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# Twombly in Context: Why Federal Rule of Civil Procedure 4(B) Is Unconstitutional

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SYMPOSIUM ARTICLE

TWOMBLY IN CONTEXT: WHY FEDERAL RULE OF CIVIL  
PROCEDURE 4(B) IS UNCONSTITUTIONAL

*E. Donald Elliott\**

Abstract

Rule 4(b) of the Federal Rules of Civil Procedure delegates to private parties state authority to compel a person to appear and answer civil charges in court without any preliminary state review or screening for reasonableness. This is argued to be unconstitutional as a unreasonable seizure of the person, a deprivation of private property without due process, and a standardless delegation of state power to a private party with a financial interest.

The history of the writ of summons is reviewed. From the Founding until 1938, federal courts reviewed the grounds proposed for suit prior to service of a summons ordering someone to come to court to answer charges. It is argued that unless courts routinely award full economic costs after the fact to make someone whole who has been sued wrongfully, they must satisfy themselves in advance that there is a reasonable basis for suit before ordering the persons sued to appear and answer.

Rule 4(b) is argued to be unconstitutional as (1) a seizure of the person and property of the defendant without any attempt by the state to verify that it is reasonable to do so; (2) an unconstitutional deprivation of property without due process of law; (3) an unconstitutional delegation of state power to issue a court order to a private party with a financial interest, and (4) an unconstitutional repeal of a statute providing for judicial control over process without following constitutionally required procedures.

The policy issues are even clearer than the constitutional ones. The current practice of delegating government power to private parties with an interest in the outcome who do not pay the full social costs of their speculation creates incentives to over-supply litigation and to file strike suits. The Supreme Court decisions in *Iqbal* and *Twombly* correctly

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\* Professor (Adjunct) of Law, Yale Law School. I am grateful to Matthew Christensen, Yale Law School Class of 2012, for his excellent research assistance. An earlier version of this Article was presented at the Federalist Society's Litigation Practice Group Conference at the National Press Club in Washington, D.C. The Federalist Society, *Changing the Federal Rules of Civil Procedure: Has the Time Come?*, YOUTUBE (Dec. 9, 2010), <http://youtu.be/ZPsOcRf2zEk>. I also benefited from comments at workshops at the Arizona State University Sandra Day O'Connor College of Law and Yale Law School, and particularly the critical comments of my colleague and friend John Langbein. Of course, I alone am responsible for the errors that remain. Please direct any comments or questions to [e.donald.elliott@yale.edu](mailto:e.donald.elliott@yale.edu).

identified this problem, but they misdiagnosed it as lying in Rule 8 relating to general rules of pleading, rather than Rule 4 relating to the “right” of anyone to compel anyone to come to court about anything without any prior review by the court. A possible solution, the “Pre-Service Plausibility Determination,” is suggested based on the system of preliminary review before service that is followed in many other areas of domestic law as well as some other countries.

The issue of “reasonable but speculative” claims is also considered, and it is argued that the decision to allow such claims should not be delegated to plaintiff’s lawyers, but discovery to find missing link evidence should be allowed on a discretionary basis under Rule 27 at the expense of the plaintiff’s lawyer, who will benefit economically if the case is successful.

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*Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in.*

– Justices Stevens and Ginsburg, dissenting in *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 570, 575 (2007).

*Every reform, however necessary, will . . . be carried to an excess, that itself will need reforming.*

– Samuel Taylor Coleridge (1817)<sup>1</sup>

*In this country, the system of laws is such that a trial lawyer can say any damned thing in a claim letter—any fantasy, however fictitious—send it off, and next thing you know, you are shelling out time and money defending yourself against a fantasy. It is a nightmare, only it's real.*

– Ben Stein<sup>2</sup>

#### INTRODUCTION

Viewed from the standpoint of strategic incentives, Rule 4(b) is the foundation of the Federal Rules of Civil Procedure<sup>3</sup>: the state compels someone to appear in court and expend resources to move or answer without regard to the plausibility of the claims. Rule 4(b) is probably unconstitutional, but it is certainly bad policy and creates a distorted incentive structure. *Bell Atlantic Corp. v. Twombly*<sup>4</sup> represents a well-

1. SAMUEL TAYLOR COLERIDGE, *BIOGRAPHIA LITERARIA* 13 (George Sampson ed., Cambridge Univ. Press 1920) (1817); see also Judith Resnik, *Precluding Appeals*, 70 *CORNELL L. REV.* 603, 624 (1985) (“The history of procedure is a series of attempts to solve the problems created by the preceding generation’s procedural reforms.”).

2. Benjamin J. Stein, *Down in the Desert*, *THE AM. SPECTATOR* 59 (Feb. 2012), available at <http://spectator.org/archives/2012/02/22/down-in-the-desert>.

3. The Federal Rules of Civil Procedure became effective in 1938, and provided the first uniform system of civil procedure in the federal courts of law. See Michael C. Dorf, *Meet the New Federal Rules of Civil Procedure: Same as the Old Rules?*, *FINDLAW* (July 18, 2007), <http://writ.lp.findlaw.com/dorf/20070718.html> (“For most of American history, federal trial courts followed the same rules of procedure as the state courts in the states in which they sat. When most litigation was local, this made good sense. A lawyer practicing almost exclusively in North Carolina didn’t need to learn one set of rules for state court and a second for the rare occasions on which his clients ended up in federal court. He only needed to master the North Carolina rules. . . . By the Twentieth Century, however, the business and bar of the federal courts had become increasingly specialized and national. Lawyers who specialized in federal litigation wanted the ability to go into a federal courthouse anywhere in the country and use the same set of rules, rather than having to master the procedures of fifty different states. Thus, in the 1930s, Congress opted for inter-state uniformity over intra-state uniformity by enacting the Rules Enabling Act. In addition to favoring national practitioners, . . . the reforms of the Federal Rules . . . did away with many of the technicalities that existed under state rules . . .”).

4. 550 U.S. 544, 556 (2007) (requiring plaintiffs to plead sufficiently to show their claims are “plausible”).

intentioned but misdirected attempt by the U.S. Supreme Court to fix this fundamental problem in the incentives created by the Federal Rules, but it focuses in the wrong place. The problem is created pre-service and that is where it should be fixed.

This Article argues that Rule 4(b) is broken and proposes how to fix it. Part I explains the problem with Rule 4(b) and the distorted incentives that it creates. Part II develops the constitutional case against Rule 4(b). Finally, Part III suggests an alternative procedure to require magistrate judges to test the plausibility of claims pre-service.

### I. THE FATAL FLAW IN RULE 4(B)

The fundamental flaw in Rule 4(b) of the Federal Rules of Civil Procedure<sup>5</sup> is that it delegates governmental power to a private individual to compel another to appear and defend, at significant cost and inconvenience, without either a preliminary inquiry by a judge or magistrate judge that the imposition on the defendant is reasonable, or a reliable practice of assessing the full costs imposed without proper justification retroactively if it turns out that the interference with the time and money of the person sued was not reasonable. This delegation of state power to hale<sup>6</sup> people into court without safeguards is particularly anomalous because, as Judge Learned Hand famously reminded us, the greatest calamity that can befall a person, other than sickness or death, is to become involved in a lawsuit.<sup>7</sup>

The unsupervised power that Rule 4(b) delegates to private parties with a financial interest is incongruous. Many similar provisions under which the government summons someone to account for her actions are preceded by a preliminary judicial inquiry appropriate to the circumstances before the state intrudes on a person's most fundamental right: the right to be let alone.<sup>8</sup> For example, we require a preliminary judicial inquiry into the bona fides of claims before:

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5. FED. R. CIV. P. 4(b) ("If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant.").

6. The proper word is "hale," not "haul," see BLACK'S LAW DICTIONARY 781 (9th ed. 2009), although they have a common root in Middle English. See 7 THE OXFORD ENGLISH DICTIONARY 9 (2d ed. 1989).

7. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 105 (1926) ("[A]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.").

8. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The Framers] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."); see also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

- Issuing a warrant to search or seize;<sup>9</sup>
- Summoning someone to answer criminal charges;<sup>10</sup>
- Requiring someone to answer civil claims if brought *in forma pauperis*;<sup>11</sup>
- Requiring someone to answer civil claims that may be brought in retaliation for exercise of their First Amendment rights (a so-called “strategic lawsuit against public participation” (SLAPP));<sup>12</sup>
- Requiring someone to produce documents or testimony in response to a government inquiry;<sup>13</sup> and
- Requiring a government official to answer a petition for habeas corpus.<sup>14</sup>

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9. FED. R. CRIM. P. 41(d) (“Obtaining a Warrant. (1) In General. After receiving an affidavit or other information, a magistrate judge . . . must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device. (2) Requesting a Warrant in the Presence of a Judge. (A) Warrant on an Affidavit. *When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.*” (emphasis supplied)).

10. FED. R. CRIM. P. 9(a) (“The court must issue . . . at the government’s request, a summons . . . if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it.”).

11. 28 U.S.C. § 1915(e)(2)(B) (2006).

12. For a summary of a typical anti-SLAPP statute, see *Oasis W. Realty v. Goldman*, 250 P.3d 1115, 1120 (Cal. 2011):

Section 425.16, subdivision (b)(1), provides: “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. . . . Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.”

*Id.* (quoting *Navellier v. Sletten*, 52 P.3d 703, 708 (Cal. 2002)).

13. *United States v. Morton Salt Co.*, 338 U.S. 632, 653–54 (1950) (explaining that a court will enforce an administrative subpoena but only if reasonable).

14. For a typical rule, see, for example, C.D. CAL. R. CIV. P. 72-3.2:

The Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.

*Id.* The district court may enter an order for the summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . .” COMM. ON THE RULES OF PRACTICE AND

A preliminary determination by a judicial official reviewing the grounds for summoning someone to civil court is required by our long-standing American legal tradition dating back to the Founding,<sup>15</sup> as well as by the more recent “due process revolution.”<sup>16</sup> Rule 4 is an isolated relic of the New Deal penchant for delegating governmental power to private actors<sup>17</sup> that resulted from an unholy compromise between the drafters of the Rules and the practicing bar.<sup>18</sup> It is time to fix Rule 4 by requiring a magistrate judge or other judicial official to review the grounds proposed for suit before issuing an order of summons to determine that they are plausible enough to justify haling the persons named in the complaint into court to answer the charges. That is the central insight which the Supreme Court was moving toward in *Twombly*. Alternatively, if courts do not want to bother to assure themselves of the reasonableness of lawsuits before ordering people to spend time and resources answering them, we should routinely make whole those who are sued without sufficient justification by awarding the full costs imposed retroactively.<sup>19</sup>

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PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS 5 (1976). Summary dismissal is appropriate if the allegations in the petition are “vague [or] conclusory” or “palpably incredible” or “patently frivolous or false.” *Blackledge v. Allison*, 431 U.S. 63, 75–76 (1977) (quoting *Machibroda v. United States*, 368 U.S. 487, 495 (1962) (internal quotation marks omitted)); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 119 (1956)).

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

16. See *infra* Part II.C.

17. See Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 509–10 (2011) (“Although the propriety of the private exercise of public powers rarely has been litigated, the Supreme Court struggled with that question during the New Deal when Congress created a number of innovative governance structures combining public and private entities in an effort to end the Great Depression. Indeed, on several occasions, such as in *Carter v. Carter Coal* and in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated delegations in part because of the role accorded private parties.” (footnotes omitted)). For more general discussions of the issues raised by delegations of government functions to private actors, see generally PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* (2007); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

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

19. I have argued elsewhere that regulating by incentives is more efficient than by judicial command and control. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 326–34 (1986); E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487, 488–89 (1989). While I adhere to my view from a quarter century ago that incentive-based procedure would be a theoretical first-best solution, there appears to be no willingness on the part of either the judiciary or Congress to abandon the so-called “American Rule” and move to a loser-pays system; instead, our current legal culture regulates litigation behavior, if at all, by judicial command-and-control (aka “managerial judging” or judicial discretion). For example, I have argued that the courts could better regulate scientific evidence through a system of economic

The key concept now missing from Rule 4(b) is a requirement for a routine preliminary determination by the judiciary that the grounds proposed for a civil suit are sufficiently plausible that it is reasonable for the government to compel someone to come to court to answer. I call this a “Pre-Service Plausibility Determination” (PSPD) and argue that it is required by our Constitution and tradition as well as by good policy and common sense.

It has long been recognized that the most basic underpinning of due process is that “[t]he United States cannot . . . interfere with private rights, except for legitimate governmental purposes.”<sup>20</sup> But under the current version of Rule 4(b) courts make no attempt whatsoever to determine that “a legitimate governmental purpose” is served by requiring someone to appear and answer in a civil case unless it is brought *in forma pauperis*. The criminal rules, in contrast, already routinely require a PSPD—a probable cause determination “by the court” before an order of summons is issued requiring someone to answer charges.<sup>21</sup> In principle, there is little difference between the burdens that the government imposes on someone by issuing an order of summons requiring them to answer charges in a civil and a criminal case, although the ultimate consequences may be different.

However, like the fish that does not see the water that surrounds it,<sup>22</sup> most courts and commentators<sup>23</sup> have overlooked Rule 4 and the potential for abuse that it creates. Many casebooks and courses in civil procedure put great emphasis on the general rules of pleading under

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incentives rather than preliminary screening by judges. Elliott, *Toward Incentive-Based Procedure*, *supra*, at 488–89. Nonetheless, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–93 (1993), the Supreme Court imposed a system of preliminary screening by judges. The proposals in this Article should be regarded as a second-best approach, like *Daubert*, that moves in the right direction by improving the incentive structure of the litigation market in a way that is not only politically plausible because it is more consistent with our legal culture, but is also arguably constitutionally required.

20. *Sinking-Fund Cases*, 99 U.S. 700, 718–19 (1879) (“The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are . . . prohibited from depriving persons or corporations of property without due process of law.”).

21. FED. R. CRIM. P. 9(a) (“The court must issue . . . at the government’s request, a summons . . . if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it.”).

22. This metaphor has been attributed to the anthropologist Margaret Mead: “If a fish were to become an anthropologist, the last thing it would discover would be water.” See George Spindler & Louise Spindler, *Roger Harker and Schönhausen: From the Familiar to the Strange and Back Again*, in *DOING THE ETHNOGRAPHY OF SCHOOLING: EDUCATIONAL ANTHROPOLOGY IN ACTION* 20, 24 (George Spindler ed., 1982) (internal quotation marks omitted).

23. A notable exception is Professor Paul Carrington’s thoughtful article on Rule 4. Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733 (1988). However, Professor Carrington also focuses on the mechanics and consequences of service of process, and does not address the considerations raised in this Article.



Rule 8, and on motions to dismiss under Rule 12 but hardly mention Rule 4.<sup>24</sup> Those that do discuss Rule 4 focus almost entirely on the mechanics and territorial limits of service.<sup>25</sup> Scant attention is paid to the incentives that Rule 4 creates for nuisance settlements by requiring persons to expend resources to defend without a PSPD that it is reasonable to require them to do so.

The recent initiatives by the Supreme Court in *Twombly*<sup>26</sup> and *Ashcroft v. Iqbal*<sup>27</sup> to require that lawsuits be “plausible” have also wrongly focused on the general rules of pleading and motions to dismiss. Many of the problems in the American litigation system have their roots in Rule 4(b), and its state cognates, because that is where the principle is laid down that someone may use government power to impose costs on others regardless of the merit of their claims. This principle creates distorted incentives for rent-seeking<sup>28</sup> and nuisance litigation that should be fixed either by requiring a PSPD before the courts command someone to appear and answer, or by a more reliable system for reimbursing persons wrongfully sued for their full costs, including attorneys fees and the loss of their time after the fact.<sup>29</sup>

This Article argues that *Twombly* and its progeny are ultimately grounded in values of constitutional dimension, not merely optional constructions of the language of Rule 8(a)(2) requiring “a short and plain statement of the claim showing that the pleader is entitled to relief.” The *Twombly* Court put the problem succinctly: “[S]omething beyond the mere possibility of loss causation must be alleged, lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the

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24. See, e.g., SAMUEL ISSACHAROFF, CIVIL PROCEDURE 1–39 (2d ed. 2009). Following an introductory chapter on general concepts of due process, even Professor Samuel Issacharoff, one of the most thoughtful of modern proceduralists, jumps right into the general rules of pleading and Rule 12(b) motions to dismiss without even mentioning Rule 4. This is the conventional approach, but it overlooks the important incentive structure that is already established by Rule 4. The person being sued—now arbitrarily reclassified by the state as a “defendant”—must expend resources to convince the court that the charges against him are baseless.

25. See, e.g., BARBARA ALLEN BABCOCK ET AL., CIVIL PROCEDURE: CASES AND PROBLEMS 35–55 (4th ed. 2009).

26. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

27. 129 S. Ct. 1937 (2009).

28. See *infra* note 42 and accompanying text.

29. In theory, Rule 11 may provide such a remedy, but in practice it is rarely invoked, in large part because it is focused on “sanctions” (punishment) rather than “costs” (reimbursement). See Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523 (1984) (“Officials should create prices to compel decisionmakers to take into account the external costs of their acts, whereas officials should impose sanctions to deter people from doing what is wrong.”).

time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.”<sup>30</sup>

Motions to dismiss are decided too late to remedy the abuses at which *Twombly* and *Iqbal* were aimed. By the time that a motion to dismiss is granted, the persons sued have already been required to expend significant resources and thus the “*in terrorem* increment of the settlement value” has already occurred, although the extent varies depending on how much motions practice and discovery have been allowed. But filing a motion to dismiss does not stay discovery<sup>31</sup> or the huge costs<sup>32</sup> that it imposes. The Rules stipulate only that motions to dismiss “must be heard and decided before trial unless the court orders a deferral until trial.”<sup>33</sup> My personal experience as a litigator is that hundreds of thousands of dollars, and sometimes even millions, in defense costs can be incurred before judges rule on motions to dismiss.

A good illustration that even successful motions to dismiss are granted too late to prevent significant harm is *Ward v. Arm & Hammer*.<sup>34</sup> In that 2004 federal district court case, an inmate serving a long sentence in federal prison for selling crack cocaine sued a baking soda manufacturer for \$425 million for failing to warn on its package that it was illegal to use the product to make crack cocaine.<sup>35</sup> The federal district judge did eventually grant the defendant’s motion to dismiss, pointing out among other things that the inmate had been sentenced in 1995 but had waited until 2003 to file the case. Thus, the claim on its face was barred by the two-year statute of limitations.

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30. *Twombly*, 550 U.S. at 557–58 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (internal quotation marks omitted).

31. *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, No. 11-cv-01468-WJM-BNB, 2011 WL 4018207, at \*2 (D. Colo. Sept. 8, 2011) (“[*Twombly*] does not ‘erect an automatic, blanket prohibition on any and all discovery before an antitrust plaintiff’s complaint survives a motion to dismiss.’” (quoting *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417 WHA, 2007 WL 2127577, at \*4 (N.D. Cal. July 24, 2007))).

32. One study showed that for the years 2006–2008, companies paid an average per case discovery cost of \$621,880 to \$2,993,567. Lawyers for Civil Justice et al., Statement on Litigation Cost Survey of Major Companies App. 1 at 15 fig. 11 (2010), available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/33A2682A2D4EF700852577190060E4B5/\\$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement). Costs of this magnitude are not, however, typical of all cases. Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to The Markets in Legal Services and Legal Reform*, 39 B.C. L. REV 597 (1998) (“The recent studies of civil discovery . . . establish beyond any reasonable doubt that we have two very distinct worlds of civil discovery. These worlds involve different kinds of cases, financial stakes, contentiousness, complexity . . . . The ordinary cases, which represent the overwhelming number, pass through the courts relatively cheaply with few discovery problems. The high-stakes, high-conflict cases, in contrast, raise many more problems and involve much higher stakes.”).

33. FED. R. CIV. P. 12(j).

34. 341 F. Supp. 2d 499 (D.N.J. 2004).

35. *Id.* at 500.

