Twombly in Context: Or Why Federal Rule of Civil Procedure 4(b) Is Unconstitutional

*By E. Donald Elliott**

Note from the Editor:

In December 2010, the Federalist Society heard from a number of federal judges and civil procedure experts about amendments to the Federal Rules of Civil Procedure, including the process that would be undertaken to amend the rules and some proposed amendments that might be offered. Based on the comments and perspectives received, the Federalist Society determined that it could add value to the broader discussion over amending the rules by asking experts to flag issues or perceived problems with the rules as they currently exist, and to identify the range of solutions that are being offered to address these problems. This back-and-forth culminated in four papers, one of which follows. A version of these papers will appear in the Florida Law Review, and they are published here with permission.

> "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 by weak minds be carried to an excess, that itself will need reforming."

Samuel Taylor Coleridge (1817)[1]

Viewed from the standpoint of strategic incentives, Rule 4(b) is the foundation of the Federal Rules of Civil Procedure: the state compels someone to appear in court and expend resources to move or answer without regard to the merit of the claims brought. Rule 4(b) is probably unconstitutional, but it is certainly bad policy and creates a distorted incentive structure. *Twombly*[2] is a well-intentioned but misdirected attempt to fix this fundamental problem in the incentives created by the Federal Rules of Civil Procedure, but it focuses in the wrong place. The problem is created pre-service, and that is where it should be fixed.

I. The Fatal Flaw in Rule 4(b).

The fundamental flaw in Rule 4(b) of the Federal Rules of Civil Procedure[3] is delegating 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 that the imposition on the defendant is reasonable, or a reliable practice of assessing costs 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[4] people into court without safeguards is particularly anomalous because, as Judge Learned Hand famously reminds us, the greatest calamity that can befall a person, other than sickness or death, is to become involved in a lawsuit.[5]

The unsupervised power that Rule 4(b) delegates to private parties 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 citizen's most fundamental right: the right to be let alone.[6] For example, we require a preliminary judicial inquiry into the bona fides of claims before:

- Summoning someone to answer criminal charges;[7]
- Requiring someone to answer civil claims if brought *in forma pauperis*;[8]
- Requiring someone to answer civil claims that may be brought in retaliation for exercise of their First Amendment rights (a so-called "strategic suit against public participation" (SLAPP));[9]
- Requiring someone to produce documents or testimony in response to a government inquiry;[10]
- Requiring a government official to answer a petition for *habeas corpus*.[11]

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,[12] as well as by the more recent "due process revolution."[13] Rule 4 of 1938 is an isolated relic of the New Deal penchant for delegating governmental power to private actors[14] that resulted from an unholy compromise between the drafters of the rules and the practicing bar.[15] 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 toward which the Supreme Court was reaching in *Twombly*.[16] 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

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* *Professor (adj) of Law, Yale Law School and Partner, Willkie Farr & Gallagher LLP, Washington, DC. e.donald.elliott @yale.edu and delliott@willkie.com.* *I am grateful to Matthew Christensen, Yale Law School class of 2012, for his excellent research assistance.*

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those who are sued without sufficient justification by awarding costs retroactively.[17]

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.

The most basic underpinning of due process of law has long been recognized to be that "The United States cannot . . . interfere with private rights, except for legitimate governmental purposes."[18] But under the current version of Civil Rule 4(b), no attempt whatsoever is made to determine that "a legitimate governmental purpose" is served by requiring someone to appear and answer in a civil case. 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.[19] 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 private charges in a civil as opposed to a criminal case, although the ultimate consequences may be different.

However, like the fish that does not see the water that surrounds it,[20] most courts and commentators[21] have overlooked Rule 4 and the potential for abuse that it creates. Many casebooks and courses in civil procedure give great emphasis to the general rules of pleading under Rule 8, and to motions to dismiss under Rule 12, but hardly mention Rule 4.[22] Those that do discuss Rule 4 focus almost entirely on the mechanics and territorial limits of service. [23] Scant attention is ever 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*[24] and *Iqbal*[25] to require that lawsuits must 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[26] and nuisance litigation that should be fixed either by providing a Pre-Service Plausibility Determination by the judiciary before the courts command someone to appear and answer, or a more reliable system for reimbursing persons wrongfully sued for their costs after the fact.[27]

This Article argues that *Twombly* and its progeny are ultimately grounded on 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 time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." [28]

Motions to dismiss are decided too late to remedy the abuses at which *Twombly* and *Iqbal* were aimed. By the motion to dismiss stage, the persons sued have already been required to expend significant resources, and thus the "*in terrorem* increment of the settlement value" has already occurred, albeit the extent varies depending on how much motions practice and discovery has been allowed. But filing a motion to dismiss does not stay discovery or the costs that it imposes.[29] The Rules stipulate only that motions to dismiss "must be heard and decided before trial unless the court orders a deferral until trial."[30]

A good illustration that even successful motions to dismiss are granted too late to prevent significant harm is *Ward v. Arm & Hammer*.[31] In that 2004 federal district court case, an inmate serving a long sentence in federal prison for selling crack cocaine sued the manufacturer of baking soda for failing to warn on its package that it was illegal to use the product to cut crack cocaine. 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. 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 ordering them in the name of the court to answer these patently frivolous charges, thereby compelling them to go 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 was required to spend tens of thousands of dollars[32] to defend against a totally bogus claim; 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 to answer it in the first place. Under the procedures in effect from the Founding until 1938, the defendant in *Ward v. Arm & Hammer* would <u>not</u> have been ordered by the government to answer such patently frivolous claims.[33] But today, because we lack a Pre-Service Plausibility Determination 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, no matter how frivolous or stale the charges.[34] Today no government official even reads the complaint 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 virtually guarantees that government 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.[35]

In addition to coming too late, by focusing on pleadings and motions to dismiss, *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.[36] No one has yet shown that rules requiring

more detailed fact pleading actually result in anything other than more detailed fact pleading.[37] A mechanism more tailored to the task of screening out cases that should not be served must be developed.[38] 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 inquiries 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. Only in the misguided Rule 4(b) of 1938 did federal law first grant an absolute "right" of 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,"[39] but the person being sued is also a "rights seeker": they just have different visions of their respective rights. The government has an obligation 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 of a strong policy in America—completely out of step with most of the rest of the world[40]—that our courts almost never impose costs on losing parties in litigation. Thus, someone can sue, whether or not they have a reasonable basis, and thereby impose costs 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,[41] and it never should have happened.

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.[42] 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.[43]

Some might object that returning to the pre-1938 practice of Pre-Service Plausibility Determinations 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" appeared only a few years ago prior to *Daubert*,[44] while imposing costs retroactively is arguably inconsistent with the American legal culture.[45] At base, the argument against screening cases by imposing 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.[46] A Pre-Service Plausibility Determination by the judiciary, on the other hand, has the advantages that it is not economically punitive and that it is transparent. Judges must make and justify openly a determination that the claims are so implausible that the likely social benefit is not worth the cost, and this ruling is ultimately subject to the safeguard of review on appeal if they deny the right to go forward. A Pre-Service Plausibility Determination is analogous to the existing requirement that a judge, on his or her own motion as well as when requested, must restrict discovery if it appears that the likely benefits are outweighed by the costs,[47] or a decision by the Supreme Court to deny a request to issue a 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.[48] Reinstating judicial screening to prevent service of "junk complaints" by Pre-Service Plausibility Determinations 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.

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 issuance of a court order to appear and defend. That 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 must 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 if they are wrongfully sued are vanishingly small in our current system.

This Article makes the case that Civil Rule 4(b) is unconstitutional,[49] 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 Holmes' sense of a bloodless prediction of "what the courts will do in fact,"[50] it certainly *should* be unconstitutional. Fundamental norms in

our law underlying several different constitutional provisions all dictate that the court must 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 embed the current debate about *Twombly* and *Iqbal* in this broader context of our constitutional values and traditions, which to date have generally been overlooked.[51]

Rule 4(b) is also badly out of step with what came afterward 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.[52] Rule 4(b) was drafted before this "due process revolution" of the 1970's recognized that the state has obligations to conduct an inquiry, appropriate to the circumstances, *before* imposing burdens on alleged debtors.[53] 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 re-examined in light of these subsequent constitutional developments.

