

# Discovery Cost Allocation, Due Process, and the Constitution's Role in Civil Litigation

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## INTRODUCTION

The issue of discovery cost allocation, long ignored by both courts and scholars, has become something of a *cause celebre* in the last few years. An article which I coauthored on the subject was part of that renewed interest.<sup>1</sup> In 2011, my former student, Colleen McNamara, and I wrote an article urging a dramatic change not only in the manner of how discovery costs are allocated, but an entirely new way of understanding the concept of discovery costs.<sup>2</sup> Since the original promulgation of the Federal Rules of Civil Procedure in 1938, it has been universally assumed that discovery costs appropriately lay where they fell. In other words, producing parties always bore the costs involved in producing the discovery sought by the requesting party. But it was not as if either the courts, scholars, or rulemakers ever thought this matter through. Indeed, no Federal Rule explicitly dealt with the issue, and as far as my coauthor and I were able to ascertain, no one ever thought seriously about the allocation of discovery costs.

Even in later years, when the burdens, costs, and inefficiencies of the discovery process (especially in complex cases) became a serious concern, few thought to turn to discovery cost allocation as a potential means of ameliorating the problem. This was so even though seemingly countless other alternatives were attempted—generally with little success.<sup>3</sup> Now that some have recognized the possible value of discovery cost allocation in the fight against burdensome and excessive discovery, they still usually employ what I deem to be the misnomer of “cost shifting.” In the approach that my coauthor and I developed, imposing

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1. Even to the extent I can legitimately take credit, I should note that much of this interest may be due to others being stimulated to attempt to point out the flaws in my reasoning. *See, e.g.*, Benjamin Spencer, *Rationalizing Cost Allocation in Civil Discovery*, 34 REV. LITIG. 769 (2015).

2. Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773 (2011).

3. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (requiring that a complaint allege a plausible, not only conceivable, set of facts to state a claim upon which relief can be granted); Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundation of Modern Procedure*, 64 FLA. L. REV. 845 (2012) (arguing that heightened pleading standards are an inadequate gatekeeping mechanism for protecting against excessive discovery abuse).

the costs of discovery on the requesting party (at least where the discovery aids only the requesting party) is not a matter of *shifting* costs, because use of that word necessarily implies that the costs, as an original matter, were appropriately attributed to the producing party. Nothing, we argued, could be further from the truth. Rather, as a matter of both legal and moral theory, such costs are appropriately deemed to be those of the requester, not the producer. That circumstances required the producer to lay out the initial expenditure for production mattered not at all in that characterization.<sup>4</sup>

In addition to the moral and conceptual arguments we mounted in support of imposing discovery costs on the requesting party as long as the resulting discovery exclusively benefited that party, we argued that use of such an approach would internalize discovery costs, thereby removing externalities that result in severely excessive and inefficient discovery.<sup>5</sup>

We were certainly not alone in calling for a reexamination (ignoring the fact that there actually had never been any examination in the first place).<sup>6</sup> As a result, the Rules Advisory Committee recommended and the Supreme Court promulgated a modest modification of Rule 26(c), disposing of any doubt about the district court's legal authority to order cost shifting.<sup>7</sup> But advocates of a reallocation of discovery costs will have to wait for a later day to achieve their goals.

A relatively small portion of our article raised a potential constitutional issue inherent in the imposition of the costs of plaintiffs' discovery requests on defendants.<sup>8</sup> The constitutional argument was by no means central to either our analysis or our ultimate recommendation. Since the publication of our article, however, a number of commentators have focused on the constitutional argument, raising serious questions about its validity.<sup>9</sup> Even though the constitutional element of our argument was by no means essential to its acceptance (nor even the primary basis we relied upon), I have decided to use this opportunity to double down on the constitutional challenge to the current system of discovery cost allocation. In doing so,

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4. See Redish & McNamara, *supra* note 2, at 821.

5. *Id.* at 798.

6. See *id.*

7. See FED. R. CIV. P. 26(c)(1)(B) (permitting courts to specify "terms, including time and place or the allocation of expenses, for the disclosure or discovery").

8. See Redish & McNamara, *supra* note 2, at 807 ("[I]mpos[ing] the nonreimbursable costs of plaintiff's discovery on the defendant on the basis of nothing more than the plaintiff's unilateral allegation of liability surely takes defendant's property without due process.").