Despite the tardy and patently implausible nature of the complaint, under the mandatory command of Rule 4(b), the summons and complaint were duly served on the defendants. The defendants were thus ordered in the name of the court to answer the patently implausible charges, and were thereby compelled to incur the time and expense of retaining counsel to move or answer frivolous charges. The case was filed December 18, 2003, but not dismissed until October 21, 2004, over ten months later. In the meantime, the defendant spent tens of thousands of dollars<sup>36</sup> to defend against a totally bogus claim.<sup>37</sup> Adding insult to injury, on December 15, 2004, the Third Circuit granted Mr. Ward's petition to appeal *in forma pauperis*,<sup>38</sup> thereby obliging the defendant to incur even more expense. But as Chief Justice Randy Shepard of the Indiana Supreme Court has cogently explained:

The parties who appear in our courts do so on an equal footing. For every citizen who files a frivolous pleading, there is a citizen who must spend money to respond. The threshold for frivolity should not be so low that it imposes a tax on responding parties, obligating them to spend money answering baseless claims as a way of encouraging others to be novel.<sup>39</sup>

If a claim is implausible under *Twombly*, as this one was, the defendants should not be ordered by the federal government to come to court and spend valuable time and money to answer it in the first place. Indeed, under the procedures in effect from the Founding until 1938, the defendant in *Ward v. Arm & Hammer* would not have been ordered by the government to answer such patently frivolous claims.<sup>40</sup> But today, because we lack a PSPD as a regular part of our civil procedure, a federal district court has no mechanism to decline to issue a court order to appear and defend at the request of anyone able to pay the filing fee,

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36. See Ted Frank, *Because We All Love Wacky Pro Se Suits: Ward v. Arm & Hammer, OVERLAWYERED* (Dec. 18, 2006), <http://overlawyered.com/2006/12/because-we-all-love-wacky-pro-se-suits-ward-v-arm-hammer> (“Church & Dwight Co., the makers of Arm & Hammer, was forced to retain Morgan, Lewis & Bockius to file multiple briefs in the federal court at not inconsiderable expense to rid itself of this nuisance suit.”).

37. Personal communication, outside counsel for Arm & Hammer, Apr. 23, 2012 (on file with author).

38. Motion for Leave to Proceed In Forma Pauperis, *Ward v. Arm & Hammer*, 341 F. Supp. 2d 499 (D.N.J. 2004) (No. 3:03-cv-06113-SRC-TJB), available at <http://www.overlawyered.com/cases/ward/wardifp.pdf>.

39. *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 154 (Ind. 1987) (Shepard, C.J., concurring).

40. See *infra* notes 104–05 and accompanying text on the discretion the clerk's office exercised prior to the current version of Rule 4 not to issue a summons if a long time had passed since the events.

no matter how frivolous or stale the charges.<sup>41</sup> Today no government official even reads the complaint or asks any questions before issuing an official court order requiring the persons sued to report to court and to answer civil as opposed to criminal charges. Issuing a governmental order without any attention to its underlying justification is a blueprint that guarantees that some of the government's actions will be arbitrary. Moreover, it is an open invitation to rent-seeking—the private use of governmental power to extort economic value from others.<sup>42</sup>

In addition to providing a remedy that comes too late in the process, *Twombly* and *Iqbal* are misdirected because the mechanism of detailed fact pleading is ill-suited to the task of screening claims, as opposed to testing theories for legal sufficiency.<sup>43</sup> No one has yet shown that rules requiring more detailed fact pleading actually result in anything other than more detailed fact pleading.<sup>44</sup> A mechanism more tailored to the task of screening out cases that should not be served must be

41. See *infra* notes 72–77 and accompanying text on the “ministerial” and non-discretionary nature of current Rule 4(b).

42. See David R. Henderson, *Rent Seeking*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 445, 445 (David R. Henderson ed., 2008) (“‘Rent seeking’ is one of the most important insights in the last fifty years of economics . . . . The idea is simple but powerful. People are said to seek rents when they try to obtain benefits for themselves through the political arena.”).

43. See *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a claim *on the basis of a dispositive issue of law . . .*” (emphasis added)).

44. Professor Robert G. Bone’s otherwise excellent analysis of the economics of civil procedure suffers by assuming that detailed fact pleading will screen out baseless cases. See ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 125–57 (2003); *id.* at 126 (“One advantage of using detailed pleading requirements to screen frivolous suits is that pleading operates as a gatekeeper.”); see also Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) (analyzing more stringent pleading requirements).

It has never been demonstrated that detailed pleading requirements actually “screen” cases to any significant degree. It is equally plausible that clever lawyers will file most of the same cases anyway, merely pleading them in more detail. This is borne out by a study by the Federal Judicial Center of motions to dismiss after *Twombly* and *Iqbal*, which found more motions to dismiss were made but leave to amend was generally granted, resulting merely in more detailed pleadings. JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 8–16 (2011); see also Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (reporting that pleading-stage dismissals have increased after *Twombly* and *Iqbal* from forty-six to fifty-six percent). However, such short-term effects to rule changes tend to equilibrate as lawyers adapt their strategies to the new rules. See Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 67, 68, 77, 105 (1994); see also Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1291–92, 1297–98 (1990) (arguing the dynamic game theory models are inherently superior to static microeconomic models for understanding law because players can adjust their strategies as rules change).

developed.<sup>45</sup> In appropriate cases, this preliminary process of screening complaints before service could include a checklist regarding key evidentiary support, as well as a conversation by judges or magistrate judges with the plaintiff's lawyer in which probing questions could be asked about what evidence is available to support certain key allegations or legal theories. I call these inquisitorial procedures by the judge or magistrate judge before the adversary process begins "Pre-Service Plausibility Determinations." They would be a return to our historical practice, as well as our current practice in many other areas of our law, in which the plaintiff's lawyer appears in court to convince a judge or magistrate judge that the state should summon the persons that he wants to sue to answer his charges. It wasn't until 1938, in the Federal Rules of Civil Procedure, that federal law first granted an absolute "right" to a private citizen to commandeer the power of the state to order someone else into federal court.

This strange departure from our usual approach of requiring safeguards against abuse of governmental power is sometimes justified by positing that the person suing is a "rights seeker,"<sup>46</sup> but the person being sued is also a "rights seeker": they just have different visions of their respective rights. A plaintiff's alleged positive "right" almost always comes at the cost of curtailing the defendant's reciprocal

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45. See *infra* Part III for a description of the preliminary processes that should be incorporated into Rule 4 to screen claims before they are served—the "Pre-Service Plausibility Determination." They differ from fact pleading in that, in appropriate circumstances, the court should ask questions, rather than being bound by the assumption that the factual allegations of the complaint are true even if implausible and unsubstantiated. Cf. FED. R. CRIM. P. 41(d)(2)(A) ("When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.").

In an early article after *Twombly*, Professor Richard Epstein recognized that the "plausibility" standard inherently involves factual inquiry and thereby elides the traditional distinctions between motions to dismiss and motions for summary judgment. See Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 72, 80 (2007). Epstein has subsequently proposed a system in which judges would reevaluate on an ongoing basis throughout the course of a case whether the case is strong enough to go to the next stage. See Richard A. Epstein, *Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 205–07 (2011). I regard my suggestion for a Pre-Service Plausibility Determination as in the same spirit.

46. See, e.g., Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2179 (1989) (citing Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 500 (1986); see also Robert L. Carter, *Civil Procedure as a Vindicator of Civil Rights: The Relevance of Conley v. Gibson in the Era of Plausibility Pleading*, 52 HOW. L.J. 17 (2008) (discussing the viability of civil procedure as an aid to civil rights claims in light of the trend toward plausibility pleading).

negative “right” to liberty and freedom of action.<sup>47</sup> For example, in the recent case of *Wal-Mart Stores v. Dukes*,<sup>48</sup> the defendant was seeking the “right” of management to continue to give local store managers substantial discretion over the pay and promotions of the employees that they supervise, while the plaintiffs maintained that this policy discriminated against women.<sup>49</sup> Both were “rights seekers” but of opposing reciprocal rights and the courts have to strike the right balance between them. The government has an obligation of constitutional dimension to treat both kinds of “rights seekers” neutrally unless and until it determines that there is a reasonable basis to favor the claims of one over the other.

The bizarre, albeit now familiar, governmental practice of issuing official court orders based solely upon the unverified claims of persons who wish to sue is an open invitation to abuse. It is costly to answer charges, even if they are baseless and are ultimately dismissed, as illustrated by *Ward v. Arm & Hammer*. The problem is exacerbated because in America—unlike most of the rest of the world<sup>50</sup>—courts almost never impose the full economic costs including attorneys fees and compensation for lost time on losing parties in litigation.<sup>51</sup> Thus,

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47. See generally PHILIP K. HOWARD, LIFE WITHOUT LAWYERS: LIBERATING AMERICANS FROM TOO MUCH LAW 11–12 (2009) (“The idea of freedom as personal power has been pushed aside in recent decades by a new idea of freedom—where the focus is on the rights of whoever might disagree with a decision.”).

48. *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (U.S. June 20, 2011), available at <http://www.supremecourt.gov/opinions/10pdf/10-277.pdf>.

49. *Id.* slip op. at 2, 4.

50. “In almost all other countries, except Japan and China, the winning party, whether plaintiff or defendant recovers at least a substantial portion of litigation costs.” AM. LAW INST. & INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 7 (2006).

51. Confusion may be created by Rule 54(d), which states that “Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.” However, the seemingly broad principle of Rule 54(d) is limited by 28 U.S.C. § 1920 which restricts “taxable costs” actually awarded in litigation to only a few minor items such as filing fees:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

someone can sue, whether or not they have a reasonable basis, and thereby impose substantial costs in terms of money and time on others with little or no risk that they will ever have to reimburse those injured by their actions. This is unfair, as well as an open invitation to strike suit arbitrage,<sup>52</sup> and it never should have happened. But today the problem is much more intense than it was in 1938 because of the changing nature of federal litigation and the mushrooming costs of discovery, particularly in complex cases.<sup>53</sup>

The pivotal wrong turn in our law to hand over to private parties with a financial interest in coercing settlements the state's power to summon people to court was wrought in 1938 by what purported to be a merely technical change in an obscure rule governing service of process.<sup>54</sup> In fact, however, the 1938 change in Rule 4 was a fundamental policy shift that quietly gutted statutes that had been passed by the First Congress in 1789 and made permanent by the Second Congress in 1792 to maintain judicial control over the power to issue writs, including the writ of summons to appear in a civil case.<sup>55</sup>

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*Id.* Thus the “taxable costs” actually awarded under Rule 54(d) do not include the overwhelming majority of the actual economic costs incurred in litigation, including the time and money spent complying with discovery, and attorneys fees. *See generally* Ayeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975) (adhering to the general “American rule” that attorneys fees are not awarded to the prevailing party absent a specific statute); Mary Jo Hudson, Comment, *Expert Witness Fees as Taxable Costs in Federal Courts—The Exceptions and the Rule*, 55 U. CIN. L. REV. 1207, 1210 (1987) (“Throughout the history of the federal courts, the norm of taxing costs has been to limit the award of litigation expenses. This norm [is] commonly known as the American Rule.”). Thus, taxable costs actually awarded to prevailing parties absent a statutory exception typically fall far short of the full actual full economic costs contemplated by this Article as necessary to make someone whole for being sued wrongfully.

52. For a definition, see *infra* note 236 and accompanying text.

53. When the rules were adopted in 1938, most cases involved simple historical facts, such as an automobile accident, for which discovery was self-limited by the nature of the facts in controversy. Moreover, costly discovery of documents was only by leave of court until 1970. Today, however, many cases in federal court are structural reform litigations in which extensive and costly discovery is virtually automatic. *See supra* note 33. As a result of these changes in the background, the costs of requiring someone to appear and answer, which may have appeared *de minimis* in 1938, have grown to be substantial in many cases.

54. *See infra* Part II.A discussing the drafting history of Rule 4.

55. *See infra* notes 94–101 and accompanying text discussing the Judiciary Act of 1789 and the Process Act of 1792. Process Act of 1792, ch. 36, § 1, 1 Stat. 275 (1789) (“[A]ll writs and processes issuing from the supreme or a circuit court, shall bear test of the chief justice of the supreme court (or if that office shall be vacant) of the associate justice next in precedence; and all writs and processes issuing from a district court, shall bear test of the judge of such court (or if that office shall be vacant) of the clerk thereof, which said writs and processes shall be under the seal of the court from whence they issue, and signed by the clerk thereof.”). This followed verbatim in relevant part a statute enacted on a temporary basis by the First Congress. Process Act of 1789, ch. 21, § 1, 1 Stat. 93 (1789). *See* Middleton Paper Co. v. Rock River Paper Co., 19 F. 252, 253–54 (C.C.W.D. Wis. 1884) (“The summons, notice, writ, or whatever it may be called, by virtue of which a defendant is required to come into court and answer,

Some might object that returning to the pre-1938 practice of preliminary review before issuing process is too fundamental a change to consider. But preliminary judicial screening to weed out “junk lawsuits” is no more politically implausible today than judicial screening to weed out “junk science” seemed only a few years ago prior to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>56</sup> while imposing full costs retroactively is arguably inconsistent with the American legal culture.<sup>57</sup> At base, the argument against screening cases by imposing full costs retroactively is that the *in terrorem* effect of self-executing threats of economic consequences will over-deter some cases that should be brought to the overall detriment of society.<sup>58</sup> A PSPD by the judiciary, on the other hand, has the advantages that it is not economically punitive on either plaintiffs or defendants and that it is transparent. Judges must make and justify openly a determination that the claims are so implausible that the likely social benefit of allowing the case to go forward is not worth the cost, and this ruling is ultimately subject to the safeguard of review on appeal if trial judges deny the right to go forward. A PSPD is analogous to the existing requirement that a judge must restrict discovery if the likely benefits are outweighed by the costs,<sup>59</sup> or a decision by the Supreme Court to deny a request to issue a

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litigate his rights, and submit to the personal judgment of the court, must be ‘*process* within the meaning of the law of congress’ . . . is to be issued by the clerk of this court, under the seal of the court and *tested* in the name of the chief justice of the United States. . . . *It is no doubt the policy of the law to keep process under the immediate supervision and control of the court.*” (emphasis added)).

56. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

57. From 1983 to 1993, the Federal Rules of Civil Procedure experimented with mandatory imposition of sanctions under Rule 11. Most commentators agree that this experiment with mandatory financial sanctions for frivolous cases and motions was a disaster, see William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988), and therefore anything like it is unlikely to be tried again soon. There is, however, an important conceptual difference between costs for consuming resources and sanctions as punishment. See Cooter, *supra* note 29. The distinction is often overlooked by judges who tend to equate the two. See, e.g., *infra* note 153.

58. “Sometimes there are reasons to sue even when one cannot win . . . . The first attorney to challenge *Plessy v. Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v. Board of Education*.” *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 575 (E.D.N.Y. 1986). I agree with the first part, but not the second. Claims are not frivolous merely because they advance an “argument for extending, modifying, or reversing existing law or for establishing new law.” FED. R. CIV. P. 11(b)(2). But the rhetoric is symptomatic of a concern about over-detering claims worth hearing that is prevalent in our legal culture. It does not follow, however, that the decision of what arguments for changes to existing law should take up the time of others should be delegated without judicial supervision to plaintiffs’ lawyers with a financial stake in the outcome. See *infra* Part II.

59. FED. R. CIV. P. 26(b)(2)(C)(iii) (“On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the



writ of certiorari to decide an issue that someone would like the Court to decide. We all understand why the Supreme Court's resources should not be wasted on cases that are not worth its time, but we have a blind spot when it comes to wasting the time and money of the persons sued in ordinary civil cases.

American judges and magistrate judges routinely screen many other kinds of requests for judicial orders for reasonableness before imposing burdens on private citizens in the name of the judiciary.<sup>60</sup> Reinstating judicial screening to prevent service of "junk complaints" by PSPDs in all civil cases, not just those brought *in forma pauperis*, would not be judicial activism, but rather a return to our long-standing Anglo-American traditions and the original understanding and practices of the Founders from which we have unwisely deviated. Moreover, it is unfair and humiliating to subject poor people to pre-service review of their lawsuits but exempt those wealthy enough to pay a filing fee.<sup>61</sup>

The root of the incentive structure about which the *Twombly* Court rightly complained is not in Rule 8 regarding pleadings, but in Rule 4 regarding automatic and unthinking issuance of a court order to appear and defend. Rule 4 is what requires the person sued to expend resources regardless of the merits of the claim. Contrary to our long-standing traditions, Rule 4 now takes the judge completely out of the loop. The plaintiff's lawyer now controls who is ordered by the court to appear to answer charges in a civil case. Thereby, Rule 4 strikes a fundamentally unfair and unconstitutional imbalance between the rights of persons who wish to sue and the rights of the persons whom someone wishes to sue. The state imposes substantial burdens on the latter based only on the unverified say-so of the former. But both are entitled to equal dignity before the law. The fundamental constitutional norm of state neutrality unless and until a reasonable basis is shown to distinguish among classes of citizens requires that the judiciary conduct a PSPD, a reasonable inquiry into the bona fides of a proposed lawsuit, before it disrupts someone's right to be left alone. This is particularly true because the chances that anyone will actually be made whole afterwards if they are wrongfully sued are vanishingly small in our current system.

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importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.").

60. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 652–53 (1950) (explaining that a court will enforce an administrative subpoena but only if reasonable).

61. See Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 *FORDHAM L. REV.* 413, 414 (1985), available at <http://ir.lawnet.fordham.edu/flr/vol54/iss3/3> (noting the anomaly that "can an in forma pauperis complaint be dismissed even though an identical paid complaint cannot be similarly dismissed?" but ultimately concluding that the difference in treatment is constitutional because wealth is not a suspect classification).

This Article makes the case that Civil Rule 4(b) is unconstitutional,<sup>62</sup> but the policy issues are even clearer and more important than the constitutional ones. Even if Rule 4(b) isn't technically unconstitutional, at least not in Justice Oliver Wendell Holmes' sense of a bloodless prediction of "what the courts will do in fact,"<sup>63</sup> it certainly *should* be unconstitutional. Fundamental norms in our law underlying several different constitutional provisions all dictate that the court should conduct an appropriate preliminary inquiry into the bona fides of claims that one citizen wishes to bring against another to determine that they are reasonably well-founded before the state imposes the burden of requiring those whom someone wishes to sue to expend resources to respond. It is important to locate the current debate about *Twombly* and *Iqbal* within this broader context of our constitutional values and traditions, which to date have generally been overlooked.<sup>64</sup>

Rule 4(b) is also badly out of step with what came afterwards in constitutional law, as well as with long-standing Anglo-American tradition. In the years since 1938, Rule 4(b)'s approach of empowering creditors to commandeer state power to impose burdens on alleged debtors without appropriate due process protections has been repeatedly repudiated by a long line of Supreme Court cases.<sup>65</sup> Rule 4(b) was drafted before this "due process revolution" of the 1970s recognized

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62. There are undoubtedly rejoinders to many of the constitutional arguments that I propose, but I will leave them to others. This is not only because the length of this Article already strains the patience of law review editors, but because my primary purpose is to locate *Twombly* within the context of history and values of constitutional dimension, and also to suggest that the problem of distorted incentives is better solved by Pre-Service Plausibility Determinations by the judiciary than by enhanced pleading requirements and motions to dismiss.

63. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

64. For example, a distinguished proceduralist, Professor Arthur R. Miller, has recently published a long and impassioned defense of keeping the courts open to all comers no matter how unreasonable and unsupportable their charges may be, based primarily on the history of the Federal Rules. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 3, 5, 127 (2010). Miller's historical focus overlooks the fundamental countervailing constitutional principles of privacy (about which he has been passionate in other contexts) and that the state may not arbitrarily favor one group of citizens over another without a reasonable basis for doing so. Cf. Holmes, *supra* note 52, at 469 ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."). Moreover, according to Miller, history apparently began in 1938 with the adoption of the Federal Rules of Civil Procedure. In fact, however, on this point the Federal Rules were a sharp and unwise departure from our long tradition that persons sued were also entitled to reasonable protection against an unwarranted invasion of their privacy. See *infra* Part II.B.

65. See *infra* Part II.C.

that the state has obligations to conduct an inquiry, appropriate to the circumstances, *before* imposing burdens on alleged debtors.<sup>66</sup> However, Rule 4's delegation of unsupervised power to creditors to impose substantial costs on alleged debtors without any quality control by the state has never been seriously reexamined in light of these subsequent constitutional developments.

This Article uses the term "alleged debtor" or "person someone wants to sue" rather than "defendant" advisedly in an attempt to liberate the reader from the social construction—dare I say, "narrative"—prevalent in our culture that "defendants" are always unscrupulous corporations and "plaintiffs" are all sick, impoverished, or injured workers or consumers who are seeking justice.<sup>67</sup> The defining feature of procedure is its potential for reciprocal application. Evil corporations may also sue crusading scientists to coerce their silence.<sup>68</sup> One cannot legitimately design rules of civil procedure by quietly assuming that plaintiffs are always the good guys and defendants are always the bad guys.<sup>69</sup>

Rule 4(b) is indefensible as a matter of public policy and the public policy issues are even more important and clear-cut than the constitutional legalisms. Rule 4 not only allows unjustified impositions on individuals without a rational justification; at a systemic level, it creates economic incentives to oversupply litigation by encouraging the filing of cases that are not cost-justified by either their probability of success or their potential to develop law or facts in a socially useful way. The policy and constitutional issues are particularly serious when private parties with a financial stake in the outcome are empowered by the state to impose substantial costs on others that are not justified under existing facts or law in the hope that something may turn up. For this narrow category of cases, the "reasonable but speculative" cases, I suggest not only that a preliminary determination of reasonableness by government should be required, but also that the lawyer bringing the

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66. See, e.g., *Connecticut v. Doehr*, 501 U.S. 1, 4 (1991) (holding that the prejudgment attachment of real property without prior notice and hearing, exigent circumstances, or requirement to post a bond violates 14th Amendment due process); see also *infra* Part II.C.

