain no evidence to support an essential element of the plaintiff's claim. Under the

153. *Id.* at 338 (footnotes omitted) (Stevens, J., dissenting).

154. *Id.* at 325.

155. *Id.* at 323.

156. *Id.* at 324.

157. *See id.* at 320 (noting that Catrett had failed to identify in interrogatories any evidence of her husband's exposure to Celotex asbestos products).

second, the Rule 56(c) documents must be ones that, like Catrett's interrogatory answers, would be expected to indicate supporting evidence but fail to do so.

As if to compound the ambiguity, the *Celotex* majority cited two influential scholarly articles that took opposite views on this subject. The majority stated that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."¹⁵⁸ For this proposition, the majority cited articles by Martin Louis and David Currie.¹⁵⁹

David Currie's article endorsed the first approach. He argued that the mere filing of a summary judgment motion should be sufficient to require a plaintiff to "produc[e] evidence sufficient to sustain a favorable verdict."¹⁶⁰ Currie would not require the defendant to conduct any discovery designed to elicit evidence that the plaintiff intended to use at trial.¹⁶¹ Martin Louis, on the other hand, believed that a defendant must use discovery to "obtain a preview of his opponent's evidence on an essential element and contend, in support of his motion, that the evidence is insufficient to discharge the opponent's production burden."¹⁶² Louis recognized that, when the plaintiff identified witnesses in response to such discovery, a defendant would be required to depose those witnesses in order to establish that the evidence they could provide at trial would be insufficient to carry plaintiff's burden.¹⁶³

A related issue that *Celotex* failed to resolve explicitly is which materials a court should consider in determining whether a defendant has shown an "absence of evidence." While the *Celotex* majority explained that the defendant could meet its burden using any of the documents listed in Rule

158. *Id.* at 323–24.

159. *Id.* at 324 n.5 (citing Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 752 (1974); David P. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 79 (1977)).

160. Currie, *supra* note 159, at 79.

161. *See id.* at 77–78 (criticizing the *Adickes* Court for requiring the defendant to foreclose the possibility that there was a policeman in the store when the plaintiff had presented no evidence indicating otherwise).

162. Louis, *supra* note 159, at 750. Louis also recognized a second method by which a party might obtain summary judgment. He stated that "[b]y previewing *his own proof*, [a summary judgment movant] can attempt to show the nonexistence of an essential element asserted by the opposing party." *Id.* (emphasis added). This method was not pursued in *Celotex*, however. *Celotex* did not base its motion on evidence showing that Mr. Catrett had not, in fact, been exposed to any *Celotex* product.

163. *See id.* at 751 (noting that seeking summary judgment based on an absence of evidence "commends itself whenever the opposing party's witnesses are few and can be deposed without undue effort or expense").

56(c),¹⁶⁴ it did not discuss whether other materials might also be considered to decide whether the defendant has met its burden. It is clear from the opinion that the majority did not consider Catrett's materials when addressing Celotex's burden. But the majority failed to explain why the Court should not have considered these materials in connection with Celotex's burden.

One possible explanation is that the majority viewed Catrett's materials as having been revealed after Celotex filed its motion.¹⁶⁵ Justice Brennan disagreed with this characterization of the record, noting that Catrett had presented these materials in response to Celotex's first motion, which was withdrawn.¹⁶⁶ Thus, Brennan argued that Catrett's materials should be considered for purposes of whether Celotex met its burden because they were already "in the record" at the time Celotex filed its second motion, which was the one granted by the trial court.¹⁶⁷ The majority, however, viewed these materials as having been filed "in response" to Celotex's motion.¹⁶⁸ If this was the logic underlying the majority's approach, then perhaps it would be appropriate—as Brennan argues—to consider materials favorable to the plaintiff as long as those materials were indeed "in the record" before the defendant sought summary judgment.¹⁶⁹

But this is not the only inference one might draw. One might also infer that the majority did not consider Catrett's materials because the defendant's burden is to be evaluated solely based on the documents on which the defendant relies. On this reading, materials submitted by the plaintiff "in response"¹⁷⁰ to a defendant's motion should be considered only in connection with whether the plaintiff has met its burden, regardless of whether they were "in the record"¹⁷¹ before defendant filed its motion.

2. *The Plaintiff's Burden*

As for the plaintiff's burden, the majority did not decide whether Catrett had made a "sufficient showing" in response to Celotex's summary judgment

164. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

165. *See id.* at 320 ("In response to petitioner's summary judgment motion, respondent then produced three documents.").

166. *Id.* at 335–36 (Brennan, J., dissenting).

167. *Id.* at 336 (Brennan, J., dissenting); *see also* Nelken, *supra* note 8, at 66 (stating that the majority "misread the record as to when Celotex became aware of the three documents relied on by the plaintiff").

168. *Celotex*, 477 U.S. at 320.

169. *Id.* at 336 (Brennan, J., dissenting).

170. *Id.* (Brennan, J., dissenting).

171. *Id.* at 336 (Brennan, J., dissenting).

motion.¹⁷² The D.C. Circuit did not address that issue in its initial opinion because it concluded that Celotex had not met its initial burden.¹⁷³ Thus, the Supreme Court remanded the case for the D.C. Circuit to determine whether Catrett had made a sufficient showing of exposure to Celotex's products.¹⁷⁴

While the *Celotex* majority gave some general guidance about how a plaintiff may satisfy its burden,¹⁷⁵ the opinion begged obvious questions. Under what circumstances can materials that are not "in a form that would be admissible at trial" constitute a sufficient showing by the plaintiff on an essential element of her case?¹⁷⁶ And under what circumstances may a plaintiff defy the "normal[] expect[ation]" and make this showing using materials other than affidavits, depositions, answers to interrogatories, or admissions?¹⁷⁷ The majority's opinion does not illuminate any of these issues.

V. *The Myths of Celotex*

Celotex's unanswered questions have given rise to competing myths, which are described below. While these myths are plausible interpretations of *Celotex* (the majority opinion is ambiguous on many important issues), they are based principally, if not exclusively, on policy preferences—the myth-propounders' own views about how summary judgment procedure should operate in the federal system. These policy perspectives are important, to be sure, and can help to illuminate the trade-offs that are at stake. However, the prevailing myths have put the policy cart before the interpretive horse. Scholars have yet to take a more traditional approach to finding the best reading of *Celotex* in terms of what we customarily value when interpreting a decision. This Article considers three such values: (1) consistency with prior cases; (2) consistency with the text that the decision purports to interpret; and (3) internal coherence with other parts of the majority opinion and with the case's factual and procedural posture.

These simple values are consistent with basic principles of interpretation and should not be controversial.¹⁷⁸ As to the first, *Celotex* should be read to be

172. See *id.* at 326–27 (deferring to the Court of Appeals decision not to address the adequacy of Catrett's showing).

173. *Id.*

174. *Id.* at 326–28.

175. See *supra* notes 114–20, 128–30 and accompanying text (outlining what a plaintiff must do to satisfy her burden).

176. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

177. *Id.*

178. There is, to be sure, robust academic debate about interpretation and how best to

consistent with prior Supreme Court cases, at least absent any indication of an intent to overrule those cases.¹⁷⁹ Second, *Celotex* should be read in a way that

perform that task. See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986) (exploring the complexities of interpreting law); STANLEY E. FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980) (arguing that interpretive communities create meaning); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985) (espousing "a theory of interpretation within a larger theory of legal reasoning"); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (questioning the traditional methods of interpretation and suggesting new criteria); W. Bradley Wendel, *Professionalism As Interpretation*, 99 NW. U. L. REV. 1167, 1172 (2005) (discussing "the lawyer's responsibility as a law-interpreter and private law-giver"). Although some might argue that the principal goal of interpretation is to achieve the best policy result, e.g., Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996) (stating that "[t]he pragmatist judge" is one who "wants to come up with the best decision having in mind present and future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case"), many do not. Ronald Dworkin, for example, has written:

If [a judge's] threshold of fit is wholly derivative from and adjustable to his convictions of justice, so that the latter automatically provide an eligible interpretation—then he cannot claim in good faith to be interpreting his legal practice at all.

DWORKIN, *supra*, at 255.

In any event, it remains important for a practitioner or judge to justify her interpretation in terms of "standard legal references." Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 MO. L. REV. 287, 332 (1993) ("[M]ost judges strive in drafting opinions to reconcile their preferences with standard legal references, such as statutory text and judicial precedent."). Judge Posner might call this a positivist approach:

The judicial positivist would begin and usually end with a consideration of cases, statutes, administrative regulations, and constitutional provisions—all these and only these being 'authorities' to which the judge must defer in accordance with Dworkin's suggestion that a judge who is not a pragmatist has a duty to secure consistency in principle with what other officials have done in the past. [It is] the judge's duty to find the result in the present case that would promote or cohere with the best interpretation of the legal background as a whole.

Posner, *supra*, at 4–5; see also DWORKIN, *supra*, at 262 ("[T]he grounds of law lie in integrity, in the best constructive interpretation of past legal decisions."). Whatever divergent views scholars hold on interpretive theory, there should at least be consensus that, all other things equal, an interpretation that achieves the values of consistency and coherency I articulate is superior to an interpretation that does not.

179. See *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 99–100 (1990) (White, J., concurring) ("[T]he doctrine of stare decisis demands that we attempt to reconcile our prior decisions rather than hastily overrule some of them."); *Ex Parte Harding*, 219 U.S. 363, 378 (1911) ("We must then either reconcile the cases or if this cannot be done determine which line rests upon the right principle and having so determined overrule or qualify the others and apply and enforce the correct doctrine."); *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1018 (7th Cir. 2002) (Posner, J.) ("[W]e have no authority to overrule a Supreme Court decision no matter how out of touch with the Supreme Court's current thinking the decision seems."); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 58 (1st Cir. 1999) ("Scholarly debate about the continuing viability of a Supreme Court opinion does not, of course, excuse the lower federal

is consistent with the text of the governing sources, absent any indication that a superior legal source supersedes the governing text, such as when a statute or rule of procedure is unconstitutional.¹⁸⁰ Third, *Celotex* should be read so that different parts of the majority opinion are consistent with other parts of that opinion, and so that the majority's statements are relevant in light of the factual and procedural issues presented by the case.¹⁸¹

The myths of *Celotex* described below are not true to these values. On some issues, they cannot be reconciled with the Supreme Court's holding sixteen years earlier in *Adickes*. On others, they conflict with the actual text of Rule 56. On others, they offer readings of *Celotex* that make little sense given the factual and procedural posture of the case.

A. The Paper Trial Myth

Many cases and commentators read *Celotex* as placing essentially no burden at all on a defendant seeking summary judgment.¹⁸² Because the plaintiff will bear the burden of proof at trial, summary judgment should be granted unless the plaintiff can provide evidence to the court that would be sufficient to avoid a directed verdict if that were the evidence presented at

courts from applying that opinion."), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

180. *E.g.*, Jones v. United States, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (stating that the Court's opinion, which he joined, "convincingly explains why its construction of 18 U.S.C § 844(i) better fits the text and context of the provision than the Government's expansive reading"); United States v. Lasaga, 328 F.3d 61, 66 (2d Cir. 2003) (following an interpretation of a federal sentencing guideline that is "more consistent with the text"); United States v. Norris, 319 F.3d 1278, 1288 (10th Cir. 2003) (same); Lonberg v. Sanborn Theaters, Inc., 259 F.3d 1029, 1035 (9th Cir. 2001) (adopting a construction of the Americans with Disabilities Act that is "more consistent with the text and structure of the statute," even though "the evidence does not perfectly align in its favor"); *see also* DWORKIN, *supra* note 178, at 338-40 (noting that a prudent justice must consider what the text of the statute requires).

