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RACE TO JUDGMENT? AN EMPIRICAL STUDY OF *SCOTT V. HARRIS* AND SUMMARY JUDGMENT

*Amelia G. Yowell**

INTRODUCTION

In three of the most cited cases in its history, the U.S. Supreme Court strongly encouraged the use of summary judgment as an efficient way to rid the federal dockets of frivolous claims before expensive trials.[1] After this trilogy of decisions, scholars expressed concern about the heavy use of summary judgment.[2] Two decades later, most of the judicial and scholarly world seemed content again with the state of summary judgment.[3] Then came *Scott v. Harris*.[4] With a video link included underneath the Supreme Court's decision, it is hard to imagine a more modern test of the relationship between judges, evidence, and summary judgment.

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

2 *See* Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1914–17, 1942 (1998) ("Rough justice may well be taking place in the corner-cutting practice I have described—the system may be surviving by weeding out marginal cases that would exact from the courts as well as the litigants costly and useless resources if permitted to go to trial. But that judgment ought to be made more openly, by changes to Rule 56, rather than covertly."); Marcy J. Levine, Comment, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 EMORY L.J. 171, 206–15 (1988) (providing a discussion of lower court decisions two years following the trilogy).

3 *See* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 525 (2007) (noting that "detractors have been all but drowned out in a sea of support" for summary judgment).

4 550 U.S. 372 (2007).

Summary judgment is perhaps the most important tool in evaluating the legal sufficiency of a claim. Once a judge grants a summary judgment motion, the claim is barred from a jury.[5] A granted motion also bars the cause of action for purposes of claim and issue preclusion.[6] Because the impact of summary judgment is expansive, the way federal courts decide summary judgment motions ultimately determines whether a claim continues to a jury or, perhaps, a lucrative settlement. Therefore, the legal community understandably takes notice when it appears that the summary judgment framework has changed.

In reading *Scott*, one thing becomes obvious: the majority relied heavily upon a videotape portraying a high-speed car chase in reversing the lower courts' denials of summary judgment.[7] The defendants' summary judgment motion concerned the plaintiff's argument that a police officer had used excessive force during the chase.[8] While both lower courts discussed other evidence, including testimony from the parties,[9] the Supreme Court needed only one short grainy tape to make its conclusion: the officer's actions, which resulted in severe and lasting injuries to the plaintiff, were reasonable under the circumstances and thus did not constitute excessive force.[10] In this decision, the Supreme Court did not make an express change to summary judgment rules.[11] However, many scholars are concerned that the Court's lenient attitude toward summary judgment will have a substantive effect on summary judgment decisions.[12]

In interpreting *Scott*, scholars have disagreed about the scope of the decision. Does it signal another large increase in the granting of all summary judgment motions?[13] Or is its impact limited to cases

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5 *See* 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2712 (3d ed. 1998).

6 *See id.*

7 *See Scott*, 550 U.S. at 378–81.

8 Defendants' Motion for Summary Judgment at 9–10, 12–21, Harris v. Coweta County, No. 3:01-CV-148, 2003 WL 25419527 (N.D. Ga. Sept. 25, 2003), *aff'd*, 433 F.3d 807 (11th Cir. 2005), *rev'd sub nom. Scott*, 550 U.S. 372.

9 *See Harris*, 433 F.3d at 815–17; *Harris*, 2003 WL 25419527, at *1–7.

10 *See Scott*, 550 U.S. at 378–81.

11 *See id.* at 378.

12 *See, e.g.*, George M. Dery III, *The Needless "Slosh" Through the "Morass of Reasonableness": The Supreme Court's Usurpation of Fact Finding Powers in Assessing Reasonable Force in* Scott v. Harris, 18 GEO. MASON U. CIV. RTS. L.J. 417, 436–48 (2008); Martin A. Schwartz et al., *Analysis of Videotape Evidence in Police Misconduct Cases*, 25 TOURO L. REV. 857, 860–63 (2009).

13 *See, e.g.*, Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 109–110 (2007); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 122–25 (2008).

that are factually similar?[14] This Note seeks to answer these questions through an empirical study. The study analyzes how district courts—the initial decision makers confronted with summary judgment motions—have used *Scott*. The rates of district court decisions on 56(c) motions for summary judgment provide a useful first look at *Scott*'s impact.

The results of this study suggest three conclusions. First, *Scott* has had little to no substantive impact on summary judgment rates overall. Second, there has been a significant decrease in denial rates in those cases that cite to *Scott*, suggesting that *Scott* does have an impact within a limited scope. Third, there has been a remarkable increase in the number of cases dealing with videotape evidence after *Scott*.[15] In exploring these results, this Note proceeds in four parts. Part I provides context for the study by examining the state of summary judgment before and after *Scott* as well as discussing the literature's response to *Scott*. Part II presents the methodology of the empirical study while Part III presents the results. Part IV offers several explanations for the results suggested by the study.

I. HISTORICAL AND ACADEMIC CONTEXT

A. *History and Development of Summary Judgment*

According to Federal Rule of Civil Procedure 56, a court should grant a summary judgment motion if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."[16] Introduced in 1938, the purpose of Rule 56 was to provide speedy, cheap relief from dockets burdened by frivolous issues.[17] A 1963 amendment made it clear that summary judgment should "pierce the pleadings and . . . assess the proof in

14 *See, e.g.*, Jessica Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 24–25 (2008); Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 607–10 (2009).

15 While there is a large increase, the small number of cases dealing with video evidence before *Scott* made it impossible to determine the statistical significance of this analysis.

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

17 *See* Broderick Wood Prods. Co. v. United States, 195 F.2d 433, 435–36 (10th Cir. 1952) ("The purpose of the rule is to provide against the vexation and delay which comes from the formal trial of cases in which there is not substantial issue of fact, and to permit expeditious disposition of cases of that kind."); *see also* Levine, *supra* note 2, at 171–73 (providing a brief history of Rule 56).

order to see whether there is a genuine need for trial."[18] Before Rule 56, cases either settled or went to trial.[19] Now, "summary judgment stands alongside trial and settlement as a pillar of our system."[20]

Until about a decade before the trilogy, the judiciary cautiously interpreted Rule 56 and rarely granted summary judgment motions.[21] Judges were primarily fearful of denying litigants the right to trial.[22] This practice provoked Judge Charles Clark, a member of the original federal rules advisory board, to come to summary judgment's defense.[23] In a fiery dissent, Judge Clark declared, "Of course it is error to deny trial when there is a genuine dispute of facts; but it is just as much error—perhaps more in cases of hardship, or where impetus is given to strike suits—to deny or postpone judgment where the ultimate legal result is clearly indicated."[24] Clark's concerns about underuse fell on deaf ears; judges continued to consider summary judgment the exception, not the rule.[25]

In 1986, the Supreme Court signaled a shift in judicial attitude toward 56(c) summary judgment motions in the trilogy.[26] In the first trilogy decision, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[27] the Court rejected the common belief that the nonmoving party must prove only the slightest doubt in the evidence.[28] Instead, the party must prove a factual dispute that is reasonable.[29] In *Anderson v. Liberty*

18 FED. R. CIV. P. 56 advisory committee's note. Therefore, summary judgment must occur after some factfinding so that the court can assess whether there would be enough evidence to support the allegations. *See id.*

19 *See* Bronsteen, *supra* note 3, at 522–25, 536–39.