9. See, e.g., Spencer, *supra* note 1.

I significantly expand upon our relatively brief constitutional analysis to underscore two central themes: (1) the Constitution plays a far more important role in limiting or shaping modern civil procedure than most jurists or scholars probably think, and (2) the current version of discovery cost allocation raises serious constitutional concerns which have never been thoroughly considered or to which no adequate response has been fashioned.<sup>10</sup> Briefly stated, the constitutional challenges to the current system of discovery cost allocation fall within three categories of individual rights: procedural due process,<sup>11</sup> so-called substantive due process,<sup>12</sup> and equal protection of the laws.<sup>13</sup>

In this Article, I plan to view the challenge to the current discovery cost allocation system exclusively through the lens of constitutional analysis. An essential element of that approach turns on acceptance of a subconstitutional argument fashioned in my prior work on the subject: even though the producing party necessarily bears the initial cost of producing requested discovery, to the extent that discovery exclusively benefits the requesting party, those costs are properly viewed, morally and legally, as the costs of the requesting party. Once that premise is accepted (and for reasons discussed in my earlier work and summarized below, I consider the argument persuasive), it logically follows that the requirement that the producing party, rather than the requesting party, ultimately bear those costs constitutes a governmentally imposed subsidy of the requesting party by the producing party.<sup>14</sup> Once that conceptualization is accepted, one should be able to apply the previously mentioned constitutional doctrines to understand why and how the current system clearly violates constitutional directives.<sup>15</sup>

While my prior work on the subject was predominantly about the important need for the reconceptualization of discovery costs, this Article is exclusively a study in constitutional law. The stakes in civil litigation, while usually not rising to the level of those in criminal

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10. See Redish & McNamara, *supra* note 2, at 805–12 (examining the due process concerns implicated in cost allocation of discovery).

11. U.S. CONST. amend. V.

12. *Id.*

13. *Id.* amend. XIV, § 1, cl. 4. While no explicit equal protection clause binding the federal government appears in text, the Supreme Court has long found such a limitation in the Due Process Clause of the Fifth Amendment. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that racial segregation in public education is inconsistent with valid government objectives and the Due Process Clause of the Fifth Amendment).

14. See Redish & McNamara, *supra* note 2, at 791–92 (“Because each party bears the costs of producing the information that will be used against it by its opponent, each party effectively subsidizes that portion of its opponent’s case.”).

15. See *id.*

prosecutions, can be very high. Both the Due Process and Equal Protection Clauses apply with significant force to civil litigation, because substantial property interests may be at stake. But equally important is the need to have litigants believe in the legitimacy of the litigation system, for without it we not only create new practical dangers, we threaten to undermine the liberal social contract implicit in our constitutional democracy.

The first Part of this Article lays the foundation for the more specific constitutional analysis to follow by exploring the numerous ways—including discovery—that the Constitution has shaped and limited modern civil procedure. The second Part briefly reprises the reconceptualization of discovery cost allocation that my coauthor and I proposed in our 2011 piece. Using that reconceptualization as a foundation, the third Part analyzes our current system through the lens of constitutional law. Because the underlying purpose of the current system is ambiguous, however, my constitutional analysis will have to include incorporation of some reverse engineering in an effort to determine what goals our current system is seeking to attain. As such, my constitutional critique will include several contingencies that take the critique down different paths. But all of them end up at the conclusion that the current system is unconstitutional.

## I. CIVIL LITIGATION AND THE CONSTITUTION

It is probably safe to assert that, as a general matter, scholars do not view civil litigation through the lens of constitutional law. Rarely do issues of civil litigation receive attention in constitutional law casebooks, and when they do the discussion is relatively brief. While there exists some overlap between constitutional and civil procedure scholars, most constitutional scholars write only rarely about procedure and vice versa. The fact remains, however, that the Constitution plays an important role in controlling procedure in civil litigation in two different ways. On the one hand, constitutional provisions—for example, the Fifth Amendment’s Due Process Clause<sup>16</sup> and the Seventh Amendment right to jury trials in civil cases<sup>17</sup>—directly shape civil procedure doctrine.

Virtually all of modern personal jurisdiction doctrine is, at its foundation, a matter of due process, and has been since the Court’s famed decision in *Pennoyer v. Neff*.<sup>18</sup> Indeed, absent such constitutional

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16. U.S. CONST. amend. V.