The term "alleged debtor" or "person someone wants to sue" rather than "defendant" is used 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.[54] The defining feature of procedure is its potential for reciprocal application. Evil corporations may also sue crusading scientists to coerce their silence.[55] 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.[56]

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, Rule 4 creates economic incentives to over-supply 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 intense 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, but in the hope that something may turn up. For this narrow category of cases, the "reasonable but speculative" cases, I suggest that not only a preliminary determination of reasonableness by government should be required, but that the lawyer bringing the case should also be required routinely to pay for the costs of a venture from which he or she will profit if successful.[57]

II. Rule 4(b) Unconstitutionally Delegates State Power.

Federal Rule of Civil Procedure Rule 4(b) 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 order 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 to 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. 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

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)

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[58]) is paid:

> *If the summons is properly completed, the clerk must sign, seal, and issue* it to the plaintiff for service on the defendant.[59]

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.[60] The government takes the plaintiff at its word and automatically and without the regular exercise[61] 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 is set out at the bottom of the previous page. 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.[62] 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").

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 "suing . . . is a use of government power against another free citizen . . . . Being sued 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."[63]

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, [64] is completely contrary to our constitutional traditions and values. The federal government is *commanding* someone to appear in court[65] 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.[66] The federal practice of ordering someone to court without any quality control is (1) an unwarranted departure from our historical tradition that the judge controls the basis upon which someone can be haled into court, as well as facially unconstitutional as (2) an unreasonable seizure; (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. 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 sections.

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.[67]

1. The Original Understanding of the Court Order of Summons.

It was clearly established in both England[68] and the Colonies[69] 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 PSPD review of the *bona fides* of the proposed lawsuit.

According to a book written by federal district judge Samuel Betts early in the 19th century, the practice in his court prior to the Revolution was for the lawyer for the plaintiff to appear in open court and state her case orally to the judge, who would then decide whether or not to summon the person whom they wished to sue to answer.[70] 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.[71]

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 routinely the case under Rule 4). Rather, as of 1838, either the judge or the clerk "examines carefully" the filing, and only gives the party an order of summons to serve on the proposed defendant if justified.

While Judge Betts was writing a treatise about admiralty, he was a federal district judge sitting in general jurisdiction, and throughout his treatise he routinely notes 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.[72]

Similarly, another federal district judge, Alfred Conkling,[73] writing a generation later shortly before the Civil War, also testifies 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*.[74]

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

This already-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."[75] 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."[76] In other words, existing English and Colonial practice, including preliminary review of complaints for plausibility before issuance of summons, was specifically incorporated by reference as a condition by the section of the 1789 Judiciary Act 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 practice. In the 1792 Process Act,[77] they 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.[78] As one of their first acts establishing the federal courts, the First and Second Congresses enacted the statute, set out below, requiring all processes issued by district courts, including writs of summons, to "bear test of the judge."[79] 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.[80] But the statutory requirement that the judge must sign off on process before it issued is still important,[81] just as signing a contract is important to signify that one has adopted its terms. The statutory requirement that

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 judge must test and the clerk must issue, seal, and sign signifies that issuing process, including a writ of summons, is a discretionary act by the United States,[82] not a power granted to the plaintiff's lawyer. The federal statute just cited was understood throughout the 19th and early 20th 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."[83] 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 court to answer before doing so.[84]

It is true, sadly, however, that 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[85] 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, formalistic, and less substantive. A late-19th-century 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.[86]

One of the principal drafters of the Federal Rules of Civil Procedure, Edson Sunderland, notes 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."[87] In other words, where it 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, the court in the 19th century and early 20th century had clear discretion to refuse to issue a summons. That now-"superseded" practice[88] compares favorably with the 2004 case of *Ward v. Arm & Hammer*,[89] 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 that they failed to warn that using their product to cut crack cocaine was illegal, despite it also being apparent on the face of the complaint that the statute of limitations had long since run.[90]

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 pleader 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*[91] is illustrative. There a prominent Pennsylvania inventor, investor, and frequent *pro se* litigant brought a contract suit against a company in federal court in Massachusetts.[92] 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.'"[93] 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."[94]

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*[95] illustrates this route. There 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 Mr. 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 because the clerk had properly refused to issue a writ of summons because there was no colorable allegation of federal jurisdiction.[96]

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 over-reaction by the drafters in 1938 against the then-prevailing practice of assistant clerks rejecting complaints for a variety of formal defects. But it threw out the baby with the bathwater by completely abrogating judicial control over the grounds for haling someone into court.

Charles Clark, then dean of Yale Law School and the principal drafter of the rules, wanted to go even farther. 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.[97] Clark thought that this system "works quite satisfactorily," but according to him, the practicing bar objected that it "seemed undignified and over-simple."[98] They called it the "hip pocket system," in which attorneys could sue without filing anything with the court until later when some action was requested of the court.[99] 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 then-prevailing state and federal systems but in an untenable way. Like the then-prevailing federal practice, 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 the state systems, the clerk's office would 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."[100] 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 over anything with which they were unfamiliar, Clark described the final compromise as "long on dignity" and adopting "the original procedure in the Federal Courts" merely because "that was the more familiar system throughout the country."[101] An outline found in the Clark papers at the Yale University library for a September 1937 speech to the ABA by the Chair of the Rules Committee, former Attorney General William D. Mitchell, tells essentially the same story.[102]

In fact, however, Clark was misstating the reasons 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 in his comments, also found in the Clark Papers at Yale, 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."[103]

The drafters of Rule 4 were forced by opposition from the bar into a political compromise that amalgamated two different systems into a new hybrid that is constitutionally unsustainable. 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. That private system, like that used by most states, is constitutional and does not involve the flaws in the current federal system identified in this Article. Under the New York system (both then and now), 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 prospective 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 Clark correctly 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."[104]

That fundamental difference between the federal practice of issuing a writ of summons as a court order, and the practice in many of the states of merely providing a private notice of suit from the plaintiff's attorney, was explained in 1904 in *Leas & McVitty v. Merriman*[105]:

> [T]he word "process," as used in Rev. St. § 911 [the successor to the 1792 Federal Process Act 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. Johnston's Forms, p. 1. 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. See 19 Am. & Eng. Ency. (1st Ed.) p. 222, notes, and cases cited supra. 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 states the summons is not issued by the court, and is not an order of court*.

For example, you can find the current New York state form of summons, which is like that in many states, at the top of the next page.[106] Note that the NY 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 such as a federal marshal, but rather may be served by any person over eighteen who is not a party of the action.[107] Most importantly, the New York form of summons is <u>NOT a court order to appear</u>. Rather, it is merely notice by the plaintiff's attorney that if the person sued fails to appear, the plaintiff intends to apply to the court for a judgment by default against them. Private notice of the general form "I am about to sue you and here's how that works" does not raise the federal constitutional issues of delegating state power to private individuals, or of the state seizing someone without a reasonable basis to do so, or of a deprivation of property by the state without due process of law, which are all raised by the federal system of a court issuing an order to someone to appear without determining that there is a reasonable basis to do so. All of these constitutional issues depend upon state action, which is not present in the typical state system for issuance of summons by the plaintiff's attorney because the court is not involved until later. By contrast, under the federal system, "behind that innocent-looking piece of paper titled 'Summons' stands the full coercive power of the State."[108]

After service in the typical state 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 state 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.[109] Thus, unlike the federal system created by the 1938 rules, the system of summons by private notice as opposed to court order in effect in New York and many

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]

other states does NOT involve state power at the initial stage of serving a complaint, but rather only after the complaint is returned to court and the state decides whether or not to enter a default judgment.[110]

It has long been recognized that federal and state practices for commencing a lawsuit are fundamentally different. The leading case is *Dwight v. Merritt*.[111] 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. 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 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.[112]

For our purposes, 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 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 the typical state system, summons was a private action by the plaintiff's lawyer merely to put the prospective defendant on notice.[113] The state did not become involved until later, when the state decided based on the facts and the law whether a default judgment was justified. 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.