20 *Id.* at 523.

21 *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (refusing to grant summary judgment because the defendant had not offered evidence that affirmatively "foreclose[d] the possibility" of what the plaintiff alleged). *But see* Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 881–906 (2007) (arguing that the trilogy merely confirmed a shift that had already taken place).

22 *See* Wald, *supra* note 2, at 1898–1907.

23 *See* Arnstein v. Porter, 154 F.2d 464, 479–80 (2d Cir. 1946) (Clark, J., dissenting); *see also* Wald, *supra* note 2, at 1898–1904 (providing further background information about the Clark-Frank debates).

24 *Arnstein*, 154 F.2d at 480 (Clark, J., dissenting) (footnote omitted).

25 *See* Wald, *supra* note 2, at 1904–07 (arguing that Clark's view prevailed in the end).

26 Some commentators argue that the trilogy just confirmed a shift that had already occurred in lower courts. *See* Cecil et al., *supra* note 21, at 881–906; Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 163 (2000).

27 475 U.S. 574 (1986).

28 *See id.* at 586 (holding that the nonmovant has to "do more than simply show that there is some metaphysical doubt as to the material facts").

29 *See id.* at 586–87.

Lobby, Inc.,[30] the Court held that the standard for granting a motion for summary judgment is the same as that under a directed verdict and, in deciding whether that standard has been fulfilled at the summary judgment stage, courts should use the same burden of proof as they would at trial.[31] In the seminal trilogy decision, *Celotex Corp. v. Catrett*,[32] the Court shifted its focus to the movant, reducing his burden by holding that the movant does not need to establish the absence of material fact.[33] By simultaneously lowering the burden on the movant and raising the burden on the nonmovant, these decisions suggested that the use of summary judgment would increase.[34]

After the trilogy, many scholars stopped worrying about the underuse of summary judgment and focused instead on its overuse.[35] Decreased trial rates especially fueled the debate about summary judgment.[36] Many scholars have worried about the scope of summary judgment, fearing that it could cause judges to go beyond their traditional power.[37] Others have questioned the constitutional grounds of summary judgment itself.[38] In a recent article about the trilogy, Professor Miller concludes:

> One primary function of the jury has been to make commonsense determinations about human behavior, reasonableness, and state of mind based on objective standards, the paradigm being the reasonable person standard. Since the Supreme Court trilogy, there is evidence that these responsibilities have been taken away from juries . . . . Given the existing, convoluted jurisprudence, it is imperative that the Supreme Court provide some clarity rather than leaving the matter entirely to the genial anarchy of trial court discretion.[39]

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30 477 U.S. 242 (1986).

31 *See id.* at 252–55.

32 477 U.S. 317 (1986).

33 *See id.* at 325.

34 *Cf.* Cecil et al., *supra* note 21, at 881–906 (providing an empirical response to these claims).

35 *See, e.g.*, *id.* at 864–69; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 511–12, 529–30 (1986); Wald, *supra* note 2, at 1935.

36 *See, e.g.*, Gillian Hadfield, *Where Have All the Trials Gone?*, 1 J. EMPIRICAL LEGAL STUD. 705, 706–12 (2004).

37 *See supra* note 35 and accompanying text.

38 *See, e.g.*, Suja A. Thomas, Essay, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 145–60 (2007) (arguing that summary judgment is unconstitutional under the Seventh Amendment).

39 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, 1134 (2003).

The recent Supreme Court decision in *Scott v. Harris* has renewed the discussion about the proper scope of summary judgment.[40] Instead of clarifying the proper place of summary judgment, the Supreme Court only muddied the water with its decision in *Scott*.[41] *Scott* dealt primarily with the proper role of the judge in determining whether a genuine issue of fact exists.[42] The Court had previously held that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[43] Furthermore, "[i]f reasonable minds could differ as to the import of the evidence . . . a verdict should not be directed."[44] The Court also held that a judge must draw all reasonable inferences in favor of the nonmoving party and consider "'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'"[45] While *Scott* did not explicitly replace this standard, some have argued that its attitude broadened the scope of summary judgment motions.[46]

B. Scott v. Harris

On a dark Georgia night, Victor Harris sped down a two-lane road at seventy-three miles per hour.[47] A deputy caught Harris speeding in the fifty-five miles per hour zone and turned on his lights.[48] Instead of pulling over, Harris led a high-speed chase.[49] Deputy Timothy Scott heard the call for backup and joined the chase.[50] Dur-

40 *See infra* Part I.C.

41 *See* Scott v. Harris, 550 U.S. 372, 378–81 (2007).

42 *See id.*

43 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

44 *Id.* at 250–51.

45 Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000) (quoting 9A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2529, at 300 (2d ed. 1995) (discussing the standard in the context of a Rule 50 judgment as a matter of law, which uses the same standard as a Rule 56 summary judgment).

46 *See infra* Part I.C.

47 Harris v. Coweta County, No. 3:01-CV-148, 2003 WL 25419527, at *1 (N.D. Ga. Sept. 25, 2003).

48 *Id.*

49 *Id.*

50 *Id.*

ing the chase, Harris managed to escape a cruiser blockade in a parking lot, but collided with Scott's cruiser in the process.[51]

Following this incident, Scott took over as the main police cruiser in the pursuit.[52] Scott obtained approval from his supervisor to come into contact with Harris through the Precision Intervention Technique (PIT) maneuver.[53] A PIT maneuver requires the officer to hit the fleeing car at a specific point, throwing the car into a spin.[54] Scott did not know the underlying offense for the chase (speeding), but he told his supervisor that he felt Harris was acting in a reckless and dangerous manner.[55] The supervisor responded, "Go ahead and take him out."[56] Deciding that Harris was traveling too fast, Scott hit Harris's car in a manner that was not a part of the PIT maneuver.[57] Harris lost control of the vehicle, which ran down an embankment and crashed.[58] As a result, Harris was rendered a quadriplegic.[59] A camera on Scott's cruiser captured the incident.[60]

Harris sued under § 1983[61] alleging, among other claims, that Scott had used excessive force to end the high-speed chase in violation of the Fourth Amendment.[62] Scott then filed a motion for summary judgment on the basis of qualified immunity.[63] Determining whether an officer is entitled to qualified immunity under § 1983 is an inherently factual determination.[64] As part of that analysis, the Northern District Court of Georgia asked whether a reasonable jury could find that Scott violated Harris's Fourth Amendment rights by the use

51 The parties disagreed. *See id.* at *1 n.2 ("Defendants assert that Harris was boxed in by the officers and deliberately rammed Scott's cruiser in an attempt to get away. Harris maintains that the crash was unintentional.").

52 *Id.* at *2.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* (internal quotation marks omitted).

57 *See id.* The Supreme Court noted that it is "irrelevant to our analysis whether Scott had permission to take the precise actions he took." Scott v. Harris, 550 U.S. 372, 375 n.1 (2007).

58 *Harris*, 2003 WL 25419527, at *2.

59 *Id.*

60 *Id.* at *1.

61 42 U.S.C. § 1983 (2006).