17. *Id.* amend. VII.

18. 95 U.S. 714, 733 (1877).

grounding, the United States Supreme Court would lack authority to limit the reach of state court jurisdiction in the first place.<sup>19</sup> The Court has developed a complex doctrinal framework for shaping the required elements of a hearing in civil cases and in so doing has imposed a utilitarian-type calculus to determine what procedural protections must be employed.<sup>20</sup> And while the Court's jurisprudence on the subject may be less than clear, there is doubt that the Seventh Amendment imposes a constitutional restriction on procedure in civil cases.<sup>21</sup>

Arguably, the situation is different when a Federal Rule of Civil Procedure is involved. While of course as a theoretical matter the Federal Rules are subject to the limits imposed by the Constitution, the Supreme Court has noted that "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect give the Rules presumptive validity under both the constitutional and statutory constraints."<sup>22</sup> But this statement fails to recognize that the Court consciously construes ambiguous rules in a manner to avoid potential constitutional difficulties. For example, the Court held that "Rule 37 should not be construed to authorize dismissal of [a] complaint because of [a] petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."<sup>23</sup> The obvious concern was that imposing the serious penalty of dismissal for a plaintiff's failure to comply with an order that was impossible to satisfy could easily be found inherently unfair and therefore to violate due process. Thus, to avoid finding an application of Rule 37

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19. I developed this point more fully in Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1114 (1981).

20. See *Connecticut v. Doehr*, 501 U.S. 1, 2 (1991) (striking down a state statute providing for prejudgment attachment of real estate, absent prior notice or hearing, as inconsistent with due process); *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (maintaining that due process does not require an evidentiary hearing in order to terminate social security disability benefits); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972) (holding that prejudgment replevin statutes denied one's due process right to be heard, which is a prerequisite to taking one's property).

21. Cf. Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407 (1995) (comparing the Court's treatment of non-Article III proceedings and concluding that it is inconsistent with the due process guarantees of the Seventh Amendment).

22. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 3 (1987) (citation omitted).

23. *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958); see also *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1067 (1979) (holding that a grossly negligent, as opposed to a willful, failure to adhere to an order compelling discovery is sufficient to warrant severe sanctions under Federal Rule of Civil Procedure 37).

unconstitutional, the Court expressly construed the Rule to circumvent the issue.

Despite the Court's strong presumption of constitutionality for its promulgated rules, the Constitution thus remains the proverbial elephant in the room where necessary, influencing how the rules are to be construed. Before we consider my constitutional challenges to traditional discovery cost allocation methodology, it is essential to approach those challenges with a full understanding of the important role the Constitution has long played in modern civil procedure. Not only has the Constitution played such a role, it is vitally important to recognize that it *should* play such a role. To be sure, the property interests of the litigants are of both legal and practical significance, expressly guaranteed by the Due Process Clause. But equally important is the extent to which the governmentally established and administered system of civil litigation fulfills the terms of the implicit social contract between government and citizen in a liberal democratic society. The procedural system is designed to implement the network of substantive rights and restrictions in a fair and efficient manner. To deprive a litigant of her property without first providing that litigant with a full and complete opportunity to defend herself or to establish the absence of any justification for the deprivation undermines the liberal democratic system in two important ways. First, it undermines the respect that a representative and accountable government must show its citizens. Second, it increases the risk of reaching an inaccurate decision, thereby either under- or overenforcing the underlying substantive rights and restrictions. In so doing, the system threatens to disrupt substantive lawmaking of the bodies most representative of and accountable to the electorate. Hence the Constitution's guarantee of due process in particular stands as the fundamental guardian of the democratic system in civil litigation.

Before we can understand how the current system of discovery cost allocation violates important constitutional protections, however, it is first necessary to understand why, at least in many instances, the costs of discovery are properly seen, from the outset, as the costs of the requesting party rather than the producing party. By this I do not mean that we should *shift* costs; rather, I mean that regardless of which party physically makes the initial expenditure, in the majority of instances that cost, *from the very moment the discovery request is made*, is properly viewed—both legally and morally—as the cost of the requesting party. Only if this subconstitutional premise is accepted can the due process and equal protection challenges I make to producer-pays discovery cost allocation be understood.