The federal rules drafters 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 in Rule 4.[114] With cryptic understatement, the 1937 Advisory Committee Note to Rule 4(b) recites merely that "USC, Title 28, former § 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."

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 to summon someone to court instead to the person suing (or more practically, the plaintiff's lawyer). This fundamental shift to put state power in private control was not even mentioned in the 1937 Advisory Committee note.

No one seems to have noticed or raised any controversy as this aspect of the new rules made their way through the process. Nor did anyone note the constitutional issues (which, in fairness, did not become prominent until the "due process revolution" of the 1970's). After the rules were adopted, several of the drafters wrote law review 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,"[115] Charles E. Clark, then-Dean of Yale Law School and 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 . . . ."[116] 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."[117] There is no intimation that the phrase "the clerk issues the summons" papered over a significant change or that the new process in any way impinged upon long-standing traditions and constitutional values.

Another academic who also served on the drafting committee, Professor Armistead M. Dobie of the University of Virginia Law School, later 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."[118] The "as of course" language may have been drawn from former Equity Rule 12 of 1912,[119] which is cited in the 1937 Advisory Committee note to Rule 3.[120] However, it is clear that a subpoena issued under Equity Rule 12 still required "teste" by the district judge under the 1792 Process Act.[121] What was significant about the 1938 changes was the removal 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 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 to reduce formalism and legal technicalities and to insure that cases would be decided on their merits. But this "reform" brings to mind Coleridge's admonition quoted in the epigraph that "[e]very reform, however necessary, will by weak minds be carried to an excess, that itself will need reforming."[122] 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 specifically prohibited the clerk's office from rejecting papers for formal defects.[123] 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 attitude toward "largely groundless claims" (in the words of *Twombly*) before and after the 1938 rule changes 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.[124]

A few years later, however, under the aegis of 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.[125] That case involved a vindictive ex-wife who filed numerous *pro se* cases against her ex-husband and his new wife, as well as picketing his place of employment. The immediate complaint in question was a civil rights claim in federal court against the state court judge who had previously enjoined her from picketing her former husband's place of employment, as well as the lawyer who had represented the husband in that prior case, and the new wife as well. The clerk's office referred Ms. Dear's complaint to a district judge, who after 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.[126]

The Seventh Circuit reversed, stating:

> 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 (b)], Fed.R.Civ.P. which imposes a duty on the Clerk to issue the summons "forthwith." [citations omitted] 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.[127]

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 constitutional 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.[128] 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, Ralph Dear, was eventually forced into default because he lacked the financial resources to answer all of his ex-wife's numerous lawsuits.[129]

In granting summary judgment, the district judge observed that the suit against Mr. Dear's 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 Ralph C. Dear's new wife a defendant but made no allegations against her, merely charging that she was a conspirator."[130] 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.[131]

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.[132] 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 gives any 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.[133] In particular, they seem 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" (in the words of the Supreme Court in *Twombly*[134]).

Sixty years after Rule 4 was adopted, in the 1998 re-codification of the *United States Code*, portions of the statute passed by the First and Second Congresses relating to court control over issuance of writs of summons were quietly deleted from the statute books on the grounds that they had been "superseded" by the adoption of Rule 4(b) in 1938.[135] The small portion of the original 1792 law about testing of process by the judge before issuance that is still on the books today[136] is a pale shadow on the original passed by the first two Congresses; today the requirement for *teste* of process is formalistic[137] and performed as a ministerial act by the clerk's office without any judicial involvement or 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 statutes passed by the first two Congresses.

Whether the adoption of the Federal Rules of Civil Procedure by the Supreme Court in 1938 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."[138]

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 a

statute required by *INS v. Chadha*,[139] 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.[140] The Senate did not concur, however, and the provision was restored.[141] 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."[142] The issue has never been squarely decided by the Supreme Court. It was noted in passing, however, in *Clinton v. City of New York*,[143] 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 altogether persuasively.[144]

It may be that 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 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 patently frivolous claims, 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, I argue that the 1938 change to eliminate Pre-Service Plausibility Determinations, even if superficially legal under the Rules Enabling Act, was unconstitutional as well as unwise.

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

The Fourth Amendment guarantees, "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and *seizures,* shall not be violated . . . ."[145] This is an important protection for that most fundamental of all rights: the right of privacy; the right to be left alone without intrusion by the government except when reasonably justified.

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.[146] 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. [147] For much the same reasons that we require a showing of either probable cause or reasonable suspicion in criminal cases, we should not require fellow citizens to come to court and answer charges made against them without verifying that there is a reasonable and credible basis for the government to impose this substantial cost and inconvenience of being involved in a lawsuit. 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, 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.[148] Yet we 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 Civil Rule 4,[149] and there are no court of appeals cases on point. The case that comes closest is *Williams v. Chai-Hsu Lu*.[150] There, 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."[151] 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-sanction 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 case 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, but rather merely given notice of the right to do so.

The constitutional "seizure" results from the federal government's additional actions in imposing an official requirement 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. [152]

Lower court cases such as *Williams v. Chai-Hsu Lu*, *supra,* 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.[153] 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.[154] 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.[155] As Justice Scalia explained for a unanimous Supreme Court in the 1989 roadblock case, *Brower v. County of Inyo*, 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 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*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), 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." Id., at 58, 44 S.Ct., at 446. 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.*[156]

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 states *is* "a Fourth Amendment seizure." 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.[157] "An arrest requires either physical force . . . *or, where that is absent, submission to the assertion of authority*."[158]

The summons in a civil case certainly meets these criteria for "submission to [official] authority."

> Well into the sixteenth century, . . . the writ of *capias ad respondenum* . . . 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.[159]

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—"default judgment will be entered against you for the relief demanded in the complaint," 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 recently, a D.C. administrative law judge sued his local cleaners for $67 million for allegedly losing his pants.[160] 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 questions at issue.[161]

The most thoughtful exploration[162] in modern jurisprudence of whether a summons constitutes a constitutionally-protected "seizure" under the Fourth Amendment is Justice Ginsburg's 1994 concurring opinion in *Albright v. Oliver*.[163] There, 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."[164] That happened to be 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 Criminal Rules 4(a) and 9(a), 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.[165] Similarly, no adverse consequences can be visited on an individual for ignoring an IRS summons until a court determines that it is reasonable and enforces it.[166] 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.[167] In some circumstances, it has even been held that reasonableness requires shifting the costs of

compliance to the inquiring agency.[168] But there is no parallel requirement that the courts must 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 unfounded.

Civil Rule 4 not only unreasonably "seizes" the person of the defendant by requiring him or 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[169] 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.[170] The Deprivations Clause, which Rule 4 violates, is broader than the Takings Clause [171] (which Rule 4 generally does not violate[172]), 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 insure that a "legitimate governmental purpose" justifies an imposition on citizens causing them trouble and expense.[173] Rule 4 is deficient in that the government makes no attempt whatsoever to verify that there is a legitimate reason to order someone to answer in court before doing 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[174] 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.[175] 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,[176] although, unsurprisingly, the costs varied in proportion to a number of variables.[177]

Deprivations of property are not necessarily illegal; they merely 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 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 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.[178]

What process is "due" is of course dependent upon the circumstances.[179] At the time that the writ of summons developed in the 13th 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.[180] 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*,[181] and extended in *Fuentes v. Shevin*,[182] 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.[183] The 1975 due process decision in *North Georgia Finishing, Inc. v. Di-Chem*, *Inc.*[184] is particularly interesting for our purposes. There, in dicta, the Court suggested 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.[185]

The suggestion in *Di-Chem* that a detailed affidavit, review 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.*[186] That case upheld a Louisiana statute permitting a secured creditor with a pre-existing lien to sequester property pre-judgment. The *Mitchell* Court emphasized the lien-holder's pre-existing interest in preventing dissipation of the previously-encumbered property, but also the requirement of 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.[187]

Civil 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 *Mitchell v. W. T. Grant*, the plaintiff in an ordinary civil case has no pre-existing 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.[188] Unlike the temporary deprivations of 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 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 1970's was reiterated and clarified in 1991 in *Connecticut v. Doehr*,[189] in which a unanimous U.S. Supreme Court struck down a Connecticut statute that had authorized 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 Civil 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.[190] Nonetheless, a unanimous U.S. 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.[191]