181. *See* Carmick v. United States, 2 Ct. Cl. 126, 139 (1866) (stating that prior case law should be "read in the light of its own facts and history, and with reference to them, and not as an abstract homily on law in general"); *see also* Prymer v. Ogden, 29 F.3d 1208, 1213 n.2 (7th Cir. 1994) (rejecting proposed interpretation of *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989), because *Gray* "must be read in the context of the procedural posture presented to the court in that case").

182. *See* Redish, *supra* note 8, at 1345 ("Since *Celotex*, the majority of lower federal courts have wisely read that decision to impose virtually no burden at all on the movant where she would have no burden of proof at trial."); *see also* EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 79 (2d ed. 2000) (arguing that there is "no reason to impose any triggering burden on a movant for summary judgment who would not bear the burden of production at trial").

trial.¹⁸³ On this view, a defendant can "show" an "absence of evidence" merely by stating that plaintiff has yet to provide any evidence to support one or more essential elements of its claim.¹⁸⁴ At that point, the plaintiff must come forward with evidence that would be sufficient to sustain its burden of production at trial.¹⁸⁵

Moreover, the plaintiff's evidence must meet a strict standard with respect to admissibility—one that mirrors the rules for admissibility at trial.¹⁸⁶ It is not enough for the plaintiff to identify witnesses she plans to call at trial, even if the plaintiff indicates how she expects those witnesses to testify. Likewise, it is not enough to present information via deposition transcripts, interrogatory responses, or affidavits when the witness, signatory, or affiant would not be competent to testify to such information at trial.¹⁸⁷ The plaintiff must provide what this Article calls "trial-quality" evidence—sworn statements, via

183. See *Redish*, *supra* note 8, at 1344 (noting that the "standards for summary judgment and directed verdict are fungible"); see also *BRUNET ET AL.*, *supra* note 182, at 85 ("There is no reason to impose a burden on the movant at summary judgment that he would not bear in moving for directed verdict at trial.").

184. See *Kennedy*, *supra* note 8, at 239 (reading Justice Rehnquist's opinion as holding that "the burden on the moving party can be met by pointing out that the discovery record fails to contain admissible evidence to support the nonmoving party's case").

185. See *Street v. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1988) ("[T]he [defendant] could challenge the opposing party to 'put up or shut up' on a critical issue. . . . [I]f the respondent did not 'put up,' summary judgment was proper.").

186. *E.g.*, *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991) ("*Celotex* did not alter the settled law that 'Rule 56(e) requires the adversary to set forth facts that would be admissible in evidence at trial.'" (quoting 10A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2727 (2d ed. 1983)); see also *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990) (finding that because plaintiff could not use proffered expert testimony at trial, he could not rely on it for summary judgment purposes); *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990) ("Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment."); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (ruling that unauthenticated documents are not admissible because they cannot be admitted into evidence at trial); *Redish*, *supra* note 8, at 1344 n.53 (questioning the reasoning by which the *Celotex* Court approached the standard of admissibility at trial versus the standard for summary judgment); *Kennedy*, *supra* note 8, at 233 (noting "the commonly understood implication that the content of the discovery record also must meet the same substantive trial test of admissibility in order to create an issue of fact").

187. See, *e.g.*, *Garside v. Osco Drug*, 895 F.2d 46, 49–50 (1st Cir. 1990) (stating that a court may consider interrogatory answers only if they "show affirmatively that the signing party is competent to testify to the matters stated therein" (quoting FED. R. CIV. P. 56(e))); *WILLIAM W. SCHWARZER ET AL.*, *FED. JUDICIAL CTR., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS* 47–52 (1991) (discussing the evidence on which the nonmoving party may rely and, in particular, restrictions on the use of inadmissible evidence).

affidavits, depositions, or interrogatory answers, by a swearer with personal knowledge of the facts stated.¹⁸⁸

This approach to summary judgment essentially treats the summary judgment record as a paper trial. When that record contains no trial-quality evidence, or when such evidence would be insufficient to carry the plaintiff's burden at trial, summary judgment would be granted for the defendant. The plaintiff bears the burden of putting trial-quality evidence into the record just as she would at trial.

The policy rationale for treating summary judgment as a pretrial paper trial is straight-forward. The purpose of summary judgment is to prevent trial when there will be no genuine dispute to be resolved by live testimony before the jury. If the plaintiff does not provide sufficient trial-quality evidence at the summary judgment stage, there is no reason to think she will be able to provide that evidence at trial. Since the defendant will have no burden of production at trial, there is no reason to impose a burden on the defendant for purposes of summary judgment.¹⁸⁹

This approach may be defensible as a matter of policy. However, it fails in terms of the interpretive values I have described above. First, this approach places *Celotex* in fundamental conflict with the *Adickes* decision sixteen years earlier. The Court's rationale in *Adickes*—that summary judgment was improper because of Kress's "failure to foreclose the possibility" that a police officer was in the store¹⁹⁰—is flatly inconsistent with the view that a defendant should face no burden when moving for summary judgment. Under the paper trial myth, the court should have granted summary judgment in *Adickes* because none of *Adickes*'s summary judgment materials were trial-quality. *Adickes* submitted (a) her own deposition testimony that her student had seen a police officer in the store and (b) an unsworn statement by a Kress employee that there was a police officer in the store.¹⁹¹ Thus, this approach cannot be reconciled either with *Adickes* or with the *Celotex* majority's statement that *Adickes* reached the correct result.¹⁹² If

188. See, e.g., *Garside*, 895 F.2d at 49 (stating that interrogatory answers "should be accorded no probative force where they are not based upon personal knowledge").

189. See *Redish*, *supra* note 8, at 1343 ("[T]here exists no justification for imposing any burden on a movant for summary judgment that would not parallel the burden that party would have at trial prior to moving for judgment as a matter of law."); see also *BRUNET ET AL.*, *supra* note 182, at 85 ("There is no reason in logic or practicality, then, to impose a burden on the movant at summary judgment that he would not bear in moving for directed verdict at trial.").

190. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

191. *Id.* at 156–57 nn.13–14.

192. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (stating that the Court was correct in denying summary judgment in *Adickes*).

we accept the paper trial myth, we must also accept that *Adickes* was wrongly decided.¹⁹³

Second, this myth fails to provide a sensible account of what the *Celotex* majority meant when it said that a plaintiff does not have to use materials that are "in a form that would be admissible at trial."¹⁹⁴ The standard account that proponents of this view give is that the majority was simply recognizing that affidavits may be considered for purposes of summary judgment, even though affidavits (which by definition have not been cross-examined) are not admissible at trial.¹⁹⁵ They note that the very next sentence in the opinion states that "Rule 56 does not require the nonmoving party to depose her own witnesses,"¹⁹⁶ and they infer that Rule 56 *does* require the nonmoving party to obtain affidavits of her witnesses.¹⁹⁷

The term "depose," however, frequently refers not only to the taking of a deposition as provided for in the federal rules, but also to the swearing of an affidavit.¹⁹⁸ Thus, the majority's statement that "Rule 56 does not require the nonmoving party to depose her own witnesses"¹⁹⁹ may plausibly be read as

193. Indeed, many propounders of this myth freely admit that it does not reconcile *Celotex* and *Adickes*. See BRUNET ET AL., *supra* note 182, at 81 (noting that *Celotex*'s handling of *Adickes* was disingenuous insofar as it "suggest[ed] that no change was being made in the standard"); Redish, *supra* note 8, at 1342 ("[T]he Court's *rejection* of the prior standard for determining whether the court reaches the merits of the summary judgment action, associated primarily with its earlier decision in *Adickes v. S. H. Kress & Co.*, makes perfect sense.") (emphasis added); *id.* at 1344 & n.53 (describing the *Celotex* majority's refusal to repudiate *Adickes* as "stubborn" and "mystifying" and stating that the majority's description of *Adickes* "brings to mind Groucho Marx's famous line when his wife surprised him in the company of his lover: 'Who are you going to believe, me or your own eyes?'").

194. *Celotex*, 477 U.S. at 324.

195. See *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991) ("[I]t is clear that the Supreme Court meant merely that full depositions were not required, and that other documents listed in Rule 56(c), such as 'answers to interrogatories, and admissions on file, together with affidavits,' could suffice."); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (noting that affidavits could be considered for summary judgment purposes); SCHWARZER ET AL., *supra* note 187, at 50 (concluding that "[t]he facts on which the nonmovant may rely must be admissible at trial, but need not be in admissible form as presented" in opposition to summary judgment).

196. *Celotex*, 477 U.S. at 324.

197. See, e.g., SCHWARZER ET AL., *supra* note 187, at 50 (finding "that *Celotex* merely clarifies the nonmovant's right to oppose a summary judgment motion with any of the materials listed in Rule 56(c), including affidavits of its own witnesses that may contain testimony in a form not admissible at trial").

198. See James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1551 n.93 (1995) (explaining that the term depose typically includes taking an affidavit).

199. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

rejecting the notion that a plaintiff must obtain affidavits of her witnesses in order to avoid summary judgment. Moreover, the view that the majority intended only to carve out an exception for affidavits cannot be reconciled with the factual posture of *Celotex* itself. Catrett had not relied on affidavits in opposing Celotex's motion.²⁰⁰ Rather, she presented copies of two letters (from the insurer and the assistant secretary of Mr. Catrett's employer) and the decedent's own deposition testimony from an earlier proceeding to which Celotex was not a party.²⁰¹ If affidavits are the only materials that courts may consider on summary judgment despite being inadmissible at trial, the majority would have had no need to remand the case. There certainly would have been no need to remand the case out of deference to the D.C. Circuit's "superior knowledge of local law."²⁰²

B. The Dissenters' Myth

Other courts and commentators have endorsed the approach followed by Justice Brennan in his dissenting opinion.²⁰³ According to this myth, a defendant who seeks to meet its burden by showing that there is an "absence of evidence" must establish the inadequacy of any documents or potential witnesses reflected "in the record."²⁰⁴ There appears to be little or no admissibility requirement under this approach. The defendant would have to refute materials in the record even if those materials are (a) hearsay, such as Adickes's deposition testimony that her student had seen a police officer in the store;²⁰⁵ (b) unsworn statements, such as Irene Sullivan's unsworn statement on which Adickes relied;²⁰⁶ or (c) unauthenticated documents, such as the letters

200. See *Catrett v. Johns-Manville Sales Corp.* (*Catrett I*), 756 F.2d 181, 183 (D.C. Cir. 1985) (listing the evidence that Catrett relied on in opposition to summary judgment), *rev'd sub nom.* *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

201. *Id.*; see also Shapiro, *supra* note 17, at 348 (describing the materials that Catrett submitted in opposing the motion).

202. *Celotex*, 477 U.S. at 327.

203. See, e.g., Nelken, *supra* note 8, at 68 (endorsing Justice Brennan's approach).

204. *Celotex*, 477 U.S. at 332 (Brennan, J., dissenting); see also Nelken, *supra* note 8, at 68 ("[T]he party seeking to rely on the absence of record evidence as a basis for summary judgment has an obligation to pursue leads obtained in discovery.").

205. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 156–57 & n.13 (1970); see also *Celotex*, 477 U.S. at 333–34 (Brennan, J., dissenting) (indicating that Adickes's deposition testimony prevented Kress from meeting its burden).

206. *Adickes*, 398 U.S. at 156–57 & n.14; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 333–34 (1986) (Brennan, J., dissenting) (indicating that the unsworn statement from Irene Sullivan prevented Kress from meeting its burden).

by O'Keefe and Hoff on which Catrett relied.²⁰⁷ Even if the record lacks such supportive materials, the defendant must also "show that reasonable efforts have been made to uncover the relevant evidence, through use of interrogatories, document requests, depositions, and requests for admission."²⁰⁸

There are also valid policy rationales for this approach. One is to maintain the integrity of the discovery process set forth elsewhere in the Federal Rules.²⁰⁹ The discovery devices themselves authorize a defendant to obtain information about the plaintiff's claims and evidence. If a defendant wishes, for example, to test the credence or knowledge of a plaintiff's witness, it may notice a deposition of that witness.²¹⁰ But a defendant who has not made use of such discovery procedures should not be able to use a summary judgment motion to force a plaintiff not only to disclose what her evidence will be but also to create trial-quality evidence that would support an essential element of her claim. Melissa Nelken explained that "[d]iscovery is as integral a part of the Federal Rules as summary judgment. There is little merit in an interpretation of summary judgment procedure that would encourage parties not to use the discovery rules, in hopes of then invoking summary judgment to force an opponent to reveal his case."²¹¹ Another policy justification for the dissenters' myth is the danger of harassment.²¹² If the rules impose little or no burden on a defendant who seeks summary judgment on an "absence of evidence" theory, defendants could file summary judgment motions simply to harass plaintiffs by forcing them to create affidavits from their own witnesses in order to avoid a summary dismissal.