## II. WHY DISCOVERY COSTS ARE PROPERLY DEEMED TO BE THE COSTS OF THE REQUESTING PARTY, NOT THE PRODUCING PARTY

Imagine the following situation: Worker A informs his fellow workers that he is about to go out for lunch and asks if he can pick up anything for anyone. Worker B informs him that he would like a Big Mac, large fries, and a strawberry shake. Worker A, as instructed, purchases Worker B's order and gives it to him upon his return to the office. Worker A used his own money to pay for Worker B's meal. To whom is that cost appropriately attributed? Is it Worker A's cost, because in doing a favor for Worker B that benefits Worker A in no direct way, Worker A physically used his own money to pay for the food? Can Worker B say to Worker A, "Since you used your own money to pay for my food, the cost of my food is properly deemed to be yours, and you cannot legally impose that cost on me"? Certainly as a legal matter, were the case to be brought to small claims court, this would be considered nonsense. It is also nonsensical on a purely moral level: surely no one can deny Worker B's moral obligation to reimburse Worker A for the money spent to purchase food asked for by Worker B and exclusively for his benefit. The law synthesizes both the moral and legal perspectives in the doctrine of *quantum meruit*. That doctrine creates a quasi-contractual obligation in the absence of a formal agreement that, as a matter of law, imposes on a party an obligation to pay or reimburse another for efforts from which that party knowingly benefitted.<sup>24</sup>

Application of the *quantum meruit* principle to discovery production should be obvious. Certainly the requesting party has no basis for assuming that the responding party is doing him a favor by producing requested discovery. To the extent that discovery exclusively benefits the requesting party, there exists no moral or legal basis on which to attribute the costs of production to the responding party. Surely, the mere fact that the producing party necessarily incurs the initial costs of production in no way leads to the conclusion that those costs are morally attributable to that party. Thus, when the costs of discovery benefiting the requesting party are imposed exclusively on the producing party, the only way to conceptualize that transfer, both legally and practically, is as a forced subsidization of the requesting party's litigation costs.<sup>25</sup> With this understanding, we should be able to

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24. Redish & McNamara, *supra* note 2, at 777.

25. It must be acknowledged that not all discovery exclusively benefits the requesting party. It is certainly conceivable that discovery requested by one party may simultaneously benefit the producing party in the sense that the producing party may find some of the material or information produced strategically helpful. In such situations, the court would be called upon to allocate costs



undertake our analysis of the constitutional implications of the producer-pays model of discovery cost allocation.

### III. THE CONSTITUTIONAL ATTACK ON THE PRODUCER-PAYS APPROACH TO DISCOVERY COST ALLOCATION

#### *A. The Problem in Fashioning a Constitutional Attack*

Challenging the constitutionality of the current producer-pays cost allocation model is similar to attempting to punch a marshmallow: you have trouble hitting anything with any force since there is nothing to provide resistance. There is no rule or statute to challenge since the current allocation practice is not embodied in either a rule or a statute. There is no asserted justification for the current practice to critique for the simple reason that no one has ever explained why the current practice is what it is. No one ever made a formal decision to adopt a producer-pays system; it just happened. More importantly, when scholars do happen to discuss discovery cost allocation, few have considered the possibility of conceptualizing the cost as being attributable, in the first instance, to the requesting party, so no scholar to date has deemed a producer-pays system a form of subsidization of the requesting party, thereby avoiding any conceivable constitutional concern.

Because of these factors, anyone who wishes to challenge the constitutionality of the producer-pays model must initially (1) explain how that model constitutes a deprivation of a litigant's property and then (2) postulate conceivable justifications for having the producing party subsidize the litigation expenses of his opponent. Only then can the constitutional attack take shape, by explaining why those conceivable rationales fail to justify the deprivation of the producing party's property.

The second problem in shaping a constitutional challenge arises because of current practice's uniform application to both plaintiffs and defendants. Regardless of which party requests the discovery, the other party is obligated to bear what should be deemed the requesting party's costs. Constitutional challenges to the producer-pays practice zero in on application of current practice to defendants. Thus, one first must explain why those same constitutional challenges do not apply equally to application of the producer-pays model to plaintiffs. Ultimately,

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between the parties. But even in situations in which the discovery benefits both parties rather than exclusively the requesting party, the fact remains that under the producer-pays model the producing party bears not only his own costs but also the costs of producing materials that benefit the requesting party.

however, it is possible to deal with both of these problems, as the following Section demonstrates.