62 Complaint at 11–15, *Harris*, 2003 WL 25419527 (No. 3:01-CV-148).

63 Defendants' Motion for Summary Judgment, *supra* note 8, at 28–31.

64 *See* Dery, *supra* note 12, at 419–25.

of excessive force.[65] Excessive force claims are subject to an objective reasonableness standard.[66]

The district court denied the motion for summary judgment, holding that a jury could find "Scott's use of force—ramming the car while traveling at high speeds—was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable."[67] The district court made no mention of the video in its analysis of the motion, instead emphasizing the facts as seen from the nonmovant.[68] Mentioning the video only in a footnote, the Eleventh Circuit affirmed the district court's decision.[69] The court noted that, from the video, a reasonable jury could find that Harris did not pose an immediate risk of danger because he was driving in a nonaggressive fashion in front of the squad cars on a road with little to no pedestrian traffic.[70] This could be in line with the nonmovant's view that "Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns."[71]

The Supreme Court reversed the decisions of the lower courts.[72] The Court based its decision on the videotape, which had been an afterthought to the lower courts.[73] Writing the majority opinion, Jus-

65 The district court employed the two-part *Saucier* test for qualified immunity: (1) Can the facts alleged establish a constitutional violation?; and (2) If so, was the right clearly established so that it would have been clear to a reasonable officer that Scott's conduct was unlawful? *See Harris*, 2003 WL 25419527, at *6 (citing Saucier v. Katz, 533 U.S. 194, 201–02 (2001), *overruled by* Pearson v. Callahan, 129 S. Ct. 808 (2009)). Both the district court and the court of appeals discussed genuine issues of fact on both prongs of the test. *See* Harris v. Coweta County, 433 F.3d 807, 811–22 (11th Cir. 2005); *Harris*, 2003 WL 25419527, at *4–7. The Supreme Court, however, only reached the first prong. *See* Scott v. Harris, 550 U.S. 372, 377–86 (2007). The Court declined to evaluate the rigid two-prong *Saucier* test, which has since been overruled by *Pearson*. *See id.* at 377 n.4.

66 *See Harris*, 550 U.S. at 381 ("It is also conceded, by both sides, that a claim of 'excessive force in the course of making [a] . . . "seizure" of [the] person . . . [is] properly analyzed under the Fourth Amendment's "objective reasonableness" standard.'" (quoting Graham v. Connor, 490 U.S. 386, 388 (1989) (alterations in original))). *Graham* instructs courts to evaluate the facts carefully and offers examples of questions relevant to that evaluation: "(1) how severe was the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether he was attempting to evade arrest by flight." *Harris*, 2003 WL 25419527, at *4 (citing *Graham*, 490 U.S. at 396).

67 *Scott*, 2003 WL 25419527, at *5.

68 *See id.* at *4–6.

69 *See Harris*, 433 F.3d at 816 & n.11.

70 *See id.*

71 *Id.* at 815–16.

72 Scott v. Harris, 550 U.S. 372, 386 (2007).

73 *See id.* at 378–81.

tice Scalia declared that, when faced with a motion for summary judgment, courts should "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'"[74] Scalia went on to explain, however, that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record," the court should not adopt that party's version of the facts, even if the party is the nonmovant.[75]

The majority opinion held that the lower courts should not have rested on "such visible fiction."[76] For the majority, Harris's view of the events was "so utterly discredited by the record that no reasonable jury could have believed him."[77] Therefore, the Court declined to view the facts from the nonmovant's point of view.[78] Instead, the Court characterized the facts for itself primarily from the video: "Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."[79] Based on these facts, the Court held that the risk Harris posed to the officers and pedestrians justified the use of excessive force, entitling Scott to summary judgment.[80]

Justices Ginsburg and Breyer concurred in the judgment.[81] Neither Justice thought that the Court should instate a per se rule that excessive force used to prevent harm to civilians is always reasonable.[82] Instead, they believed that the Court "must still slosh our way through the factbound morass of 'reasonableness.'"[83] Breyer briefly mentioned the video by encouraging the reader to view the tape for herself.[84] Breyer agreed with the majority that no reasonable jury could find that Scott violated the Fourth Amendment.[85]

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74 *Id.* at 378 (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (alterations in original)).

75 *Id.* at 380.

76 *Id.* at 380–81.

77 *Id.* at 380.

78 *See id.*

79 *Id.* at 380.

80 *See id.* at 386.

81 *See id.* at 386–87 (Ginsburg, J., concurring); *id.* at 387–89 (Breyer, J., concurring).

82 *See id.* at 386 (Ginsburg, J., concurring); *id.* at 389 (Breyer, J., concurring).

83 *Id.* at 386 (Ginsburg, J., concurring) (quoting *id.* at 383 (majority opinion)).

84 *See id.* at 387 (Breyer, J., concurring).

85 *See id.*

Justice Stevens was the sole dissenter.[86] Stevens suggested that the video actually confirmed the lower courts' decisions on the factual questions.[87] Offering an extensive analysis of the tape, Stevens concluded that a jury could agree with Harris's version of the facts—that he was in control of the car and did not pose a high risk to the officers or other pedestrians.[88] Stevens noted that most cars had pulled over in anticipation of the police sirens and that Harris had waited for other cars to pass before changing lanes.[89] In any case, the video was "hardly the stuff of Hollywood."[90]

Apart from merely disagreeing about the characterization of the videotape, Stevens claimed that even if the Justices believed that the use of force was reasonable, this view did not justify depriving Harris of his right to have a jury determine that question.[91] Stevens argued that the Court was essentially calling the four other judges who reviewed the case unreasonable.[92] To Stevens, the fact that these judges all offered differing opinions on the evidence poignantly illustrated the genuine issue of material fact.[93] He argued that a Georgia jury would be the best body to evaluate the conduct that occurred because Georgia residents would be most familiar with the roads and local practices.[94]

C. *Academic Context*

In analyzing the procedural portion of *Scott*, there are two main interpretations: the first interpretation confines the application of the case strictly to its facts—most significantly the use of video evidence—while the second branches outside the facts of the case to see a general encouragement of the use of summary judgment. The majority of scholarship on *Scott* can hardly be considered complimentary of the

86 *See id.* at 389–97 (Stevens, J., dissenting).

87 *See id.* at 390 n.1 ("Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.").

88 *See id.* at 391.

89 *See id.* 391–93.

90 *Id.* at 392.

91 *See id.* at 390 ("[I]t surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.").

92 *See id.* at 395.

93 *See id.*

94 *See id.* at 397.

Supreme Court's analysis. This subpart examines the different interpretations of *Scott* and the tools scholars have used to reach them.