While the dissenters' myth may enjoy the support of worthy policy arguments, it has serious problems as a coherent reading of *Celotex* in terms of traditional interpretive values. At the outset, of course, arguing that a case's holding is actually the one stated by the dissenters raises an interpretive red

207. *Celotex*, 477 U.S. at 335 (Brennan, J., dissenting).

208. Nelken, *supra* note 8, at 68–69; *see also* Nissan Fire Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1105 (9th Cir. 2000) (noting that "[i]n a typical case the moving party will have made reasonable efforts, using the normal tools of discovery, to discover whether the nonmoving party has enough evidence to carry its burden of persuasion at trial").

209. *See* Nelken, *supra* note 8, at 68 ("Any other rule would vitiate the incentive to do thorough discovery before moving for summary judgment.").

210. *See* FED. R. CIV. P. 30 (providing the procedures for taking oral depositions).

211. Nelken, *supra* note 8, at 66.

212. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 332 (1986) (Brennan, J., dissenting) ("Such a burden of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment."); Nelken, *supra* note 8, at 68 ("Any other rule would encourage the use of summary judgment to harass the nonmoving party or to force him to disclose his case prematurely.").

flag.²¹³ Even so, the dissenters' myth of *Celotex* cannot be reconciled with the Court's reasoning in *Adickes*. Perhaps this myth can explain the result reached in *Adickes*. As Justice Brennan states, "the record" in *Adickes* indicated potential witnesses—*Adickes*'s student Carolyn Moncure and the Kress employee Irene Sullivan—who might be able to testify that a police officer was in the store.²¹⁴ Because Kress had not "demonstrate[d] the inadequacy" of these potential witnesses, such as by deposing them, adherents to the dissenters' myth would argue that Kress had failed to meet its burden and summary judgment should therefore have been denied.²¹⁵

But this attempt to reconcile the two cases ignores the *Adickes* Court's actual reasoning. *Adickes* concluded that Kress failed to meet its burden because Kress's own materials—the affidavits of the police officers and store manager—had "fail[ed] to foreclose" the possibility that a police officer was in the store.²¹⁶ The Court did not base its finding on *Adickes*'s hearsay testimony or Irene Sullivan's unsworn statement.²¹⁷ To the contrary, it indicated that there were problems with these materials and that they would not have been sufficient to avoid summary judgment if Kress's affidavits had denied the officers' presence in the store.²¹⁸

In addition, the dissenters' approach is inconsistent with the text of Rule 56(c), which mandates summary judgment when the "pleadings, depositions, answers to interrogatories, . . . admissions . . . [and] affidavits, if any, show that there is no genuine issue as to any material fact."²¹⁹ According to the dissenters' myth, the presence of materials suggesting potential witnesses or evidence can thwart a summary judgment motion even if such materials are not listed in Rule 56(c).²²⁰ But Irene Sullivan's unsworn statement in *Adickes*, for

213. See, e.g., J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and its Quiet Ending in the United States Supreme Court*, 71 *FORDHAM L. REV.* 1, 20 n.127 (2002) ("[C]ourts should resist relying too much on dissenting opinions when trying to interpret unclear sections of a majority decision.").

214. *Celotex*, 477 U.S. at 333 (Brennan, J., dissenting); see also *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 156–57 & nn.13–14 (1970) (discussing the statements of the witnesses).

215. See *Celotex*, 477 U.S. at 333–34 (Brennan, J., dissenting) (finding that Kress "had 'failed to fulfill its initial burden' of demonstrating that there was no evidence that there was a policeman in the store" (citing *Adickes*, 398 U.S. at 157–58)).

216. *Adickes*, 398 U.S. at 157.

217. See *id.* at 160 (finding that the petitioner did not have to provide any opposing evidence because respondent had failed to meet its burden).

218. See *id.* (noting that if respondent had met its initial burden, petitioner would have been required to respond with appropriate affidavits).

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

220. See *supra* note 204 and accompanying text (explaining the dissenters' myth).

example, was not a pleading, a deposition, an answer to an interrogatory, an admission, or an affidavit. Why should it be considered to determine whether Rule 56(c)'s threshold for summary judgment is satisfied?

Finally, it is unclear how the text of Rule 56 supports the requirement—however laudable as a policy matter—that the defendant make "reasonable efforts" to uncover plaintiff's relevant evidence. If Rule 56(c) required an examination of the defendant's discovery efforts, we would surely want to examine whether the defendant made requests for production of documents to uncover plaintiff's evidence,²²¹ but Rule 56(c) does not list either requests for production or their fruits among the items that a court should consider in deciding a summary judgment motion.²²² Likewise, we might expect Rule 56(c) to include not only "answers to interrogatories"²²³ but also the interrogatories themselves.

C. Other Myths

Shortly after *Celotex* was decided, John E. Kennedy offered an alternative understanding of *Celotex* that attempted to reconcile it with *Adickes*.²²⁴ He suggests that in both cases, the plaintiff had "made enough of an *imperfect* showing" to avoid summary judgment under Rule 56(f).²²⁵ Rule 56(f) allows the court to "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had."²²⁶ On this view, both plaintiffs had "made showings of sufficient strength and quality" such that "[t]he trial court would have abused its discretion not to allow both *Adickes* and *Catrett* continuances to perfect their summary judgment evidence."²²⁷ While neither plaintiff had provided supportive materials in "an evidentiary form acceptable to defeat summary judgment,"²²⁸ their showings were such that they deserved an opportunity to convert their inadequate materials into an admissible form.²²⁹

221. See FED. R. CIV. P. 34 (authorizing requests for production of documents and things).

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

223. *Id.*

224. See Kennedy, *supra* note 8, at 247–48 (trying to reconcile the two cases based on Rule 56(f)).

225. *Id.* at 248.

226. FED. R. CIV. P. 56(f).

227. Kennedy, *supra* note 8, at 247.

228. *Id.* at 248.

229. See *id.* at 247 ("The trial court would have abused its discretion not to allow both *Adickes* and *Catrett* continuances to perfect their summary judgment evidence."). This approach might be viewed as a milder version of the dissenters' myth. Justice Brennan took

Kennedy readily admitted that "[t]he problem with this reconciliation of the two cases . . . is that neither *Adickes* nor *Catrett* made requests for continuance under Rule 56(f)."²³⁰ In addition, the Supreme Court did not base its *Adickes* and *Celotex* decisions on Rule 56(f). The Court did not indicate, for example, that *Adickes* would still have to get an affidavit from either her student Carolyn Moncure or the Kress employee Irene Sullivan. To the contrary, the Court held that summary judgment was inappropriate because Kress had failed to meet its burden.²³¹ Thus, like the dissenters' myth, it ignores the actual reasoning of *Adickes*, which based its reversal on Kress's failure to meet its burden due to problems with the affidavits that Kress provided in support of its motion.²³² The Court did not find that *Adickes*'s materials, which admittedly were not trial-quality,²³³ were sufficient to avoid summary judgment.

Kennedy also suggested, but did not endorse, another reading of *Celotex* that might reconcile it with *Adickes*: one might call it the right-to-remain-silent myth. On this view, "Kress waived its summary judgment right to remain silent by attempting to testify with affidavits on its own behalf."²³⁴ In *Adickes*, "Kress's own affidavits supplied and raised the issue of fact which negated Kress's satisfaction of its initial burden to show no issue of fact."²³⁵ In *Celotex*, on the other hand, "*Celotex*'[s] silence in its motion supplied and raised no factual issue."²³⁶ Had Kress, like *Celotex*, provided no affidavits, then it would have met its burden.²³⁷

Kennedy himself recognized that "[t]his reconciliation is somewhat perverse."²³⁸ In terms of this Article's methodology, it strains against both the

arguably the most plaintiff-friendly view of *Adickes* and *Celotex*—the presence of evidence that was not trial-quality was still enough to defeat a summary judgment motion because such evidence would preclude the defendant from meeting its burden. *See supra* Part IV.B, notes 205–09, and accompanying text (describing the dissenters' myth). In Kennedy's approach, the presence of such evidence is not enough to keep the defendant from meeting its burden but would warrant giving the plaintiff enough time to "perfect" it by converting it to trial-quality evidence. Kennedy, *supra* note 8, at 247–48.

230. Kennedy, *supra* note 8, at 248.

231. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

232. *See id.* (reversing summary judgment because Kress's materials did not "foreclose the possibility that there was a policeman in the store").

233. *See id.* at 159 n.19 (pointing out the flaws in *Adickes*'s summary judgment evidence).

234. Kennedy, *supra* note 8, at 247.

235. *Id.* at 246.

236. *Id.*

237. *Id.*

238. *Id.* at 247.

text of Rule 56 and the actual language of the *Celotex* majority. The basic standard for granting summary judgment is whether the materials listed in Rule 56(c) "show that there is no genuine issue as to any material fact."²³⁹ While this language is admittedly vague and subject to interpretation, it is hard to see why a defendant should hurt its cause by introducing materials that would tend to support the defendant's view of the facts.

The right-to-remain-silent approach also conflicts with the *Celotex* majority's statement that a "principal purpose[] of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."²⁴⁰ If the defendant is truly able to show that the plaintiff will lack evidence to support her claim at trial, then summary judgment is appropriate even if the defendant also produced affirmative evidence that, standing alone, would not fully "foreclose" the plaintiff's claim. This leaves open the key question of what a defendant must do to demonstrate that plaintiff's claims are unsupported, but it illustrates that the presence of additional evidence supporting the defendant should not contaminate a showing that is otherwise sufficient to show an absence of evidence.

Finally, it is worth noting that a panel of the Eleventh Circuit endorsed a unique reading of *Celotex*. In *Clark v. Coats & Clark, Inc.*,²⁴¹ the court concluded that *Celotex* created only a narrow exception to *Adickes*'s "general rule" that a defendant must submit evidence that would "foreclose the possibility"²⁴² of plaintiff being able to establish a necessary element of her claim.²⁴³ According to *Clark*, *Celotex* allows a moving defendant to prevail without negating an element of the plaintiff's claim only in "the unusual situation . . . where neither party could prove either the affirmative or the negative of an essential element of the claim."²⁴⁴ The *Clark* court presumably did not view *Adickes* as this kind of situation, perhaps because Kress was in a position to prove—with affidavits of the police officers and/or Kress employees—that there had been no conspiracy (although it failed to do so).

This interpretation is also unpersuasive. As an initial matter, the *Celotex* majority hardly viewed it as a "general rule" that a defendant must submit evidence that would foreclose the possibility of a necessary element of

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

240. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

241. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991).

242. *Id.* at 606.

243. *See id.* at 608 (stating *Adickes*'s rule on the moving party's burden and finding that "*Celotex* did not change the general rule").