### *B. Exploring the Potential Constitutional Violations*

Two constitutional protections arguably apply to the current producer-pays method of discovery cost allocation. The first, as a conceptual matter, is equal protection.<sup>26</sup> The second and arguably more important directive is the guarantee of procedural due process embodied in the Fifth Amendment.<sup>27</sup> I will consider each one separately. It will quickly become evident, however, that the two are actually intertwined in an organic, symbiotic relationship.

#### 1. Equal Protection

One might question the viability of any equal protection challenge in this context because there appears to be no suspect classification involved (that is, a classification based on race, religion, or national origin), and nonsuspect classifications are generally subjected to the traditionally very deferential “rational basis” standard.<sup>28</sup> But that does not mean that the Court *never* invalidates governmental classifications under rational basis review.<sup>29</sup> To the contrary, there are a number of modern Supreme Court decisions—albeit a small minority—invalidating nonsuspect classifications purely

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26. It should be noted that purely as a textual matter, the federal government is not bound by an equal protection directive. The Fourteenth Amendment’s Equal Protection Clause by its express terms limits only state action. U.S. CONST. amend. XIV, § 1, cl. 4. Since 1954, the Supreme Court, however, has made clear that it finds in the Fifth Amendment’s Due Process Clause an equal protection component. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (emphasizing that equal protection and due process are not mutually exclusive and that “discrimination may be so unjustifiable as to be violative of due process”). While on a textual level one may raise legitimate questions about such an interpretation, there exists no doubt that, purely as a matter of Supreme Court doctrine, equal protection limits federal action as well as that of the state. *Id.* at 500.

27. U.S. CONST. amend. V.

28. *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (upholding a statute because the legislature “thought that the particular legislative measure was a rational way to correct [an evil at hand]”). *See generally* Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401 (2016) (explaining that a law is valid if it is a “reasonable way to accomplish” a legitimate government objective). Note that exclusively in the area of discrimination based on sexual preference, the Supreme Court has purported to invoke rational basis review in a manner that triggers relatively invasive review. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down an amendment to a state constitution that would prohibit the government from protecting “homosexual, lesbian or bisexual” people from discrimination because it violated the Equal Protection Clause). The use of this “rational basis with teeth” standard, however, has been confined to this area.

29. For an argument that the modern rational basis test should be strengthened as a limitation on legislation, see Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 GEO. J.L. & PUB. POL’Y 493, 509 (2016).

on the basis of rational basis review. It is true that under modern rational basis doctrine, the reviewing court will postulate plausible rationales for legislation, even if no evidence exists that the legislature considered those rationales. But where no conceivable rationale for a governmentally imposed classification makes rational sense, the Court has held the classification unconstitutional, even under a rational basis standard and even in the absence of a suspect or even near-suspect classification.<sup>30</sup>

The producer-pays model of discovery cost allocation, conceptualized as a required subsidization of costs appropriately attributed to the requesting party, amounts to a governmentally imposed classification of producing parties as litigants to be burdened with what are in reality their opponents' costs.<sup>31</sup> The equal protection challenge to a producer-pays model of discovery cost allocation proceeds as follows: The costs associated with discovery requested by one party for that party's exclusive benefit are, both as a legal and moral matter, appropriately deemed the costs of the requesting party. Therefore a decision to force those discovery costs upon the producing party, as both a legal and practical matter, requires the producing party to subsidize the requesting party's litigation costs. The only conceivably legitimate justification for imposing such a subsidization process is the *ex ante* assumption that the requesting party's costs must be subsidized. This will of course not always be the case, however, since it is at least conceivable that situations will arise in which the requesting party is

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30. See, e.g., *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (allowing an equal protection claim and rational basis review for a “class of one” theory); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty.*, 488 U.S. 336, 342 (1989) (finding an equal protection violation for taxes assessed on a single property); *Quinn v. Milsap*, 491 U.S. 95, 109 (1989) (finding no rational basis for a landownership requirement for eligibility for public office); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 621–22 (1985) (finding a distinction between New Mexico veterans and other residents for tax purposes not rationally related to purported legislative goals); *Williams v. Vermont*, 472 U.S. 14, 27–28 (1985) (finding that a tax exemption afforded only to Vermont residents constituted a valid equal protection claim); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (finding that Alaska's dividend distribution plan, which was based on years of residency within the state, failed rational basis review); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (holding that a food stamp program that was designed to disadvantage “hippies” had no rational basis); *Lindsey v. Normet*, 405 U.S. 56, 70, 74 (1972) (finding an equal protection violation for a statute that classified real property tenants differently from other tenants).