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 the statute requires something akin to the plaintiff stating a claim with sufficient facts to survive a motion to dismiss."[192] The U.S. 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 *Snaidach* and its progeny for balancing competing private and public interests against the risk of error under *Mathews v. Eldridge*.[193] 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*.[194]

Applying this same analysis to the much more substantial deprivation of property worked by Civil 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* Civil Rule 4 was written, and as far as I have been able to determine, 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 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 *Connecticut v. Doehr, supra*. Connecticut's pre-judgment attachment statute contained substantially more protection against arbitrariness [195] than are currently provided by Civil 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. [196] This strongly suggests that so-called "cost shifting"[197] 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.[198] 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 plaintiffs' 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 Philip Howard above.[199] Rule 4, however, makes the issuance of a federal civil summons a ministerial act by the court clerk.[200] It thereby delegates an important exercise of state power to private individuals in violation of the constitutional provision that the 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.[201] 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, statute 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.[202]

The issue of standardless delegation of governmental power to private individuals is particularly objectionable because the private actors[203] exercising this power, plaintiff's lawyers, have a financial stake in the outcome. If a judge made these same decisions of 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.[204] But we allow plaintiffs' lawyers with contingent fee arrangements who will share in the proceeds of any nuisance settlements 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.

This problem of a delegation of state power to those with a financial interest in the outcome is particularly intense when plaintiffs' lawyers are empowered by the state to bring cases that do not currently have a valid basis in law or in fact. The rules properly allow them 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,[205] or "by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law."[206] Some of these speculative cases are reasonable in terms of the benefits they confer on society and probably should be allowed.[207]

It does not follow automatically, however, that the person sued should subsidize the investigation into whether a wrong has been committed. 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.[208] 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 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 another assumes the risks, has been criticized by economists for creating runaway speculation.[209]

The present system, however, unconstitutionally delegates all of these decisions to the plaintiff's lawyer without any standards, supervision, or review by the state and merely with 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 and/or in the facts currently in the plaintiffs' possession does not mean that decision should be delegated to private individuals who have a financial interest in the outcome.[210] 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*, we currently seem 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 plaintiff's lawyer. Because this occurs "out of sight, out of mind," judges have no idea how common it is for defendants to be extorted by power delegated by the state into making payments in cases in which they are not legitimately involved.[211]

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 that the many people that they are suing may pay nuisance value. They should not be condemned for responding rationally to the lucrative economic opportunities that the ethical and procedural rules currently permit. Traditionally called "strike suits,"[212] 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 dead-weight loss that they impose on the economy, but one cannot logically deny that they exist. In a famous article in 1979, Landes and Posner showed formally that even cases with little or no prospect of success do create settlement value in proportion to the costs of litigation. [213] Empirical data are not very good on how large the dead-weight 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.[214]

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.[215] The discontinuity between expected costs and benefits is in turn a function of the endemic judicial reluctance to "shift" costs of consuming resources in litigation from where they fall to those who cause them.[216] Judges should not confuse costs with penalties. There is nothing punitive about requiring an economic actor to pay for resources that are consumed in an activity that they undertake to make a profit.[217] 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.[218] For the same reasons that electricity will be wasted and over-consumed if government

requires it to be supplied at a price below the marginal cost to make it, litigation will be over-supplied, 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 on 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 that the state may reasonably require the person sued to answer them or routinely award costs afterward.

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

> [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.[219]

In a 1989 decision, *Neitzke v. Williams*,[220] 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. See *Franklin v. Murphy*, 745 F.2d 1221, 1226 (CA9 1984).[221]

That was, however, before *Iqbal* and *Twombly*. The *Neitzke v. Williams* Court cited with approval *Conley v. Gibson*'s[222] very liberal pleading standard that no actionable set of facts could be proven under the allegations.[223] This standard was later specifically disavowed in *Twombly*.[224] The main concern of the Court in *Neitzke v. Williams* 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.[225] This laudable goal of 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 already are.

The *Neitzke v. Williams* Court noted the issue whether *sua sponte* dismissals under Rule 12(b)(6), as opposed under the *in forma pauperis* statute, are permissible in a footnote, but did not answer it.[226] 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). See, e. g., *Hagans v. Lavine*, 415 U.S. 528, 536 -537 (1974) (federal courts lack power to entertain claims that are "so attenuated and unsubstantial as to be absolutely devoid of merit'") (citation omitted); *Bell v. Hood*, 327 U.S. 678, 682 -683 (1946).[227]

The question left open by the Supreme Court in *Neitzke v. Williams* 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*.[228] That *per curiam* decision is of particular interest because the panel included then-Circuit Judges Ruth Bader Ginsburg and Clarence Thomas, arguably the most liberal and most conservative Justices of the current Supreme Court. They both joined Judge Lawrence Silberman in a *per curiam* opinion 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."[229] Other circuits hold to the contrary,[230] however, and there is a clear circuit spit 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 create the Pre-Service Plausibility Determination process advocated by the 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.[231] The principal drafter of the Federal Rules of Civil Procedure, Charles 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.[232] In this instance, the practice that the clerk's office issues the summons automatically without any

preliminary determination by the court that it is reasonable to require the person sued to answer is so deeply embedded in our current practice that a change in rule language is required.

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 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 satisfy itself 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) 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.

For the reasons described above, it 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 th**at** 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 not unknown to our law. In fact, we honor that principle in every other area of law that I can think of—except when summoning someone to defend a civil lawsuit under Rule 4 and its state equivalents.

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 *Iqbal* and *Twombly* 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 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.[233] *Ceteris paribus* 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 re-invent 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 compel the persons that the plaintiff wishes to sue to incur the costs and inconvenience of appearing in court; or if not, (2) whether the plaintiff is sufficiently likely to develop the necessary facts or law at a later date.[234] Some "speculative but reasonable" cases should be brought for their broader social utility even though the available facts and/or law 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; and it also does not follow (2) that 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.

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(s) to 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

the 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 word-smithing 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 ado:

> The expectation of preliminary review helps deter frivolous complaints. Yet that review should not deter 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 is to direct the plaintiff to clarify the point before dismissing the case.[235]

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 to 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. This oral conference would be similar to the first status conference that is typically held today, in which the judge finds out from the parties what the case is about.

The conference, if 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. In appropriate instances, the reviewing magistrate could in his or her discretion also invite[236] in the prospective defendant(s) or consult with them by telephone to learn their side of the story.[237]

For example, a reviewing magistrate tasked with determining the *bona fides* of a claim before service could often determine quickly and inexpensively by consulting the defendant that many of the putative defendants either did not exist or did not manufacture the products in question. Over time, reviewing magistrates would develop experience 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 the 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 co-workers, I do not currently have product identification evidence for 8 of the 10 manufacturers named, but I hope to obtain it through discovery of their records showing that they sold their products to the employers where he 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 reasonableness would be lower if plaintiffs' lawyers routinely paid for the costs of inquiries to try to find missing evidence.[238]

As we routinely do in criminal cases, or when courts are asked to enforce administrative subpoenas,[239] in habeas corpus 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. I argue that minimal preliminary inquiry by the state is constitutionally *required*, but regardless of whether that is the case, 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.

To those who would object that a PSPD is impractical, I would remind them that (1) we already do it in many civil cases and (2) we did it routinely between 1789 and 1938.

Endnotes

1 Samuel Taylor Coleridge, Biographia Literaria 13 (Ernest Rhys ed., 1906), *available at* http://www.archive.org/details/biographialitera027747mbp.

2 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) [hereinafter Twombly] (requiring plaintiffs to plead sufficient facts to show their claims are "plausible").

3 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."), and cases cited *infra* note 60.

4 The proper word is "hale," not "haul," although they have a common root in Middle English. *See* Definition of Hale, http://www.yourdictionary.com/hale (last visited Dec. 13, 2011).

5 "As a litigant, I should dread a lawsuit above all else, other than sickness and death." Judge Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 Lectures on Legal Topics 87, 105 (1926).

6 Charles Warren & Louis D. Brandeis, *The Right To Privacy*, 4 Harv. L. Rev. 193 (1890).

7 Fed. R. Crim. Pro. 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.").

8 28 U.S.C. §1915(e)(2)(B).