On one reading, *Scott* may have set forth a blanket encouragement for the increase of grants on all summary judgment motions in general.[95] While the discussion of summary judgment occurs within the context of video evidence, the Court's overall attitude in the opinion could send strong signals to the lower courts. The Court's fervent language against the nonmovant's view could be read as a general distaste for potentially shaky claims and a heavy reliance on the court's ability to make that determination.[96] The Court does not expressly confine this attitude toward nonmovants in cases with video evidence. Instead, the opinion simply refers to "the record."[97] This signals that the Court may have "broaden[ed] the authority of judges to intercept weak cases rather than leaving them to jury decision."[98] Judge Jack Weinstein, a federal district judge, apparently views *Scott* from this perspective and has spoken out against the decision, stating that it is an "unprecedented effort to displace the fact-finding power of the jury."[99] Judge Weinstein acknowledges that judges in the federal system play an important role in "preventing our country from losing sight of our destination and our goals and aspirations enshrined by Lincoln."[100]

The other dominant interpretation of *Scott* emphasizes its unique use of video evidence. *Scott* has been called "the YouTube" case, a tribute to a link to the video that was posted on the Supreme Court website next to the decision.[101] For most commentators, the problem with *Scott* is not that video evidence was used; rather, it is that the Justices made value judgments about the tape.[102] For example, the tape was not used to establish simple, objective facts, such as determin-

95 *See, e.g.*, Marcus, *supra* note 13, at 109–10; Weinstein, *supra* note 13, at 122–25.

96 *See* Scott v. Harris, 550 U.S. 372, 380 (2007) ("That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him.").

97 *Scott*, 550 U.S. at 380.

98 Marcus, *supra* note 13, at 109.

99 Weinstein, *supra* note 13, at 124.

100 *Id.* at 231.

101 *See Scott v. Harris (Car 2)* (YouTube online video Apr. 30, 2007), http://www.youtube.com/watch?v=cmx8gzx1N1k.

102 *See, e.g.*, Dery, *supra* note 12, at 436–48; Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 881–87 (2009); Silbey, *supra* note 14, at 42–45; Wasserman, *supra* note 14, at 607–10; David Kessler, Comment, *Justices in the Jury Box: Video Evidence and Summary Judgment in* Scott v. Harris, 31 HARV. J.L. & PUB. POL'Y 423, 430–35 (2008); Forrest

ing whether a street light was red. Instead, the Justices looked at the tape in order to make a value judgment concerning the reasonableness of the conduct[103]—something that is dangerous precedent.[104]

One extension of this interpretation calls for the removal of all video evidence from summary judgment decisions because the process of reviewing such evidence inherently causes judges to engage in a weighing analysis—a job that should always be the responsibility of the jury.[105] This interpretation is grounded in Stevens' dissent, which argued that a jury from Georgia was best suited to watch the video and use community standards evaluate whether the risk posed by Harris justified excessive force.[106] Specifically in the appellate context, some have argued that "when it comes to the summary judgment standard, appellate courts should . . . not make use of the availability of multimedia information."[107] Judges post-*Scott* may evaluate video evidence improperly, potentially usurping the jury's role in every case.[108] Therefore, this type of evidence should be excluded from summary judgment determinations altogether.[109] The use of video evidence simply gets too close to determinations of credibility and weight that are uniquely shaped by the jury's own community standards, especially in factually intense issues like the Fourth Amendment's reasonableness standard.[110]

Exclusion may not be the exclusive remedy to the problems of video evidence seen in *Scott*. Instead, this tendency could be corrected by the use of extreme caution in relying on video evidence.[111] Video evidence has been described as "seductive."[112] While video and other forms of multimedia evidence appear to be disinterested, they

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Plesko, Comment, *(Im)Balance and (Un)Reasonableness: High-Speed Police Pursuits, the Fourth Amendment, and* Scott v. Harris, 85 DENV. U. L. REV. 463, 472–78 (2007).

103 *See Scott*, 550 U.S. at 378–81.

104 *See supra* note 102.

105 *See, e.g.*, Schwartz et al., *supra* note 12, at 860–63 ("[D]espite the existence of a videotape, the jury should normally be the finder of the facts."); Leah A. Walker, Comment, *Will Video Kill the Trial Courts' Star? How "Hot" Records Will Change the Appellate Process*, 19 ALB. L.J. SCI. & TECH. 449, 451–65 (2009).

106 *See supra* notes 86–94 and accompanying text.

107 Walker, *supra* note 105, at 480.

108 *See id.* at 472–81.

109 *See id.*

110 *See id.* at 462–64.

111 *See supra* note 102 and accompanying text.

112 *See* Kessler, *supra* note 102, at 432–33 ("Video evidence, like that encountered by the Court in *Harris*, is seductive. . . . This may lead courts to believe—overconfidently—that how they view the evidence with their own eyes is the correct (and only) version of what happened." (footnote omitted)).

can often be biased toward one party or the other.[113] For example, in *Scott*, the video was taken from the dashboard of the police cruiser.[114] Therefore, the viewer saw only the officer's perspective, not Harris's. Film also has the ability to include some images, but exclude others.[115] Because of this bias, judges may wrongly refuse to look at contradictory evidence because the video appears to be objective.[116] Instead of cumulatively looking at the evidence and drawing inferences in favor of the nonmoving party, judges post-*Scott* may be quick to rely on video evidence, weighing it heavily against non-electronic evidence.[117] As one scholar observed about *Scott*, "[t]his may . . . be the first time that the Supreme Court disregarded all other evidence and declared the film version of the disputed events as the unassailable truth."[118] As long as judges resist tunnel vision, this group of scholars believes that the use of video evidence can be important when viewed cumulatively. Judges should just "resist the urge simply to believe what they see."[119] Film must be considered as one piece of *all* the evidence, subject to the same biases and credibility issues.[120]

In addition to the inherent biases of the medium, judges can also impart their own personal biases on to the video.[121] This view is commonly referred to as the critique of "cognitive illiberalism"—the failure of judges to recognize the connection between perceptions of societal risk and differing opinions of what society should ultimately look like.[122] In the *Scott* context, cognitive illiberalism is seen when the majority assumes that there is only one "reasonable" perspective of the videotape.[123] The only empirical study of *Scott* demonstrates this fallacy. Three law professors showed the *Scott* video to a sample of

113 *See* Silbey, *supra* note 14, at 18–19 ("From the earliest emergence of film technology, filmmakers and critics recognized that the appearance of reality in films is an illusion based upon conventions of representation . . . ."); Wasserman, *supra* note 14, at 624–25 ("Nor is the story the video told necessarily complete or fully contextual—it did not show what was happening off-camera, what happened before the camera began running, or the cause of the actions we see and hear on the video.").

114 *See* Harris v. Coweta County, No. 3:01-CV-148, 2003 WL 25419527, at *1 (N.D. Ga. Sept. 25, 2003).

115 *See* Silbey, *supra* note 14, at 25–32.

116 *See* Dery, *supra* note 12, at 436–48; Silbey, *supra* note 14, at 20–25; Wasserman, *supra* note 14, at 607–10.

117 *See supra* note 116.

118 *See* Silbey, *supra* note 14, at 17.

119 Kessler, *supra* note 102, at 435.

120 *See supra* note 113.

121 *See* Kahan et al., *supra* note 102, at 851–54.

122 *See id.* at 842–43.

123 *See id.* at 881–87.

1350 Americans and asked for their interpretations.[124] While a majority of those surveyed did agree with the Court that Scott acted reasonably, several sub-communities did not.[125] Among those were African Americans, low-income workers, Northeast residents, and people who tended to lean toward the left politically.[126] Instead of focusing on the inherent flaws of video evidence, these professors argued that the *Scott* Court was wrong to substitute its own view of the video as fact.[127] Harris should have had the ability to present it to a jury that (1) may have brought different biases to the video, and (2) may have been informed and persuaded by Harris's version of the event.[128] This argument does not suggest eliminating video evidence altogether; rather, it suggests that a judge should "engage in a sort of mental double check when ruling on a motion that would result in summary adjudication."[129] While this empirical study exposed an important fact about the Justices' evaluation of the evidence, it did not evaluate whether judges have indeed engaged in that mental double check when ruling on motions after *Scott*.