31. Characterizing the imposition of the requester's costs on the producer as “governmentally imposed” may seem somewhat strange, since no Federal Rule or congressional enactment actually imposes such an obligation. But there is little doubt that in the overwhelming number of instances, a party who fails to incur the cost of producing its opponent's requested discovery will be subject to sanctions under Federal Rule of Civil Procedure 37 unless the district court decides to “shift” costs—a very rare event to this point. Thus, to the extent an organ of the government—the federal judiciary—stands ready to coerce the producing party to produce the discovery requested by its opponent fully at the producing party's own cost, current practice is appropriately characterized as “governmentally imposed.”

far more financially well-off than the producing party. Thus, a blanket requirement that the producing party must bear the costs of the requesting party because of the requesting party's financial need for a subsidy is at best overbroad, and therefore irrational. At the very least, then, equal protection must require the court to make an initial assessment as to whether subsidization is necessary.

In many instances, however, the producing party will be in a far better financial position than the requesting party to bear the costs of discovery, even for discovery that benefits only the requesting party. In such a case, one might at first blush conclude that the reasons for such a subsidization process are at the very least rational, if not compelling. Absent subsidization of the requesting party, the requesting party will be unable to afford the discovery and therefore the achievement of justice may well be hindered.

That subsidization of the requesting party is rational, however, does not automatically imply that the cost of the subsidy must be borne by the producing party. It is at this point that equal protection review is properly triggered. For one may accept, if only for purposes of argument, that subsidization of financially needy requesting parties is appropriate. But to justify the current producer-pays allocation model, one must justify the classification that distinguishes between the producing party and all other citizens in the nation. In other words, why is it rational to impose what are properly conceived of as the needy requesting party's costs on the producing party rather than on all citizens through some sort of tax-based fund? In short, the question for equal protection purposes is whether it is rational to distinguish between an opposing litigant and the rest of society for purposes of imposing the costs of subsidizing a needy requesting party's discovery costs.

In answering that question, it is necessary to distinguish between plaintiff-producers and defendant-producers. If one employs a highly deferential approach to determining rationality, it appears likely that a reviewing court would conclude that there is in fact a rational basis for distinguishing plaintiffs from the rest of society: plaintiffs have chosen to start the process in the first place; but for their actions, none of these costs would have occurred. A reviewing court could therefore reason that it is rational to impose a needy defendant's discovery costs on a producing plaintiff rather than on the citizenry at large because the plaintiff is the reason the litigation exists in the first place. In concluding that this reasoning provides a rational basis to support a distinction between producing plaintiffs and the rest of society, I in no way mean to suggest that the basis for distinction is necessarily persuasive. One could respond to this reasoning with the criticism that

the plaintiff only brought the suit because of the defendant's fault. But the defendant's fault is yet to be determined; all that is known for certain at the discovery stage is that the plaintiff instituted the action. Given the highly deferential nature of rational basis review, it is likely that such a distinction would satisfy scrutiny under equal protection.

It is by no means as easy to distinguish defendant-producers from the rest of society as it is to distinguish plaintiff-producers from citizens in general, however. To support such a defendant-based classification, the judiciary would need to show that once it is assumed that needy plaintiffs must have costs properly deemed theirs subsidized, there exists a rational basis for imposing those costs on the defendant rather than on the rest of society. Even under the highly deferential rational basis test, I submit, such a conclusion is far from certain. By way of illustration, consider the following admittedly extreme hypothetical: congress decides that a plaintiff's discovery costs must be subsidized and determines that the subsidy will be provided by one individual chosen at random from the pool of all citizens. No one could possibly consider such a classification rational, even under the highly deferential version of the rational basis test that currently controls. Absent some basis for concluding that forcing the defendant to subsidize the plaintiff's discovery costs is more rational than forcing a randomly selected individual to do so, imposition of the subsidization cost on the defendant cannot satisfy the rational basis test.