9 For a summary of a typical anti-SLAPP statute, see *Oasis West Realty v. Goldman*, S181781 (Cal. May 16, 2011), *available at* http://scocal.

stanford.edu/opinion/oasis-west-realty-v-goldman-33970 ("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.").

10 United States v. Morton Salt, 338 U.S. 632 (1950) (court will enforce administrative subpoena if, but only if, "reasonable").

11 For a typical rule, see, e.g., Local Rule 72-3.2, United States District Court, Central District of California, *available at* http://www.cacd.uscourts.gov/CACD/LocRules.nsf/a224d2a6f8771599882567cc005e9d79/4ef5256bde5a03708825768e005825e3?OpenDocument L.R. 72-3.2 ("**Summary Dismissal of Habeas Corpus Petition.** 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."). 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. . . ." *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. . . ." Rule 4, Rules Governing Section 2254 Cases (West 1977). 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).

12 See *infra* pp. 115-117.

13 See *infra* pp. 125-128.

14 *See* Harold J. Krent, The Private Performing the Public: Delimiting Delegations to Private Parties (Nov. 24, 2010) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1714497 ("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 and citations omitted)).

For more general discussions of the issues raised by delegations of government functions to private actors, see Paul R. Verkuil, Outsourcing Sovereignty (2007); Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367 (2003); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543 (2000).

15 See *infra* pp. 117-118.

16 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

17 Elsewhere I have argued 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 (1986); E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. Rev. 487 (1989). While I adhere to my view from a quarter century ago that incentive-based procedure would be a theoretical first-best solution, I have detected no willingness on the part of either the judiciary or the 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 argued (very persuasively I thought) in the second article cited above that the courts could better regulate scientific evidence through a system of economic incentives rather than preliminary screening by judges. Nonetheless, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court imposed a system of preliminary screening by judges. The proposals in this paper 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.

18 *In re* Sinking Fund Cases, 99 U.S. 700, 718-19 (1878) ("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.").

19 Fed. R. Crim. Pro. 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.").

20 The metaphor is Margaret Mead's: "[I]f a fish were to become an anthropologist, the last thing it would discover would be water." *Quoted in* Doing the Ethnography of Schooling: Educational Anthropology in Action 24 (G.D. Spindle ed., 1982).

21 A notable exception is Professor Carrington's thoughtful article on Rule 4. Paul D. Carrington, *Symposium: The Fiftieth Anniversary of The Federal Rules of Civil Procedure: Article: 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.

22 *See, e.g.*, Samuel Issacharoff, Civil Procedure 17 (Foundation Press, 2d ed. 2009). Following an introductory chapter on general concepts of due process, even Professor 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.

23 *See, e.g.*, Barbara Allen Babcock, Toni M. Massaro & Norman W. Spaulding, Civil procedure: Cases and Problems 35-55 (4th ed. 2009) [hereinafter Babcock Civil Procedure Casebook].

24 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

25 Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

26 See i*nfra* p. 112 and note 36.

27 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*, 1984 Colum. L. Rev. 1523 ("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.").

28 *Id.* at 557-58 (citations omitted).

29 SOLIDFX, LLC v. Jeppesen Sanderson, Inc., 11-CV-01468-WJM-BNB, 2011 WL 4018207 (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.").

30 Fed. R. Civ. P. 12(i).

31 341 F. Supp. 2d 449 (D.N.J. 2004).

32 "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." Posting of Ted Frank to Overlawyered, http://overlawyered.com/2006/12/because-we-all-love-wacky-pro-se-suits-ward-v-arm-hammer/ (Dec. 18, 2006).

33 See *infra* p. 117 regarding the discretion that 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.

34 See *infra* pp. 115 regarding the "ministerial" and non-discretionary nature of current Rule 4(b).

35 "'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."

David R. Henderson, *Rent Seeking*, *in* The Concise Encyclopedia of

Economics (2d ed. 2008), *available at* http://www.econlib.org/library/Enc/RentSeeking.html.

36 *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 supplied).

37 Professor Bone's otherwise excellent analysis of the economics of civil procedure suffers by assuming that detailed fact pleading will screen out baseless cases. Robert G. Bone, Civil Procedure: The Economics of Civil Procedure 125-157 (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).

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 *Iqbal* and *Twombly*, which found more motions to dismiss were made but leave to amend was generally granted, resulting merely in more detailed pleadings. Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon, Fed. Judicial Ctr., Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules (2011); *see also* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553, 556 (2010) (study of reported cases indicates that pleading stage dismissals have increased after *Twombly* and *Iqbal*, from forty-six to fifty-six percent of cases in which the motion to dismiss is made). However, such short-term effects of rules changes tend to equilibrate as lawyers adapt their strategies to the new rules. *See* Linda Cohen & Matthew Spitzer, *Solving the Chevron Puzzle*, 57 Law & Contemp. Probs. 67 (1994); *see also* Ian Ayres, *Playing Games with the Law*, 42 Stan. L. Rev. 1291 (1990) (arguing the dynamic game theory models are inherently superior to static micro-economic models for understanding law because players can adjust their strategies as rules change).

38 See *infra* pp. 128-129 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. In an early article after *Twombly*, Richard Epstein recognized that the "plausibility" standard inherently involved factual inquiry and thereby elided the traditional distinctions between motions to dismiss and motions for summary judgment. Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 Wash. U. J.L. Pol'y 61 (2007). Epstein has subsequently proposed a system in which judges would re-evaluate on an ongoing basis throughout the course of a case whether the case is strong enough to go to the next stage. Richard A. Epstein, *Of Pleading and Discovery: Reflections on* Twombly *and* Iqbal *with Special Reference to Antitrust*, 2011 U. Ill. L. Rev. 187 (2011). I regard my suggestion for a Pre-Service Plausibility Determination before service of process as in the same spirit.

39 *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, 497 & n.11, 501 & n.29 (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 Howard L.J. 17 (2008-2009).

40 "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." ALI/Unidroit Principles of Civil Procedure 6 & sources cited *id.* n.8 (2006).

41 For a definition, see i*nfra* p. 126.

42 See *infra* pp. 117-122 discussing the drafting history of Rule 4.

43 See *infra* pp. 116-117, discussing the 1789 Judiciary Act and the 1792 Process Act, An act for regulating processes in the Courts of the United States, and providing compensation for the officers of the said Courts, and for jurors and witnesses. Ch. 36, §1, 1 Stat. 275 (May 8, 1792) ("*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all writ 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. An Act to regulate Processes in the Courts of the United States. Ch.21, §1, 1 Stat. 93 (Sept. 29, 1789); *see* Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252, 253-254 (Cir. W.D. Wisc. 1884)("The summons, notice, writ or whatever it may be called, by virtue of which a defendant is required to come in court and answer, litigate his rights and submit to the personal judgment of the court is certainly 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 supplied)).

44 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

45 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, 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 27. The distinction is often overlooked by judges who tend to equate the two.

46 "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). The author agrees with the first sentence, 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-deterring 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* pp. 125-126.

47 Fed. R. Civ. P. 26(b)(2)(C)(iii):

> (C) *When Required.* 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:
>
> . . . .
>
>> (iii) 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 importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

48 *See, e.g.*, United States v. Morton Salt, 338 U.S. 632 (1950) (court will enforce administrative subpoena if, but only if, "reasonable").

49 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 to to locate *Twombly* into 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.

50 Oliver Wendell Holmes Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897) (By "law" I mean "[t]he prophecies of what the courts will do in fact and nothing more pretentious . . . .").

51 For example, a distinguished proceduralist, Professor Arthur 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. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1 (2010). His 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.* Oliver Wendell Holmes Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("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 Professor 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* pp. 115-117.

52 See *infra* pp. 124-125.

53 *See, e.g.*, Connecticut v. Doehr*,* 501 U.S. 1 (1991) (prejudgment attachment of real property without prior notice and hearing, exigent circumstances or requirement to post a bond violates 14th Amendment due process), and other cases discussed *infra* at pp. 124-125.

54 *See, e.g.*, Babcock Civil Procedure Casebook, *supra* note 23, 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).