244. *Id.* at 607.

plaintiff's claim.²⁴⁵ To the contrary, it stated that *Adickes* should not "be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof."²⁴⁶ Even if *Celotex* intended to create only a "narrow exception" to the *Adickes* rule,²⁴⁷ it is a stretch to infer that this exception applied only when the defendant could not "prove [a] negative"²⁴⁸ because the *Celotex* majority never made any reference to whether *Celotex* would have been able to prove a lack of exposure with affirmative evidence. And if summary judgment is designed "to isolate and dispose of factually unsupported claims or defenses,"²⁴⁹ a convincing showing of an absence of evidence should warrant summary judgment even if the defendant might also have provided affirmative evidence that a factual predicate to the plaintiff's claim is false. Whether a defendant is able to show such an absence of evidence bears no relation to whether the defendant could also have proved the negative of that element, were it so inclined. Finally, it is unclear how the *Clark* court's approach fits with the text of Rule 56.

D. Myth-ing in Action: The Lower Courts Interpret *Celotex*

1. Defendant's Burden

Lower courts have conflicting views with respect to the scope of the defendant's burden under *Celotex*.²⁵⁰ Most courts seem to follow the paper trial myth, imposing virtually no burden on defendants moving for summary judgment.²⁵¹ While courts often give lip service to the proposition that "the

245. *Id.* at 608.

246. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

247. *Supra* notes 241–43 and accompanying text.

248. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 607 (11th Cir. 1991).

249. *Celotex*, 477 U.S. at 323–24.

250. *See, e.g.*, *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 n.2 (11th Cir. 1993) ("[T]here has been some confusion among courts as to the nature of the showing required when the movant seeks to discharge the initial responsibility by demonstrating that there is an absence of evidence to prove a fact necessary to the non-movant's case.").

251. *E.g.*, *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) ("[A] movant that will not bear the burden of persuasion at trial need not negate the nonmovant's claim."); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1988) ("[T]he movant could challenge the opposing party to 'put up or shut up' on a critical issue . . . [I]f the respondent did not 'put up' summary judgment was proper."); *see also* *Redish*, *supra* note 8, at 1345 ("Since *Celotex*, the majority of lower federal courts have wisely read that decision to impose virtually no burden

initial burden is on the moving party to show the court 'that there is an absence of evidence to support the non-moving party's case,'²⁵² they nearly as often either ignore that burden entirely or presume that the burden is necessarily met as long as there is insufficient trial-quality evidence in the summary judgment record to support plaintiff's claim.²⁵³

Some notable lower court decisions, however, either follow the dissenters' myth or impose a more substantial burden on a moving defendant.²⁵⁴ One Sixth Circuit panel, for example, found it improper for the district court to grant summary judgment based on the plaintiff's failure to produce evidence to rebut the defendant's assertion that a particular fact was undisputed.²⁵⁵ The panel reasoned that the defendant, "as the party moving for summary judgment, had the initial burden of production and persuasion on the motion."²⁵⁶ Judge Fletcher (a former Civil Procedure professor²⁵⁷) authored a Ninth Circuit decision that endorsed the dissenters' myth, concluding that a defendant seeking summary judgment on an absence of evidence theory must "have made reasonable efforts, using the normal tools of discovery, to discover whether the nonmoving party has enough evidence to carry its burden of persuasion at trial."²⁵⁸ Finally, as already mentioned, the Eleventh Circuit's *Clark* decision held that a defendant must use affirmative evidence negating the existence of

at all on the movant where she would have no burden of proof at trial.").

252. *Manders v. Okla. ex rel. Dep't of Mental Health*, 875 F.2d 263, 264 (10th Cir. 1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

253. *E.g., id.* at 265 (granting summary judgment because "[a] review of the record reveals that plaintiffs failed to offer evidence of any conduct by defendant which indicated a continuation of his alleged sexual harassment"). One empirical study undertaken after *Celotex* indicated that 60% of decisions granting summary judgment for a defendant contained no "discussion of the sufficiency of the defendant's production in support of the summary judgment motion." Issacharoff & Loewenstein, *supra* note 15, at 92.

254. *E.g., Russ v. Int'l Paper Co.*, 943 F.2d 589, 592 (5th Cir. 1991) ("[B]efore the non-moving party is required to produce evidence in opposition to the motion, the moving party must first satisfy its obligation of demonstrating that there are no factual issues warranting trial."); *United States v. Four Parcels*, 941 F.2d 1428, 1438 n.19 (11th Cir. 1991) ("[T]he moving party must point to specific portions of the record in order to demonstrate that the nonmoving party cannot meet its burden of proof at trial." (citing *Celotex*, 477 U.S. at 325 (Brennan, J., dissenting))).

255. *See Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 725–26 (6th Cir. 2000) (disagreeing with the lower court's reasoning).

256. *Id.* at 725–26 (citing *Celotex*, 477 U.S. at 331–32, but failing to note that it was citing Justice Brennan's dissenting opinion).

257. *Judges of the United States Court of Appeals for the Ninth Circuit*, 35 GOLDEN GATE U. L. REV. xiii, xix–xx (2005).

258. *Nissan Fire Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1105 (9th Cir. 2000).

an essential element, except in the "unusual situation . . . where neither party could prove either the affirmative or the negative of an essential element."²⁵⁹

2. Plaintiff's Burden

Lower court opinions also conflict over the plaintiff's burden, particularly with respect to the materials on which a plaintiff may rely. Most courts seem to follow the paper trial myth on this issue as well, requiring that the plaintiff satisfy its burden with trial-quality evidence.²⁶⁰ One court explained:

Celotex did not alter the settled law that Rule 56(e) requires the adversary to set forth facts that would be admissible in evidence at trial. Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless.²⁶¹

Some courts, however, have read *Celotex* as allowing a plaintiff to demonstrate a genuine issue of fact using materials that fall short of the admissibility standards that would govern at trial. After the Court remanded *Celotex*, the D.C. Circuit decided that "even if the Hoff letter itself would not be admissible at trial, Mrs. Catrett has gone on to indicate that the substance of the letter is reducible to admissible evidence in the form of trial testimony."²⁶²

259. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 607–08 (11th Cir. 1991).

260. *See, e.g., Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990) ("[A]bsent a showing of admissibility appellant may not rely on hearsay, whether or not embodied in an interrogatory answer, to oppose proper motions for summary judgment."); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) ("It is well settled that unauthenticated documents cannot be considered on a motion for summary judgment."); *see also Sallis v. Univ. of Minn.*, 408 F.3d 470, 474 (8th Cir. 2005) ("The nonmoving party must show by admissible evidence that specific facts remain which create a genuine issue for trial."). One court has stated, apparently inadvertently, that a plaintiff's own affidavit is not sufficient to create a genuine issue of fact, even if it was based on personal knowledge and set forth facts as would be admissible at trial. *See Ashbrook v. Block*, 917 F.2d 918, 921 (6th Cir. 1990) (stating that the plaintiff "must employ proof other than his pleadings and own affidavits" to establish the existence of specific triable facts).

261. *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991) (quoting *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990)).

262. *Catrett v. Johns-Manville Sales Corp. (Catrett II)*, 826 F.2d 33, 38 (D.C. Cir. 1987), *on remand from Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *see also Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1015 (11th Cir. 1987) ("The claim by [defendant] that the letter is inadmissible hearsay does not undercut the existence of any material facts the letter may put into question. Consideration of the letter does not turn on admissibility at trial but on availability for review."). *But see id.* at 1016 (Edmondson, J., concurring) (debating whether *Celotex* changed the law on admissibility standards for summary judgment purposes). The concurrence argued that:

VI. *Dispelling the Myths: An Interpretive Approach to Celotex*

In formulating an alternative approach to *Celotex*, this Article emphasizes values that are traditionally employed when interpreting a case: (1) consistency with prior Supreme Court cases; (2) consistency with the governing textual sources; and (3) coherence with other parts of the opinion and relevancy given the case's factual and procedural posture.²⁶³ This Part considers these values with respect to both the defendant's burden and the plaintiff's burden and proposes a new approach to summary judgment. This Part also explains how this approach reconciles the *Celotex* majority opinion with Justice White's concurring opinion. Finally, this Part responds to potential critiques of my approach to summary judgment.

A. *Reconsidering the Defendant's Burden*

With respect to the defendant's summary judgment burden, a principal problem with the prevailing myths is their inability to reconcile *Celotex* with the result and reasoning of the Court's earlier decision in *Adickes*. The first step toward a coherent reading of *Celotex* and *Adickes* is to heed Martin Louis's pre-*Celotex* observation that there are two distinct ways for a defendant to show that there is no genuine issue of material fact:

First, through discovery he can obtain a preview of his opponent's evidence on an essential element and contend, in support of his motion, that the evidence is insufficient to discharge the opponent's production burden. . . . Second, by previewing his own proof he can attempt to show the nonexistence of an essential element asserted by the opposing party.²⁶⁴

If "X" is a necessary element of plaintiff's claim, a defendant seeking summary judgment can either (1) show that plaintiff lacks sufficient evidence to prove "X" at trial, or (2) produce evidence showing "*not-X*" (that is, that "X" is false).

Celotex involved the first of these methods, and *Adickes* involved the second.²⁶⁵ *Celotex* met its burden of showing that Catrett would lack evidence

The law in this circuit prior to *Celotex* clearly provided that evidence inadmissible at trial could not be used to avoid summary judgment. Of course, the Supreme Court could change the law. But, it is not plain to me that *Celotex* actually endorses the use of hearsay in summary judgment proceedings (citations omitted).

Id.

263. See *supra* notes 178–81 and accompanying text (setting forth the basic interpretive principles that guide this Article's analysis).

264. Louis, *supra* note 159, at 750.

265. Judge Fletcher's decision in *Nissan* recognized this distinction as well. See *Nissan*

to prove exposure because it served interrogatories that would be expected to elicit a description or identification of any evidence Catrett might use at trial to establish exposure.²⁶⁶ When Catrett identified no evidence or witnesses in her answer to these interrogatories,²⁶⁷ Celotex could persuasively argue, in lockstep with the text of Rule 56(c), that these "answers to interrogatories . . . show that there is no genuine issue" as to whether Mr. Catrett had been exposed to asbestos via a Celotex product.²⁶⁸

In *Adickes*, on the other hand, the defendant did not seek to show that the plaintiff would lack evidence to support a necessary element of her claim.²⁶⁹ Kress had not served interrogatories similar to the ones that Celotex did—or at least did not rely on them in support of its summary judgment motion.²⁷⁰ Unlike Celotex, Kress could not point to a Rule 56(c) document that would be expected, but failed, to reveal any evidence that *Adickes* could use at trial to establish a conspiracy. Instead, Kress relied on various affidavits in an attempt to show "*not-X*," that is, that there in fact was no conspiracy between Kress and any government official.²⁷¹ Thus, Kress used what Martin Louis identified as the second method of showing a lack of a genuine issue of material fact—producing affirmative evidence that a condition necessary for plaintiff to prevail is false.²⁷² The Supreme Court held simply that Kress's evidence was insufficient because it failed to foreclose the possibility that a police officer was in the store and had reached an agreement with a Kress employee other than the one who had provided a sworn affidavit.²⁷³ In other words, Kress's documents failed to show "*not-X*."

Fire Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1103–04 (9th Cir. 2000) (concluding that the "tension between *Adickes* and *Celotex*" stems from the fact that the cases "dealt with the two different methods by which a moving party can carry its initial burden of production").

266. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 320 (1986) ("[P]etitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products.").

267. *Id.*

268. See *id.* at 322 (quoting FED. R. CIV. P. 56(c)) (discussing the Court's understanding of Rule 56(c)).

269. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157–58 (1970) (reviewing the evidence that the defendant presented to show the absence of a necessary element of plaintiff's claim).

270. See *id.* at 153–55 & nn.8–12 (describing the materials submitted by Kress in support of its motion).

271. See *id.* at 153 (documenting Kress's attempt to show the absence of a conspiracy).

272. See Louis, *supra* note 159, at 750 ("[B]y previewing his own proof [the moving party] can attempt to show the nonexistence of an essential element asserted by the opposing party.").

273. *Adickes*, 398 U.S. at 157.