At first glance it might be thought that such a distinction is easily justified. It is, after all, the defendant who presumably harmed the plaintiff, thereby leading to institution of the suit in the first place. Surely the same could not be said of the citizenry at large or an individual citizen selected at random. But a more careful inquiry quickly demonstrates the fallacy in such reasoning. On what basis are we assuming that the defendant did in fact violate the plaintiff's legally protected rights? At the point of discovery, nothing—or at least very little<sup>32</sup>—about that question has been litigated, much less resolved.

It is at this point in the analysis that the equal protection inquiry begins to organically blend into the procedural due process inquiry. The following Section explores the procedural due process basis for finding that producer-pays discovery—when used against defendants—is unconstitutional.

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32. See *infra* notes 42–47 and accompanying text.

## 2. Procedural Due Process

### *a. Subsidization as Property Deprivation*

The Due Process Clause of the Fifth Amendment<sup>33</sup> provides that neither life, nor liberty, nor property may be deprived without due process of law. It is, of course, by no means clear exactly what procedures satisfy due process. What is clear at the outset is that the inquiry cannot take place absent an initial finding that life, liberty, or property have been taken. In the case of discovery cost allocation, that finding turns on acceptance of the view, advocated by my coauthor and myself in our prior scholarly work, that the costs associated with producing discovery requested by a litigant for the sole strategic benefit of that litigant are properly envisioned as the requesting party's costs, even though the producing party must first lay out funds to pay for those costs.<sup>34</sup> If that premise is not accepted, then the entire due process argument collapses, for it is only when those expenses are properly viewed as expenses of the requesting party that we can view the producer-pays model of cost allocation as a subsidization of the requester's costs. In other words, we need to determine that there has been a deprivation of the defendant-producer's property before we can trigger the inquiry into whether due process has been satisfied prior to that deprivation.<sup>35</sup> Because the defendant-producer is forced to bear the costs of producing the plaintiff-requestor's discovery that solely benefits the plaintiff-requestor, it is proper to conclude that the judiciary has forced the defendant to give its property to the plaintiff-requestor. In other words, the defendant-producer's property has been taken and transferred to the plaintiff-requestor. From this perspective, there is no doubt that the defendant-producer has been deprived of property.

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33. U.S. CONST. amend. V. The exact same constitutional analysis would apply to state discovery cost allocation under the Due Process Clause of the Fourteenth Amendment, *id.* amend. XIV, § 1, cl. 4, which for all intents and purposes is identical to the analysis under the Fifth Amendment. But for present purposes, I confine my discussion to the Fifth Amendment since the focus of my inquiry is on discovery cost allocation methodology in the federal courts.

34. Redish & McNamara, *supra* note 2, at 792.

35. I should emphasize that I here confine my analysis to defendant-producers because, as previously discussed, imposition of a needy defendant's discovery costs on a plaintiff-producer could be deemed rational, even if it were later determined that the defendant had violated the plaintiff's rights, because it was the plaintiff who instituted the suit in the first place. *See supra* Section III.B.1.

*b. Litigation Procedure and Procedural Due Process*

As already noted,<sup>36</sup> the only conceivable basis for rationally distinguishing a defendant-producer from society as a whole for purposes of subsidizing the plaintiff-requestor's discovery is that the defendant is somehow at fault, thereby justifying imposition of the plaintiff-requestor's discovery costs as a form of penalty. But it is at this point that the Fifth Amendment's Due Process Clause is triggered: a party may not be deprived of its property without due process of law. Has the defendant-producer been afforded procedural due process prior to the preliminary determination that he is somehow at fault? On what basis is it assumed that a defendant is at fault? On the basis of the plaintiff's complaint? Surely the answer must be no, since at the outset of the litigation the complaint serves as nothing more than a self-serving, unilateral document containing unchallenged and unvetted allegations.