67. See, e.g., BARBARA ALLEN BABCOCK ET AL., *supra* note 25, at 475 ("[T]he Rules transferred power, in the form of access to information, from corporate defendants to individual plaintiffs."); PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985) (detailing an asbestos company's response to thousands of lawsuits brought by injured workers).

68. See THOMAS O. MCGARITY & WENDY E. WAGNER, *BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* 157–59 (2008).

69. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant.").

case should also generally be required to pay for the costs of a venture from which he or she will profit if successful.<sup>70</sup>

## II. RULE 4(B) UNCONSTITUTIONALLY DELEGATES STATE POWER

Rule 4(b) of the Federal Rules of Civil Procedure delegates to any person in the United States (not only attorneys as officers of the court), without any judicial supervision whatsoever, the inherently governmental power to require any other person to stop whatever they are doing and appear in court upon pain of substantial financial penalties. Incredibly, this fearsome state power to summon any person to court to answer for anything upon threat of harsh financial penalties may be exercised merely by filling in three pieces of information on a government form: the plaintiff's (or her attorney's) name and address, and the defendant's name.<sup>71</sup> There is no reference at all in the current Rule 4 to the plausibility or legal sufficiency of the allegations of the complaint, nor is there any regular process for determining whether the grounds for suit are minimally sufficient on either the law or the facts. On the contrary, Rule 4(b) requires that the Clerk of Court "must" issue a summons, an official court order requiring the defendant to appear and answer upon pain of default, if two names and one address are filled in on a printed form that is available in the clerk's office and a minimal filing fee (currently \$350)<sup>72</sup> is paid: "*If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant.*"<sup>73</sup>

This is not a drafting glitch. Both the courts and the commentators agree that under current law, issuing the summons is a purely ministerial act by the clerk's office that has no discretion to refuse to issue the summons.<sup>74</sup> The government takes the plaintiff at its word and

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70. See *infra* Part III.

71. FED. R. CIV. P. 4(a)(1) (requiring that a summons "be directed to the defendant" and "state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff").

72. From an incentive-based perspective, one of the problems with the filing fee is that there is no marginal cost for adding additional defendants (beyond the minimal cost for service). Therefore, it should not come as a surprise that some defendants are named who have little or nothing to do with the matter. It costs the plaintiffs' lawyer merely the nominal cost of service of process to name additional defendants, but many of them can be expected to pay nuisance value to settle.

73. FED. R. CIV. P. 4(b) (emphasis added).

74. *Bauers v. Heisel*, 361 F.2d 581, 595 n.3 (3d Cir. 1966); 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1084 (2d ed. 1987) ("[The current rule] . . . makes it clear that the only formal requirement for the issuance of a summons is the filing of a valid complaint."). The use of the word "valid" before the word "complaint" in the Wright and Miller treatise might be read to suggest that there is discretion under the existing rule for the clerk's office to decline to issue a summons if it determines that the complaint is palpably deficient. While that is the result for which this Article argues, both the language of the present rule and the case law construing it would make it difficult to accomplish this result

automatically and without the regular exercise<sup>75</sup> of any government review or discretion issues a court order summoning the person designated by the plaintiff to expend his resources to answer.

As shown in the official appendix of forms, the federal form of summons used in every federal district court today says:

**Form 3. Summons.**

(Caption – See Form 1.)

To name the defendant:

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, \_\_\_\_\_, whose address is \_\_\_\_\_. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date \_\_\_\_\_

\_\_\_\_\_  
Clerk of Court

(Court Seal)

The form summons is an official order from the court that states specifically that the defendant “must” answer the complaint. To emphasize its official character, it is signed by the Clerk of Court, a federal official, and bears the official seal of the court.<sup>76</sup> It also makes a stern threat that the government will impose financial sanctions if the recipient disobeys (“judgment by default will be entered against you for the relief demanded in the complaint”).<sup>77</sup>

Most American lawyers are so used to this system that it seems natural, and they take it for granted. One enlightened exception, however, is Philip K. Howard, who rightly points out that “[s]uing . . . is a use of government power against another free citizen . . . . Being sued

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without a rule change. *But cf.* Mitchell v. Beaubouef, 581 F.2d 412, 414–15 (5th Cir. 1978) (holding that process must be served on the defendant where a prisoner’s pro se complaint is deemed legally sufficient under the liberal standard appropriate to pro se prisoner litigation).

75. See *infra* Part III for a discussion of 28 U.S.C. § 1915(e), under which cases brought *in forma pauperis* are singled out for sua sponte review before service of process; see also Neitzke v. Williams, 490 U.S. 319 (7th Cir. 1989).

76. The sign and seal are essential. Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, 569–70 (3d Cir. 1996) (“Requiring the Clerk to sign and issue the summons assures the defendant that the process is valid . . . . [A] summons not issued and signed by the Clerk with the seal of the court affixed thereto fails to confer personal jurisdiction over a defendant even if properly served.”); accord 2 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 4.05 (2d ed. 1996) (“Under Rule 4(b) only the clerk may issue the summons . . . . [A] summons issued by the plaintiff’s attorney is a nullity.”); 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1084 (2d ed. 1987).

77. FED. R. CIV. P. Form 3 app. at 100.

is like being indicted for a crime, except that the penalty is money. Today in America, however, we let any self-interested person use that power without any significant check.”<sup>78</sup>

Once that undeniable reality is made visible and we see the current Rule 4 system for what it is, we should recoil in horror and recognize that this practice, although so familiar in our legal culture that we may hardly be aware of it,<sup>79</sup> is completely contrary to our constitutional traditions and values. The federal government is *commanding*<sup>80</sup> someone to appear in court based merely on a form being “properly completed” with names and addresses by a private party. That is not the prevailing practice in most state courts, where the service of a summons is not a court order but a private act by the plaintiff’s lawyer with no compulsory legal force or effect until a judge later decides whether to grant a default judgment based on the law and the facts.<sup>81</sup> The federal

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78. Philip K. Howard, *There Is No “Right to Sue,”* WALL ST. J., July 31, 2002, <http://online.wsj.com/article/0,,SB102807662822805480,00.html>; see also WILLIAM A. ALDERSON, A PRACTICAL TREATISE UPON THE LAW OF JUDICIAL WRITS AND PROCESS IN CIVIL AND CRIMINAL CASES 9 (1895) (“[S]ummoning the party to answer to a complaint and enforcing a judgment were originally private acts, which were not authorized but only permitted by the state. Progress in the modes of judicial procedure resulted in rendering such acts those of the state, and the issuing and execution of all writs and process are now the exercise of state powers. This fact is important to remember in determining the validity of writs and process and the acts of the officer performed in executing them. Courts have too often been forgetful of this fact, which should constitute the premise of the argument, and have pronounced upon such matters as though the state had no concern therein.”); Philip K. Howard, *Making Civil Justice Sane: Judges Should Stop Unreasonable Lawsuits Before They Start*, CITY J., Spring 2006, <http://www.city-journal.org/printable.php?id=1989> (“Juries in a criminal case are our protection against abuses of state power. But a private lawsuit, we seem to have forgotten, is a use of state power against another private citizen. Filing a lawsuit is just like indicting someone—it’s just an indictment for money. Without the protection of a disinterested prosecutor and a grand jury, the defendant needs the protection of the judge to decide whether the claim has legal merit, leaving the jury to decide disputed facts.”).

79. It is a commonplace in cultural anthropology that a “culture” consists of those things that the people in it do not see because they take those things for granted. LUCILA L. SALCEDO ET AL., SOCIAL ISSUES 12 (1999) (“Culture also affects all the things that we take for granted and what we question.”); LARRY A. SAMOVAR & RICHARD E. PORTER, COMMUNICATION BETWEEN CULTURES 51 (1991) (“Culture is the collective programming of the mind which distinguishes the members of one category of people from another.” (quoting GEERT HOFSTEDE, NATIONAL CULTURES AND CORPORATE CULTURES (1984)) (internal quotation marks omitted)); EDGAR H. SCHEIN, THE CORPORATE CULTURE SURVIVAL GUIDE 19–20 (1999) (discussing shared mental models that members of an organization hold and take for granted).

80. William Feilden Craies, *Summons*, in 26 THE ENCYCLOPEDIA BRITANNICA 80 (11th ed. 1911) (defining a summons as “(1) a command by a superior authority to attend at a given time or place or to do some public duty; (2) a document containing such command, and not infrequently also expressing the consequences entailed by neglect to obey”); see also *Leas & McVitty v. Merriman*, 132 F. 510, 512 (C.C.W.D. Va. 1904) (distinguishing between a federal summons which orders the defendant to appear and summons in some states which merely provide notice of a claim but are not orders from the court to appear).

81. See *infra* notes 121–30 and accompanying text.

practice of ordering someone to court without any quality control is (1) an unwarranted departure from our historical tradition that a federal judge controls the basis upon which someone can be haled into court; (2) unconstitutional as an unreasonable seizure of the person of the alleged debtor; (3) a deprivation of private property without due process of law; and most clearly of all, (4) a standardless delegation of inherently governmental power to private individuals with a financial interest in misusing state power for their own private gain. For all of these reasons, Rule 4 should be revised to include a Pre-Service Plausibility Determination by the court prior to service of process, as is explained in the following Parts.

*A. Rule 4 Deviates from Our Historical Tradition that a Federal Judge Controls the Grounds upon Which Someone May Be Summoned by the Court*

Rule 4 is a sharp departure from our Anglo-American tradition that the court, not private parties, defines regular and predictable grounds upon which someone can be summoned by the government to answer at law.<sup>82</sup>

1. The Original Understanding of the Court Order of Summons

It was clearly established in both England<sup>83</sup> and the colonies<sup>84</sup> at the time of the Founding that common law courts had discretion to decline to issue a court order to summon the prospective defendant to court based on a pre-service review of the bona fides of the proposed lawsuit. As is described below, in the mid-nineteenth century, several states delegated the function of initiating a lawsuit to private lawyers<sup>85</sup> and the Federal Rules followed in 1938 by taking the court entirely out of the

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82. That the state must define reasonable and predictable grounds upon which someone may be held to account is arguably the core meaning of clause 39 of Magna Carta, upon which our concept of “due process of law” is based: “No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.” Magna Carta cl. 39 (1215), available at <http://avalon.law.yale.edu/medieval/magframe.asp> (last visited May 2, 2012).

83. An 1890 decision by the Queen’s Bench, *R v. Byrde*, [1890] 63 Q.B. 645, reiterates this long-standing understanding. “The justices may . . . in the exercise of their discretion refuse to issue a summons, even though there is evidence before them of an alleged indictable misdemeanour, if they consider that the issue of the summons would be vexatious or improper.” *Id.* at 647 (citing *R v. Ingham*, (1849) 14 Q.B. 396)). The *Byrde* case involved forfeiture of statutory penalties for failure to construct a reservoir in a timely manner and thus it is debatable whether it is properly classified as a criminal or civil case. *Id.* at 646–47. However, since the same writs were used to summon the prospective defendant, this distinction seems not to have mattered. *Id.*

84. See *infra* notes 87–88 and accompanying text (discussing the practice in colonial courts as described by Judge Betts in 1838).

85. See *infra* notes 122–30 and accompanying text.

loop.<sup>86</sup> The original understanding at the time of the Founding, however, was clearly that the court, not counsel, controlled whether to summon someone to answer a civil lawsuit.

According to a treatise written by federal district Judge Samuel Betts in the early nineteenth century, the practice in his court prior to the Revolution was for the plaintiff's lawyer to appear in open court and state her case orally to the judge, who would then decide whether to summon the person whom they wished to sue to answer.<sup>87</sup> But even after the oral testing of the request for a writ of summons in open court fell into desuetude, there were still substantial safeguards in the form of a discretionary decision by either a judge or the clerk's office, not the plaintiff or plaintiff's lawyer, that process was warranted:

*In some cases the judge still considers and determines preliminarily the right of the party to coercive process, and in others subrogates the clerk to that office. And in no instance is the actor permitted to use the process of the court to institute or forward an action at his own discretion, nor without placing on the files a justificatory document (Rule 2). . . . When no order of the judge is filed, the clerk examines carefully the case made by the libel and the prayer of process, and gives the party such process as his libel will justify. . . . Although the process issues thus by act of court, yet it is taken out by the actor at his risk and responsibility.<sup>88</sup>*

The key concept is not whether the preliminary screening before service was oral or written (although I argue later that oral is better, because it allows probing questions). The main point is that a private party was "in no instance" entitled to a summons "at his own discretion" as is now routine under Rule 4. Rather, as of 1838, either the judge or the clerk "examine[d] carefully" the filing, and only gave the party an order of summons to serve on the proposed defendant if it was justified.

While Judge Betts was writing a treatise about admiralty, he was a federal district judge sitting in general jurisdiction. Throughout his

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86. *See infra* notes 114–21 and accompanying text.

87. SAMUEL R. BETTS, A SUMMARY OF PRACTICE IN INSTANCE, REVENUE AND PRIZE CAUSES, IN THE ADMIRALTY COURTS OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK; AND ALSO ON APPEAL TO THE SUPREME COURT: TOGETHER WITH THE RULES OF THE DISTRICT COURT 23–24 (1838) ("In this district process emanates from the court correspondent to the libellant's case. The actual practice for a half century was to read the libel in open court, and thereupon pray and receive directions for the appropriate process. This direct agency of the court has been discontinued since the revolution, but the principle upon which the usage was founded, yet enters into and influences the practice.")

88. *Id.* (emphasis added).



treatise he routinely noted significant differences between the practices in ordinary civil cases as opposed to admiralty. No such differences are mentioned on this point, which strongly suggests that a similar practice, under which judges or the clerk's office exercised discretion before issuing a writ of summons, also applied in other civil cases. There is, moreover, no logical reason why the clerk's "duty" only to issue such process as was justified (as Judge Betts puts it) would be restricted to admiralty cases only.<sup>89</sup>

Similarly, another federal district judge, Alfred Conkling,<sup>90</sup> writing a generation later, shortly before the Civil War, also explained that either the judge or the clerk's office made a substantive review before granting a request for a writ of summons to compel someone to appear and answer. After quoting portions of the passage from Judge Betts also quoted above, that "[w]hen no order of the judge is filed, the clerk examines carefully the case made by the libel and the prayer of process, and gives the party such process as his libel will justify," Judge Conkling goes on to observe:

Such is the course of proceeding supposed to have been contemplated by the above recited [1844 Supreme Court admiralty] rule. Except in those cases which require the previous order of the court directing the issue of process, the mere delivery or transmission of the libel to the clerk is all that the rule requires. *But the duty thus imposed upon this officer demands vigilance and intelligence on his part; for he cannot lawfully issue any process, until, by an examination of the libel, he has ascertained that the matter of complaint is in its nature cognizable in a court of admiralty; that the libellant is, prima facie, entitled to redress, and that the particular form of process prayed for in the libel is adapted to the case.*<sup>91</sup>

Judge Conkling's statement is even stronger than Judge Betts': he maintains that examining and testing the complaint was not only the prevailing practice, but that it is legally required before the clerk may "lawfully issue" process and therefore that it must be read into the rules. In addition, Judge Conkling makes clear that the review before issuance

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89. See *Middleton Paper Co. v. Rock River Paper Co.*, 19 F. 252 (C.C.W.D. Wis. 1884), an ordinary, non-admiralty civil case between two paper companies involving garnishment of a debt, in which the court stated, "It is no doubt the policy of the law to keep process under the immediate supervision *and control of the court.*" *Id.* at 254 (emphasis added).

90. Conkling served as a federal district judge in the northern district of New York from 1825 to 1852. *History of the Federal Judiciary*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=490&cid=999&ctype=na&inststate=na> (last visited May 2, 2012).

91. 2 ALFRED CONKLING, *THE ADMIRALTY JURISDICTION, LAW AND PRACTICE OF THE COURTS OF THE UNITED STATES*, 71-72 (1857).

of the summons was not only for formal defects but must also to confirm that the person suing is “*prima facie* entitled to redress.”

This existing discretion to decline to issue a writ of summons was incorporated by reference into the procedures of the federal courts by the original 1789 Judiciary Act, which created the lower federal courts. Section 14 of the 1789 Judiciary Act authorized the federal courts to issue writs, including writs of summons, but only on terms “agreeable to the principles and usages of law.”<sup>92</sup> This was understood to mean “those general principles, and those general usages, which are to be found, not in the legislative acts of any particular state, but in that generally recognised and long established law, (the common law,) which forms the *substratum* of the laws of every state.”<sup>93</sup> In other words, existing English and colonial practice, including preliminary review of complaints for plausibility before issuance of summons, was incorporated by reference as a condition by the section of the Judiciary Act of 1789 that authorized federal courts to issue writs of summons in the first place.

But the First and Second Congresses were not content with this indirect reference to existing understandings and practices regarding pre-service review by the court of requests for summons. In the Process Act of 1792,<sup>94</sup> Congress specifically legislated that the federal judiciary must control the issuance of writs, including the writ of summons. On most procedural matters, the early Congresses simply mandated that the federal courts follow existing state procedures, but the founding generation thought this one thing important enough to impose it separately regardless of state practice: a federal judge had to “test” (certify) and the clerk had to sign every writ personally, not delegate that right to a plaintiff’s lawyer, even though that was already the practice in some state systems.<sup>95</sup> As one of their first acts establishing the federal courts, the First and Second Congresses enacted the

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92. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789) (“*And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*,(e) and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”).

93. THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A VIEW OF THE PRACTICE AND JURISDICTION OF THE COURTS OF THE UNITED STATES, AND OF CONSTITUTIONAL POINTS DECIDED 143 (2d ed. 1830).

94. Process Act of 1792, ch. 36, § 2, 1 Stat. 275 (1792).

95. *See* Dwight v. Merritt, 4 F. 614, 614–16 (C.C.S.D.N.Y. 1880) (holding that a summons issued by a lawyer pursuant to state practice is invalid to compel someone to answer in federal court).

following statute requiring all processes issued by district courts, including writs of summons, to “bear test of the judge.”<sup>96</sup>

## SECOND CONGRESS. SESS. I. CH. 35, 36. 1792.

CHAP. XXXVI.—*An Act for regulating Processes in the Courts of the United States, and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses.*(a)

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all writs and processes issuing from the supreme or a circuit court, shall bear test of the chief justice of the supreme court (or if that office shall be vacant) of the associate justice next in precedence; and all writs and processes issuing from a district court, shall bear test of the judge of such court (or if that office shall be vacant) of the clerk thereof, which said writs and processes shall be under the seal of the court from whence they issue, and signed by the clerk thereof. The seals shall be provided at the expense of the United States.

The statutory command of 1792 that the district judges “test” process before issuing writs gradually reified into a formal requirement to include a *teste*, an attestation clause witnessing the document.<sup>97</sup> But the statutory requirement that the judge sign off on process before it issued is still important,<sup>98</sup> just as signing a contract is important to signify that one has adopted its terms. The statutory requirement that the judge test and the clerk issue, seal, and sign means that issuing process, including a writ of summons, was a discretionary act by the United States,<sup>99</sup> and not a power granted to the plaintiff’s lawyer. The federal statute just cited was understood throughout the nineteenth and early

96. Process Act of 1792, ch. 36, § 1, 1 Stat. 275 (1792). This followed verbatim in relevant part a statute enacted on a temporary basis by the First Congress in 1789 a few months after ratification of the Constitution. Act of Sept. 29, 1789, ch. 21, § 1, 1 Stat. 93 (1789).

97. “The teste of a writ is the concluding clause, commencing with the word *witness*, &c.” 2 JOHN BOUVIER, LAW DICTIONARY 562 (2d ed. 1843).

98. ALDERSON, *supra* note 78, at 70 (“Once the seal was everything, the signature nothing. In modern times the signature is regarded at least as of much importance as the seal. . . . *The signature is independent evidence of the authorized delegation of the power of state in judicial proceedings.*” (emphasis added) (footnote omitted)); *see also* *Ins. Co. v. Hallock*, 73 U.S. (6 Wall.) 556, 558 (1868) (invalidating title to land purchased at sheriff’s sale because writ under which sale had been conducted had not been properly sealed); *Id.* at 561 (“Without the seal it is void. We cannot distinguish it from any other writ or process in this particular.”).