This conclusion is consistent with the majority's approach in *Celotex*. One must simply recognize that the summary judgment record in *Celotex* contained an important Rule 56(c) document that was missing in *Adickes*: inadequate answers to interrogatories that would otherwise be expected to identify or describe evidence plaintiff could use at trial. This material allowed Celotex to meet its initial burden by showing an absence of evidence. Kress, on the other hand, could not point to such a document and, therefore, lacked a basis for showing an absence of evidence.

Thus, the best way to reconcile *Adickes* and *Celotex* is this: A defendant seeking summary judgment on an absence of evidence theory must use Rule 56(c) documents that would be expected to reveal any evidence supporting the plaintiff's claim, but that failed to do so. To illustrate, imagine what would have happened in *Adickes* if Kress had conducted the kind of discovery that Celotex did. Suppose that Kress had served interrogatories asking for evidence and witnesses that would support Adickes's conspiracy claim. If Adickes failed to identify any such evidence, Kress could have used that answer to show an absence of evidence.

But suppose that Adickes's answer identified herself as a witness. Because she revealed a witness, her answer to this hypothetical interrogatory alone could not show that there would be an absence of evidence on this issue. Kress would have to take additional steps, such as deposing Adickes, to show an absence of evidence. Recall that Kress did depose Adickes, and her only testimony supporting the existence of a conspiracy was that her student had told her that there was a police officer in the store when they arrived.²⁷⁴ Because this would be inadmissible hearsay on the issue of whether a police officer was in fact in the store, Kress could rely on the interrogatory response, in combination with the deposition testimony, to show that there would be an absence of evidence.

Finally, suppose that Adickes had identified her student Carolyn Moncure in her answer to the hypothetical interrogatory. Again, the identification of a witness would preclude Kress from relying on the interrogatory answer alone to show an absence of evidence. Kress could then depose the student. Although no such deposition was taken, the student did testify at the trial on Adickes's "custom of the community" claim, which had survived summary judgment.²⁷⁵ The student testified at trial just as the deposition of Adickes suggested she would: there had been a police officer in the store that day.²⁷⁶ Assuming that

274. See *Adickes*, 398 U.S. at 156 n.13 (noting Adickes's deposition testimony that one of her students had seen a police officer enter the store).

275. See *id.* (quoting the student's testimony).

276. See *id.* (recounting the student's testimony that "she saw a policeman come into the

the student gave this same testimony in a deposition, Kress might still seek summary judgment of the theory that this testimony is legally insufficient to establish a conspiracy. While the Supreme Court suggested in *Adickes* that the mere presence of a police officer in the store would suffice to support an inference of a conspiracy between the officer and a Kress employee,²⁷⁷ this is an arguable proposition.²⁷⁸ If Kress had used the various discovery tools described above, the interrogatory answers and depositions would have revealed that the only evidence of a conspiracy would be testimony that a police officer was present. At that point, Kress could have argued in its summary judgment motion that such evidence is insufficient to support an inference of a conspiracy and, thus, that there is no genuine issue of material fact.

This still leaves the question of what materials the court should consider in determining whether a defendant has shown an "absence of evidence." According to the dissenters' myth, assessing the defendant's showing requires consideration of any materials that are "already in the record" at the time the defendant filed its motion, including materials that were "overlooked or ignored" by the defendant's motion.²⁷⁹ In *Celotex*, Justice Brennan believed that Celotex had overlooked such materials—the two letters and Mr. Catrett's workers' compensation deposition.²⁸⁰ But the majority opinion indicated that these materials should be examined in connection with the plaintiff's showing, not the defendant's.²⁸¹

Perhaps, as proponents of the dissenters' myth contend, the majority based its approach on its misperception that these materials were not in the record at the time of the motion.²⁸² Or perhaps the majority's approach could be limited to the special situation in *Celotex* where a motion is filed, withdrawn, and then renewed (albeit with important modifications).²⁸³ For a number of reasons,

store" while the group was awaiting service).

277. *Id.* at 158.

278. *See* Currie, *supra* note 159, at 77–78 (stating that any inference of a conspiracy based on a policeman's presence in the store "appears strained").

279. *Celotex Corp. v. Catrett*, 477 U.S. 317, 332 (1986) (Brennan, J., dissenting); *see also supra* note 204 and accompanying text (describing the dissenters' myth).

280. *See id.* at 335–36 (Brennan, J., dissenting) (finding that "Celotex was not free to ignore supporting evidence that the record clearly contained").

281. *See, e.g., id.* at 326–27 (suggesting that petitioner's evidence of exposure should be considered by the Court of Appeals in connection with the respondent's opposition to summary judgment).

282. *See id.* at 320 ("In response to petitioner's summary judgment motion, respondent then produced three documents.").

283. *See* *Catrett v. Johns-Manville Sales Corp. (Catrett I)*, 756 F.2d 181, 183 & n.2 (D.C. Cir. 1985) (noting that Celotex first filed its motion for summary judgment in September 1981, withdrew it in November, and re-filed it in December), *rev'd sub nom.* *Celotex Corp. v. Catrett*,

however, the best interpretation of *Celotex* is that the court should consider only the Rule 56(c) materials that the defendant itself uses to support its contention that there is an "absence of evidence."

First, the *Celotex* majority equates the defendant's burden with Rule 56(e)'s requirement that the motion be "made and supported as provided in this rule."²⁸⁴ As a textual matter, then, the most natural reading is to examine whether defendant's motion is "supported" by Rule 56(c) documents showing that there is an absence of evidence to support plaintiff's claim. Second, this approach is consistent with language used elsewhere in Justice Rehnquist's majority opinion. He defines the defendant's "initial responsibility" as "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact."²⁸⁵ If the defendant were required to canvass the entire record, it would never be sufficient merely to identify only "those portions" of Rule 56(c) documents that demonstrate the absence of a genuine issue.

B. Reconsidering the Plaintiff's Burden

With respect to the plaintiff's burden, the most puzzling aspect of *Celotex* is what materials the court may consider. Justice Rehnquist's majority opinion stated that the plaintiff does not have to use materials that are "in a form that would be admissible at trial."²⁸⁶ He added, however, that "one would normally expect" the plaintiff to make this showing from depositions, answers to interrogatories, admissions, or affidavits.²⁸⁷ But when can materials that are not "in a form that would be admissible at trial" constitute a sufficient showing by the plaintiff on an essential element of her case?²⁸⁸ And under what circumstances may a plaintiff defy the "normal[] expect[ation]" that she make her showing using affidavits, depositions, answers to interrogatories, or admissions?²⁸⁹

477 U.S. 317 (1986); Shapiro, *supra* note 17, at 348–49 (summarizing *Celotex*'s initial motion for summary judgment, filed in September, and noting that *Celotex* refiled its motion in December, "but this time the focus was quite different"); *see also Celotex*, 477 U.S. at 319 (stating that *Celotex*'s summary judgment motion "was first filed in September 1981").

284. *Celotex*, 477 U.S. at 324 (quoting FED. R. CIV. P. 56(e)).

285. *Id.* at 323 (quoting FED. R. CIV. P. 56(c)).

286. *Id.* at 324.

287. *Id.*

288. *Id.*

289. *Id.*

1. When Can a Court Consider Non-Rule 56(c) Documents?

Rule 56(c) sets forth the list of documents that determine whether "there is no genuine issue as to any material fact."²⁹⁰ If we aim to be faithful to the text of Rule 56, the majority's suggestion that there could ever be an exception to the "normal" expectation that a plaintiff use such documents is problematic. The threshold interpretive question is this: when can something that is not a Rule 56(c) document nonetheless merit consideration under Rule 56(c)?

One potential answer is that some materials are the substantial equivalent of the documents enumerated in Rule 56(c). Answers to interrogatories, for example, are properly considered under Rule 56(c).²⁹¹ The Federal Rules of Civil Procedure relating to discovery create a duty to supplement answers to interrogatories "seasonably," unless the "additional information" has been "made known" to one's opponent either during discovery or in writing.²⁹² In this way, the rules treat certain "information" as tantamount to supplemental interrogatory answers when that information is disclosed to the opposing party. The rules also state that when a party fails to provide such additional information without substantial justification, that party may not use that information.²⁹³ This bar applies not only to use at trial, but also to use in connection with "any motion" before the court,²⁹⁴ including a summary judgment motion.²⁹⁵

Thus, the federal rules deem information to be equivalent to a supplemental answer to an interrogatory if it is provided in a seasonable manner and with substantial justification for the party's failure to provide the

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

291. *Id.*

292. FED. R. CIV. P. 26(e)(2). This Rule states:

A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Id.

293. FED. R. CIV. P. 37(c)(1). This Rule states:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.

Id.

294. *Id.*

295. *See, e.g., Poulis-Minott v. Smith*, 388 F.3d 354, 358 (1st Cir. 2004) (stating that Rule 37(c)(1) "can also be applied to motions for summary judgment").

information in its initial answer. When material containing such information satisfies the federal rules in this way, it is reasonable to treat that information as tantamount to "answers to interrogatories" for purposes of Rule 56(c) and, therefore, to consider that information for purposes of a summary judgment motion.²⁹⁶

This reading of Rule 56(c) makes sense in light of the facts facing the Court in *Celotex*. Among the materials Catrett presented in opposition to Celotex's summary judgment motion were letters from Mr. Catrett's employer's insurer and assistant secretary.²⁹⁷ These documents contained information relating to the asbestos products Catrett's husband might have handled while on the job. Thus they contained information that could be deemed supplemental answers to Celotex's interrogatories, which had asked Catrett to describe and identify evidence and witnesses relating Mr. Catrett's exposure to any Celotex product.²⁹⁸

2. When Can "Inadmissible" Materials Be Considered?

The other issue *Celotex* left unaddressed is when the court may consider materials even though they are not "in a form that would be admissible at trial."²⁹⁹ Rule 56 imposes no general standard of admissibility. With respect to affidavits, however, Rule 56(e) requires that they "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."³⁰⁰ The text of Rule 56 does not impose this requirement on the other categories of documents listed in Rule 56(c).³⁰¹

Rule 56(e) also provides that when a summary judgment motion "is made and supported as provided in this rule," the responding party may not rest on

296. See *Catrett v. Johns-Manville Sales Corp. (Catrett II)*, 826 F.2d 33, 38 (D.C. Cir. 1987) (stating that "[t]here can, of course, be no doubt" that a supplemental answer to an interrogatory can be considered because Rule 56(c) "specifically list[s] 'answers to interrogatories'" (quoting FED. R. CIV. P. 56(c))), *on remand from Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

297. *Celotex*, 477 U.S. at 320.

298. See *id.* at 320 (stating that Rule 56(c) allows a party to oppose a summary judgment motion using any of the evidentiary materials listed in Rule 56(c) except the pleadings themselves).

299. *Id.*

300. FED. R. CIV. P. 56(e).

301. See FED. R. CIV. P. 56 (failing to impose a requirement that the other documents be in a form admissible at trial).

"mere allegations" in its pleading, but rather "must set forth specific facts showing that there is a genuine issue for trial."³⁰² Although courts and commentators often cite this language when they discuss summary judgment admissibility, this portion of Rule 56(e) actually has nothing to do with whether a particular material may be considered in connection with the plaintiff's burden. Rather, it goes to the merits of the summary judgment inquiry—whether the record "show[s] that there is no genuine issue" of "material fact."³⁰³ To illustrate, suppose a defendant meets its summary judgment burden, and the plaintiff responds solely with allegations in her complaint about the existence of a particular element. Summary judgment should be granted not because Rule 56(e) makes it improper to consider an allegation in her pleading, but because a mere allegation in the plaintiff's complaint is not sufficient to show that there is a genuine issue of material fact. Moreover, this is consistent with the *Celotex* majority's instruction that a sufficient showing by the plaintiff must be able to be "reduced to admissible evidence."³⁰⁴ A mere pleading allegation—absent the identification of a witness to support it—is not reducible to admissible evidence.