55 Thomas O.McGarity & Wendy E. Wagner, Bending Science: How Special Interests Corrupt Public Health Research (2008).

56 "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." Hickman v. Taylor, 329 U.S. 495, 507 (1947).

57 See *infra* p. 129.

58 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, we should not be surprised that some defendants are named who have little or nothing to do with the matter. It costs the plaintiff's lawyer merely postage to name additional defendants, but many of them can be expected to pay nuisance value to settle.

59 Fed. R. Civ. P. 4(b).

60 Bauers v. Heisel, 361 F.2d 581, 595 n.3 (3d Cir. 1966), *cert. denied*, 396 U.S. 1021 (1967); Charles A. Wright & Arthur R. Miller, 4A Federal Practice & Procedure: Civil § 1084 (3d ed. 2010) ("The current rule . . . makes it clear that the only formal requirement for the issuance of a summons is the filing of a valid complaint with the court."). The use of the word "valid" before the word "complaint" in the Wright & 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 without a rule change. *But cf.* Mitchell v. Beaubouef, 581 F.2d 412 (5th Cir. 1978), *reh'g denied,* 586 F.2d 842 (5th Cir. 1978), *cert. denied*, 441 U.S. 966 (1979) (If a prisoner's *pro se* complaint is deemed legally sufficient under the liberal standard appropriate to *pro se* prisoner litigation, the process must be served on the defendant.).

61 See *infra* 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 (1989), discussed *infra* p. 127.

62 The sign and seal are essential. Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, (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 W. 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).

63 Philip K. Howard, *There Is No Right to Sue*, Wall St. J., July 31, 2002, at A14, *available at* http://commongood.org/society-reading-cgpubs-opeds-13.html; *see also* Philip K. Howard, *Making Civil Justice Sane: Judges Should Stop Unreasonable Lawsuits Before They Start*, City J., Spring 2006, at 64, *available at* 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."); *see also* William A. Alderson, A Practical Treatise Upon the Law of Judicial Writs and Process in Civil and Criminal Cases: The Sufficiency, Validity, Amendment and Alteration of Process; Its Execution and Return, and The Powers and Liabilities of Officers Thereunder §3 at 9 (New York, Baker, Voorhis & Company 1895)("[S]ummonsing 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.").

64 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 for granted. Lucila L. Salcedo, Social Issues 12 (1999) ("Culture also affects all the things that we take for granted and what we question."); Edgar Schein, Corporate Culture Survival Guide 119-120 (1999)("shared mental models that members of an organization hold and take for granted"); Geert Hosstede, *National Cultures and Corporate Cultures*, *in* Communication Between Cultures 51 (Larry A. Samovar, Richard E. Porter & Edwin R. McDaniel eds., 1984) ("Culture is the collective programming of the mind which distinguishes the members of one category of people from another.").

65 William Feilden Craies, *Summons*, *in* Encyclopedia Britannica (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."), *available at* http://en.wikisource.org/wiki/1911_Encyclop%C3%A6dia_Britannica/Summons; *see also* Leas & McVitty v. Merriman, 132 F. 510 (Cir. W.D. Va. 1904) (distinguishing between a federal summons which orders the defendant to appear, and summons in some states that merely provide notice of a claim but are not orders from the court to appear).

66 See *infra* pp. 118-120.

67 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 Carte (1215), upon which our concept of "due process of law" is based: "No free man shall be taken or imprisoned, or dispossessed, or outlawed, or banished, or in any way destroyed, . . . except by the legal judgment of his peers or by the law of the land."

68 An 1890 decision by Queens Bench, *Reg. v. Colonel Byrde and Others, Justices, and the Pontypool Gas Company*, 63 Law Times Rep. N.S. 645 (QB Div., 1890), 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" (citing Reg. v. Ingham, 14 Q. B. 396 (1849).)). The *Pontypool Gas Co.* 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. However, since the same writs were used to summon the prospective defendant, this distinction seems not to have mattered.

69 See *infra* pp. 115-116, discussing the practice in Colonial courts as described by Judge Betts in 1838.

70 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 (New-York, Halsted and Voorhies, 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.").

71 *Id.* (emphasis supplied).

72 See also *Middleton Paper Co. v. Rock River Paper Co.,* 19 Fed. 252, 254 (Cir. W.D. Wisc. 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*." (emphasis supplied).

73 Conkling served as a federal district judge in the northern district of New York from 1825 to 1852. Alfred Conkling, http://en.wikipedia.org/wiki/Alfred_Conkling (last visited Dec. 14, 2011).

74 2 Alfred Conkling, The Admiralty Jurisdiction, Law and Practice Courts Of The United States: With An Appendix, Containing The New Rules of Admiralty Practice Prescribed by the Supreme Court of The United States, Those of the Circuit and District of The United States for The Northern District of New York, and Numerous Practical Forms of Process, Pleadings, Stipulations, Etc., Comprising The Entire Progress of a Suit in Admiralty Accompanied by Explanatory Notes 70-72 (Albany, W.C. Little & Co. 1857).

75 The Judiciary Act of 1789, September 24, 1789. 1 Stat. 73. Chap. XX §14. ("*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*, 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.").

76 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 (Philadelphia, Abraham Small, 2d ed. 1830) (citing United States v. Burr, Appendix, 2d part, 186 (opinion of Marshall, C.J.).

77 An act for regulating processes in the Courts of the United States, and providing compensation for the officers of the said Courts, and for jurors and witnesses. Ch. 36, §2, 1 Stat. 275 (May 8, 1792).

78 *See* Dwight v. Merritt, 4 Fed 614 (Cir. 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).

79 An act for regulating processes in the Courts of the United States, and providing compensation for the officers of the said Courts, and for jurors and witnesses. Ch. 36, §1, 1 Stat. 275 (May 8, 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. An Act to regulate Processes in the Courts of the United States. Ch.21, §1, 1 Stat. 93 (Sept. 29, 1789).

80 "Teste, *practice*. The teste of a writ is the concluding clause, commencing with the word witness, &c." John Bouvier's Law Dictionary 562 (2d. ed., 1843).

81 William A. Alderson, A Practical Treatise Upon the Law of Judicial Writs and Process in Civil and Criminal Cases: The Sufficiency, Validity, Amendment and Alteration of Process; Its Execution and Return, and the Powers and Liabilities of Officers Thereunder §39 at 70 (New York, Baker, Voorhis & Company 1895) ("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 supplied and footnote omitted)); *see also* Ins. Co. v. Hallock, 73 U.S. 556 (1887) (unanimously invalidating title to land purchased at sheriff's sale because writ under which sale had been conducted had not been properly sealed: "Without the seal it is void. We cannot distinguish it from any other writ or process in this particular.").

82 *See* Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252, 253-54 (Cir. W.D. Wisc. 1884) ("The summons, notice, writ or whatever it may be called, by virtue of which a defendant is required to come in court and answer, litigate his rights and submit to the personal judgment of the court is certainly 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*."(emphasis supplied)).

83 *Id.*

84 *See* William Stewart Simkins, A Federal Suit at Law 22 (1912) ("Form of process for the commencement of suits is controlled by the conformity act, sec. 914, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 684, except as to the official signature, seal and test, which by sec. 911, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 083, is required to all writs and processes issuing from the courts of the United States. Gillum v. Stewart, 112 Fed. 32; Chamberlain v. Mensing, 47 Fed. 436; Shepard v. Adams, 168 U. S. 624, 42 L. ed. 604, 18 Sup. Ct. Rep. 214. Congress having thus legislated as to the process, it must be followed (Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 614), though the State law permitted an attorney to issue the summons (Middleton Paper Co. v. Rock River Paper Co. 19 Fed. 252; AEtna Ins. Co. v. Hallock (AEtna Ins. Co. v. Doe) 6 Wall. 556, 18 L. ed. 948).").

85 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. Commissioners were limited by background and experience to criminal cases, and I can find 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 maters." Babcock Civil Procedure Casebook, *supra* note 23, at 683.

86 William A. Alderson, *supra* note 63, at 24-88; *see also* Current Decisions, *Process—Amendment—Void Summons Not Amendable*, 32 Yale L. J. 297 (1923).