99. *See Middleton Paper Co. v. Rock River Paper Co.*, 19 F. 252, 253–54 (C.C.W.D. Wis. 1884) (“The summons, notice, writ, or whatever it may be called, by virtue of which a defendant is required to come into court and answer, litigate his rights, and submit to the personal judgment of the court, must be ‘process within the meaning of the law of congress’ and the rule of the court, which is to be issued by the clerk of this court, under the seal of the court and *tested* in the name of the chief justice of the United States. . . . *It is no doubt the policy of the law to keep process under the immediate supervision and control of the court.*” (third emphasis added)).

twentieth centuries to establish a federal policy to keep issuance of a summons to answer in court “under the immediate supervision and control of the court.”<sup>100</sup> The clear understanding from the Founding until 1938 was that federal judges and court clerks had a responsibility to satisfy themselves that it was reasonable to order the proposed defendant to come to court to answer before doing so.<sup>101</sup>

Sadly, however, some federal judges wanted to avoid what they evidently considered the tedious work of reviewing complaints before service. Without the modern institution of magistrate judges<sup>102</sup> to assist them, the review of complaints to determine whether writs of summons should issue was delegated to the clerk’s office and, because assistant court clerks (many of whom are not even lawyers) do not typically have the training or breadth of vision of federal district judges or magistrate judges, review of complaints before service gradually became more technical and formalistic, and less substantive. A treatise from 1895 devotes over sixty-four pages to considering various formal defects in issuing process, and whether they void the court’s jurisdiction, or are merely voidable, and hence subject to correction by amendment.<sup>103</sup>

One of the principal drafters of the Federal Rules of Civil Procedure, Professor Edson Sunderland, noted in a 1909 article that review by the clerk’s office was not limited to matters of form or whether proper allegations had been made in the complaint. Sunderland states, “[I]t is within the discretion of the court to allow or refuse the issuance of summons after a long delay.”<sup>104</sup> In other words, where it

100. *Id.* at 254 (emphasis added).

101. See W.S. SIMKINS, A FEDERAL SUIT AT LAW 22 (1912) (“Form of process for the commencement of suits is controlled by the conformity act, except as to the official signature, seal and test, which . . . is required to all writs and processes issuing from the courts of the United States. Congress having thus legislated as to the process, it must be followed, though the State law permitted an attorney to issue the summons.” (citations omitted)).

102. Congress created the system of magistrates (now called “Magistrate Judges”) in the Federal Magistrates Act of 1968, Pub. L. 90-578, 82 Stat. 1115 (1968), a generation after the Federal Rules. However, a system of “United States Commissioners” had existed since 1793 to try petty offenses, issue search and arrest warrants, set bail and the like. See *Landmark Judicial Legislation*, FED. JUD. CENTER, [http://www.fjc.gov/history/home.nsf/page/landmark\\_19.html](http://www.fjc.gov/history/home.nsf/page/landmark_19.html) (last visited May 2, 2012). Commissioners were limited by background and experience to criminal cases, *id.*, and there appears to be no evidence that the possibility of using commissioners or magistrate judges rather than assistant clerks to screen cases was considered by the drafters of Rule 4. Today, “[a]s a practical matter, the sub-judiciary has become indispensable. Federal judges likely could not manage their caseloads effectively without delegating some tasks to magistrates and special masters.” BARBARA ALLEN BABCOCK ET AL., *supra* note 25, at 683.

103. ALDERSON, *supra* note 78, at 23–88; see also Current Decisions, *Process—Amendment—Void Summons Not Amendable*, 32 YALE L. J. 297 (1923).

104. Edson R. Sunderland, *Process*, in 32 CYCLOPEDIA OF LAW AND PROCEDURE 412, 426 (William Mack ed., 1909) (citing *Steves v. Carson*, 40 P. 569 (Colo. 1895); *Reese v. Kirby*, 68 Ga. 825 (1882)).

was apparent from a preliminary review of the complaint that a long time had passed between the events forming the basis for suit and the filing of a case, courts in the nineteenth century and early twentieth century had clear discretion to refuse to issue a summons. That practice, which has now been “superseded,”<sup>105</sup> compares favorably with the case of *Ward v. Arm & Hammer*,<sup>106</sup> in which the clerk’s office, acting under the edict of “modern” Rule 4(b), mechanically issued a summons requiring a company to spend ten months defending against patently frivolous charges, despite it also being apparent on the face of the complaint that the statute of limitations had long since run.<sup>107</sup>

The practice of pre-service review of complaints described in the treatises is also confirmed by the few pre-1938 appellate decisions that discuss this issue. Historical records of the practices of courts in declining to issue writs of summons are not easily available. There would typically be no written record of these discretionary decisions by judges and clerks except in the rare instances in which a disappointed plaintiff whose papers had been rejected brought an appeal to a higher court and the appellate court wrote and published an opinion. Several such reported appellate decisions do confirm, however, that the prevailing practice prior to 1938 was for courts to reject requests for summons for a variety of deficiencies, both substantive and formal.

The 1913 decision by the First Circuit in *In re Kinney*<sup>108</sup> is illustrative. In that case, a prominent Pennsylvania inventor, investor and frequent pro se litigant brought a contract suit against a company in federal court in Massachusetts.<sup>109</sup> When his request for a writ of summons was rejected by the clerk of court, he requested the district judge to order the clerk to issue the summons. The district judge upheld the clerk’s refusal to issue the summons in an unpublished opinion. The disappointed litigant then attempted to mandamus the district judge in the First Circuit, which also denied his request for a summons, “because the proposed writs ‘were not made returnable at the proper return day.’”<sup>110</sup> However, the First Circuit’s opinion strongly suggests that there were additional, more substantive reasons as well as formal defects: “It is not necessary for us to examine the reasons given by the judge of the District Court beyond this, because this was a sufficient reason for his refusal.”<sup>111</sup>

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105. See *infra* notes 135–38 and accompanying text (describing how Rule 4 was claimed to supersede the 1792 Process Act).

106. 341 F. Supp. 2d 499 (D.N.J. 2004).

107. *Id.* at 500, 502 n.4; *supra* notes 25–37 and accompanying text.

108. 202 F. 137 (1st Cir. 1913).

109. For more information about the underlying dispute, see *Kinney v. Plymouth Rock Squab Co.*, 214 F. 766 (1st Cir. 1914). It appears that Kinney was a frequent litigant.

110. *Id.*

111. *Id.*

Another route by which the practice of the clerk's office in declining to issue summonses could come to light was if a disappointed litigant sued the clerk for damages. The 1905 case of *United States ex rel. Kinney v. Bell*<sup>112</sup> illustrates this route. In that case, the same pro se litigant referred to above, Robert D. Kinney, sued the clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania, and his sureties, on his bond for refusing to issue a summons in a case that Kinney desired to bring against several state court judges who had ruled against him. In this instance, the refusal by the clerk's office to issue a summons was clearly because of a substantive defect: lack of federal jurisdiction. The Third Circuit held that Kinney had not suffered any legal damage; the clerk had properly refused to issue a writ of summons because there was no colorable allegation of federal jurisdiction.<sup>113</sup>

## 2. The "Reforms" of 1938

The stern insistence in Rule 4 that the clerk "must" issue a court order to appear if a simple form is filled out correctly was no accident; it was an overreaction by the drafters in 1938 against the then-prevailing practice of assistant clerks rejecting complaints for a variety of formal defects. But Rule 4 threw out the baby with the bathwater by completely abrogating judicial control over the grounds for haling someone into court.

Charles E. Clark, then-Dean of the Yale Law School and the principal drafter of the Rules, wanted to go even further. He originally proposed "the New York system" in which private attorneys serve the complaint on prospective defendants and only thereafter file it with the court.<sup>114</sup> Dean Clark thought that this system "work[ed] quite satisfactorily," but according to him, the practicing bar objected that it "seemed undignified and over-simple."<sup>115</sup>

They called it the "hip pocket rule" in which attorneys could sue without filing anything with the court until later when some action was

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112. 135 F. 336 (3d Cir. 1905).

113. *Id.* at 339–40 ("The questions sought to be presented in this case relate to the interpretation to be given to a law of the state, and the complaint is that this law is being misinterpreted and misapplied, to the injury of the plaintiff in his rights of property. In all such cases, where there is not the requisite diverse citizenship and amount in controversy to give the court jurisdiction, the remedy for the injuries complained of is in the state courts.' As, then, the Circuit Court had no jurisdiction of the proposed action against the state judges, it follows that the use plaintiff, Kinney, sustained no legal injury whatever by the clerk's noncompliance with his præcipe, and failure to file his papers." (quoting *Kiernan v. Multnomah Cnty.*, 95 F. 849, 849–50 (C.C.D. Or. 1899))).

114. See Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 563–64 (1939).

115. *Id.* at 564 (internal quotation marks omitted).

requested of the court.<sup>116</sup> The compromise that ultimately resulted required the complaint to be filed with the court, but removed the court's discretion not to issue the summons. It was a political compromise that combined aspects of the New York and federal systems but in an untenable way. Like the federal practice of the time, a lawsuit was initiated by filing a complaint with the federal court and the clerk's office would issue a summons in the form of a federal court order. But as in some state systems, the clerk's office had to issue the summons as a matter of course without any preliminary review by the court before an order to appear was issued.

In an article published a year after the new Federal Rules were adopted, Dean Clark described the new system succinctly but without any apparent awareness of the problems that this new hybrid had created: "You start a suit by taking your complaint to the clerk, and the clerk issues the summons and the summons and complaint are served by a marshal."<sup>117</sup> There was no attention at all to the incentive structure for strike suits created or the constitutional issues of ordering someone to report to court to answer even implausible charges. In fact, with evident impatience at what he evidently regarded as the unthinking conservatism of the bar about anything with which they were unfamiliar, Clark described the final compromise as "long on dignity" and he believed it adopted "the original procedure in the Federal Courts" merely because "that was the more familiar system throughout the country."<sup>118</sup> An outline for a September 1937 speech to the

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116. *Id.*

117. *Id.*

118. *Id.* The full context of Clark's description of what occurred is as follows:

Now, I want to run over a few of the more striking things in the early part of the Rules, and, of course, there is not time to go into great detail. The first general matter is the way suit is commenced. We had much discussion about this matter. The New Yorkers wanted their system, which is simple service of summons on the opposing side, with an exchange of pleadings between the parties, and with the Court not in the case at all, until some action is asked of it. Under the New York system, therefore, a case can go forward very far before the Court or any of its officers, even the clerk, may know it exists. It is a very simple system, and I think it works quite satisfactorily.

To many lawyers this system seemed undignified and over-simple. It came to be dubbed the "hip-pocket rule," because one lawyer said, "Why, that is just a case where the lawyer carries around the case in his hip-pocket," since the lawyer would have the pleadings and they would not be filed in the Court until some action was requested of the Court. That was one of the alternative plans we suggested in the preliminary draft. Due to the objections of lawyers, who were long on dignity, however, we adopted the original procedure in the Federal Courts, to-wit: that an action is started by filing the complaint with the clerk, and the court's process is issued by the clerk and served by a marshal. That is provided here at the beginning, Rule 3 and Rule 4. You start a suit by

American Bar Association by the Chair of the Rules Committee, former Attorney General William D. Mitchell, tells essentially the same story.<sup>119</sup>

In fact, however, Clark failed to mention that at least some members of the bar wanted to keep the court in the loop for reasons more substantive than mere “dignity.” Irvin H. Fathchild, a prominent Chicago attorney, argued that requiring a summons to emanate from the court, rather than from a private party, would eliminate a lot of suits “which never would have been filed if the court filing was required as an official step in litigation.”<sup>120</sup>

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taking your complaint to the clerk, and the clerk issues the summons and the summons and complaint are served by a marshal. There is a provision in Rule 4(c) that special appointments in place of the marshal shall be made freely when substantial savings in trial fees will result, but the procedure indicated is the one that was the more familiar system throughout the country.

*Id.* at 563–64.

119. William D. Mitchell, Outline of Address on Proposed Federal Rules Civil Procedure Before the Judicial Section of the American Bar Association (Sept. 1937), from the Clark Papers at Yale University Library (on file with author).

In the preliminary draft we presented two alternative methods of beginning an action. One provided that to begin a suit it is necessary to file a complaint with the clerk of court, have summons issued under the seal of the court and delivered to the marshal for service, and that all other pleadings and papers must be filed as well as served. The other method proposed was that permitted in many code states, which allows the lawyers to prepare the summons and complaint in their own offices and serve them without filing, and allows all papers to be withheld from the files until the point is reached at which some judicial action is asked for. All those members of the Advisory Committee who had practiced under the latter system favored it. Those members who had not practiced under this system were either opposed to it or doubtful. The reaction from the profession has been overwhelmingly in favor of the first system, which requires the complaint to be filed when the action is commenced. The Advisory Committee in its last draft has, therefore, adopted this system. Those of us who have practiced under the other yielded reluctantly. We know that the more informal system is more convenient, saves time and results in a saving of expense in cases which are settled or dismissed without judicial action, and we know from experience that the prediction of the opponents of this system of abuses and dire consequences that will flow from it are not borne out by actual experience in those states where this system is used. Nevertheless, it is after all largely a matter of speed and convenience, and as the bar of the country seems to prefer the more formal system, the Advisory Committee have recommended it to the Court.

*Id.* It is not entirely clear whether Mitchell actually delivered the remarks verbatim or whether Clark or someone else merely prepared the outline of talking points for him as background for his speech, but for our purposes, it hardly matters as either way the Mitchell outline shows the drafters’ contemporary understanding.

120. Box 101 in Clark Papers at Yale University Library.



The drafters of Rule 4 were forced by opposition from the bar into a political compromise that amalgamated two different systems into a new constitutionally unsustainable hybrid. Under the option originally proposed and preferred by the drafters of the Rules, Rule 4 would have incorporated the New York system for initiating a lawsuit. They believed that system of private notice but no court order to appear, used by several states including New York, was constitutional and did not involve the flaws in the current federal system identified in this Article because under the New York system, state power does not become involved in ordering someone to court without assessing the bona fides of a proposed lawsuit. Rather, the service of the complaint is a private act performed by an agent of the plaintiff and merely notifies the prospective defendant that the action is about to be brought, how to appear to answer it, and what the potential consequences of failing to appear might be. As Dean Clark described it in his 1939 article, under the New York system, “the Court [is] not in the case . . . until some action is asked of it.”<sup>121</sup>

That difference between the federal practice of issuing a writ of summons as a court order, and the practice in some states of merely providing a private notice of suit from the plaintiffs’ attorney, was explained in 1904 in *Leas & McVitty v. Merriman*:

[T]he word “process,” as used in Rev. St. § 911 [the successor to the 1792 federal quoted above], *means an order of court*, although it may be issued by the clerk. *The summons in a common-law action, which is, I think, a “process” in the name of the court commands the sheriff or marshal to summon the defendant*, etc. The writs of scire facias, fieri facias, habeas corpus, subpoenas for witnesses, subpoenas duces tecum, writs of certiorari, supersedeas, attachments, and of venire facias are all commands or orders of court that something be done. In equity the writ of subpoena, and in criminal cases the bench warrant, command that something be done. Now, the notices under the Code are in no sense commands or orders of court. *They are mere notices that the plaintiff will on some specified rule day file the declaration, or make a motion in court. . . .*

In several of the states a summons in an action may be issued by the plaintiff’s attorney. And in at least the majority of such states it is held that a summons is not a process. *This conclusion is based on the fact that in such*

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121. Clark, *supra* note 114, at 564.

*states the summons is not issued by the court, and is not an order of court.*<sup>122</sup>

Today that may strike some as a distinction without a difference, but at the time the federal rules were drafted, it was thought that there was a basic difference between the New York system, which did not involve the power of the state until later, and the federal system, in which the defendant was issued an official court order requiring him or her to come to court.

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122. 132 F. 510, 513 (C.C.W.D. Va. 1904) (emphasis added) (citations omitted); *see also* Shepard v. Adams, 168 U.S. 618, 624 (1898) (“The state Code of Colorado provides that civil actions shall be commenced by the issuing of a summons or the filing of a complaint; that the summons may be issued by the clerk of the court or by the plaintiff’s attorney; it may be signed by the plaintiff’s attorney; it may be served by a private person not a party to the suit. All writs and process issuing from a Federal court must be under the seal of the court and signed by the clerk, and bear teste of the judge of the court from which they issue. The processes and writs must be served by the marshal or by his regularly appointed deputies.” (citation omitted)).

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF [Type in County]

Type in Plaintiffs  
 Plaintiff(s),

-against-

[Type in Defendants]  
 Defendant(s).

Index No. [type in Index No]

**Summons**

Date Index No. Purchased: [ ]

To the above named Defendant(s)

TYPE IN NAME AND ADDRESS OF DEFENDANTS BEING SUMMONED

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is [Basis for choice of venue]  
 which is [fact supporting venue, i.e. address of plaintiff]

Dated: [Type location & Date]

[Type in Law Firm]  
 by \_\_\_\_\_  
 [Type in name of signing attorney]  
 Attorneys for Plaintiff  
 [Type in name of plaintiff and address of law firm]

For example, the current New York state form of summons, like that in many states, provides<sup>123</sup>: Note that the New York summons, unlike the federal one, is not signed by the court, but merely by the attorney for the plaintiff. In addition, the summons is not served by an officer of the state like a federal marshal, but rather may be served by any person over eighteen who is not a party to the action.<sup>124</sup> Most importantly, the New York form of summons is *not* a court order to appear. Rather, it is merely notice by the plaintiff's attorney that if the person sued fails to

123. *Starting a Case*, N.Y. ST. UNIFIED CT. SYS., <https://iapps.courts.state.ny.us/fbem/forms/summons.pdf> (last visited May 2, 2012).

124. *Starting a Case*, NEW YORK ST. UNIFIED CT. SYS., <http://www.nycourts.gov/courts/nyc/civil/starting.shtml#issuance> (last visited May 2, 2012).

appear, the plaintiff intends to apply to the court for a judgment by default against them. All of the constitutional issues raised in this Article depend upon state action, which is arguably not present in a state system such as New York's because the court is not involved until later when a default judgment is entered.

After service in the New York system, the complaint is "returned" to court and the lawsuit and the state's involvement begins. If the defendant declines to appear and answer, the court may enter a default judgment against the defendant. But note that entering default judgment is a judicial act, performed by a judge or sometimes a clerk acting under judicial supervision. And most importantly for our purposes, a default judgment may not be entered without state scrutiny of the bona fides of both the law and the facts.<sup>125</sup> Thus, unlike the federal system created by the 1938 Rules, the system of commencing a lawsuit by private notice as opposed to court order currently in effect in New York and some other states arguably does not involve state action to seize someone and order them to appear, but rather state power is involved only after the court decides whether or not to enter a default judgment,<sup>126</sup> although of course in practice the result is much the same.

None of the arguments in this Article depend on whether particular state systems for initiating lawsuits are also unconstitutional. But it should be acknowledged that it has long been maintained in law that federal and state practices for commencing a lawsuit are different. The leading case is *Dwight v. Merritt*.<sup>127</sup> In that case, a hapless New York lawyer attempted to initiate a lawsuit in federal court using the New York practice for private issuance of summons signed by the attorney rather than the court.<sup>128</sup> The court held, however, that the federal statutory requirement for the court to issue an order of summons was a jurisdictional requirement:

In this case an attempt has been made to commence a suit at common law, in this [federal] court, by serving on the defendant a paper purporting to be a summons, in the form prescribed by the statute of New York for commencing a civil action. It is signed by the plaintiffs' attorney, but is

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125. See, for example, N.Y. C.P.L.R. § 3215(a) (McKinney 2007), which provides upon failure to appear, the clerk shall enter default judgment for a sum certain but only "upon submission of the requisite proof."

126. It is true that the state typically tells the plaintiff in advance what the plaintiff is going to need to do to acquire jurisdiction and get a default. But that advance notice to the plaintiff of what is going to be required later to show that the prospective defendant received fair notice does not raise any of the federal constitutional issues raised by the present federal practice of officially ordering the defendant to court.

127. 4 F. 614 (C.C.S.D. N.Y. 1880).