Thus, Rule 56 does not impose any admissibility requirement, except for affidavits. Many courts and commentators have assumed, consistent with the paper trial myth, that summary judgment materials are subject to the same admissibility requirements that would apply at trial.³⁰⁵ For example, they have refused to consider testimony in a deposition that would be hearsay if that same testimony were introduced at trial for the truth of the matter asserted.³⁰⁶ Those who support this approach read Justice Rehnquist's statement as recognizing only that affidavits may be considered for purposes of summary judgment even though affidavit testimony is not "in a form that would be admissible at trial."³⁰⁷ Other summary judgment materials such as depositions and interrogatories, however, would be subject to usual evidentiary standards that would govern at trial.³⁰⁸

302. FED. R. CIV. P. 56(e).

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

304. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

305. *See supra* notes 189–91 and accompanying text (explaining that, under the paper trial myth, a plaintiff's summary judgment evidence must generally meet the standards for admissibility at trial).

306. *See, e.g., Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990) ("Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment.").

307. *See supra* note 195 and accompanying text (stating that proponents of this view believe that Justice Rehnquist was "simply recognizing that *affidavits* may be considered for purpose of summary judgment" even if such testimony is not in admissible form).

308. *See supra* note 188 and accompanying text (describing the "trial-quality" evidence

The precise basis for importing trial evidentiary standards at the summary judgment phase is unclear. Take hearsay, for example. As one commentator has recognized, testimony that would be hearsay at trial is not necessarily testimony that would be hearsay for purposes of summary judgment.³⁰⁹ Hearsay is defined as an out-of-court statement offered for the truth of the matter asserted.³¹⁰ Materials offered in opposition to summary judgment, however, are not offered to establish the truth of the matter asserted. They are offered to establish a genuine issue of material fact for trial.³¹¹ Suppose plaintiff's interrogatory answer identifies a witness and states that she anticipates the witness's testimony will establish "X." That is clearly inadmissible hearsay if the plaintiff seeks to introduce that interrogatory answer at trial to establish "X." But at the summary judgment phase, the plaintiff is not required to prove "X." She is only required to establish that there is a genuine issue for trial.

To conclude that a court may consider particular material in assessing the plaintiff's showing is not to say that this material is sufficient to meet the plaintiff's burden. What exactly constitutes a "sufficient showing" by a plaintiff when the defendant meets its burden by showing an "absence of evidence" on a necessary element of plaintiff's claim?³¹² Recall that a defendant seeking summary judgment on an absence-of-evidence theory must be able to point to a Rule 56(c) material that it would expect to identify evidence the plaintiff might use at trial, but either fails to do so or identifies evidence that would be insufficient to carry plaintiff's burden.³¹³ Assuming the defendant can do so (as *Celotex* did), suppose that the plaintiff responded not with trial-quality evidence, but rather with a supplemental answer to an interrogatory identifying and describing witnesses and evidence that would support her claim. Would it still be the case that the Rule 56(c) materials show no genuine issue as to any material fact?

required by proponents of the paper trial myth).

309. See Duane, *supra* note 198, at 1532 (concluding that assertions made in affidavits submitted on a summary judgment motion are not hearsay).

310. *Anderson v. United States*, 417 U.S. 211, 219 & n.7 (1974); Duane, *supra* note 198, at 1532.

311. Duane, *supra* note 198, at 1532; *see id.* at 1535 ("[A] judge ruling on such a motion is neither permitted nor required to draw any conclusions about what happened in the *past*—that is, the truth of the matter asserted in the parties' pleadings and affidavits—but what *will happen at a future trial if there is one*.").

312. *Celotex Corp. v. Catrett*, 417 U.S. 317, 323, 325 (1986).

313. See *supra* notes 264–73 and accompanying text (explaining the absence-of-evidence theory and classifying *Celotex* as a case in which the defendant met its burden by demonstrating the plaintiff's lack of evidence).

If the plaintiff had provided that information in her original answer to the defendant's interrogatory, the defendant would not be able to establish an "absence of evidence" sufficient to meet its burden under my reading of *Celotex*; the Rule 56(c) documents before the court would not show that there is no "genuine issue" of material fact. The question, then, is whether the result should be different simply because the plaintiff identified the witness in a supplemental interrogatory answer. In both situations, the information before the court is exactly the same. To conclude that summary judgment should be granted in the first instance but not in the second would create not only an intuitive inconsistency but also a textual anomaly. We would be requiring courts to conclude that the same materials are enough to create a "genuine issue" in one situation but not in another. If Rule 56(c)'s standard is to have an ascertainable meaning, it should at least yield consistent results when applied to identical records.

Obviously, the plaintiff's response is sufficient only if her materials are "reduc[ible] to admissible evidence."³¹⁴ So materials that do not indicate that there will be evidentiary support usable at trial would not suffice since they would not indicate a genuine issue for trial. Suppose, for example, that Catrett had produced only Mr. Catrett's deposition from his workers' compensation proceeding. The transcript would not be admissible at trial because *Celotex* was not a party to the earlier proceeding,³¹⁵ and it could not be "reduced to admissible evidence" because Mr. Catrett was deceased by that point in time. This hypothetical showing would be insufficient not because such a deposition is "inadmissible" for purposes of summary judgment, but because it fails to show a "genuine issue" as to the material fact of exposure.

C. *The Interpretive Approach: A Summary*

The subparts above illustrate how *Celotex* is best read in light of the interpretive values I have described. This subpart combines these insights and describes the approach to summary judgment that is most consistent with these values. It then explains how summary judgment would operate under this approach.

A defendant who seeks summary judgment on the basis that the plaintiff will lack sufficient evidence to prove her case at trial must be able to point to

314. *Celotex*, 477 U.S. at 327.

315. See FED. R. CIV. P. 32(a) (providing that a deposition "may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof").

some Rule 56(c) document that would be expected to contain an identification or description of evidence that the plaintiff could use at trial, but does not. *Celotex* provides a perfect example of this scenario. *Celotex* served interrogatories asking the plaintiff not only for an identification of potential witnesses supporting her claim, but also for information about any work Mr. Catrett did with asbestos, including the identity of any specific asbestos product he used.³¹⁶ When answers to such interrogatories fail to identify any such witnesses or information, the defendant can argue that these answers show that there is an absence of evidence to support the plaintiff's claim. And when such a Rule 56(c) document does point to evidence that would support the plaintiff's claim, the defendant could use other Rule 56(c) documents to demonstrate that such evidence will in fact be insufficient to meet the plaintiff's burden. The defendant could, for example, obtain affidavits from or take depositions of the witnesses identified by the plaintiff.

When the defendant is able to present Rule 56(c) documents that establish an absence of evidence in this way, it meets its burden. The defendant does not have to cull through the record to determine if other information indicates that evidence may exist to support the plaintiff's claim. Nor, however, may the defendant satisfy its burden simply by pointing to some or even all of the Rule 56(c) materials created up to that point in the litigation and asserting that they do not contain evidence to support a particular element of the plaintiff's claim. That is why Kress could not prevail on an absence-of-evidence theory, even though it deposed Adickes and she could provide no first-hand testimony that a police officer was in the store.³¹⁷ While such a deposition is a Rule 56(c) document, it does not "show that there is no genuine issue as to any material fact" unless there is also a Rule 56(c) document indicating that this would be the evidence on which the plaintiff would rely to establish that fact at trial.³¹⁸

If the defendant meets its burden, then courts should grant summary judgment unless the plaintiff is able to meet her burden.³¹⁹ Under *Celotex*, she

316. See *Catrett v. Johns-Manville Sales Corp. (Catrett II)*, 826 F.2d 33, 34 (D.C. Cir. 1987) (noting that *Celotex* asked for the "type and identity of each such asbestos material with which [Mr. Catrett] had contact"), *on remand from Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

317. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970) ("Because [Kress] did not meet its burden of establishing the absence of a policeman in the store, [Adickes] was not required to come forward with suitable opposing affidavits.").

318. FED. R. CIV. P. 56(c). A defendant would always have the option, of course, to seek summary judgment by presenting affirmative evidence that a condition necessary for plaintiff to prevail is false. If Kress, for example, had provided affidavits of the police officers that denied being in the store, it could have met its burden that way. *Adickes*, 398 U.S. at 160.

319. See *supra* notes 124–30 and accompanying text (describing the plaintiff's burden). If

must make "a sufficient showing" with respect to the aspect of her claim that the defendant has challenged.³²⁰ Her supporting materials must be sufficient to carry her burden of proof at trial "if reduced to admissible evidence."³²¹ Assuming that the plaintiff has such materials, she faces a problem at the very outset: The plaintiff may have to excuse her failure to reveal this information in response to the defendant's discovery requests. The rules would require her to demonstrate "substantial justification" for failing "seasonably to amend" her earlier response.³²² Assuming that she can provide such justification, then the material she presents in support of her motion will be the functional equivalent of a supplement to the Rule 56(c) document that formed the basis of the defendant's summary judgment motion in the first place.³²³ If, as in *Celotex*, the defendant based its motion on an interrogatory answer, then the plaintiff's new information is tantamount to a supplemental interrogatory answer and so may be considered to determine whether the Rule 56(c) materials "show that there is no genuine issue as to any material fact."³²⁴

Thus, when a defendant seeks summary judgment on the basis that there is an absence of evidence, the plaintiff does not have to produce trial-quality evidence such as an affidavit from a witness who would be competent to testify at trial or deposition testimony that itself would be admissible at trial. She does, however, need to provide material sufficient to refute the absence of evidence indicated by the defendant's showing. If, for example, the defendant had asked her to identify supporting witnesses and she failed to do so, then her responsive material must identify such witnesses. And she must also justify her failure to disclose that information earlier, or else she may be prevented from using that information under the discovery rules.³²⁵ In the event that the plaintiff is not able to provide a sufficient response regarding the evidence she

the defendant is unable to meet this burden, of course, then summary judgment should be denied. *See Adickes*, 398 U.S. at 159–60 (noting that Kress's failure to show that there was no policeman in the store required the Court to reverse the grant of summary judgment and stating that Adickes was not thereafter required to produce opposing affidavits).

320. *Celotex*, 477 U.S. at 323.

321. *Id.* at 327.

322. *See* FED. R. CIV. P. 26(e)(2) (describing a party's duty to amend prior discovery responses); FED. R. CIV. P. 37(c)(1) (stating the penalties for failure to amend a prior discovery response).

323. *See supra* notes 292–96 and accompanying text (discussing Rules 26(e)(2) and 37(c)(1) and concluding that as long as the plaintiff justifies her failure to amend earlier answers, such materials can be treated like Rule 56(c) materials for purposes of summary judgment).

324. FED. R. CIV. P. 56(c); *see also supra* note 301 and accompanying text (explaining why it is reasonable to treat supplemental answers as equivalent to Rule 56(c) materials).

325. *See supra* note 293–94 and accompanying text (explaining Rule 37(c)(1)).

could use to support her claim at trial, then she may urge the court, under Rule 56(f), to allow her more time for discovery and investigation.³²⁶

Under this Article's approach, the defendant will usually have to do some legwork if it wants to obtain summary judgment on an "absence of evidence" theory. For example, the defendant could use interrogatories to elicit an identification or description of the evidence and witnesses that may support the plaintiff's claim. When the plaintiff fails to do so, that alone would show an absence of evidence. A defendant might also meet its burden by pointing to plaintiff's failure to identify witnesses or evidence as part of her Rule 26(a)(1) disclosures.³²⁷ When the plaintiff does provide information about possible witnesses and evidence, the defendant may either (a) seek summary judgment on the basis that the plaintiff's own response indicates that her evidence will be insufficient to carry her burden at trial,³²⁸ or (b) seek to create other Rule 56(c) documents showing that the evidence will be insufficient, for example, by taking depositions or obtaining affidavits of the witnesses plaintiff identified.

While this Article's approach imposes more of a burden on the defendant than the paper trial myth,³²⁹ it also facilitates the discovery process by giving the plaintiff a strong incentive to provide complete information in its disclosures and discovery responses. If she delays, she would give the defendant a basis for seeking summary judgment and would run the risk that the court would not allow previously undisclosed information to be used in

326. FED. R. CIV. P. 56(f):

Should it appear that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had.