87 Edson R. Sunderland, *Process*, *in* 32 Cyclopedia of Law and Procedure 412, 426 (William Nash & Howard Pervear Nash eds., 1909) (citing Steves v. Carson, 40 P. 569 (1895); Reese v. Kirby, 68 Ga. 825).

88 See *infra* pp. 120 & 121 (describing how Rule 4 was deemed to supersede the 1792 statute).

89 *See supra* note 32.

90 *Supra* p. 112.

91 *In re* Kinney, 202 F. 137, 138 (1st Cir. 1913).

92 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.

93 *In re* Kinney, 202 F. at 138.

94 *Id.*

95 135 F. 336 (3d Cir. 1905).

96 135 F.2d at 140 ("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 *praecipe*, and failure to file his papers." (internal quotation omitted)).

97 *See* Charles Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 Tenn. L. Rev. 551, 563-64 (1939).

98 *Id.* at 564.

99 *Id.*

100 *Id.*

101 *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 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 4. 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. 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.

Charles Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 Tenn. L.Rev. 551, 563-64 (1939).

102 "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." Outline of Address by William D. Mitchell 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, copy on file with Florida Law Review). 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.

103 Box 101 in Clark Papers at Yale University Library.

104 Clark, *supra* note 101, at 564.

105 132 F. 510, 513 (Cir. W.D. Va. 1904) (emphasis supplied); *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. Rev. St. § 911. The process and writs must be served by the marshal or by his regularly appointed deputies. Id. §§ 787, 788.").

106 Supreme Court of the State of New York, Summons, https://iapps.courts.state.ny.us/fbem/forms/summons.pdf (last visited Dec. 14, 2011).

107 New York State Unified Court System, New York City Civil Court, Starting a Case, Issuance of the Summons, http://www.nycourts.gov/courts/nyc/civil/starting.shtml#issuance (last visited Dec. 14, 2011).

108 Babcock Civil Procedure Casebook, *supra* note 23, at 104.

109 See, e.g., N.Y. CVP. LAW § 3215(a), which provides upon failure to appear, the clerk shall enter default judgment for a sum certain but only "upon submission of the requisite proof."

110 It is true that the state typically tells the plaintiff in advance what the plaintiff is going to need to do in order 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 was given fair notice does not raise any of the federal constitutional issues raised by the present federal practice of officially ordering the defendant to court.

111 4 Fed 614 (Cir. N.Y. 1880).

112 *Id.* at 614-15.

113 Admittedly, not all state systems for summons still follow the New York model. Under the pernicious influence of Federal Rule 4, some may since have adopted the federal model in which the state delegates to the plaintiff's attorney the power of the state to issue an official order compelling the person sued to appear without any government quality control. If so, they too are 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*. But it has long been held that state systems for summoning persons to answer in court are subject to constitutional due process restrictions. Pennoyer v. Neff, 95 U.S. 714 (1878); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

114 One of the most influential of the drafters, Edson Sunderland of Michigan, had even written about the power of courts to refuse to serve summons in patently frivolous cases. Edson R. Sunderland, *Process*, *in* 32 Cyclopedia of Law and Procedure 412, 426 (William Nash and Howard Pervear Nash eds., 1909) ("[I]t is within the discretion of the court to allow or refuse the issuance of summons after a long delay.").

115 Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I,* 15 Tenn L. Rev. 551 (1939).

116 *Id.* at 551; *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).

117 *Id.* at 564.

118 Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 264 (1939) (emphasis supplied).

119 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*." (emphasis supplied). *Reprinted in* Charles C. Montgomery, Montgomery's Manual Of Federal Procedure §911 at 428 (1914), *available at* http://www.archive.org/stream/manualoffederalp00montiala/manualoffederalp00montiala_djvu.txt.

120 1937 Advisory Committee Note to Rule 3, http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/html/USCODE-2009-title28-app-rulesofci-other-dup1.htm.

121 Montgomery, *supra* note 119, §913 at 429.

122 Samuel Taylor Coleridge, Biographia Literaria 13 (1817).

123 *See also* Farzana v. Ind. Dep't of Educ., 473 F.3d 703 (7th Cir. 2007) (Easterbrook, J.) ("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.'").

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

125 485 F.2d 558 (7th Cir. 1973).

126 *Id.* at 559.

127 *Id.* at 560.

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

129 *Id.* at 10 n.2.

130 *Id.* at 10.

131 *Id.*

132 Dear v. Rathje, 532 F.2d 756 (7th Cir. Mar. 16, 1976) (table).

133 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. According to the Mitchell outline found in the Clark papers at Yale, *supra* note 102, Judge Finch objected that the new rules would greatly increase the potential for strike suits, but his perceptive remarks were interpreted as merely relating to discovery, and 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 economic incentives:

> 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 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 disbarring or disciplining lawyers guilty of misconduct.

Outline of Address by William D. Mitchell on Proposed Federal Rules Civil Procedure Before the Judicial Section of the American Bar Association (Sept. 1937), *supra* note 102.

134 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557-58 (2007) (citations omitted).

135 Historical Note to 1998 Revision of 28 U.S.C. §1691, at 5 ("Based on title 28, U.S.C., 1940 ed., § 721 (R.S. § 911; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167). *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 supplied), *available at* www.gpo.gov/fdsys/pkg/USCODE.../USCODE-1998-title28-partV.pdf.

136 28 U.S.C. §1691.

137 *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.")

138 28 U.S.C. § 2072(b) ("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.").

139 462 U.S. 919 (1983).

140 H.R. Rep. No. 889, at 28 (1988).

141 *See generally* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655, 1663 (1995).

142 Jackson v. Stinnett, 102 F.3d 132, --- note 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. 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.").

143 524 U.S. 417 (1998).

144 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, 135-137 (1984).

145 U.S. Const. amend. IV, cl. 1.

146 A functional, albeit adventurous, argument might be advanced that a summons under Civil 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. Akhil Reed Amar*, The Fourth Amendment, Boston, and the Writs of Assistance* , 30 Suffolk U. L. Rev. 53 (1996); *see also* William J. Stuntz, *Warrant Clause*, *in* The Heritage Guide to the Constitution 326 (Edwin Meese III, David F. Forte & Matthew Spaulding eds., 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 "shift costs" and/or impose 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.

147 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, DeReuil, who was serving at the time as an Internal Revenue Service attorney, largely limited his observations to summonses in tax cases, but he clearly maintains that the Fourth Amendment applies to orders of summons in civil cases.

148 United States v. Harris, 403 U.S. 573 (1971) (warrant may issue if there is a "substantial basis for crediting" the informant).

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

150 335 F.3d 807 (8th Cir. 2003).

151 *Id.* at 809.

152 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 supplied)).

153 United States v. Mendenhall, 446 U.S. 544, 554 (1980) (Stewart, J., majority op.) ("[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.").

154 Brower v. County of Inyo, 489 U.S. 593 (1989).

155 *Id.* at 596-97.

156 *Id.* at 596-98 (first emphasis original; second emphasis supplied).

157 United States v. Johnson, 620 F.3d 685, 691 (6th Cir. 2010) (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) (An individual was seized when he got out of a truck after a command from an officer within a patrol car with flashing lights.); United States v. Jones, 562 F.3d 768, 775 (6th Cir. 2009) (A 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.).

158 California v. Hodari D, 499 U.S. 621, 626 (1991) (emphasis supplied).

159 Babcock Civil Procedure Casebook, *supra* note 23, at 104.

160 Pearson v. Chung, 961 A.2d 1067, 1070 (D.C. 2008).

161 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).

162 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.").

163 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring).

164 *Id.*

165 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 the issuance of a summons in a criminal case 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." *U.S. v. Herndon*, 546 F. Supp. 2d 854, 857-58 (E.D. Cal. 2008).

Charles Alan Wright & Andrew D. Leipolda, Federal Rules of Criminal Procedure § 51 A (2010).

166 Schulz v. I.R.S., 395 F.3d 463, 465 (2d Cir. 2005), *as clarified on reh'g*, 413 F.3d 297 (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.").

167 United States v. Morton Salt, 338 U.S. 632 (1950) (Court will enforce administrative subpoena if, but only if, "reasonable.").