Prior to this empirical work, commentators have made arguments about the impact of *Scott* based on theory, with only a few case examples.[130] No scholar has actually looked at what impact *Scott* has had on the lower courts. The value of empiricism is slowly becoming known to the legal world: "Since we all became Realists, it is difficult to question the utility of empirical information."[131] Helpful empirical research has been done in many contexts, including pleadings, settlements, trials, and the appeal process.[132] Especially in the context of summary judgment, empirical evidence has been limited until just recently.[133] Most agree that summary judgment is important because

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124 *See id.* at 854.

125 *See id.* at 864–81.

126 *See id.* at 854.

127 *See id.* at 881–87.

128 *See id.* at 881–906.

129 *Id.* at 898.

130 *See, e.g.*, Dery, *supra* note 12, at 436–48; Schwartz, *supra* note 12, at 860–63; Silbey, *supra* note 14, at 974–88; Wasserman, *supra* note 14, at 626–36.

131 Marcus, *supra* note 13, at 113 (also explaining several common problems with empirical studies conducted by lawyers).

132 *See, e.g.*, Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1921–73 (2009).

133 *See id.* at 1941–42. For some of the recent studies on summary judgment, see Cecil et al., *supra* note 21; Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 91 (1990); Brian N. Lizotte, *Publication of Summary Judgment Motions*, 2007 WIS. L. REV. 107; Mollica, *supra* note 26. One of the oldest empirical studies on summary judgment was done in the late 1970s. *See* Wil-

it eliminates many cases that do not require trial.[134] But debate is lively regarding the cases at the margins.[135] How stringent should our standards of summary judgment be? How many cases are we comfortable keeping out of court before trial? Empirical research is needed to craft better discussions about how summary judgment should move forward.[136] Before proposing amendments to Rule 56 or advancing theories about *Scott*, one must know exactly what kind of impact *Scott* is having.[137]

II. METHODOLOGY

Two questions drove my study: First, in general, what kind of effect is the attitude in *Scott* having on all federal district court decisions on summary judgment motions? Second, in particular, how are federal district courts using *Scott* in their decisions, especially in cases that are factually similar? This study answers these questions by examining 56(c) motions for summary judgment. I made this choice for several reasons. First, *Scott* actually concerned a 56(c) motion for summary judgment and it was within those boundaries that the Justices examined the evidence.[138] Furthermore, summary judgment challenges the legal sufficiency of a claim or defense before trial.[139] Because the troublesome areas of *Scott* dealt with the evaluation of evidence, summary judgment motions are preferable to motions to dismiss because summary judgment motions can rely on more than just the pleadings.[140] This study does not include Rule 50 judgments as a matter of law even though the standards are the same because I wanted to measure the effect *Scott* had on cases that had not been presented at trial. Fundamentally, a paper trial and a physical trial present different perspectives on evidence.[141] At the summary judgment stage, a judge may wonder what evidence or credibility issues

liam P. McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. EMPIRICAL LEGAL STUD. 427 (1977).

134 *See* Clermont, *supra* note 132, at 1940–46.

135 *See id.*

136 *See id.*

137 In addition to supporting arguments about how legal rules should change in the future, empirical studies also serve to hold the judiciary accountable. *See* Rebecca Love Kourlis & Pamela A. Gagel, *Reinstalling the Courthouse Windows: Using Statistical Data to Promote Judicial Transparency and Accountability in Federal and State Courts*, 53 VILL. L. REV. 951, 954–60 (2008).

138 *See* Scott v. Harris, 550 U.S. 372, 378–81 (2007).

139 *See* 10A WRIGHT ET AL., *supra* note 5, § 2712.

140 *See id.* § 2713.

141 *See id.* § 2713.1.

will occur at trial.[142] Finally, summary judgment motions have a finite set of possible outcomes, which is essential to crafting an empirical study. When faced with a motion for summary judgment, a judge may either grant, deny, or deny-in-part/grant-in-part ("mixed") the motion. Therefore, this study examines the granted, denied, and mixed rates before and after *Scott*.

I limited my search to federal district court cases gathered from the commercial database Westlaw.[143] While several scholars have expressed apprehension about the use of commercial databases in empirical work about summary judgments,[144] I was not attempting to establish absolute rates of dismissal in federal district courts. Nor was this study meant to measure the increase or decrease in total summary judgment motions made. Instead, I sought to examine the relative rates before and after *Scott*. While many dismissals are not published through commercial databases (therefore not corresponding with the dismissal rates seen in reported cases), this reported "bias" is evident in both the pre- and post-*Scott* datasets and, thus, this method still provides a useful vehicle for analysis.

Because the *Scott* decision was handed down over two years ago, it was also important to determine the appropriate time frame for the study. As time passes after a landmark Supreme Court case, the effect of the case could potentially stabilize as lawyers adopt their arguments and case strategies to the new precedent. While this problem may not be as prevalent in the summary judgment motion context as opposed to the pleading context,[145] I sought to limit the time span so that the majority of the motions were drafted before or immediately after *Scott*, giving attorneys less time to adjust to the particulars of the case. A competing interest was pulling enough cases that cited *Scott* to provide a useful and statistically significant comparison. With these interests in mind, I decided to examine decisions on summary judgment motions handed down within a year before or after *Scott*. These time frames allowed me to evaluate how lower federal district courts had

142 *See id.*

143 All cases in this study were obtained from the Westlaw federal district court database (DCT).

144 *See, e.g.*, Cecil et al., *supra* note 21, at 869–73 ("Because the denial of a summary judgment motion may not generate a formal opinion that meets standards for publication or inclusion in a computerized legal reference system, these instances escape the notice of scholars who rely on only published opinions.").

145 Summary judgment deals with evidence, as opposed to a 12(b)(6) motion to dismiss that only evaluates a claim on its face. It is easier for a lawyer to manipulate the wording of a pleading than the actual evidence. *See* 10A WRIGHT ET AL., *supra* note 5, § 2713.

applied Rule 56(c) in the few months surrounding *Scott* and radiating outward.

I ran two Westlaw searches—one for cases a year before *Scott* and one for cases a year after *Scott*—in the federal district court database for cases that included the phrase "summary judgment" within a paragraph of the phrases "genuine issue" and "material fact" or "56(c)."[146] 14,603 cases with those key words were available for the year before *Scott* and 15,079 cases with those key words were available for the year after *Scott*. Because of the time constraints of this study, it was impossible to code approximately 30,000 cases; therefore, I needed a method of sampling. I divided the cases into three groups: (1) all cases pre-*Scott*, (2) all cases post-*Scott* that did not include a citation to *Scott*, and (3) all cases post-*Scott* that cited *Scott* only for its summary judgment precedents.[147] I then used a random number generator to sample cases from each group.[148] By using this division of cases, I was able to compare not only summary judgment rates before and after *Scott*, but also the rates within two groups after *Scott*. Because *Scott* did not hand down a clear alteration of the summary judgment standard,[149] it is possible that the liberal attitude portrayed by the Justices in *Scott* influenced judges when deciding motions, but, without similar facts, made a citation to the case impractical. Not only did this comparison allow me to examine the general outcome of *Scott*, it also allowed suggestions to be made about how far the case extends beyond its facts.