128. *Id.* at 614–15.

not under the seal of the court, nor is it signed by the clerk of the court. Section 911 of the Revised Statutes of the United States provides that “all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof.” A summons, or notice to the defendant, for the commencement of a suit, is certainly process, quite as much as a *capias* or a subpoena to appear and answer is process. The statute intends that all process shall issue from the court, where such process is to be held to be the action of the court, and that the evidence that it issues from the court and is the action of the court shall be the seal of the court and the signature of the clerk. It is clear that a signature by the plaintiffs’ attorney, without a seal, and an issuing from the office of such attorney, cannot be substituted.<sup>129</sup>

For the purposes of this Article, the important point is that Rule 4 as it now exists is a sharp departure from the methods of initiating a lawsuit that prevailed historically in both the federal and New York state systems. In the federal system, summons was an official court order to appear, but it was preceded by a preliminary review by a court official to determine that it was justified. In some state systems, initiating a lawsuit was a private action by the plaintiff’s lawyer merely to put the prospective defendant on notice.<sup>130</sup> The state did not become involved until later, when the complaint was returned and state decided, based on the facts and the law, whether a default judgment was justified. Clark and the other drafters thought this distinction made a difference, although today that may not seem so clear. But whether or not particular state systems are also unconstitutional would have to be analyzed state by state, and that is outside the scope of this Article. What is clear is that the new federal system of 1938, in which the government must order the defendant to appear regardless of the merit or lack thereof of the plaintiff’s claims, was neither fish nor fowl.

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129. *Id.*

130. Admittedly, not all state systems for summons still follow the New York model. Under the pernicious influence of Rule 4, some may have adopted the federal model in which the state delegates to the plaintiffs’ attorney the power of the state to issue an official order compelling the person sued to appear without any government quality control. If so, these models are also unconstitutional. One would have to assess them individually, just as state pre-judgment attachment systems had to be assessed and amended individually in the wake of *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969). But it has long been held that state systems for summoning persons to answer in court are subject to constitutional due process restrictions. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Pennoyer v. Neff*, 95 U.S. 714 (1878).

The drafters of the Federal Rules that were promulgated in 1938 certainly must have known that they were abrogating a long tradition by making the issuance of a court order of summons automatic and nondiscretionary under Rule 4.<sup>131</sup> With cryptic understatement, the 1937 Advisory Committee Note to Rule 4(b) recites merely that “U.S.C., Title 28, § 721 [now § 1691] (Sealing and testing of writs) is substantially continued insofar as it applies to a summons, but its requirements as to teste of process are superseded.”<sup>132</sup>

One might question how honest a characterization it was for the drafters to say that Rule 4(b) “substantially continued” the provisions of the 1792 statute. Rule 4(b) actually totally abrogated long-standing judicial discretion not to issue a summons and delegated the decision instead to the person suing (or more practically, that person’s lawyer). This fundamental shift, which put state power in private control, was not even mentioned in the 1937 Advisory Committee note.

This aspect of the new Rules was incorporated without controversy. No one noted the constitutional issues (which, in fairness, did not become prominent until the “due process revolution” of the 1970s). After the Rules were adopted, several of the drafters wrote journal articles and delivered speeches describing the significant changes wrought by the new Rules. None of these shows any awareness that a fundamental change had been made in the incentive structure for litigation by delegating the unsupervised power to private parties to issue court orders requiring others to appear in court to answer charges.

In a 1939 article provocatively titled “Fundamental Changes Effected by the New Federal Rules,”<sup>133</sup> Dean Charles E. Clark, who served as Reporter for the Rules Advisory Committee, began with a telling remark that reveals his general approach: “[P]rocedural rules are but means to an end, means to the enforcement of substantive justice . . . .”<sup>134</sup> Clark goes on to describe many aspects of the then-new Rules in detail, but the process for issuing a writ of summons receives only the briefest passing mention: “You start a suit by taking your complaint to the clerk, and the clerk issues the summons and the summons and complaint are served by a marshal.”<sup>135</sup> There is no intimation that the phrase “the clerk issues the summons” papered over

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131. One of the most influential of the drafters, Professor Edson Sunderland of the University of Michigan, had even written about the power of courts to refuse to serve summons in patently frivolous cases. Sunderland, *supra* note 104, at 426 (“[I]t is within the discretion of the court to allow or refuse the issuance of summons after a long delay.”).

132. FED. R. CIV. P. 4 advisory committee’s note (1937).

133. Clark, *supra* note 114, at 551.

134. *Id.*; see also STEVEN N. SUBRIN, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115, 115–52 (Peninah Petruck ed., 1991).

135. Clark, *supra* note 114, at 564.

a significant change or that the new process impinged upon long-standing traditions and constitutional values.

Another academic who served on the drafting committee, Professor Armistead M. Dobie of the University of Virginia Law School, who later served as a judge on the Fourth Circuit, acknowledged at least obliquely that the court no longer had authority to review the complaint before issuing a summons: “Process, in the form of a summons, is issued by the clerk *as a matter of course* and is served on the defendant together with a copy of the summons.”<sup>136</sup> The “as a matter of course” language may have been drawn from former Equity Rule 12 of 1912,<sup>137</sup> which is cited in the 1937 Advisory Committee note to Rule 3.<sup>138</sup> However, it is clear that a subpoena issued under Equity Rule 12 still required *teste* by the district judge under the 1792 statute.<sup>139</sup> The significance of the 1938 changes was the elimination of review by the court before issuance of a court order to appear, and thereby the implicit repeal of the 1792 statute by the adoption of Rule 4.

In abolishing pre-service review of complaints by judges and the clerk’s office prior to service in 1938, the drafters of the Federal Rules may have felt that they were striking a blow against formalism and legal technicalities and ensuring that cases would be decided on their merits. But this “reform” brings to mind Samuel Taylor Coleridge’s admonition that “[e]very reform, however necessary, will by weak minds be carried to an excess, that itself will need reforming.”<sup>140</sup> It is one thing to say that the clerk’s office should not reject complaints for formal defects that do not affect substantive rights, and quite another to provide that a court order of summons must be issued at the behest of a self-interested private party in every case without any regard to the merits of the claims presented. A more sensible, moderate amendment to Rule 5 in 1993

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136. Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 264 (1939) (emphasis added).

137. Former Equity Rule 12 of 1912 provided:

Whenever a bill is filed, and not before, the clerk shall issue the process of subpoena thereon, *as of course*, upon the application of the plaintiff, which shall contain the names of the parties and be returnable into the clerk’s office twenty days from the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is required to file his answer or other defense in the clerk’s office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.

Former Equity Rule 12 of 1912, *reprinted in* CHARLES C. MONTGOMERY, MONTGOMERY’S MANUAL OF FEDERAL PROCEDURE § 911 (1914) (emphasis added), *available at* [http://www.archive.org/stream/manualoffederalp00montiala/manualoffederalp00montiala\\_djvu.txt](http://www.archive.org/stream/manualoffederalp00montiala/manualoffederalp00montiala_djvu.txt) (last visited May 2, 2012).

138. FED. R. CIV. P. 3 advisory committee’s note (1937).

139. MONTGOMERY, *supra* note 137, § 913.

140. COLERIDGE, *supra* note 1, at 26.

specifically prohibited the clerk's office from rejecting papers for formal defects.<sup>141</sup> But that moderate approach of overlooking formal defects was not the approach adopted in the 1938 Rules, which instead completely eliminated judicial involvement in issuing court orders to appear and defend.

The change in judicial attitude toward "largely groundless claim[s]"<sup>142</sup> before and after the 1938 rule change is palpable. In a 1933 decision, the Tenth Circuit had proclaimed:

A court has inherent power to determine whether its process is used for the purpose of vexation or fraud, instead of the single purpose for which it is intended—the adjudication of bona fide controversies. It is the duty of the court to prevent such abuse, and a dismissal of the cause is an appropriate way to discharge that duty.<sup>143</sup>

A few years later, however, under new Rule 4, the focus had shifted away from preventing abuse of the court's processes to enforcing the newly created "right" under Rule 4 for every plaintiff to have her complaint served on whatever persons she wished to sue, regardless of patent lack of merit or an evident purpose to harass. An illustrative case is *Dear v. Rathje*, a 1973 per curiam decision by the Seventh Circuit.<sup>144</sup> In that case the plaintiff was a vindictive ex-wife (Ms. Dear) who had previously filed numerous pro se cases against her ex-husband (Mr. Dear) and his new wife. The complaint in question was a civil rights claim in federal court against the state court judge who had previously enjoined Ms. Dear from picketing Mr. Dear's place of employment, and also the lawyer who had represented the husband in that prior case, and Mr. Dear's new wife. The clerk's office referred the complaint to a district judge, who after reviewing the grounds proposed for suit and taking judicial notice of a "series" of Ms. Dear's numerous prior cases against her ex-husband and others allegedly acting in concert with him to conspire against her, dismissed the case sua sponte prior to service.<sup>145</sup>

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141. *See* *Farzana K. v. Ind. Dep't of Educ.*, 473 F.3d 703, 707 (7th Cir. 2007) ("By refusing to accept complaints (or notices of appeal) for filing, clerks may prevent litigants from satisfying time limits. To prevent this—to ensure that judges rather than administrative staff decide whether a document is adequate—Fed. R. Civ. P. 5(e) was amended in 1993 to require clerks to accept documents tendered for filing. The last sentence of this rule provides: 'The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.'").

142. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (internal quotation marks omitted).

143. *Pueblo de Taos v. Archuleta*, 64 F.2d 807, 813 (10th Cir. 1933).

144. 485 F.2d 558 (7th Cir. 1973) (per curiam).

145. *Id.* at 559.



The Seventh Circuit, vacating the orders and remanding, stated:

It appears that a pattern of practice has developed in the Clerk's office in which summons are not issued [automatically without review] when a *pro se* complaint is filed. . . . We do not need to reach the issue of whether the practice is constitutional since it is possible to decide the appeal on other grounds. The practice here . . . is in clear conflict with Rule 4(a) [now 4(b)], Fed.R.Civ.P. which imposes a duty on the Clerk to issue the summons "forthwith. . . ." We are not unsympathetic with the plight of the district courts as they face growing numbers of "professional litigants." We also understand the reluctance of its judges to have their courts used as a tool for harassment of public officials and others. But . . . it is not for a United States district court to resolve the problem by cutting off *pro se* litigation at the wellspring.<sup>146</sup>

While the Seventh Circuit may have had a good point about a local rule that singled out *pro se* cases for special review, the rest of its opinion is shallow and one-sided. The opinion only considers the "right" of the plaintiff under the language of Rule 4 to have a summons issued "forthwith," but fails to weigh in the balance the countervailing privacy interests of those being sued not to be harassed by being required by the state to answer baseless charges.

As a result of the appellate court decision enforcing the terms of Rule 4, Mr. Dear, his lawyer, his new wife, and the state court judge who had ruled in his favor in the prior injunction case were required to endure eighteen more months of litigation, from September 25, 1973 to March 17, 1975, when the district court finally granted summary judgment for all defendants.<sup>147</sup> There is no record of the expense involved, but we do know that two law firms and two lawyers from the Attorney General's office all appeared in the case, and that the ex-husband, Mr. Dear, was eventually forced into default because he lacked the financial resources to answer all of his ex-wife's numerous lawsuits.<sup>148</sup>

In granting summary judgment, the district judge observed that the suit against Mr. Dear and his new wife was totally groundless: "This action is nothing more than an aftermath of a domestic controversy between plaintiff and her former husband. Plaintiff made Mr. Dear's new wife a defendant but made no allegations against her, merely

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146. *Id.* at 560.

147. *Dear v. Rathje*, 391 F. Supp. 1, 3, 10 (N.D. Ill. 1975).

148. *Id.* at 9.

charging that she was a conspirator.”<sup>149</sup> Almost equally groundless was the claim that the attorney had acted under color of state law in representing Mr. Dear, or that the state court judge lacked judicial immunity for rulings made in the ordinary course of business, even if erroneous.<sup>150</sup>

All told, this totally groundless lawsuit by a vindictive ex-wife lasted over three and a half years—from August 14, 1972, when the original complaint was filed, until March 16, 1976, when the court of appeals finally summarily affirmed the summary judgment.<sup>151</sup> (Note the irony in the word “summary”—“performed speedily”<sup>152</sup>—to describe a unnecessary three and one-half year ordeal that would not have occurred prior to the “reforms” of 1938.)

And this case was merely one of a long “series” that she filed against her ex-husband and anyone unlucky enough to be associated with him. But under the rigid command of Rule 4, the Seventh Circuit held that a federal court was now powerless to prevent its processes from being used as an instrument of abuse by a woman scorned.

Neither Mitchell, Clark, Dobie, nor any of the others involved in drafting the 1938 Rules gave indication of any awareness that they had fundamentally altered the incentive structure of civil litigation, with far-reaching consequences of constitutional dimension. None of the drafters of the Federal Rules of Civil Procedure seems to have paid any attention to the economic incentives for the law business that their work was creating. One Cassandra who saw clearly the potential for the new Rules to increase strike suits was Francis M. Finch, an Associate Justice of the New York Court of Appeals. Justice Finch objected at the 1936 ABA annual meeting that the new Rules would greatly increase the potential for strike suits, but his perceptive remarks were dismissed as relevant only to “admittedly bad” conditions in New York City where many lawyers were considered to have “low ethical standards” but not to other parts of the country where lawyers were deemed more ethical and less susceptible to succumb to economic incentives.<sup>153</sup> Unlike

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149. *Id.* at 9–10.

150. *Id.* at 8.

151. *Dear v. Rathje*, 532 F.2d 756 (7th Cir. 1976) (referencing the date the Seventh Circuit affirmed summary judgment); *Dear v. Rathje*, 485 F.2d 558, 559 (referencing the date the complaint was filed).

152. *Summary*, FREE DICTIONARY.COM, <http://www.thefreedictionary.com/summary> (last visited May 10, 2012).

153.

At the same meeting [1936 annual meeting of the ABA] Judge Finch of the Court of Appeals of the State of New York made an address deploring the extent to which strike suits and dishonest or blackmailing cases are instituted, and he suggested that the proposed rules would open the way still further for this sort of abuse. His illustrations were taken from conditions in the City of

Justice Finch, the drafters seem to have been totally unaware of the “increment of the settlement value” that they were creating in Rule 4 by giving “a plaintiff with a largely groundless claim” the right “to take up the time of a number of other people.”<sup>154</sup>

Sixty years after Rule 4 was adopted, in the 1998 recodification of the United States Code, portions of the 1792 Process Act passed by the First and Second Congresses relating to court control over issuance of writs of summons were quietly deleted from Title 28 of the U.S. Code on the grounds that they had been “superseded” by the adoption of Rule 4(b) in 1938.<sup>155</sup> However, the 1998 codification of Title 28 has never been enacted as positive law so the 1792 Process Act is technically still on the books, despite its omission from the U.S. Code.<sup>156</sup> The small portion of the original 1792 law about testing of process by the judge before issuance that is still included in Title 28 today<sup>157</sup> is a pale shadow of the original passed by the first two Congresses. Today the requirement for *teste* of process is formalistic<sup>158</sup> and performed as a ministerial act by the clerk’s office without any judicial involvement or

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New York. His principal suggestion was that the law should punish the plaintiff who brings a strike suit by requiring him to pay not merely the ordinary costs, but all the expenses of the defendant, including reasonable counsel fees, if the defense is successful. The Advisory Committee believes that any substantial change in the present basis for taxing costs or disbursements is a matter for the Congress and not properly embodied in the proposed rules of practice and procedure. It may be that in large metropolitan areas like New York City where the conditions are admittedly bad and many dishonest actions are brought in the courts, the rules relating to discovery and examination before trial offer opportunities to lawyers of low ethical standards. As applied to the country as a whole, we think the rules relating to these subjects are in line with modern enlightened thought on the subject and will not be subjected to abuse. Uniform rules of practice and procedure must be drawn to meet conditions generally throughout the country and not special conditions in a few areas. Our suggestion is that in places like New York City the remedy is an improvement in the machinery for disbaring or disciplining lawyers guilty of misconduct.

William D. Mitchell, Outline of Address on Proposed Federal Rules Civil Procedure Before the Judicial Section of the American Bar Association (Sept. 1937), *supra* note 119.

154. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (internal quotation marks omitted).

155. 28 U.S.C. § 1691 hist. n. (2006) (“Based on title 28, U.S.C., 1940 ed., § 721 . . . . Provisions as to *teste* of process issuing from the district courts were omitted as superseded by Rule 4 (b) of the Federal Rules of Civil Procedure.” (emphasis added)).

156. See Richard J. McKinney, *United States Code: List of Positive Law Titles with Enacting Cites and Location to Revision Notes* (Rev. to Jan. 2011), <http://www.llsdc.org/attachments/wysiwyg/544/usc-pos-law-titles.pdf> (noting that the 1948 version of Title 28 but not the 1998 codification was enacted as positive law).

157. 28 U.S.C. § 1691 (2006).

158. *Id.* (“Seal and *teste* of process. All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof.”).

discretion; instead, the operative rule that the clerk “must” issue a summons at the behest of a private party is provided by Rule 4(b) rather than the original statutes passed by the first two Congresses.

Whether the adoption of the Federal Rules of Civil Procedure by the Supreme Court was actually effective to “repeal” the provisions of the 1792 statute requiring test of process by the judge before issuance depends upon whether its provisions are deemed to have provided persons sued with “a substantive right,” such as a substantive right to be free from being required to answer implausible lawsuits. Under the Rules Enabling Act, procedural rules may not modify “any substantive right” but laws in conflict with the rules are “of no further force or effect.”<sup>159</sup>

In addition, it might be argued that the 1938 rule was ineffective to repeal the 1792 Process Act because it did not go through the constitutional procedures for amending or repealing a statute required by *INS v. Chadha*,<sup>160</sup> the legislative veto case. Several courts and commentators have noted the apparent inconsistency between the Rules Enabling Act provisions for invalidating inconsistent statutes and *Chadha*. In 1988, when the Rules Enabling Act was last reauthorized by Congress, the House questioned including the provision about superseding inconsistent statutes on the grounds that it violated *Chadha*’s requirements for bicameral passage and presentation to the President for a possible veto.<sup>161</sup> The Senate did not concur, however, and the provision was restored.<sup>162</sup> Subsequently, a unanimous panel of the Fifth Circuit Court of Appeals noted but did not reach the issue, stating as an alternative rationale for its statutory construction that the Rules Enabling Act’s provision for superseding statutes “approaches a violation” of *Chadha* and “would strain the Constitution’s limits on the exercise of the legislative power.”<sup>163</sup> The issue has never been squarely

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159. 28 U.S.C. § 2072(b) (2006) (“Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”).

160. 462 U.S. 919 (1983).

161. H.R. REP. NO. 889, at 28 (1988).

162. See generally Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1663 (1995).

163. *Jackson v. Stinnett*, 102 F.3d 132, 135 n.3 (5th Cir. 1996) (Garza, J.) (“Another good reason not to read the abrogation clause to nullify provisions of the PLRA is that such a reading approaches a violation of the Presentment Clause and the nondelegation doctrine. The abrogation clause of the Rules Enabling Act purports to give the Supreme Court the legislative power to repeal any federal law governing practice and procedure in the courts. Under the Rules Enabling Act, the Court need only report such changes to Congress in the form of a rule, which would acquire the force of law without Congress ever casting a single vote. To say the least, such a power would strain the Constitution’s limits on the exercise of the legislative power. U.S. Const. art. I, § 7, cl. 2; *INS v. Chadha*, 462 U.S. 919, 950–51, 103 S. Ct. 2764, 2784, 77 L. Ed. 2d 317 (1983); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 55 S. Ct.

decided by the Supreme Court. It was noted in passing, however, in *Clinton v. City of New York*,<sup>164</sup> the line item veto case. There the federal government argued unsuccessfully that the line item veto should be constitutional by analogy to the Rules Enabling Act, but the Supreme Court distinguished the two situations, albeit not persuasively.<sup>165</sup>

The Supreme Court might not apply the principles of *Chadha* full-force to the repeal of statutes by procedural rules because of the Court's own role in promulgating rules of procedure for the lower federal courts. A full exploration of that interesting issue would require an article at least as long as this one. But for present purposes it is enough to indicate that the issues raised by this Article could be raised in litigation as well as through the rules amendment process. A person summoned to appear in court pursuant to Rule 4 by a summons that had not been tested pre-service for plausibility by a judge or magistrate judge could argue that the 1792 Process Act requiring all writs including the writ of summons to bear the "test" of a judge remains in effect, both because it created a "substantive right" not to be required to come to court to answer claims that are implausible under *Twombly*, but also because the purported nullification of this portion of the 1792 Process Act by Rule 4 did not go through the constitutional process required by *Chadha* for amending or repealing a statute.

In the next three sections, this Article argues that this change, even if superficially legal under the Rules Enabling Act as a procedural rather than substantive change, was unconstitutional as well as unwise.