168 SEC v. Arthur Young & Co.*,* 584 F.2d 1018, 1034 (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.").

169 A "seizure" of property occurs when "there is some meaningful interference [by the state] with an individual's possessory interests in that property." Soldal v. Cook County, Ill., 506 U.S. 56, 61 (1992).

170 "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.

171 *See* Jennifer B. Arlin, *Of Property Rights and the Fifth Amendment: FIRREA's Cross-Guarantee Reexamined*, 33 Wm. & Mary L. Rev. 293 (1991), *available at* http://scholarship.law.wm.edu/wmlr/vol33/ iss1/13 ("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." (citations omitted)).

172 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 hereafter, *infra* p. 126.

173 *In re* Sinking Fund Cases, 99 U.S. 700, 718-19 (1878) ("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.").

174 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.").

175 GE v. Jackson, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 79 U.S.L.W. 3685 (U.S. June 6, 2011) ("The parties agree that the costs of compliance and the monetary fines and damages associated with noncompliance qualify as protected property interests."); Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 391-92 (8th Cir. 1987); Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir. 1986); Employers Ins. of Wausau v. Browner, 52 F.3d 656, 664 (7th Cir. 1995); *see also* Sackett v. EPA, 622 F.3d 1139 (9th Cir, 2010), *cert. granted*, 80 U.S.L.W. 3003 (U.S. June 28, 2011) (No. 10-1062).

176 Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. Times, Nov. 14, 2010, *available at* http://www.nytimes.com/2010/11/15/ business/15lawsuit.html.

177 Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., Litigation Costs in Civil Cases: Multivariate Analysis - Report to the Judicial Conference Advisory Committee on Civil Rules (2010); *see also* William H. J. Hubbard, Civil Justice Reform Group, Preliminary Report on the Preservation Costs Survey of Major Companies (2011) (Costs of litigation in some cases are significantly higher as costs exhibit a "long tail," meaning that a small fraction of cases account for most of the expenses associated with individual cases.).

178 *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); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

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

180 Andrew H. Hershey, *Justice and Bureaucracy: The English Royal Writ and "1258,"* 113 Eng. Hist. Rev. 829, 838 (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 844-850.

181 395 U.S. 337 (1969) (Statute permitting prejudgment garnishment of wages without notice and prior hearing violates due process).

182 407 U.S. 67 (1972) (State replevin provisions that permitted vendors to have goods to be seized through an *ex parte* application to a court clerk and posting of a bond violates due process.).

183 It is well-settled that even preliminary and temporary deprivations of property require process appropriate to the circumstances. Niki Kuckesd, *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.").

184 419 U.S. (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).

185 *Id.* at 606-608.

186 416 U.S. 600 (1974).

187 *Id.* at 615-618.

188 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."); 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.") (internal quotations omitted); *see also* 1 Am. Jur. 2d Abuse of Process § 6 ("ulterior motive or purpose generally required in an abuse of process action"); *id.* ("[M]ere ill will or spite toward the adverse party in a proceeding does not 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 proof of 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 ("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 nor a malicious prosecution. *See* Campbell v. City of San Antonio, 43 F.3d 973, 979 (5th Cir. 1995) (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 generally* Charles A. Wright & Arthur R. Miller, 10 Federal Practice & Procedure: Civil § 2668 (3d ed., 2010).

189 501 U.S. 1 (1991).

190 "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 . . . ." *Doehr*, 501 U.S. at 11; *see also Doehr*, 501 U.S. at 26, 27 (Rehnquist, C.J., and 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.").

191 *Doehr*, 501 U.S.

192 *Id.* at 13.

193 424 U.S. 319, 335 (1976).

194 *Doehr*, 501 U.S. at 13-14 (both emphases supplied).

195 *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)).

196 *Id.* at 18-23.

197 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. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

198 *See* Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 Geo. Wash. L. Rev. 773 (2011).

199 See *supra* text at note 64. *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").

200 See *supra* p. 115.

201 Carter v. Carter Coal Co., 298 U.S. 238, 310 (1936) (Fifth Amendment due process limits authority of federal government to delegate to other coal producers the power to fix wages and hours.); *see also* President George H.W. 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.

202 Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (zoning variance only by consent of adjacent owners unconstitutional); Eubank v. City of Richmond, 226 U.S. 137 (1912) (setting of property line by adjacent owners unconstitutional).

203 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.

204 Tumey v. Ohio, 273 U.S. 510 (1927) (Due process is violated if judge has a personal, direct and substantial financial interest in the outcome.); *see also* Caperton v. A. T. Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (Due process is violated by judge who received large campaign contributions from litigant.).

205 Fed. R. Civ. P. 11(b)(2) ("[T]he factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.").

206 *Id.*

207 *See* Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 932-35 (2009).

208 *Cf.* Redish & McNamara, *supra* note 198 ("liken[ing] 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").

209 George A. Akerloff & Paul M. Romer, *Looting: The Economic Underworld of Bankruptcy for Profit*, 2 Brookings Papers of Economic Activity 1 (1993).

210 *Compare* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S.

787, 802-09 (1987) (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.).

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

212 "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, 199 (Summer 1999).

213 William Landes & Richard Posner, *Adjudication as a Private Good*, 8 J. Legal Stud. 235 (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. *See* Bone, *supra* note 37, at 64.

214 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.

215 "[A]n arbitrage is a transaction that involves no negative cash flow at any probabilistic or temporal state and a positive cash flow in at least one state; in simple terms, a risk-free profit." Arbitrage, http://en.wikipedia.org/wiki/Arbitrage (last visited Dec. 14, 2011).

216 Some of the reasons that judges are reluctant to second-guess decisions by litigants are catalogued in Elliott, *Managerial Judging*, *supra* note 17.

217 *See* Redish & McNamara, *supra* note 198.

218 *See* Thomas K. McCraw, Prophets of Regulation: Charles Francis Adams; Louis D. Brandeis; James M. Landis; Alfred E. Kahn 224 (1984) ("Sound regulatory policy [Cornell economist and Carter Administration official Alfred Kahn] never tired of explaining, requires that buyers pay marginal cost of all the goods and services they receive. If five units of an item cost $40 to produce and six units costs $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 only have 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 good and service 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.").

219 28 U.S.C. §1915(e)(2)(B).

220 490 U.S. 319 (1989).

221 Neitzke v. Williams, 490 U.S. 319, 326 (1989).

222 Conley v. Gibson, 355 U.S. 41, 47 (1957).

223 *Williams*, 490 U.S. at 326.

224 Bell Atlantic 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").

225 *Williams*, 490 U.S. at 329-30 ("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, 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."). 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.

226 490 U.S. at 318 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).").

227 490 U.S. at 318 n.6.

228 916 F.2d 725 (D.C. Cir. 1990).

229 916 F.2d at 726; *accord* Omar v. Sea-Land Service, Inc., 813 F.2d 986, 991 (9th Cir. 1987).

230 Frankos v. LaVallee, 535 F.2d 1346 (2d Cir. 1976); 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); *cf.* Literature, Inc. v. Quinn, 482 F.2d 372, 374 (1st Cir. 1973) (failure to give plaintiff prior notice "might well justify reversal," but reversed on other grounds).

231 See *infra* p. 128.

232 Charles Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 Vand. L. Rev. 493, 501 (1950) ("RULES AS EXPLAINING AS WELL AS GRANTING POWER . . . [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.").

233 John von Neumann & Oskar Morgenstern, Theory of Games and Economic Behavior 11 (1947), *quoted in* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

234 *See* Fed. R. Civ. Pro. 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 supplied)).

235 *Id.*

236 An optional invitation that provides an optional *opportunity* to be heard is different in a constitutional sense than an order that one must appear. See *supra* at pp. 118-120 (describing state systems of summons without a mandatory court order to appear).

237 *Cf.* Connecticut v. Doehr, 501 U.S. 1 (1991) (condemning relying solely on "one-sided, self-serving, and conclusory submissions").

238 *See generally* Redish & McNamara, *supra* note 198.

239 United States v. Morton Salt, 338 U.S. 632 (1950) (Court will enforce administrative subpoena if, but only if, "reasonable.").