Id.

327. Although Rule 56(c) does not expressly mention disclosures, the initial disclosures required by Rule 26(a) are commonly viewed as identical to interrogatories. Indeed, the Rules Advisory Committee called them "the functional equivalent of court-ordered interrogatories." FED. R. CIV. P. 26 advisory committee's note (1993 amendment). Thus, Rule 56(c)'s reference to interrogatories is sensibly read to allow consideration of Rule 26(a) disclosures.

328. Imagine, for example, that Kress had served interrogatories on Adickes asking her to identify and describe the evidence and witnesses supporting her conspiracy claim. If Adickes had identified only her student Carolyn and described her testimony as being that there was an officer in the store, Kress might have argued for summary judgment on the theory that the mere presence of an officer in the store would not be sufficient to infer a conspiracy. *See supra* notes 277-81 and accompanying text (discussing how Kress might have discharged its burden in hypothetical situations).

329. *See supra* notes 183-86 (explaining that under the paper trial myth, a defendant can meet its initial summary judgment burden by pointing out that the plaintiff has provided no evidence of one or more essential elements of its claim).

opposition.³³⁰ Unlike the dissenters' myth,³³¹ however, this Article's approach would not impose on the defendant the burden of culling through every piece of material that has changed hands during discovery before seeking summary judgment.³³² Once the defendant is able to meet its burden, it would be up to the plaintiff to present materials supporting her claim (whether or not those materials are already "in the record"³³³) and to justify her failure to disclose or describe those materials earlier.

D. Solving the Paradox of Justice White's Concurrence

My reading of the *Celotex* majority opinion also solves a long-standing riddle. Although Justice White joined the majority opinion, many view his concurrence as endorsing a very different view of summary judgment.³³⁴ Some have gone so far as to label Justice Rehnquist's opinion a mere "plurality," apparently viewing Justice White's concurrence as so incongruous with Rehnquist's approach that White's critical fifth vote should be disregarded.³³⁵ In particular, many struggle to reconcile the Rehnquist opinion with White's statements that a defendant cannot simply "move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case," and that the plaintiff "need not . . . depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his

330. See *supra* notes 297–99 (detailing the risk that a plaintiff creates by delaying her discovery disclosures).

331. See *supra* notes 205–09 and accompanying text (noting that under the dissenters' myth, a defendant seeking to show an absence of evidence must show the inadequacy of any documents or potential witnesses "in the record," even if those materials are hearsay, unsworn statements, or unauthorized documents).

332. Jack Friedenthal has criticized this apparent consequence of Justice Brennan's approach. See Friedenthal, *supra* note 17, at 778 ("Must the moving party comb through all the material available to see if there is *something* to be refuted even though the responding party has never mentioned it in answers to interrogatories requesting relevant evidence?").

333. *Celotex Corp. v. Catrett*, 477 U.S. 317, 332 (1986) (Brennan, J., dissenting).

334. See, e.g., Redish, *supra* note 8, at 1344–45 (stating that Justice White rejected a standard under which movants would have no greater burden on summary judgment than they would have at trial, even though the majority opinion he joined appeared to adopt such a standard).

335. See *supra* note 131 (noting that some scholars argue that Justice Rehnquist's opinion was a plurality because of Justice White's separate concurrence).

case."³³⁶ They find White's view to be more consistent with Justice Brennan's dissent than with the Rehnquist opinion.³³⁷

On closer analysis, the paradox of Justice White's concurrence is simply another symptom of the paper trial myth. If one reads the majority opinion as imposing on the plaintiff the burden of producing trial-quality evidence just as she would at trial, then Justice White's concurrence is irreconcilable with the majority opinion that he joined. But for the reasons set forth above, the paper trial myth is not the best reading of the *Celotex* majority opinion.³³⁸ The best interpretation is that a defendant moving for summary judgment on an absence-of-evidence theory must be able to present a Rule 56(c) document that it would expect to reveal evidence that the plaintiff could use at trial but does not.³³⁹ This view fits quite nicely with Justice White's understanding that the defendant must still "discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way."³⁴⁰

Rendering the majority opinion to be consistent with Justice White's concurrence was not one of the interpretive values that animated this Article's analysis. Indeed, such a value would be controversial as a principle of interpretation. As Justice Blackmun wrote, "the meaning of a majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative."³⁴¹ This Article's interpretation of *Celotex* is based on the majority opinion itself, along with standard legal referents such as past Supreme Court decisions and the governing textual sources. It is a pleasant surprise, however, that this interpretation also reconciles the majority opinion with Justice White's concurrence.

E. Response to Likely Critiques

This subpart considers possible criticisms of my interpretation of *Celotex*. It considers three such critiques: (1) this approach is inconsistent with the text of Rule 56(e); (2) this approach would increase the likelihood of abuse by

336. *Celotex*, 477 U.S. at 328 (White, J., concurring).

337. *E.g.*, Nelken, *supra* note 8, at 68 (noting that both Justice White's and Justice Brennan's opinions emphasized that the initial burden in "absence of evidence" cases is not illusory and made clear that the party relying on the lack of evidence must pursue "leads obtained in discovery").

338. *See supra* Part V.A (explaining and critiquing the paper trial myth).

339. *See supra* Part VI.C (presenting a better interpretation of *Celotex*).

340. *Celotex*, 477 U.S. at 328 (White, J., concurring).

341. *McKoy v. North Carolina*, 494 U.S. 433, 448 n.3 (1990) (Blackmun, J., concurring).

litigants; and (3) this approach would prevent courts from reaching the merits of summary judgment motions by imposing artificial burdens on moving defendants. The first would challenge this approach from an interpretive standpoint, and the latter two would take issue with its practical consequences.

1. Inconsistent with Rule 56(e)

Opponents of this Article's interpretation might voice a textual objection. Recall Rule 56(e)'s instruction that when a summary judgment motion "is made and supported as provided in this rule," the responding party "must set forth specific facts showing that there is a genuine issue for trial."³⁴² One could argue that by requiring "specific facts," Rule 56(e) intended to require trial-quality evidence, not simply the identification or description of such evidence.

At best, this is one plausible interpretation of an ambiguous provision. The more persuasive reading, however, supports my view. First, a coherent reading of this text must also account for the language used in the first half of Rule 56(e), which requires that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."³⁴³ The drafters knew what language to use when they wanted to require trial-quality evidence. For affidavits, the drafters imposed explicit requirements of personal knowledge, competence, and the ability to be admitted at trial if that testimony were provided live. But when describing the general burden to be imposed on nonmovants, the drafters required only "specific facts." Juxtaposed against the language used to define the admissibility of affidavits, the "specific facts" requirement can hardly be read to require trial-quality evidence in all circumstances.

In addition, the full statement of what Rule 56(e) requires of a nonmoving plaintiff includes "specific facts showing that there is a genuine issue for trial."³⁴⁴ Thus, Rule 56(e) is tied to Rule 56(c)'s requirement that summary judgment be entered when there is "no genuine issue as to any material fact."³⁴⁵ As already discussed, the best reading of *Celotex* from an interpretive standpoint is that a defendant seeking summary judgment based on an "absence of evidence" fails to meet its burden if Rule 56(c) materials or their equivalents show evidence that the plaintiff might use at trial, regardless of whether those

342. FED. R. CIV. P. 56(e).

343. *Id.*

344. *Id.*

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

materials are in trial-quality form.³⁴⁶ It follows that such materials present sufficiently "specific facts" to "show[] that there is a genuine issue for trial."³⁴⁷

2. Likelihood of Abuse by Litigants

One might argue that this Article's reading of *Celotex* would be susceptible to abuse, both by plaintiffs and defendants. Imagine that in response to *Celotex*'s interrogatories, Catrett listed a hundred people whom she claimed had knowledge of Mr. Catrett's use of *Celotex*'s asbestos products and whom she planned to call at trial. Under this Article's approach, this would effectively preclude summary judgment on an absence-of-evidence theory unless the defendant takes affidavits or depositions of these witnesses. Imagine that *Celotex* deposed the first three witnesses on the list, and they all testified that they had never worked for Anning & Johnson, had no idea who Mr. Catrett is, and knew nothing about working with asbestos. Can *Celotex* seek summary judgment in this situation, or must it first depose the remaining ninety-seven employees?

As an initial matter, Rule 26(g) should adequately deter any plaintiff considering this strategy, because it authorizes sanctions where a party's discovery responses are made without "a reasonable inquiry" or are "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."³⁴⁸ But even so, the trial court would have the authority to police such abusive behavior under Rule 16, demanding under circumstances like this that the plaintiff present something more akin to trial-quality evidence.³⁴⁹

In any event, a defendant can improve its position by seeking via discovery not only the identity of witnesses, but also a description of what the plaintiff anticipates their testimony will be. If the description provided in response appears to be inadequate—for example, it fails to indicate that the key witness has personal knowledge of the relevant facts—then that alone could be a basis for seeking summary judgment. If the plaintiff simply tailors her descriptions to avoid summary judgment without conducting a reasonable

346. See *supra* Part V.C (arguing that the plaintiff is not required to produce trial-quality evidence, but need only provide material sufficient to refute the absence of evidence indicated by the defendant's showing).

347. FED. R. CIV. P. 56(e).

348. FED. R. CIV. P. 26(g)(2).

349. See Miller, *supra* note 12, at 1006 & nn.120–31 (discussing the use of FED. R. CIV. P. 16).

inquiry, and this tactic is exposed during the discovery process, the defendant will be in an even stronger position to seek sanctions under Rule 26(g) or other action under Rule 16.

One could also imagine defendants behaving abusively under this Article's approach. Unlike the dissenters' myth, this approach would permit a defendant to meet its burden when particular Rule 56(c) documents demonstrate an absence of evidence, even if other information revealed during the course of discovery indicates that such evidence might exist. Does this mean that the defendant can harass the plaintiff by deliberately ignoring new materials and seeking summary judgment anyway?

As other scholars have noted, Rule 11 allows sanctions when the defendant files a summary judgment motion "for any improper purpose, such as to harass."³⁵⁰ In any event, this Article's approach would not permit a defendant to obtain summary judgment simply by deliberately ignoring potential sources of evidence in the record. Those other materials are simply assessed in connection with the plaintiff's burden. And unlike the paper trial myth, the plaintiff will be able to meet this burden in a fairly low-cost way. Rather than being required to convert those materials into trial-quality form, she needs only present the materials and justify why this information had not been provided in the Rule 56(c) documents that formed the basis of the defendant's motion.

3. Prevents Decisions on the Merits

Martin Redish argued recently that *Celotex* should be read to impose virtually no burden on a defendant moving for summary judgment.³⁵¹ He drew a distinction between "external" and "internal" barriers to summary judgment.³⁵² External barriers are "procedural restraints on a trial court's ability to reach the merits of a summary judgment motion."³⁵³ The internal

350. FED. R. CIV. P. 11(b)(1); *see also* Redish, *supra* note 8, at 1346 (noting that Rule 11 requires parties to certify that a claim is not submitted for harassment or other improper purposes); Friedenthal, *supra* note 17, at 776 ("If one party could, merely by filing an unsupported motion, force an opponent to make a substantial showing, there would be a strong incentive to make such a filing if for no other reason than to harass the other party and raise its costs of litigation.").

351. *See* Redish, *supra* note 8, at 1345 (noting that the majority of lower federal courts have wisely interpreted the decision in this way).

352. *See id.* at 1331 (stating his conclusions regarding the "external" and "internal" barriers to summary judgment determinations).