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837, 843, 79 L. Ed. 1570 (1935); see also Note, *supra*, 98 HARV. L. REV. at 836–37. To avoid such a drastic result, we will not construe the abrogation clause to dictate that Rule 24(a) invalidates Congress's subsequent amendments of i.f.p. procedure.”)

164. 524 U.S. 417 (1998).

165. *Clinton v. City of New York*, 524 U.S. at 446 n.40 (“The Government argues that the Rules Enabling Act, 28 U.S.C. § 2072(b), permits this Court to ‘repeal’ prior laws without violating Article I, § 7. Section 2072(b) provides that this Court may promulgate rules of procedure for the lower federal courts and that ‘[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.’ See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (stating that the procedural rules that this Court promulgates, ‘if they are within the authority granted by Congress, repeal’ a prior inconsistent procedural statute); see also *Henderson v. United States*, 517 U.S. 654, 664 (1996) (citing § 2072(b)). In enacting § 2072(b), however, Congress expressly provided that laws inconsistent with the procedural rules promulgated by this Court would automatically be repealed upon the enactment of new rules in order to create a uniform system of rules for Article III courts. As in the tariff statutes, Congress itself made the decision to repeal prior rules upon the occurrence of a particular event—here, the promulgation of procedural rules by this Court.”). A similar argument that “Congress itself made the decision to repeal prior [administrative decisions] upon the occurrence of a particular event” was made unsuccessfully in *Chadha*. See E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution and the Legislative Veto*, 1983 SUP. CT. REV. 125, 135–37 (1984).

### B. *Rule 4(b) Unconstitutionally Seizes Persons and Property*

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and *seizures*, shall not be violated . . . .”<sup>166</sup> This is an important protection for the most fundamental of all rights: the right of privacy, the right to be left alone without intrusion by the government except when reasonably justified. A summons issued under Rule(4) is an unreasonable seizure of the person of the alleged debtor because the government makes no attempt to verify that there is a reasonable basis in law and fact for the suit before ordering the person sued in the name of the United States to come to court.

It is a basic requirement imposed by the Fourth Amendment that, absent exigent circumstances, the government must obtain a search warrant from a neutral judicial officer who independently verifies that there is a substantial basis to proceed with a governmental intrusion.<sup>167</sup> Presently, however, there is no parallel requirement for independent judicial verification of the minimal bona fides of a civil claim before someone’s time and money are “seized” through a summons to appear and defend in a civil case in federal court.

The Fourth Amendment applies to civil as well as criminal cases.<sup>168</sup> For much the same reasons that we require a showing of either probable cause or reasonable suspicion in criminal cases, we should require verification that there is a reasonable and credible basis for the government to impose the substantial cost and inconvenience of being

166. U.S. CONST. amend. IV (emphasis added).

167. A possible, albeit adventurous, argument might be advanced that a summons under Rule 4(b) to appear and defend should be considered a “warrant” for purposes of the additional protections of the Warrant Clause of the Fourth Amendment. A strong argument has been made on historical grounds that the higher standard requiring an advance judicial determination of probable cause (as opposed to mere reasonableness) was imposed under the Warrant Clause because officers acting under the protection of a warrant were not responsible for their actions at common law. See Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 60 (1996); see also William J. Stuntz, *Warrant Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 326 (2005) (“When the Fourth Amendment was written, the sole remedy for an illegal search or seizure was a lawsuit for money damages. Government officials used warrants as a defense against such lawsuits.”). As a practical matter, the well-known judicial reluctance to award full retroactively costs in even the most abusive situations means that someone obtaining a civil summons under Rule 4(b) is, as a practical matter, immune from ever having to answer in damages for the costs that they impose on others, much like an officer serving a search warrant at common law.

168. For an early article observing that the Fourth Amendment applies to civil as well as criminal cases, see Louis J. DeReuil, *Applicability of the Fourth Amendment in Civil Cases*, 1963 DUKE L. J. 472 (1963). Unfortunately, however, Louis J. DeReuil, who was serving at the time as an Internal Revenue Service attorney, largely limited his observations to summons in tax cases, but he clearly maintains that the Fourth Amendment applies to orders of summons in civil cases. *Id.* at 472, 487.

involved in a lawsuit before requiring fellow citizens to come to court and answer charges. And yet the government arbitrarily imposes that very substantial burden and inconvenience on citizens based on the unverified say-so of a single person without any attempt to corroborate his claim or verify his credibility. The government could not obtain a warrant to search your home, in many ways a much lesser intrusion on your privacy than making you a defendant in a lawsuit, based solely on the uncorroborated claims of a single informant who had not been shown to be credible. Rather, except in exigent circumstances, an independent judicial official must verify that the facts provide a substantial basis to credit the informant's story.<sup>169</sup> Yet the Federal Rules do not impose a similar minimal requirement of reasonableness before someone's time and property are seized by the government via an order of summons to appear in a civil case.

The Supreme Court has never ruled on the constitutionality of this aspect of Rule 4,<sup>170</sup> and there are no appellate cases on point. The case that comes closest is *Williams v. Chai-Hsu Lu*.<sup>171</sup> In that case, in the context of a § 1983 damage action against state process servers, the Eighth Circuit announced the ipse dixit that “[a] court’s mere acquisition of jurisdiction over a person in a civil case by service of process is not a seizure under the fourth amendment.”<sup>172</sup> But that pronouncement was not accompanied by any analysis, nor was the argument made or ruled upon that the state has an obligation to conduct a preliminary inquiry into the bona fides of a civil claim before summoning a person sued to answer. Moreover, to the extent that the court offers any analysis at all, it is one-sided and invalid. The issue is not that the “mere acquisition of jurisdiction over a person” in a metaphysical sense constitutes an unreasonable seizure; the New York practice of giving private notice that suit is about to be brought is part of a state-sanctioned process for acquiring jurisdiction over a person, but it does not involve a governmental order to appear. On the contrary, one is free if he or she so chooses to ignore the notice and rely on whether the plaintiff can prove a sufficient prima facie case to obtain a default judgment. Under the state practice, one is not ordered by the government to appear and defend; rather, they are merely given notice of the right to do so.

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169. *United States v. Harris*, 403 U.S. 573, 583 (1971) (holding that magistrate may rely on policeman’s knowledge of a suspect’s reputation for credibility when assessing the reliability of an informant’s tip).

170. The Supreme Court last considered Rule 4 in *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965) (interpreting the *Erie* doctrine to allow Rule 4 to govern service of process even when this would lead to a different outcome than the state rule).

171. 335 F.3d 807 (8th Cir. 2003).

172. *Id.* at 808–09.

The constitutional “seizure” results from the federal government’s additional actions in imposing an official order to come to court and to expend resources (either in time or money, and usually both) to answer—upon pain of substantial official financial sanctions—without any attempt to verify that there is a reasonable basis for doing so. An official document signed and sealed by the court tells you that you “must” answer and that if you fail to do so, default judgment “will” be entered for the amount sought in the complaint. That is not a polite invitation, nor merely a notice of actions being taken against you by another private party. Rather, it is an unmistakable *command* from the state, backed by a threat of official sanctions if you disobey.<sup>173</sup>

Lower court cases such as *Williams v. Chai-Hsu Lu*, holding that a civil summons is not a “seizure” in the constitutional sense, also ignore the established body of Fourth Amendment law defining “seizures.” The conventional legal test for whether a Fourth Amendment “seizure” has occurred is whether, under all the circumstances, a reasonable person would conclude that someone has been deprived of his freedom by the state, or alternatively is free to go on about his business as he chooses.<sup>174</sup> For example, a roadblock designed to halt a car chase has been held to constitute a “seizure,” even though the fleeing suspect was not physically placed under arrest.<sup>175</sup> It is the state’s intentional restriction of a person’s freedom of movement, and not the particular means chosen by the state to accomplish the restriction, that defines a “seizure” in the constitutional sense.<sup>176</sup> As Justice Antonin Scalia explained for a unanimous Supreme Court, a command by an officer of the state that is intended to restrict someone’s freedom of movement with which they comply is a “seizure” in the constitutional sense:

It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement (the

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173. LARRY L. TEPLY, RALPH U. WHITTEN & DENIS F. MCLAUGHLIN, *CASES, TEXT, AND PROBLEMS ON CIVIL PROCEDURE* 32 (2d ed., 2002) (“A summons is a paper that notifies the defendant that the actions has been commenced. *It also commands the defendant to appear and defend the action by a certain date or the court will enter a judgment (a default judgment) against the defendant for the remedy demanded by the plaintiff.*” (emphasis added)).

174. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”).

175. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599 (1989).

176. *Id.* at 596–97.



fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*. . . . This analysis is reflected by our decision in *Hester v. United States*, where an armed revenue agent had pursued the defendant and his accomplice after seeing them obtain containers thought to be filled with “moonshine whisky.” During their flight they dropped the containers, which the agent recovered. The defendant sought to suppress testimony concerning the containers’ contents as the product of an unlawful seizure. Justice Holmes, speaking for a unanimous Court, concluded: “The defendant’s own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after they had been abandoned.” Thus, even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action by the police, the Court held that no seizure had taken place. *It would have been quite different, of course, if the revenue agent had shouted, “Stop and give us those bottles, in the name of the law!” and the defendant and his accomplice had complied. Then the taking of possession would have been not merely the result of government action but the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred.*<sup>177</sup>

The official summons in a civil case is the direct written equivalent of the Supreme Court’s hypothetical revenue agent shouting, “Stop and give us those bottles in the name of the law,” which the Supreme Court specifically and unanimously stated is “a Fourth Amendment seizure.”<sup>178</sup> The subsequent cases also stand for the proposition that a command by the authorities is enough to constitute a “seizure” in the constitutional sense if it is followed by compliance even though no physical force is used.<sup>179</sup> “An arrest requires *either* physical

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177. *Id.* at 596–98 (third emphasis added) (citation omitted).

178. *Id.* at 597.

179. *United States v. Johnson*, 620 F.3d 685, 691 (6th Cir. 2010) (stating that when the police yelled “stop” and the defendant obeyed, the defendant was seized); *United States v. Salazar*, 609 F.3d 1059, 1066–67 (10th Cir. 2010) (stating that the individual was seized when he got out of the truck after a command from an officer within a patrol car); *United States v. Jones*, 562 F.3d 768, 775 (6th Cir. 2009) (stating that defendant was seized when he “complied with [the officer’s] order to stop”); *see also Brendlin v. California*, 551 U.S. 249, 262 (2007) (“[A] fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away.”).

force . . . *or*, where that is absent, *submission* to the assertion of authority.”<sup>180</sup>

The summons in a civil case certainly meets these criteria for “submission to the assertion of [official] authority.”

Well into the sixteenth century, . . . the writ of *capias ad respondendum* . . . directed the sheriff to arrest defendants and bring them before the court. Today service of process substitutes for bodily seizure, but behind that innocent-looking piece of paper titled “Summons” stands the full coercive power of the State.<sup>181</sup>

No reasonable person reading the standard form summons reproduced above could conclude that the person receiving it was free to go on about his business. The official-looking form bearing an official seal explicitly informs the recipient that untoward legal consequences will be visited upon him or her by the state if he or she does not do exactly as commanded—“judgment by default will be entered against you for the relief demanded in the complaint,”<sup>182</sup> which is generally a tidy sum designated by the person suing, again without any review for reasonableness by the state. For example, in one case that made the headlines, a former D.C. administrative law judge sued his local cleaners for \$67 million for allegedly losing his pants.<sup>183</sup> It is indefensible for the state to issue an official threat to one of its citizens that it will impose \$67 million in financial penalties if he or she fails to show up in court to answer a lawsuit over a lost pair of pants without any attempt to confirm that the sanctions threatened are reasonably proportional to the issues.<sup>184</sup>

The most thoughtful exploration<sup>185</sup> in modern jurisprudence of whether a summons constitutes a constitutionally-protected “seizure” under the Fourth Amendment is Justice Ruth Bader Ginsburg’s

180. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

181. *BARBARA ALLEN BABCOCK ET AL.*, *supra* note 25, at 104.

182. FED. R. CIV. P. Form 3 app. at 100.

183. *Pearson v. Chung*, 961 A.2d 1067, 1069–70 (D.C. 2008).

184. By contrast, the magistrate courts of the Republic of South Africa specifically authorize the clerk to decline to issue a summons if an excessive amount is claimed for attorney’s costs or court fees. TORQUIL M. PATERSON, *ECKARD’S PRINCIPLES OF CIVIL PROCEDURE IN THE MAGISTRATE’S COURTS* 94 (5th ed., 2005).

185. Admittedly, there are lower court cases that come out the other way, but most of them merely announce the result that being required to come to court, without more, is not a constitutional “seizure” without the type of deeper historical and functional analysis made by Justice Ginsburg. *See, e.g.*, *Britton v. Maloney*, 196 F.3d 24, 30 (1st Cir. 1999) (“Absent any evidence that [plaintiff] was arrested, detained, restricted in his travel, or otherwise subject to a deprivation of his liberty before the charges against him were dismissed, the fact that he was given a date to appear in court is insufficient to establish a seizure within the meaning of the Fourth Amendment.”).

concurring opinion in *Albright v. Oliver*.<sup>186</sup> In that case, after an extensive review of the common law precedents and history, Justice Ginsburg squarely concluded that a person “is equally bound to appear, and is hence ‘seized’ for trial, when the state employs the less strong-arm means of a summons in lieu of arrest.”<sup>187</sup> That case happened to involve a summons in a criminal case, but there is no reason why a summons to appear in a civil case would be any less a “seizure” in the constitutional sense than a summons to appear in a criminal case.

It should be noted, however, that Rules 4(a) and 9(a) of the Federal Rules of Criminal Procedure, unlike their civil counterpart, have long required a preliminary determination of reasonableness before the state issues a summons requiring someone to appear and defend against criminal charges even though no physical arrest is involved.<sup>188</sup> Similarly, no adverse consequences can be visited upon an individual for ignoring an IRS summons until a court determines that it is reasonable and enforces it.<sup>189</sup> And the courts will not enforce an administrative subpoena unless it is determined by a neutral magistrate that it is reasonable to require a response.<sup>190</sup> In some circumstances, it has even been held that reasonableness requires the requester to pay the costs of compliance.<sup>191</sup> But there is no parallel requirement that the courts assess the reasonableness of a civil claim before they compel the person sued to report to court to respond. Nor is there presently a requirement or practice to make someone whole after the fact, even if the claim is speculative or turns out to be implausible under *Twombly*.

Rule 4 of the Federal Rules of Civil Procedure not only unreasonably “seizes” the person of the defendant by requiring him or

186. 510 U.S. 266, 276 (1994) (Ginsburg, J., concurring).

187. *Id.* at 279.

188. *United States v. Gobey*, 12 F.3d 964, 967 (10th Cir. 1993) (“Under the federal rules [of criminal procedure] . . . a summons cannot be issued in the first instance without probable cause, the decision of a neutral magistrate, and the requisite particularity.”); *accord* *United States v. Greenberg*, 320 F.2d 467, 472 (9th Cir. 1963); *United States v. Hondras*, 176 F. Supp. 2d 855, 858 (E.D. Wis. 2001). “The language of Rule 9(a) indicates that a issuance of a summons also requires probable cause when it says that at the request of the government, the court must issue a summons ‘if one or more affidavits accompanying the information establish probable cause.’” 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, *FEDERAL PRACTICE AND PROCEDURE* § 51, at n.4 (4th ed. 2008).

189. *Schulz v. IRS*, 395 F.3d 463, 465 (2d Cir. 2005) (“[A]bsent an effort to seek enforcement through a federal court, IRS summonses apply no force to taxpayers, and no consequence whatever can befall a taxpayer who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order.”).

190. *United States v. Morton Salt Co.*, 338 U.S. 632, 653–54 (1950) (explaining that a court will enforce an administrative subpoena but only if reasonable).

191. *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1033 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) (“[T]he power to exact reimbursement as the price of enforcement is soundly exercised only when the financial burden of compliance exceeds that which the party ought reasonably be made to shoulder.”).

her to come to court to defend, either personally or through an attorney, without any prior determination by the state that is reasonable to compel him or her to do so, but it also at least arguably “seizes” the defendant’s property<sup>192</sup> by requiring him or her to expend defense costs without any prior attempt by the state to determine that the financial imposition is justified. However, the deprivation of property is probably more properly analyzed under the Due Process Clause, as discussed in the next Section.

*C. Rule 4(b) Unconstitutionally Deprives Persons Sued of Property Without Due Process of Law*

The Fifth Amendment provides two separate protections against economic impositions by the federal government: the Takings Clause and the Deprivations Clause.<sup>193</sup> The Deprivations Clause (which Rule 4 violates) is broader than the Takings Clause<sup>194</sup> (which Rule 4 generally does not violate)<sup>195</sup> and their purposes are different. The Takings Clause applies if, but only if, property is confiscated by the government for public use. On the other hand, the Deprivations Clause provides that the protections of procedural and substantive due process must apply before anyone may be “deprived” of use or control of their property by the government, whether or not it is taken for public use by the state. The core purpose behind the Deprivations Clause is to ensure that a “legitimate governmental purpose” justifies an imposition on citizens causing them trouble and expense.<sup>196</sup> Rule 4 is deficient in that the government makes no attempt whatsoever to verify that there is a

192. “A ‘seizure’ of property, we have explained, occurs when ‘there is some meaningful interference [by the state] with an individual’s possessory interests in that property.’” *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 61 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

193. “No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

194. See Jennifer B. Arlin, *Of Property Rights and the Fifth Amendment: FIRREA’s Cross-Guarantee Reexamined*, 33 WM. & MARY L. REV. 293, 311 (1991) (“A taking is distinct from a deprivation in several ways. First, when the government ‘takes’ property, it takes it for public use and is required to pay just compensation. . . . This clause is stricter than the first clause of the Fifth Amendment, the Deprivations Clause, because it can apply only to private property being taken for public use. The Takings Clause requires no process; its only requirement is that the former property owner be reimbursed ‘justly’ for the value of the property.” (footnotes omitted)).

195. The narrow exception in which the Takings Clause may also be implicated is the special circumstance discussed hereafter in which defendants are required to subsidize investigations in the “reasonable but speculative” category of cases discussed *infra* Part II.D.

196. *Sinking Fund Cases*, 99 U.S. 700, 718–19 (1879) (“The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are . . . prohibited from depriving persons or corporations of property without due process of law.”).

legitimate reason to order someone to answer in court before depriving them of property by requiring them to expend resources to answer charges in court.

The key element that triggers the Deprivations Clause is that someone is denied possession or use of money or another recognized form of property<sup>197</sup> by the state. Thus, the Fifth Amendment guarantee against deprivations of property without due process of law has repeatedly been held to apply to situations in which the state imposes costs or requires payments to third parties. For example, a unilateral EPA order requiring a company to spend money to clean up a Superfund site unquestionably constitutes a “deprivation” of property, although four circuits have now held that the procedure does not violate due process because it is reasonable and provides for a pre-deprivation judicial hearing.<sup>198</sup> Similarly, by requiring someone who is sued to expend resources to answer charges in court, the state is clearly imposing costs and thereby “depriving” the person sued of property so as to trigger due process protections. This is true whether they hire counsel, or merely pay for the transportation costs and paper to represent themselves pro se (although of course the magnitude is greater when counsel is employed). The costs imposed by litigation are not trivial. According to the Federal Judicial Center, the average cost of a case in 2009 was \$15,000,<sup>199</sup> although, unsurprisingly, the costs varied in proportion to a number of variables.<sup>200</sup>

Deprivations of property are not necessarily illegal; but they must comply with due process, which means that they must be substantively reasonable and accompanied by procedures appropriate to the circumstances. What is unusual about current Rule 4, however, is that the government forswears any inquiry into the reasonableness of its

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197. In addition, although not relevant here, some cases state that “property” is defined more broadly for purposes of the Deprivation Clause than for the Takings Clause. *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996) (“‘Property’ as used in the Just Compensation Clause is defined much more narrowly than in the due process clauses.”).

198. *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113–14, 117 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011) (“The parties agree that the costs of compliance and the monetary fines and damages associated with noncompliance qualify as protected property interests.”); *see also* *Sackett v. EPA*, 622 F.3d 1139, 1146–47 (9th Cir. 2010), *rev. on other grounds*, *Sackett v. Environmental Protection Agency*, U.S.S.C. No. 10-1062 (Mar. 21, 2012); *Emp’rs Ins. of Wausau v. Browner*, 52 F.3d 656, 664–65 (7th Cir. 1995); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 391–92 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315–17 (2d Cir. 1986).

199. Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES, Nov. 14, 2010, <http://www.nytimes.com/2010/11/15/business/15lawsuit.html>.