In the course of the study, it was necessary to eliminate three types of cases. First, summary judgment decisions by federal magistrates made pursuant to the Magistrates Act[150] were excluded if they did not have the force of law.[151] District court decisions that granted,

146 I ran these searches on October 18, 2009. A Microsoft Excel spreadsheet listing the name and citation of every case included in this study is on file with the author.

147 *See supra* note 65 and accompanying text.

148 I used the Microsoft Excel random number generator to generate a list of nonrepeating random numbers. I then read the cases with the corresponding Westlaw case numbers. The random number results are on file with the author.

149 *See* Scott v. Harris, 550 U.S. 372, 378–81 (2007) (operating within the current framework). *Scott* did not change the actual wording of the summary judgment standard. *Compare* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (holding that the pleading requirement was "no set of facts"), *with* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–63 (2007) (abrogating *Conley* by requiring that the pleadings be "plausible").

150 28 U.S.C.A. § 636(b)(1) (West 2006 & Supp. 2009).

151 Decisions where the parties consented to trial before a magistrate judge were included because those decisions have the binding force of law. Decisions made by magistrate judges that were only advisory to the district judge were not included. *See id.*

denied, or mixed motions for summary judgment after a review of the magistrate's recommendation were included. Second, cases that cited *Scott* only in the context of its discussion of excessive force substantive law were excluded because this study is intended to measure the effect of *Scott* on the procedural aspect of summary judgment motions.[152] Last, cases that discussed summary judgment standards in other contexts beside decisions on actual motions were excluded.[153]

I randomly sampled 250 cases from each of the three groups. Having obtained these lists, I read each case and recorded a variety of information: the case citation, the date of the case, the district court issuing the ruling, the result of the motion (granted, denied, mixed), the moving party, and the general type of case (civil rights, contracts, torts, and other). I also looked for the presence of specific factual similarities: whether the case dealt with video evidence, excessive force, or qualified immunity. A total of 750 cases were coded.[154] The following results were calculated from these datasets.

III. RESULTS

As Table 1 illustrates, I first analyzed the granted, denied, and mixed rates of the control group (the cases decided pre-*Scott*) so I could evaluate the consistency among the group.

TABLE 1. OVERALL RESULTS FOR CASES PRE-*SCOTT*

	Denied (Total)	Granted (Total)	Mixed (Total)
Total (250)	14.8% (37)	64.4% (161)	20.8% (52)
Summer 2006* (94)	13.8% (13)	67% (63)	19.1% (18)
Winter 2006** (59)	16.9% (10)	66.1% (39)	16.9% (10)
Spring 2007*** (97)	14.4% (14)	60.8% (59)	24.7% (24)

* Summer includes months May through September
** Winter includes months October through December
*** Spring includes months January through April
**** Due to rounding errors, percentages may not sum to 100%

152 *See supra* note 65 and accompanying text.

153 For example, if a later decision traced the case's history.

154 A Microsoft Excel spreadsheet including all of the codes for the cases is on file with the author.

The denial rates show a great deal of consistency within the control group. The rates fluctuated at a rough 3.1% band (between 16.9% at the high end and 13.8% at the low end). Likewise, between summer 2006 and winter 2006, the granted and mixed rates were very consistent (0.9% and 2.2% bands respectively). In the spring of 2007, however, there was a decrease in grant rates and an increase in mixed results. This suggests that there may be another factor occurring before *Scott* that had an impact on summary judgment rates. Having calculated these results, I then compared them to decisions on 56(c) summary judgment motions after *Scott*. These results are shown in Table 2.

TABLE 2. OVERALL RESULTS FOR CASES POST-*SCOTT*

	Denied (Total)	Granted (Total)	Mixed (Total)
Total Post-*Scott*, citing *Scott* (250)	9.6% (24)	62% (155)	28.4% (71)
Summer 2007 (82)	8.5% (7)	61% (50)	30.5% (25)
Winter 2007 (51)	11.8% (6)	58.8% (30)	29.4% (15)
Spring 2008 (117)	9.4% (11)	64.1% (75)	26.5% (31)
Total Post-*Scott*, not citing *Scott* (250)	14.8% (37)	58% (145)	27.2% (68)
Summer 2007 (138)	13% (18)	60.9% (84)	26.1% (36)
Winter 2007 (43)	16.3% (7)	55.8% (24)	27.9% (12)
Spring 2008 (69)	17.4% (12)	53.6% (37)	29% (20)

Looking at the total denial rates, the denial rates of the cases post-*Scott* but not citing *Scott* and the cases pre-*Scott* are identical (14.8%). In contrast, the total denial rate for those cases citing *Scott* is more than five points below the average. This indicates that *Scott* may be having an impact on the denial rate of summary judgment motions. In the mixed category, the numbers seem to continue along the same pattern observed in the control group, with granted rates generally decreasing and mixed rulings increasing.

After observing these general trends, I ran a multinomial regression to see if the changes were statistically significant. This was accom-

plished by transferring the variables into the statistical program SPSS and running a regression analysis on the data.[155] The regression analysis suggested that *Scott* had little to no statistically significant impact on the change observed in the rates except in the denial category. Summary judgment motions that were in group 1 and group 2 (before *Scott* and after *Scott* but not citing *Scott*) were more likely to be denied than those motions in group 3 (those citing *Scott*).[156]

The results suggest that *Scott* is having an impact on cases that actually cite it. Therefore, I attempted some descriptive analysis of how district courts were actually using *Scott*. Regression analysis indicated that judges were more likely to cite *Scott* in cases that dealt with video/audio evidence, excessive force, and qualified immunity, suggesting that judges are primarily using *Scott* in factually similar cases.[157] Regression analysis was unable to confirm any statistical significance in the denial rates between one substantive area and another. At this point, the data show that *Scott* is having a statistical impact on cases citing it. Exactly where the impact lies cannot be determined without larger sample sizes.[158]

Because most scholars looked at *Scott*'s treatment of the videotape evidence, my last analysis examined the impact *Scott* has had on video evidence.

TABLE 3. *SCOTT* AND VIDEOTAPE EVIDENCE

	Denied (Total)	Granted (Total)	Mixed (Total)
Post-*Scott*, citing *Scott* (33)	3% (1)	57.6% (19)	39.4% (13)
Post-*Scott*, not citing *Scott* (1)	0% (0)	100% (1)	0% (0)
Pre-*Scott* (3)	0% (0)	66.7% (2)	33.3% (1)

The small numbers contained in the case groups pre-*Scott* and post-*Scott* not citing *Scott* were not large enough to determine statistical significance. The table shows that district courts did look at video

155 SPSS database on file with author.

156 R = .05, P<.012.

157 This was statistically significant at P<.001. Judges were also more likely to cite *Scott* in civil rights cases rather than cases classified as contracts, torts, or other.