353. *Id.* at 1331; *see also id.* at 1349 ("'External' barriers, as I define them, are those that prevent the court from even reaching the substantive merits of a summary judgment motion.").

barrier is "the standard for decision that a trial court employs once it finally reaches the merits,"³⁵⁴ namely, the plaintiff's obligation to "produce evidence sufficient to convince a rational factfinder . . . that the facts are as she has alleged, and that under the controlling law and those facts she is entitled to relief."³⁵⁵

Redish criticized *Adickes* as imposing an unjustified external barrier to considering the merits of a summary judgment motion.³⁵⁶ He directed the same argument toward Justice Brennan, Martin Louis, and Melissa Nelken,³⁵⁷ who had argued that a defendant must make reasonable discovery efforts in order to meet its burden under an absence-of-evidence theory.³⁵⁸ It begs the question, however, to assert that imposing such a burden on a defendant prevents a court from considering "the merits" of a summary judgment motion. According to Rule 56, the merits inquiry for a summary judgment motion is whether the Rule 56(c) documents "show that there is no genuine issue as to any material fact."³⁵⁹ For the reasons set forth earlier, this does not necessarily transform summary judgment into a paper trial, in which a lack of supporting evidence automatically means that the plaintiff loses.³⁶⁰ To the contrary, the best understanding is that the movant must use Rule 56(c) documents to "show that there is no genuine issue." Indeed, the party asking a court to take action (that is, to grant summary judgment) typically bears the burden of convincing the court that such action is appropriate.³⁶¹

354. *Id.* at 1331.

355. *Id.* at 1349.

356. *See id.* at 1342–43 ("Because of the artificial barrier to consideration of the merits of Kress's summary judgment motion imposed by the *Adickes* Court, however, the trial court was unable even to 'peek behind the curtain' to determine exactly what evidence *Adickes* planned to rely on to establish this essential portion of her case.").

357. *Id.* at 1347–48 (responding to Justice Brennan, Louis, and Nelken with the observation that "[t]he key point that all of the detractors of *Celotex* seem to ignore is that use of the procedure set out in *Adickes* effectively results in a denial of a motion for summary judgment *without a court's ever making an inquiry into the actual merits of that motion*").

358. *See id.* at 1347 (explaining their approach); *see also* Friedenthal, *supra* note 17, at 776 (questioning an approach to summary judgment that would "shift the entire inquiry from the fundamental question of whether the responding party could possibly meet its burden of proof at trial to the technical, irrelevant question of whether the moving party has met a contrived burden for summary judgment").

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

360. *See supra* notes 191–203 (critiquing the paper trial approach).

361. There are rare exceptions to this principle. For example, a party asserting that a federal court has subject matter jurisdiction bears the burden of establishing that jurisdiction, even if she is not the movant. Thus, a plaintiff bears the burden of establishing subject matter jurisdiction even when she is opposing the defendant's motion to dismiss, *e.g.*, *Osborn v. United States*, 918 F.2d 724, 729–30 (8th Cir. 1990), and a defendant bears the burden of

The facts of *Adickes* confirm that a lack of trial-quality evidence in the summary judgment record does not necessarily mean a lack of evidence at trial. Redish criticized the *Adickes* decision because:

If *Adickes* presented absolutely no admissible evidence to support her essential claim of a conspiracy between Kress and the policemen, Kress—with or without its own affirmative supporting evidence—could have immediately moved for directed verdict, simply pointing out the obvious—the lack of any supporting evidence—and the motion would undoubtedly have been granted.³⁶²

This is an excellent observation, one that echoes David Currie's pre-*Celotex* response to the *Adickes* decision.³⁶³ But this view mistakenly presumes that the materials *Adickes* presented in opposing summary judgment were "exactly [the] evidence *Adickes* planned to rely on" at trial.³⁶⁴ Recall that *Adickes* testified in her deposition that her student Carolyn Moncure had seen a police officer in the store.³⁶⁵ And in that case, we need not speculate whether the student could so testify or whether *Adickes* could or planned to call her as a witness. Carolyn Moncure did testify at the trial on *Adickes*'s custom of the community claim (which had survived summary judgment), and she testified that there had been a police officer in the store that day.³⁶⁶ While one might fault *Adickes* for not obtaining an affidavit from her student at the summary judgment phase, that overlooks fundamental questions that are central, not peripheral, to "the merits": When is the plaintiff obligated to disclose what her evidence will be? And what form must that disclosure take?

That said, Martin Redish is absolutely correct that an evaluation of summary judgment burdens from a policy standpoint must consider the risk "of [an] unnecessary trial that summary judgment was created to avoid."³⁶⁷ But no approach to summary judgment can eliminate this risk entirely, not even a requirement that the plaintiff produce trial-quality evidence in order to survive summary judgment. It is possible, for example, that the witness on whose affidavit the plaintiff relied to

establishing subject matter jurisdiction even when it is opposing the plaintiff's motion to remand, e.g., *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). But there appears no reason to create such an exception for summary judgment motions. To the contrary, some have read Rule 56(c)'s requirement that the documents "show that there is no genuine issue" as itself "requir[ing] an initial showing by the moving party." Friedenthal, *supra* note 17, at 775.

362. Redish, *supra* note 8, at 1343.

363. See Currie, *supra* note 159, at 77–79 (critiquing the *Adickes* decision and the ambiguity of Rule 56(c)).

364. Redish, *supra* note 8, at 1343.

365. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 156 n.13 (1970).

366. *Id.*; see also Kennedy, *supra* note 8, at 234 n.22 (suggesting that in *Adickes*, "the Supreme Court was put in a position where it virtually was compelled to reverse because evidence sufficient to sustain count two had been admitted at trial").

367. Redish, *supra* note 8, at 1347–48.

avoid summary judgment would give different testimony at trial, or not show up at all. Efforts to reduce the risk of unnecessary trials must therefore be balanced against other considerations.³⁶⁸ Allowing defendants to file burden-free summary judgment motions can be costly and unfair to plaintiffs.³⁶⁹ And given that in most cases it is in the defendant's strategic interest to use discovery to obtain a preview of the plaintiff's case, requiring defendants to do some legwork is not likely to impose costs that they would not incur willingly.

VII. Conclusion

While the *Celotex* decision has been the subject of substantial debate and disagreement within the academy and the judiciary, it has yet to be truly interpreted. Rather, the competing approaches to *Celotex* emphasize the policy consequences of alternative readings without considering traditional interpretive values such as consistency with prior precedent, consistency with textual sources, and internal coherence. By taking these values seriously, this Article's reading of *Celotex* provides cogent answers to the decision's many ambiguities and offers a reasonable middle ground between the two dominant myths of *Celotex*.

VIII. Appendix

The citation counts in the tables below and elsewhere in this Article are based on the number of citations recorded by the Shepard's citation service as of June 29, 2005. Table 1 lists the top fifteen decisions in terms of federal citations. More federal courts and tribunals have cited these fifteen decisions than any others. Table 2 lists the top thirty cases in terms of federal and state citations. More courts and tribunals (federal and state) have cited these decisions than any others.³⁷⁰

Not surprisingly, nearly all of the decisions qualifying to appear on these tables are from the United States Supreme Court. There are four exceptions: three decisions by the National Labor Relations Board (NLRB) and a Third Circuit

368. See Miller, *supra* note 12, at 1048 (questioning whether "promoting use of summary judgment may be offset by negative effects on other system values, such as accuracy, fairness, the day-in-court principle, and the jury trial right").

369. See Friedenthal, *supra* note 17, at 777 (noting the painstaking process of establishing a case through circumstantial evidence and the burden placed on the responding party at the pretrial stage); see also Issacharoff & Loewenstein, *supra* note 15, at 103-05 (demonstrating that imposing no burden on moving defendants results in "striking and unambiguous transfer of wealth from plaintiffs to defendants").

370. Thanks to Jane Morris at Lexis-Nexis for providing citation count information for this Article.

decision on a petition for review of an NLRB ruling.³⁷¹ The high citation counts for these four decisions are due to frequent citations by the NLRB.³⁷²

Table 1: Most Frequently Cited by Federal Courts and Tribunals

<i>Rank</i>	<i>Case</i>	<i>Citing References Federal</i>
1	Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	72,887
2	Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	70,041
3	Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	31,674
4	Conley v. Gibson, 355 U.S. 41 (1957)	28,335
5	McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	26,025
6	Strickland v. Washington, 466 U.S. 668 (1984)	19,007
7	Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981)	16,225
8	Woolworth, F. W., Co. (Cincinnati, Ohio), 90 N.L.R.B. 289 (1950)	16,165
9	Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)	12,374
10	Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	11,855
11	Erie R.R. v. Tompkins, 304 U.S. 64 (1938)	10,724
12	Harlow v. Fitzgerald, 457 U.S. 800 (1982)	10,719
13	Scheuer v. Rhodes, 416 U.S. 232 (1974)	10,558
14	Richardson v. Perales, 402 U.S. 389 (1971)	10,341
15	United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	10,203

371. Woolworth, F. W., Co. (Cincinnati, Ohio), 90 N.L.R.B. 289 (1950); Standard Dry Wall Prods., Inc., 91 N.L.R.B. 544 (1950); Isis Plumbing & Heating Co., 138 N.L.R.B. 716 (1962); Standard Dry Wall Prods., Inc. v. N.L.R.B., 188 F.2d 362 (3d Cir. 1951).

372. For each of these four decisions, citations by the N.L.R.B. comprise more than 99% of the total citations.

Table 2: Most Frequently Cited By All Courts and Tribunals

Rank	Case	Citing References		
		Federal	State	Total
1	Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	72,887	1,622	74,509
2	Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	70,041	2,903	72,944
3	Strickland v. Washington, 466 U.S. 668 (1984)	19,007	33,314	52,321
4	Jackson v. Virginia, 443 U.S. 307 (1979)	9,871	32,886	42,757
5	Miranda v. Arizona, 384 U.S. 436 (1966)	8,314	25,802	34,116
6	Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	31,674	383	32,057
7	Anders v. California, 386 U.S. 738 (1967)	6,810	23,064	29,874
8	Conley v. Gibson, 355 U.S. 41 (1957)	28,335	1,208	29,543
9	McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	26,025	2,161	28,186
10	Terry v. Ohio, 392 U.S. 1 (1968)	5,880	15,084	20,964
11	Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981)	16,225	1,167	17,392
12	Woolworth, F. W., Co. (Cincinnati, Ohio), 90 N.L.R.B. 289 (1950)	16,165	8	16,173
13	Brady v. Maryland, 373 U.S. 83 (1963)	7,559	7,960	15,519
14	Chapman v. California, 386 U.S. 18 (1967)	4,476	9,669	14,145
15	Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)	12,374	1,103	13,477
16	Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	11,855	355	12,210
17	Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)	7,461	4,305	11,766
18	Harlow v. Fitzgerald, 457 U.S. 800 (1982)	10,719	911	11,630
19	Erie R.R. v. Tompkins, 304 U.S. 64 (1938)	10,724	532	11,256
20	Scheuer v. Rhodes, 416 U.S. 232 (1974)	10,558	243	10,801

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Rank	Case	Citing References		
		Federal	State	Total
21	Richardson v. Perales, 402 U.S. 389 (1971)	10,341	225	10,566
22	United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	10,203	321	10,524
23	Standard Dry Wall Prods., Inc., 91 N.L.R.B. 544 (1950)	10,163	0	10,163
24	Apprendi v. New Jersey, 530 U.S. 466 (2000)	6,548	3,431	9,979
25	Haines v. Kerner, 404 U.S. 519 (1972)	9,182	204	9,386
26	Batson v. Kentucky, 476 U.S. 79 (1986)	2,208	7,144	9,352
27	Isis Plumbing & Heating Co., 138 N.L.R.B. 716 (1962)	9,168	8	9,176
28	Standard Dry Wall Products, Inc. v. NLRB, 188 F.2d 362 (3d Cir. 1951)	9,124	0	9,124
29	Bd. of Regents v. Roth, 408 U.S. 564 (1972)	6,773	2,331	9,104
30	Illinois v. Gates, 462 U.S. 213 (1983)	3,909	5,075	8,984