200. *See* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS (Mar. 2010), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DukeMaterials/Library/FJC,LitigationCostsinCivilCases-MultivariateAnalysis.pdf>.

actions before it imposes substantial economic costs on the putative defendants. This unthinking imposition of economic costs on the persons sued without providing reasonably available procedures such as the PSPD that are already used in many similar situations to assess the reasonableness of the economic harm imposed by the state violates the Deprivations Clause.

Rule 4 sticks out like a sore thumb because it provides no pre-deprivation process whatsoever and rarely is a person who is wrongly sued reimbursed retroactively for the expenses incurred. Rule 4 also arguably offends the equal protection component of the Due Process Clause by automatically taking the word of one group of citizens as the basis for imposing burdens on another group of citizens.<sup>201</sup>

What process is “due” is of course dependent upon the circumstances.<sup>202</sup> At the time that the writ of summons developed in the thirteenth century, when few people could read or write, much less communicate by email and telephone, commanding someone to appear before the King personally in order to answer charges may have been the most efficient way to determine whether there was a reasonable basis for the claims.<sup>203</sup> But that is no longer the case today, and due process requires a system that is tailored to what is reasonably available.

In a long line of cases beginning in *Sniadach v. Family Finance Corp. of Bay View*,<sup>204</sup> and extended in *Fuentes v. Shevin*,<sup>205</sup> the Supreme Court has held that the Due Process Clause constrains the use of other long-established common law writs and remedies so that not even a temporary deprivation of property by the state is allowed without a prior inquiry appropriate to the circumstances.<sup>206</sup> The 1975 due process

201. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (“The federal sovereign, like the States, must govern impartially.”); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (treating equal protection analysis in the Fifth Amendment area the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (same).

202. See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–18 (1950).

203. Andrew H. Hershey, *Justice and Bureaucracy: The English Royal Writ and “1258,”* 113 ENG. HIST. REV. 829, 837–38 (1998) (describing difficulties and expense of travel to court to complain or answer). At a later date, an alternative procedure called the *querela* developed in which someone could present their claims orally to four knights in a local country court, rather than travel to where the King and his Chancery clerks were present. *Id.* at 844.

204. 395 U.S. 337, 342 (1969) (holding that a statute permitting prejudgment garnishment of wages without notice and prior hearing violates due process).

205. 407 U.S. 67, 69–70, 96 (1972) (holding state replevin provisions that permitted vendors to have goods seized through an ex parte application to a court clerk and posting of a bond violates due process).

206. It is well-settled that even preliminary and temporary deprivations of property require process appropriate to the circumstances. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL’Y REV. 1, 12 (2006) (“Due process requires hearing procedures with respect to temporary or preliminary deprivations, as well as for those that are final and permanent.”).

decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>207</sup> is particularly interesting for our purposes. The Court suggested in dicta that the combination of a detailed affidavit, a determination of facial validity by a neutral magistrate, and a bond to pay costs for property wrongfully seized *pendente lite* could be sufficient to satisfy due process.<sup>208</sup>

The suggestion in *Di-Chem* that a detailed affidavit, reviewed by a neutral judicial officer, and a bond or other procedure to compensate the victim for wrongful deprivations, would be sufficient to comply with due process is also consistent with the decision in *Mitchell v. W.T. Grant Co.*<sup>209</sup> That case upheld a Louisiana statute permitting a secured creditor with a preexisting lien to sequester property pre-judgment. The *Mitchell* Court emphasized the lienholder's preexisting interest in preventing dissipation of the previously encumbered property, but also the requirement for a detailed affidavit from which a judge could determine a clear entitlement to the writ, plus the availability of an immediate post-deprivation hearing with the option for damages.<sup>210</sup>

Rule 4, however, provides none of these three constitutionally required elements that have been applied to constrain potential abuse of other common law writs: a detailed affidavit verifying the claim, a neutral judicial evaluation before imposing the burden, and a process for compensating the victim if the deprivation turns out to be invalid. And, unlike in *Mitchell v. W.T. Grant Co.*, the plaintiff in an ordinary civil case has no preexisting lien whatsoever on the defendant's assets. Nor does the theoretical possibility of a suit after the fact for abuse of process or malicious prosecution remedy the defect. These suits require an additional showing of an improper purpose and malice or subjective intent. Merely showing that the suit was objectively unfounded and unreasonable is insufficient.<sup>211</sup> Unlike the temporary deprivations of

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207. 419 U.S. 601, 606–07 (1975) (invalidating an ex parte garnishment statute that failed to provide for notice and prior hearing or to require a bond, a detailed affidavit setting out the claim, the determination of a neutral magistrate, or a prompt post-deprivation hearing).

208. *Id.* at 607.

209. 416 U.S. 600 (1974).

210. *Id.* at 604–07.

211. A cause of action for abuse of process generally requires proof of an ulterior motive or improper purpose. *See Nat'l Ass'n of Prof'l Baseball Leagues, Inc. v. Very Minor Leagues, Inc.*, 223 F.3d 1143, 1152 (10th Cir. 2000) (“The elements of abuse of process are (1) the improper use of the court’s process (2) *primarily* for an ulterior purpose (3) with resulting damage to the plaintiff asserting the misuse.” (quoting *Bank of Okla., N.A. v. Portis*, 942 P.2d 249, 255 (Okla. Civ. App. 1997)) (internal quotation marks omitted)); *Vittands v. Sudduth*, 730 N.E.2d 325, 332 (Mass. App. Ct. 2000) (“The essential elements of the tort of abuse of process are ‘(1) “process” was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage.’” (quoting *Kelley v. Stop & Shop Cos.*, 530 N.E.2d 190, 191 (1988))); *see also* 1 AM. JUR. 2D *Abuse of Process* § 6 (2012) (“[U]lterior motive or purpose [is] generally required in an abuse of process action.”); *id.* (“[M]ere ill will or spite toward the adverse party in a proceeding does not

property by common law writs found unconstitutional in the *Fuentes v. Shevin* line of cases, the deprivation of property worked by the writ of summons is almost always permanent and irreparable because under the so-called American Rule, costs are not assessed against losing parties in litigation. As a result, the state has a particularly strong obligation to provide pre-deprivation procedures.

This line of due process cases from the 1970s was reiterated and clarified in 1991 in *Connecticut v. Doehr*,<sup>212</sup> in which a unanimous Supreme Court struck down a Connecticut statute authorizing pre-judgment attachment of real estate as security for a pending civil suit based on an ex parte judicial determination of probable cause. The Connecticut pre-judgment attachment procedure imposed a much lesser burden than Rule 4 in that pre-judgment attachment typically imposed no actual financial costs on the defendant. Instead, it merely consisted of entering a *lis pendens* on the land records, thereby notifying other creditors of the pending unrelated claim and establishing the priority of the potential judgment creditor in the case under suit.<sup>213</sup> Nonetheless, a unanimous Supreme Court declared this procedure unconstitutional because, without prior notice and hearing, or exigent circumstances and a requirement to post a bond to make the owner whole afterwards, the state deprived someone of private property without due process.<sup>214</sup>

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constitute an ulterior or improper motive, where the process is used only for the purpose for which it was designed and intended.”). In addition, in most jurisdictions, a suit for malicious prosecution requires not only an improper purpose, but also subjective knowledge by the person filing suit that there were no reasonable grounds for suing. See 52 AM. JUR. 2D *Malicious Prosecution* § 1 (2012) (“A malicious prosecution may be briefly defined as one that is begun in malice and without probable cause to believe it can succeed, and that finally ends in failure.”). Merely filing a lawsuit that the state would have determined on preliminary review to be insufficiently well-founded to require the person sued to answer would not necessarily be actionable either as an abuse of process or as a malicious prosecution. See *Campbell v. City of San Antonio*, 43 F.3d 973, 980–81 (5th Cir. 1995) (pointing out that malicious prosecution claims require a showing of malice, ill will, or improper purpose). Nor do prevailing rules and practices for assessing costs require the person suing to reimburse those who were sued for their costs merely because the claims under suit turn out to be unfounded. See CHARLES A. WRIGHT & ARTHUR R. MILLER, 10 FEDERAL PRACTICE AND PROCEDURE § 2668 (3d ed. 2010).

212. 501 U.S. 1 (1991).

213. *Id.* at 11–12 (“We agree with the Court of Appeals that the property interests that attachment affects are significant. For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause. . . . [T]he State correctly points out that these effects do not amount to a complete, physical, or permanent deprivation of real property. . . .”); see also *id.* at 27 (Rehnquist, C.J., joined by Blackmun, J., concurring) (“In the present case, on the other hand, [unlike prior precedents] Connecticut’s prejudgment attachment on real property statute, which secures an incipient lien for the plaintiff, does not deprive the defendant of the use or possession of the property.”).

214. *Id.* at 18 (majority opinion).



For our purposes it is particularly relevant that in *Doehr*, Connecticut tried unsuccessfully to defend its statute by analogy to the Federal Rules of Civil Procedure, arguing that “that the statute requires something akin to the plaintiff stating a claim with sufficient facts to survive a motion to dismiss.”<sup>215</sup> The Supreme Court unanimously rejected Connecticut’s argument that the plaintiff’s unverified say-so in enough detail to survive a motion to dismiss was sufficient to justify even the temporary deprivation of control of real property resulting from a pre-judgment attachment. The *Doehr* Court applied the modern due process framework that had developed since *Sniadach* and its progeny for balancing competing private and public interests against the risk of error under *Mathews v. Eldridge*.<sup>216</sup> The *Doehr* Court explained:

[T]he statute presents too great a risk of erroneous deprivation under any of these interpretations. . . . *Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant’s property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute . . . .* The potential for unwarranted attachment in these situations is self-evident and too great to satisfy the requirements of due process absent any countervailing consideration. . . . *It is self-evident that the judge could make no realistic assessment concerning the likelihood of an action’s success based upon these one-sided, self-serving, and conclusory submissions.*<sup>217</sup>

Applying this same analysis to the much more substantial deprivation of property worked by Rule 4—the costs of defense imposed on every person sued, “merely because the plaintiff believes the defendant is liable”—should lead to exactly the same result. Moreover, *Doehr* stands for the proposition that more is required than “one-sided, self-serving, and conclusory submissions,” such as those in a typical complaint.

Significantly, this line of due process cases was decided a generation *after* Rule 4 was written, yet it appears that the provisions of Rule 4 have never been seriously reconsidered in light of them. It is not apparent why a requirement to spend money to answer charges in a civil case based on the unverified say-so of a would-be creditor should be

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215. *Id.* at 13.

216. 424 U.S. 319, 334–35 (1976).

217. *Doehr*, 501 U.S. at 13–14 (emphasis added).

any different than the pre-judgment attachment of real property based on the unverified say-so of a would-be creditor that was struck down as unconstitutional in *Doehr*. Connecticut's pre-judgment attachment statute contained substantially more protection against arbitrariness<sup>218</sup> than is currently provided by Rule 4.

It is also interesting that four Justices in *Doehr* went on to opine that when exigent circumstances do not permit a hearing, a bond to reimburse a person wrongfully deprived of his property might be constitutionally required.<sup>219</sup> This strongly suggests that so-called "cost shifting"<sup>220</sup> may be constitutionally required in situations where courts allow plaintiffs to conduct "fishing expedition" discovery to determine whether they have a valid cause of action, but the plaintiff is unsuccessful in doing so.<sup>221</sup> The other five Justices did not disagree; they simply felt that it was unnecessary to address that issue in the case before them.

For the same reason that the Supreme Court has held that other common law writs and remedies such as replevin and garnishment must be disciplined by the Due Process Clause, so too the writ of summons should be issued only after the state verifies that a deprivation of the proposed defendant's property is justified by the plausibility of the plaintiff's claims.

#### D. *Rule 4(b) Unconstitutionally Delegates Governmental Power to Private Parties*

The decision to order someone to come to court to answer charges is undeniably an exercise of state power, as pointed out by attorney Philip K. Howard.<sup>222</sup> Rule 4, however, makes the issuance of a federal civil

218. *Id.* at 14–15 ("Connecticut points out that the statute also [in addition to an *ex parte* judicial determination of probable cause] provides an 'expeditiou[s]' postattachment adversary hearing; notice for such a hearing; judicial review of an adverse decision; and a double damages action if the original suit is commenced without probable cause." (citations and footnotes omitted)).

219. *Id.* at 18–23 (White, J., joined by Marshall, Stevens, & O'Connor, JJ.).

220. That term should be grating to anyone graduating from any law school that teaches law and economics after about 1980, as Nobel Prize-winning economist Ronald Coase showed in a famous article long ago that costs do not naturally "belong" to either plaintiffs or defendants. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960).

221. See Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 775 (2011), and *infra* text at notes 228–42 (discussing "reasonable but speculative" cases and arguing that the plaintiffs attorney should routinely pay for discovery in such cases).

222. See Howard, *supra* note 78 and accompanying text; see also *Doehr*, 501 U.S. at 9 (stating question as "what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure").

summons a ministerial act by the court clerk.<sup>223</sup> It thereby delegates an important exercise of state power to private individuals in violation of the constitutional provision that judicial power is vested in the courts. Worse yet, there are no standards that private individuals must satisfy in order to exercise this fundamental attribute of state power (beyond properly filling out the form of summons, which is a patently insufficient check on this delegation of state power). This violates the fundamental constitutional principle that government power may not be delegated to private individuals without appropriate standards to guide its exercise.<sup>224</sup> Far less serious exercises of governmental power than issuing a court order to participate in a lawsuit have been held to violate the principle against delegating government power to private individuals. For example, statutes that require the consent of adjoining property owners to a change in zoning classification have been held unconstitutional because they delegate governmental powers to private individuals.<sup>225</sup>

The issue of standardless delegation of governmental power to private individuals is particularly objectionable because the private actors<sup>226</sup> exercising this state power, plaintiffs' lawyers, have a financial stake in the outcome. If a judge made these same decisions about whom to order to court, but had a financial interest in nuisance settlements to avoid litigation costs, we would instantly recognize a violation of due process.<sup>227</sup> But we allow plaintiffs' lawyers, with contingent fee arrangements who will share in the proceeds of any nuisance settlement, to require court orders to be issued to any person they choose without any control by the court to insure that the order to appear and defend has a reasonable basis in law and in fact.

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223. *See supra* text accompanying notes 72–77.

224. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 310 (1936) (noting that Fifth Amendment due process limits the authority of the federal government to delegate to other coal producers the power to fix wages and hours); *see also* George Bush, *Statement on Signing the Negotiated Rulemaking Act of 1990* (Nov. 29, 1990), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=19115> (last visited May 2, 2012).

225. *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 120–23 (1928) (holding a zoning variance only by consent of adjacent owners to be unconstitutional); *Eubank v. City of Richmond*, 226 U.S. 137, 140, 142, 144 (1912) (holding the setting of property lines by adjacent owners to be unconstitutional).

226. Even if lawyers admitted to practice before a court are considered “officers of the court,” they still have a financial interest in the decisions that they make. And note also that the power to require the clerk to issue a court order of summons is not limited to officers of the court, but may be exercised by any person, whether or not admitted to practice before the court.

227. *Tumey v. Ohio*, 273 U.S. 510, 523, 535 (1927) (stating that due process is violated if a judge has a personal, direct, and substantial financial interest in the outcome); *see also* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (finding that due process was violated when a judge, who received large campaign contributions from a litigant, refused to recuse himself in that litigant’s case).

This problem of delegating state power to those with a financial interest in the outcome is particularly serious when plaintiffs' lawyers are empowered by the state to bring cases that do not currently have a reasonable basis in law or in fact. The Rules properly allow plaintiffs' lawyers to bring such cases in the hope that they will later be able to develop a reasonable basis for the claim either through facts unearthed in discovery,<sup>228</sup> or "by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law."<sup>229</sup> Some of these speculative cases are reasonable in terms of the benefits they confer on society and probably should be allowed.<sup>230</sup>

It does not follow automatically, however, that the person sued should subsidize the investigation into whether a wrong has been committed.<sup>231</sup> In such "reasonable but speculative" cases, it should be routine for the plaintiff's lawyer to pay the costs that his or her speculation in "litigation futures" imposes on the persons sued.<sup>232</sup> Normally in a market economy those who make the decision to invest in an economic opportunity are required to pay the costs of the social resources consumed by their endeavor. This is thought to create a self-policing system in which those who are in the best position to determine whether an opportunity is worth pursuing can balance both the costs and benefits of the activity in which they choose to engage. The litigation business is unusual, however, in that a plaintiff's lawyer may externalize a substantial portion of the costs of the economic venture that he or she initiates onto the defendant, but the attorney and his client obtain all of the benefits if the venture is successful. In other contexts, this incentive structure, in which one economic actor gets the profits but

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228. FED. R. CIV. P. 11(b)(3) (requiring an attorney or unrepresented party to represent to the court that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

229. FED. R. CIV. P. 11(b)(2).

230. See Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 932–35 (2009).

231. See *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 154 (Ind. 1987) (Shepard, C.J., concurring).

232. Cf. Redish & McNamara, *supra* note 221, at 777 ("We therefore liken the discovery process to a quasi contract, and argu[ing] that it is morally untenable to allow the requesting party to retain the benefit of its opponent's labor without, at the very least, reimbursing the costs of discovery incurred by the producing party."); *id.* (reinforcing that the party bringing suit should be accountable for the initial costs of inquiry required to prove the suit is founded on a meritorious claim). Of course, like every rule, there may be exceptions, and these could be accommodated through a waiver of the "requester pays" default principle when necessary in the public interest. Cf. 5 U.S.C. § 552(a)(4)(A)(iii) (authorizing waivers of fees under the Freedom of Information Act if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester").

another bears the risks, has been criticized by economists for creating runaway speculation.<sup>233</sup>

The present system, however, unconstitutionally delegates all of these decisions to the plaintiff's lawyer without any standards, supervision, or review by the state subject only to the toothless threat of sanctions under Rule 11 if the case turns out to be unreasonable. This is another, more subtle version of the problem of standardless delegations of government power to private individuals discussed above. The policy judgment that plaintiffs should sometimes be allowed to bring cases that are not well-founded in existing law or in the facts currently in the plaintiff's possession does not mean that decision should be delegated to private individuals who have a financial interest in the outcome.<sup>234</sup> But because this fundamentally judicial decision to allow a case to go forward despite the absence of sufficient law or evidence to support it has been delegated to private parties to be made *sub silentio*, the federal system currently seems to have no problem with allowing plaintiffs' lawyers with a personal financial stake in the outcome routinely to summon and impose costs on defendants against whom they currently lack sufficient evidence, thereby creating settlement value that inures to the personal benefit of the plaintiffs' lawyer.<sup>235</sup> Because this occurs "out of sight, out of mind," judges have no idea how common it is for defendants to be extorted using power delegated by the state into making payments in cases in which they are not legitimately involved.<sup>236</sup>

The best that can be said for these "something may turn up" or "fishing expedition" cases is that they may be filed in good faith, but speculatively, by private parties with a financial stake in the outcome. A more sinister explanation is that experienced plaintiffs' lawyers know from experience that many of the people they are suing will pay nuisance value. They should not be condemned for responding rationally to the lucrative economic opportunities that the ethical and

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233. George A. Akerlof & Paul M. Romer, *Looting: The Economic Underworld of Bankruptcy for Profit*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 1, 2 (1993).

234. *Cf.* *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803–09 (1987). Even legal representatives may fall under this category. For example, counsel for a party that is the beneficiary of a court order may not be appointed to undertake criminal contempt prosecutions for alleged violations of that order.

235. Costs of discovery imposed not for the purposes of obtaining information but to coerce settlement have been named "impositional benefits." John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989).

236. I am indebted to my sometimes co-teacher Chief Justice Randy T. Shepard of the Indiana Supreme Court for pointing out to me that judges rarely perceive the costs that unfounded suits impose on others.

procedural rules currently permit. Traditionally called “strike suits,”<sup>237</sup> such cases are filed not because of their probability of success on the merits but because of the settlement value that they create by imposing defense costs on those who are sued. One can debate the frequency with which such cases occur and the size of the deadweight loss that they impose on the economy, but one cannot deny that they exist. In a famous article in 1979, Professors William M. Landes and Richard A. Posner formally showed that even cases with little or no prospect of success do create settlement value in proportion to the costs of litigation.<sup>238</sup> Empirical data are not very good on how large the deadweight loss to the economy is from such cases. One empirical study of employment discrimination cases concluded that it makes economic sense for an employer to pay at least \$4,000 per claim regardless of merit simply to avoid costs of defense.<sup>239</sup> A strike suit is an “arbitrage” pure and simple: economic value is manufactured not by creating anything socially useful, but simply by doing a transaction over and over where there is a discontinuity between its payoffs and its expected costs.<sup>240</sup> The discontinuity between expected costs and benefits is in turn a function of the endemic judicial reluctance to allocate the costs of litigation from those upon whom they fall initially to those who cause them.<sup>241</sup> Judges should not confuse allocating costs to those who request discovery with penalties. There is nothing punitive about requiring an economic actor to pay for resources that are consumed in an activity

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237. “A strike suit is a non-meritorious action brought to blackmail management into a settlement so that management can avoid the costly process of continued litigation, particularly the costs of discovery.” Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 *LAW & CONTEMP. PROBS.* 113, 119 (1999).

238. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 *J. LEGAL STUD.* 235, 259–62 (1979) (describing relationship between size of “stakes” in litigation and settlement). It is an implication of Landes and Posner’s famous formula that even a case with an expected value of zero on both sides will create settlement value in the form of a joint asset, the litigation costs that can be avoided by settling. Why defendants would be willing to pay settlement value rather than litigate to discourage future strike suits is a more complicated puzzle in game theory, but it too has been solved.

239. David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *STAN. L. REV.* 1557, 1579 (2005) (“Because it costs employers (1) between \$4000 and \$10,000 to defend an EEOC charge, (2) at least \$75,000 to take a case to summary judgment, and at least \$125,000 and possibly about \$500,000 to defend a case at trial, it almost always makes good business sense to settle a case for \$4000.”). Costs will vary, however, by geographic area of the country and type of case.

240. “An arbitrage opportunity is an investment strategy that guarantees a positive payoff in some contingency with no possibility of a negative payoff and with no net investment.” Philip H. Dybvig & Stephen A. Ross, *Arbitrage*, *THE NEW PALGRAVE DICTIONARY OF ECONOMICS ONLINE*, [http://www.dictionaryofeconomics.com/article?id=pde2008\\_A000123](http://www.dictionaryofeconomics.com/article?id=pde2008_A000123) (last visited May 2, 2012).

241. Some of the reasons that judges are reluctant to second-guess decisions by litigants are catalogued in Elliott, *Managerial Judging*, *supra* note 19, at 331–33.

that he undertakes to make a profit.<sup>242</sup> On the contrary, the philosophy behind a market economy is that resources will be used most efficiently if those who decide to consume them pay the marginal costs of production.<sup>243</sup> For the same reasons that electricity will be wasted and overconsumed if government requires it to be supplied at a price below the marginal cost of production, litigation will be oversupplied, wasting societal resources, if those who initiate litigation pay only a small fraction of its cost.

The root of the judicial reluctance to impose the costs of litigation on those who are in the best position to determine whether the expenditure of resources is justified is in turn embedded in Rule 4 and the perverse incentives that it creates: judges are required by law and custom to presume that every case filed in court is valid until shown otherwise, and the “showing otherwise” is expensive.

Although this constitutional defect in Rule 4 is perhaps the most clear-cut, it is not desirable to fix Rule 4 by developing more constraining standards for when private parties may exercise the state power to summon. That was the function that the “forms of action” performed until they were abolished by the Field Code in New York in 1848, and at the federal level by the Federal Rules of Civil Procedure in 1938. By delimiting acceptable categories for suit, the state historically constrained the basis by which one party could hale another into court. It is not desirable to bring back the rigidity of the “forms of action.” However, without the forms of action to constrain private discretion regarding the basis for suit, the state must now make a PSPD—a preliminary inquiry into whether the plaintiff’s claims are sufficiently plausible on both legal and factual grounds such that the state may reasonably require the person sued to answer them—or routinely award full costs afterwards.

Courts are already required by statute to do this for civil claims brought *in forma pauperis*. The federal *in forma pauperis* statute provides:

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242. See Redish & McNamara, *supra* note 221, at 774.

243. See THOMAS K. MCCRAW, PROPHETS OF REGULATION 224 (1984) (“Sound regulatory policy, [Cornell economist and Carter Administration official Alfred Kahn] never tired of explaining, requires that buyers pay the marginal cost of all the goods and services they receive. If five units of an item cost \$40 to produce and six units cost \$60, then the marginal cost of the item is not \$8 or \$10 but \$20. If the sixth unit is priced at \$10 (that is, at average cost), consumers will purchase too many units—often not just one too many, but several—and since consumers have only a certain amount of money to spend, they will be able to buy too few units of other items, relative to what they would do under allocative efficiency. When goods and services are not priced according to marginal costs, therefore, consumers will automatically bring about a misallocation of society’s resources. In order to prevent this unhappy result, Kahn believed, the prices of all goods and services should be set ‘at the margin’—that is, they should be pegged to the cost of producing one more unit at a particular time.”) *Id.*

[T]he court shall dismiss the case at any time if the court determines that—

• • • •

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.<sup>244</sup>

In a 1989 decision, *Neitzke v. Williams*,<sup>245</sup> a unanimous Supreme Court, speaking through Justice Thurgood Marshall, explained the rationale for differing treatment between *in forma pauperis* cases and those brought by paying customers as follows:

Congress recognized, however, that a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits. To prevent such abusive or captious litigation, § 1915(d) [now (e)] authorizes federal courts to dismiss a claim filed *in forma pauperis* “if . . . satisfied that the action is frivolous or malicious.” Dismissals on these grounds are often made *sua sponte* prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints.<sup>246</sup>

That was, however, before *Twombly* and *Iqbal*. The *Neitzke* Court cited with approval *Conley v. Gibson*'s<sup>247</sup> very liberal pleading standard that no actionable set of facts could be proven under the allegations.<sup>248</sup> This standard was later specifically disavowed in *Twombly*.<sup>249</sup> The main concern of the Court in *Neitzke* seems to have been to make sure that poor people were given just as much leeway as rich ones to file cases even if they ultimately proved unfounded.<sup>250</sup> But this laudable goal of

244. 28 U.S.C. § 1915(e)(2)(B) (2006).

245. 490 U.S. 319 (1989).

246. *Id.* at 324 (citing *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984)).

247. 355 U.S. 41 (1957).

248. *Neitzke*, 490 U.S. at 326.

249. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–63 (2007) (concluding that the *Conley* standard of “no set of facts” can be proved under the allegations of the complaint is “best forgotten”).

250. *Neitzke*, 490 U.S. at 329–30 asserted:

Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendant's challenge,



equality between rich and poor litigants was achieved by harmonizing in the wrong direction. Paying customers should be subject to the same sua sponte review for frivolousness before service of process as are their fellow citizens who are indigent.

In a footnote, the *Neitzke* Court noted the issue of whether sua sponte dismissals under Rule 12(b)(6), as opposed to under the *in forma pauperis* statute, are permissible, but did not answer it.<sup>251</sup> The Court did state in dicta, however, that “[a] patently insubstantial complaint may be dismissed, for example, for want of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).”<sup>252</sup>

The question left open by the Supreme Court in *Neitzke* regarding the authority of a federal court to dismiss sua sponte before service of process in an ordinary case under Rule 12(b)(6), as opposed to under 28 U.S.C. § 1915(e) in an *in forma pauperis* case, was answered in the affirmative by the D.C. Circuit in *Baker v. Director, United States Parole Commission*.<sup>253</sup> That per curiam decision is of particular interest because the panel included then-Circuit Judges Ruth Bader Ginsburg

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and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid legal cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of the case. . . . By contrast, the *sua sponte* dismissals permitted by, and frequently employed under, § 1915(d), necessary though they may sometimes be to shield defendants from vexatious lawsuits, involve no such procedural protections.

To conflate the standards of frivolousness and failure to state a claim, as petitioners urge, would thus deny indigent plaintiffs the practical protections against unwarranted dismissal generally accorded paying plaintiffs under the Federal Rules. A complaint like that filed by Williams under the Eighth Amendment, whose only defect was its failure to state a claim, will in all likelihood be dismissed *sua sponte*, whereas an identical complaint filed by a paying plaintiff will in all likelihood receive the considerable benefits of the adversary proceedings contemplated by the Federal Rules. Given Congress’ goal of putting indigent plaintiffs on a similar footing with paying plaintiffs, petitioners’ interpretation cannot reasonably be sustained. According opportunities for responsive pleadings to indigent litigants commensurate to the opportunities accorded similarly situated paying plaintiffs is all the more important because indigent plaintiffs so often proceed *pro se* and therefore may be less capable of formulating legally competent initial pleadings.

*Id.* Congress evidently disagreed, however, as it subsequently amended 28 U.S.C. § 1915 to add “failure to state a claim on which relief can be granted” as a ground for sua sponte dismissal in *in forma pauperis* cases.

251. *Id.* at 329 n.8 (“We have no occasion to pass judgment, however, on the permissible scope, if any, of *sua sponte* dismissals under Rule 12(b)(6).”).

252. *Id.* at 327 n.6 (citing *Hagens v. Lavine*, 415 U.S. 528, 536–37 (1974); *Bell v. Hood*, 327 U.S. 678, 682–83 (1946)).

253. 916 F.2d 725 (D.C. Cir. 1990).

and Clarence Thomas, arguably the most liberal and most conservative Justices of the current Supreme Court. They both joined Judge Lawrence Silberman in holding that a sua sponte dismissal prior to service of process was proper under Rule 12(b)(6), even in a case not brought under the *in forma pauperis* statute, “where the plaintiff has not advanced a shred of a valid claim.”<sup>254</sup> Other circuits hold to the contrary,<sup>255</sup> however, and there is a clear circuit split that will eventually have to be resolved by the Supreme Court. A Supreme Court case addressing that circuit split might be a good occasion to introduce the Pre-Service Plausibility Determination process advocated by this Article.

Even if the power asserted by the D.C. Circuit in *Baker* to dismiss an occasional case before service sua sponte were to be recognized more generally, that would not obviate the need for a change to the language of Rule 4 as proposed below.<sup>256</sup> The principal drafter of the Federal Rules of Civil Procedure, Charles E. Clark, sagely pointed out long ago that the Rules should not only grant judicial power, but especially when they aspire to change judicial behavior, they must also explain how and why that power is to be used.<sup>257</sup> The current practice, by which the clerk’s office issues the summons automatically without any preliminary determination by the court that it is reasonable to require the person being sued to answer, is now so deeply embedded in the federal procedural system that a change in rule language is desirable.

### III. THE GOVERNMENT MUST VERIFY THE PLAUSIBILITY OF CIVIL CLAIMS BEFORE IT ORDERS PERSONS TO ANSWER THEM

Perhaps the anomalies described above would be tolerable if they were unavoidable, but there is a simple solution, which is routinely followed in many other areas of our law—the PSPD. *Before summoning someone to spend a substantial amount of time and money defending a lawsuit, a court official should make an inquiry appropriate under the*

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254. *Id.* at 726–27; *accord* *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987).

255. *Perez v. Ortiz*, 849 F.2d 793, 797–98 (2d Cir. 1988); *Morrison v. Tomano*, 755 F.2d 515, 516–17 (6th Cir. 1985); *Jefferson Fourteenth Assocs. v. Wometco de P.R., Inc.*, 695 F.2d 524, 526–27 (11th Cir. 1983); *Frankos v. LaVallee*, 535 F.2d 1346, 1347 (2d Cir. 1976); *cf.* *Literature, Inc. v. Quinn*, 482 F.2d 372, 374 (1st Cir. 1973) (stating that failure to give plaintiff prior notice “might well justify reversal,” but reversed on other grounds).

256. *See infra* Part III.

257. Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 501 (1950) (“[W]ithout a tradition for the exercise of discretion, a general grant of power is likely to accomplish little. Habitually courts act according to precept and custom. If left to their own devices, without any precise guide beyond a general authorization, they will stick to what they have known in the past.”).

*circumstances to verify that there is a plausible basis for the claim that is sufficient in law and fact for it to be reasonable for the state to require the defendant to answer.* This does not mean that plaintiffs must show that they are going to win their lawsuit. It simply means that the government has an obligation to determine that there is a sufficiently reasonable basis for the suit so that the state is not complicit in fraud or extortion or is not itself acting arbitrarily by ordering the defendant to appear and defend. This minimal threshold requirement is not satisfied merely because someone fills in their name and address and the name of the person that they want to sue on a government form.

Rule 4(b) of the Federal Rules of Civil Procedure currently reads as follows:

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.<sup>258</sup>

For the reasons described in this Article, Rule 4(b) should be amended to read as follows:

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, and a magistrate judge or district judge determines from review of the complaint and other appropriate inquiries that it is reasonable to summon one or more of the proposed defendants to answer, the clerk must sign, seal, and issue it to the plaintiff for service on that defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

The concept of minimal governmental inquiry before imposing a substantial burden on a citizen is common in our law. In fact, we honor that principle in every area of the law—except when summoning someone to defend a civil lawsuit under Rule 4 and its state equivalents when a filing fee has been paid. This is clear discrimination in favor of the wealthy and should be eliminated by subjecting them to the same standard of pre-service review that is already applied in *in forma pauperis* cases or to subpoenas by government agencies. That someone

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258. FED. R. CIV. P. 4(b).

is able to afford a \$350 filing fee should not entitle them to co-opt the state's power to seize the time and money of another free citizen without reasonable verification by the state that the imposition is justified.

The system of civil procedure creates a series of "hurdles" of increasing height that are tailored to the appropriateness of moving to the next stage:

(1) At the Rule 4 stage, the proper question is a very modest one: whether the case appears to be sufficiently plausible that it is reasonable for the state to require the defendant to appear and respond to the complaint.

(2) At the Rule 12 stage, the proper question is a different one: whether the plaintiff has stated a legally-cognizable claim such that it is reasonable to subject the defendant to the costs and intrusion of discovery.

(3) At the Rule 56 stage, the proper question is whether a sufficient dispute of material fact exists after discovery that the case should be heard by the trier of fact.

In *Twombly* and *Iqbal* the Supreme Court correctly perceived the problem of imposing costs on those sued without verifying that there is sufficient merit to the claim to justify doing so, but it located the solution in the wrong place, using the wrong mechanism. The proper function of the complaint in the modern procedural system is to state the plaintiff's legal theories with sufficient particularity so that their legal sufficiency can be tested via a motion to dismiss. It is impossible in any system to maximize two or more variables simultaneously.<sup>259</sup> Other things being equal, procedural devices work better when they are not asked to perform multiple, inconsistent functions. While there should be a modest hurdle before the defendant is haled into court by the state, it does not necessarily follow that we should return to detailed fact-pleading in the complaint. There are many well-known deficiencies in a system that requires that the plaintiff be in possession of all the facts necessary to take a case to trial as a pre-condition to bringing a claim.

Rather than reinvent fact pleading, with all of its well-known drawbacks and inefficiencies, we should adapt new procedural devices as part of Rule 4. These procedures should be properly adapted to the purpose of determining whether it is reasonable for the state to summon the persons identified by the plaintiff and put them to the burden and expense of defending a particular claim. That would consist of a two-pronged inquiry (1) whether a claim is sufficiently plausible based on the available facts and existing law that it is reasonable for the state to

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259. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1243 (1968) (citing JOHN VON NEUMANN & OSKAR MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* 11 (2d ed. 1947)).

compel the persons that the plaintiff wishes to sue to incur the costs and inconvenience of appearing in court; and if not, (2) whether the plaintiff is sufficiently likely to develop the necessary facts or law at a later date.<sup>260</sup> Some “speculative but reasonable” cases should be allowed for their broader social utility even though the available facts, law, or both do not support the claim. But it does not follow that (1) the power to bring claims that are not currently justified by the available facts or the law should be delegated to private self-interested individuals without any standards or review by the state; or (2) the costs of the resources consumed in a speculative effort to develop facts or law should be subsidized by the persons sued regardless of how the economic venture ultimately turns out.<sup>261</sup>

A judicial official such as a magistrate judge should engage in a preliminary examination of a lawsuit before summoning the defendant to respond in order to determine that the lawsuit is plausible enough that it is reasonable for the state to put the defendant through the time and expense of responding. In many instances, this could be done simply by reviewing the complaint—particularly if it pleads facts with sufficient specificity and is verified under oath or attaches key items of evidence, such as the contract or promissory note upon which suit is based. Moreover, complaints could identify key pieces of evidence that plaintiff does not presently have in its possession but hopes to obtain through discovery.

The incentives created by advance knowledge that the complaint must satisfy a standard of minimal plausibility and reasonableness would do more than any reworking of Rule 8 to ensure that complainants plead cases with reasonable specificity. The practice of preliminary judicial review of complaints before service in Germany reportedly has exactly that effect: those drafting complaints want to put enough in them to convince the judicial official reviewing them before service that there is a valid basis for suit so that they will summon the defendant without further delay.

The expectation of preliminary review [in Germany] helps  
deter frivolous complaints. Yet that review should not deter

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260. See FED. R. CIV. P. 11(b)(3) (“By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support *or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . .*” (emphasis added)).

261. See *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 154 (Ind. 1987) (Shepard, C.J., concurring) (“The threshold for frivolity should not be so low that it imposes a tax on responding parties, obligating them to spend money answering baseless claims as a way of encouraging others to be novel.”).

many meritorious complaints, since plaintiffs do not plead at their peril. Should the judge have concerns about whether the procedural prerequisites are met, or about whether the complaint sufficiently substantiates the factual allegations, the judge should direct the plaintiff to clarify the point before dismissing the case.<sup>262</sup>

In situations in which the complaint itself does not contain enough information to verify that it is reasonable for the government to put the defendant through the time and trouble to answer a lawsuit, the reviewing magistrate should telephone or invite in the plaintiff's lawyer for an informal oral conference and ask appropriate questions, in much the same way that judges and magistrates already do before issuing search warrants.<sup>263</sup> This oral conference would be similar to the first status conference that is typically held today, in which the judge finds out what the case is about but it should occur pre-service.

The conference, if one is needed because not enough information is provided in support of the complaint, could ordinarily involve only the plaintiff's lawyer to avoid imposing unnecessary burdens on the prospective defendants before the state has verified that there is a reasonable basis to do so.

Over time, experience would teach reviewing magistrates that many defendants are often wrongly included in certain kinds of cases, and they would start asking this question of plaintiffs' lawyers. To forestall the inquiry, plaintiffs might start determining who is involved before they file their cases, and reciting same in the complaints before they file them.

If a reviewing judge or magistrate decides to hold a conference rather than sign off on the complaint, the preliminary complaint review and verification conference should be on the record before a court reporter. A transcript should be made and, in accordance with the usual final judgment rule, an appeal would be available if the reviewing judge refuses to authorize service of the complaint, but not if the judge decides to proceed with service.

Plaintiffs should be encouraged by gentle questioning about missing evidence to identify in their complaints any crucial "missing link" evidence that they anticipate obtaining through discovery. For example, a plaintiff might state: "Despite having interviewed all of the decedent's known coworkers, I do not currently have product

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262. James R. Maxeiner, *Imagining Judges that Apply Law: How They Might Do It*, 114 PENN. ST. L. REV. 469, 477 (2009).

263. FED. R. CRIM. P. 41(d)(2)(A) ("When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.").

identification evidence for eight of the ten manufacturers named in the complaint, but I hope to obtain this evidence through discovery of their records, which I believe will show that they sold their products to decedent's employers at the location where decedent worked." The court can then assess whether it is sufficiently likely that the crucial evidence will turn up that it is reasonable to go forward. The threshold for showing plausibility could be lower if plaintiffs' lawyers routinely paid for the costs of inquiries to try to find crucial missing evidence because we would not be requiring the persons sued to subsidize their inquiries.<sup>264</sup>

As we already do in criminal cases, or when courts are asked to enforce administrative subpoenas,<sup>265</sup> or issue search warrants, in habeas corpus or *in forma pauperis* civil cases, or as many other procedural systems also do in civil cases, it is possible for the state to conduct a modest preliminary inquiry into the bona fides of cases *before* the state summons the defendant to appear and begin spending resources. This Article has argued that minimal preliminary inquiry by the state is constitutionally *required*, but regardless of whether the courts ultimately so rule, the constitutional values at stake show that as a matter of policy, the Rules should require a magistrate judge to conduct a preliminary inquiry into the likely merit of a claim before those sued are required to answer it. This should be done at the Rule 4 stage, before the federal government orders the persons sued to appear in court and compels them to begin expending their resources to answer the claim.

Finally, those who would object that a PSPD is impractical should remember that (1) we already conduct such an inquiry in many civil cases; only the rich who can afford to pay the filing fee are exempt from it, and (2) we did it routinely in all federal cases between 1789 and 1938.

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264. See *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 154 (Ind. 1987) (Shepard, C.J., concurring); Redish & McNamara, *supra* note 221, at 779, 791, 804.

265. *United States v. Morton Salt Co.*, 338 U.S. 632, 642, 652–53 (1950) (explaining that a court will enforce an administrative subpoena but only if reasonable).