158 For example, are there decreased denial rates in every substantive area citing *Scott* or just in some?

evidence pre-*Scott*. Interestingly, district judges did not deny any motions in those cases. What is noteworthy is the fact that district judges examined three cases of videotape evidence before *Scott* and a startling thirty-six cases after *Scott*. While these numbers are not dispositive, they may suggest a trend following *Scott*.

IV. ANALYSIS

My two questions going into the study examined *Scott* on two levels. First, in general, what kind of effect is the attitude in *Scott* having on all federal district court decisions on summary judgment motions? Second, in particular, how are federal district courts using *Scott* in their decisions, especially in cases that are factually similar? This Part examines the results in the context of these two questions, providing explanation and analysis. The first section addresses the first question of overall impact. The second section addresses *Scott*'s impact within the context of video evidence.

A. Overall Results

The data suggests that *Scott* has not had any substantive impact on overall summary judgment rates. The percentages show a trend in the change of rates beginning right before *Scott* and continuing after. This suggests that another factor besides the *Scott* decision influenced the summary judgment rates for these two years. Determining that factor is outside the scope of this study. These data appears to rebut the argument of some that *Scott* signals a new, more liberal attitude toward all summary judgment motions.[159] *Scott* has been read as the Supreme Court's blanket encouragement of summary judgment motions.[160] These data appear to reject this particular interpretation of *Scott*. This section of the Note offers two plausible theories for why *Scott* seems to be having no impact on overall summary judgment rates.

First, district court judges may disagree with the Supreme Court's decision in *Scott* and may be attempting to limit its potential impact. In researching *Scott*, one is hard pressed to find any scholar who is comfortable with the Court's use of summary judgment. That discomfort seems to have been transferred to the judiciary. At least one fed-

159 In fact, the denial rates between those cases post-*Scott* not citing *Scott* and pre-*Scott* were identical (14.8%).

160 *See* Clermont, *supra* note 132, at 1942 ("Just three weeks before *Bell Atlantic*, the Supreme Court stepped in to encourage use of summary judgment as another way for judges to short circuit litigation, with the Court taking a very activist role in drawing inferences from the record in order to reverse a denial of summary judgment.").

eral district judge has spoken out against the Court's attitude toward summary judgment in *Scott*.[161] According to Judge Weinstein, the "Supreme Court majority [in *Scott*] intervened against jury power."[162] Weinstein worries that fellow district judges may be granting more summary judgment motions because of *Scott*. The data seem to suggest that this is in fact not the case. It is possible that many district judges feel similarly to Weinstein and are refusing to take *Scott* as an invitation to grant more summary judgment motions. In cases where the Supreme Court has not actually changed a standard, but instead advocated one particular policy position, district court judges are the true gauge. There is greater room for interpretation when courts are operating within the standard. In this case, it may be that district courts have chosen to interpret *Scott* as narrowly as possible out of discomfort with the result.

Second, and perhaps more likely, district court judges may simply be applying *Scott* as the Supreme Court intended. The Supreme Court's decision may best be interpreted as confined to its facts rather than as a sweeping endorsement of summary judgment.[163] After setting out the usual standards for summary judgment, Justice Scalia emphasized that "[t]here is . . . an added wrinkle in this case: existence in the record of a videotape."[164] The majority's opinion focused so single-mindedly on the videotape that it is hard to read the opinion as applicable to anything but that unique kind of evidence. In fact, the Court held that its entire reason for reversing the court of appeals was the lower court's lack of reliance on the videotape: "The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."[165] Based on this interpretation, *Scott* should not be having an impact on the summary judgment rates of any cases other than those factually similar. Therefore, the finding that *Scott* is having no statistical impact on summary judgment rates for cases not citing *Scott* should not be surprising. The lack of impact may simply be explained by the fact that district court judges are applying *Scott* as it was meant to be applied.

161 *See, e.g.*, Weinstein, *supra* note 13, at 124.

162 *Id.*

163 By "sweeping" I mean even beyond the defense of summary judgment seen in the trilogy. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("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.'" (quoting FED. R. CIV. P. 1)).

164 Scott v. Harris, 550 U.S. 372, 378 (2007).

165 *Id.* at 380–81.

B. The Added Wrinkle

For cases actually citing *Scott*, the data suggest that *Scott* does lead to a decreased denial rate in summary judgment motions. It is important to note that this does not necessarily mean that cases that were being denied pre-*Scott* are now being granted. The data did not show a significant increase in granted rates. It is likely that these cases are simply spread out between the granted and mixed categories. However, *Scott* does seem to result in some claims being barred ultimately from a jury, whether through a granted or mixed result.

The data suggest that *Scott*'s impact is limited to cases that actually cite *Scott*. Therefore, it is useful to see exactly how judges are using *Scott*. The results imply that judges are largely confining *Scott* to cases that are factually similar.[166] However, judges are not solely citing *Scott* in cases that involve unique multimedia evidence. In fact, out of the 250 of the cases sampled citing *Scott*, only thirty-three of those dealt with videotape evidence.[167] These data suggest that district court judges are not limiting *Scott* only to its unique and controversial use of video evidence.[168] It has been broadened to extend to cases that deal with other factual similarities like excessive force and qualified immunity cases.[169] While the numbers on both sides of the case are not large enough to reach statistical significance, the percentages suggest possible trends going forward. Therefore, this section will focus on how district court judges are using *Scott* specifically with regard to video evidence.

Thirty-three cases citing *Scott* deal with video evidence, a shocking increase from the three cases seen pre-*Scott*.[170] There are several possible explanations for this large increase. One may be that as time passes more technology has become available for use in the courtroom.[171] While this may be a plausible explanation for cases a decade

166 While the results did show that *Scott* is being cited in cases that do not involve similar facts, regression analysis showed that judges were very unlikely to cite to *Scott* in cases categorized contracts, torts, and other. *See* discussion *supra* Part III. Judges were more likely to cite to *Scott* in cases categorized civil rights. *See* discussion *supra* Part III. Statistical significance in denial rates was not discoverable for each substantive area through regression analysis. At this point, the data shows that *Scott* has a statistical influence on denial rates. What substantive areas are affected is still unknown. *See* discussion *supra* Part III.

167 *See* discussion *supra* Part III.

168 *See* discussion *supra* Part I.C.

169 I only included cases in this study that cited *Scott* in the context of the summary judgment standard, not in the context of qualified immunity. *See supra* note 65.

170 *See* discussion *supra* Part III.

171 *See* Wasserman, *supra* note 14, at 614–19.

ago, this study examined a limited time frame. The availability of technology on police cars and in prison cells likely did not increase that much from 2006 to 2007. It is, however, still a viable explanation, especially when one considers the possibility that police departments have read *Scott* and decided to increase the use of video cameras to aid in future lawsuits.[172]

A more likely explanation is twofold: (1) parties are more likely to rely on multimedia evidence in support of their summary judgment motion; and (2) courts are more likely to examine and emphasize that evidence. With this decision, parties may be more likely to try and admit video- and audiotapes if they believe that the evidence weighs strongly in their favor.[173] In turn, courts may be more willing to examine video evidence. Even in *Scott*, the district court made no mention of the videotape in its analysis except to note that it existed.[174] The court instead focused on the testimony of the two parties, reading inferences toward Harris's version of the facts.[175] Post-*Scott*, it is hard to ignore the Supreme Court's strongly worded admonishment that courts are not to rely on "visible fiction."[176] As discussed previously, the most limiting interpretation of *Scott* confines the case to video evidence. While limited, the Supreme Court was clear that courts should examine videotape evidence as part of the summary judgment analysis. District courts appear to no longer be ignoring video evidence and at the least will view the tape. It is what they are doing with that viewing that is cause for concern.[177]

Next, I examined how the courts used the video evidence in the thirty-three cases citing *Scott* that dealt with video evidence. A review of the decisions showed that some courts did use the tapes to make what would be considered "value judgments," mainly within the context of reasonableness.[178] Other district judges used the video evi-

172 *See id.*

173 *See* Silbey, *supra* note 14, at 34–38.

174 *See* Harris v. Coweta County, No. 3:01-CV-148, 2003 WL 25419527, at *1 (N.D. Ga. Sept. 25, 2003).

175 *See id.* at *2.

176 Scott v. Harris, 550 U.S. 372, 380–81 (2007).

177 *See supra* notes 101–29 and accompanying text.

178 *See, e.g.*, Bates v. Arata, No. C 05-3383, 2008 WL 820578, at *9 (N.D. Cal. Mar. 26, 2008) (finding that the videotape displayed conduct that was "reasonable under the circumstances"); Ashbrook v. Boudinot, No. C2-06-140, 2007 WL 4270658, at *4 (S.D. Ohio Dec. 3, 2007) (finding that the suspect "veered dangerously" and the officer used "minimal force"); McCabe v. Macaulay, 515 F. Supp. 2d 944, 968 (N.D. Iowa 2007) (finding that the videotape showed plaintiffs were "fully compliant"); Miller v. Jensen, No. 06-CV-0328, 2007 WL 1574761, at *5 (N.D. Okla. May 29, 2007)

dence to establish only objective facts.[179] Assuming that the weight of literature discussing the harmful effects of "value judgments" is correct, this brief sample suggests that scholars should be rightly concerned about how video evidence is being used post-*Scott*. What, then, is the proper remedy?

These facts do not support a ban on all video evidence. In some cases, video evidence has been extremely helpful in establishing certain objective facts. For example, in one case, the district judge was able to see whether or not the police officer touched the plaintiff at all.[180] The videotape showed that the plaintiff had lied about the actions of the police officer.[181] This suggests that district court judges are not always swayed by video evidence and, in fact, can properly use it to weed out undeserving claims. While video proved to be too seductive for the Justices on the Supreme Court, who used the tape in *Scott* to establish more than just objective facts, it appears that video evidence is not necessarily too seductive. Judges can and have used it wisely, even in light of *Scott*.

But the warnings of some commentators are real.[182] While a complete ban on video evidence does not appear to be necessary, the data supports the admonishment to be cautious in these decisions. *Scott* has been used by many district court judges to make value judgments that should be left to the jury.[183] These judgments inevitably come in the context of particularly sticky areas like reasonableness and excessive force.[184] While the chase in *Scott* may have seemed like a "Hollywood-style car chase of the most frightening sort"[185] to Scalia, it might have appeared tamer to the members of a Georgia jury.[186] Indeed, two lower courts, both arguably closer to the community in Georgia than the Supreme Court, held that there was a genuine issue

("After viewing the three videotapes . . . the Court finds with little difficulty that Jensen's actions were objectively reasonable.").

179 *See, e.g.*, Jones v. Castro, No. SA-6-CA-846, 2007 WL 3396500, at *3 (W.D. Tex. Nov. 13, 2007) ("The videotape shows the officers restrained Jones, escorted him back to his cell, and *did not* punch, hit, kick, or otherwise assault Jones as he alleges."); Asociacion de Periodistas de P.R. v. Mueller, No. 06-1931, 2007 WL 5312566, at *6 (D.P.R. June 12, 2007) ("In the present case, however, Plaintiffs dispute the accuracy and authenticity of Defendants' DVD. We, therefore, base our discussion on Plaintiffs' version of the facts . . . ." (citation omitted)).

180 *See Jones*, 2007 WL 3396500, at *3.

181 *See id.*

182 *See supra* notes 101–29 and accompanying text.

183 *See supra* note 178 and accompanying text.

184 *See supra* note 178 and accompanying text.

185 *See* Scott v. Harris, 550 U.S. 372, 380 (2007).

186 *See id.* at 398–97 (Stevens, J., dissenting).

of material fact.[187] It appears that the troubling attitude of the *Scott* Court may have carried over to some district courts. In evaluating these cases, district court judges should be wary of the two potential traps identified by the literature: (1) treating video and audio evidence as disinterested and objective[188] and (2) making judgments that should be best left to the community because of the judge's own inherent biases about what may be reasonable (cognitive illiberalism).[189] It appears that some judges, along with the Supreme Court, have fallen into the first trap of summary judgment: "weigh[ing] conflicting evidence (the job of the jury)."[190]

CONCLUSION

Is the concern of scholars post-*Scott* warranted? In some ways, this study suggests that we need not sound the alarm. *Scott* itself has had little statistical impact on the rates of summary judgments. It appears that it has not had a general influence on all summary judgment rates. Within these results, it is important to note that this empirical study, while providing a useful first cut at the data, has limitations that should spark—not reduce—scholarly interest in the case. Most significantly, this study only examined published cases within the two years surrounding *Scott*. Because *Scott* is relatively new to summary judgment jurisprudence, its effects may not be seen until farther down the road. Additionally, the pre-*Scott* trend, which actually saw a reduction in granted rates and an increase in mixed rates, is deserving of more empirical analysis.

The data do suggest that *Scott* was the reason for decreased denial rates in cases that cited *Scott*. Further empirical work needs to be done to determine if this significance is true across all substantive areas of the law or only in certain ones. However, the results suggest that courts are more likely to cite *Scott* in cases that are factually similar. While there is not a statistically significant use of *Scott* for video evidence, the recent increase in the use of video and audio evidence post-*Scott* may be a reason not to dismiss *Scott* as an anomaly. If district courts are, as this study suggests, more willing to examine and emphasize video evidence post-*Scott*, then the practical effects on claims

187 *See* Harris v. Coweta County, 433 F.3d 807, 816 & n.11 (11th Cir. 2005); Harris v. Coweta County, No. 3:01-CV-148, 2003 WL 25419527, at *1–7 (N.D. Ga. Sept. 25, 2003).

188 *See supra* notes 101–20 and accompanying text.

189 *See supra* notes 121–29 and accompanying text.

190 *In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655 (7th Cir. 2002).

could be large. The results appear to support many scholars' concerns about the temptation of video evidence in the judge's chambers. The fact that some judges are indeed taking their cue from *Scott* and veering into what used to be a jury's role is cause for concern. While not significant yet, these preliminary results should caution judges to be cautious and mindful when reviewing certain hot evidence.

This Note provides the first empirical look at the impact of *Scott* on summary judgment motions. While limited, this study is a useful means of analysis that invites continued empirical data. Summary judgment is an important vehicle for promoting the efficiency of the federal court system. Because of the significant ramifications of a granted summary judgment motion, the line must be carefully drawn. It is in the examination of the cases at the margin, like *Scott v. Harris*, where this debate is most productive.