One might argue that litigants do not reach the discovery stage until the defendant has had the opportunity to invoke Federal Rule of Civil Procedure 12(b)(6) by moving to dismiss the complaint for failure to state a claim upon which relief may be granted.<sup>37</sup> Under this view, the plaintiff-requestor's discovery costs cannot be imposed upon the defendant unless (1) the defendant has made a Rule 12(b)(6) motion and it has failed, or (2) the defendant has chosen not to make such a motion, presumably because the defendant has determined that it would be unsuccessful. Arguably, then, the defendant's opportunity to move to dismiss provides the requisite procedural due process owed to the defendant. But a motion to dismiss under Rule 12(b)(6) makes no inquiry into the factual merits of the plaintiff's claims against the defendant. To the contrary, the accuracy of the complaint's nonconclusory factual allegations is presumed valid, solely for purposes of argument.<sup>38</sup> But it is quite conceivable that a plaintiff who survives a Rule 12(b)(6) motion to dismiss may well lose on a motion for summary judgment,<sup>39</sup> a motion for judgment as a matter of law,<sup>40</sup> or in the fact finder's verdict at trial. In this context, it is important to point out that a defendant who is forced to subsidize the plaintiff's discovery following denial of a Rule 12(b)(6) motion to dismiss is not reimbursed at a later point, even if he wins on a motion for summary judgment or

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36. See *supra* note 32 and accompanying text.

37. FED. R. CIV. P. 12(b)(6).

38. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (assuming factual allegations as true for the purposes of deciding a Rule 12(b)(6) motion).

39. FED. R. CIV. P. 56.

40. FED. R. CIV. P. 50.

judgment as a matter of law or in a verdict at trial. Thus, when a defendant's subsidization of a plaintiff's discovery is framed in procedural due process terms, it is Orwellian to suggest that the opportunity to move to dismiss under Rule 12(b)(6) satisfies that requirement when the defendant is ultimately exonerated of any of the plaintiff's claims against him.

*c. Forced Subsidization and the Theory of Procedural Due Process*

i. A Review of the Premises That Trigger the Need for the  
Due Process Analysis

Before we examine the relevance of procedural due process theory to the context of discovery cost allocation, the framework of the situation must be kept in mind:

- (1) The costs of discovery that will benefit only the requesting party are appropriately seen as the requesting party's costs, even though the producing party initially incurs the costs of producing.
- (2) Under our current system, because the producing party is generally unable to impose those costs on the requesting party, the producing party is forced, as a practical matter, to subsidize the litigation costs of the requesting party.
- (3) Under a rational basis standard, it is at least plausible to find such forced subsidization rational when the requesting party is the defendant, since it is the plaintiff who instituted the action in the first place.<sup>41</sup>
- (4) As to a defendant-producer, however, no similar rational basis exists to distinguish the defendant from other citizens as potential subsidizers of discovery costs properly deemed the plaintiff's.
- (5) The only conceivable basis for rationally distinguishing the defendant from other citizens as a potential subsidizer of the plaintiff's discovery costs is the defendant's alleged fault, thereby justifying singling him out to bear those costs.
- (6) Unless there exists a provable basis for concluding that the defendant is somehow at fault, however, no rational basis

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41. It should be emphasized that when I say such an approach is "rational," I in no way mean to suggest that it is the correct or best way to deal with the situation. I mean only that under the highly deferential rational basis test, one could deem such reasoning at the very least plausible, if not ultimately persuasive.



exists for requiring that the defendant subsidize discovery costs properly seen as the plaintiff-requestor's.

But what is the factual basis for the conclusion that the defendant is somehow at fault in order to justify imposition of the plaintiff's discovery costs solely on the defendant? It is at this point that the theory and doctrine of procedural due process is triggered, for absent the provision of procedures that satisfy the requirements of due process prior to a determination of the defendant's fault, it is unconstitutional for government to deprive the defendant of his property to subsidize what are properly deemed to be the plaintiff's discovery costs. Because we must assume no fault on the defendant's part at the point in the proceeding that subsidization by the defendant-producer is required, the defendant stands in no different position from other members of society as the appropriate subsidizer of the plaintiff's discovery costs. As a result, the irrational selection of the defendant to serve as the sole subsidizer therefore violates the equal protection component of the Due Process Clause.

The following Section explains why, at the point in the proceeding that the defendant-producer is required to subsidize the plaintiff-requestor's discovery costs, the defendant has not been afforded procedural due process on the issue of his fault or liability. From that conclusion flows all other relevant conclusions justifying a finding that the required subsidization is unconstitutional. First, I will describe the alternative theoretical foundations that scholars suggest as the underpinning of procedural due process. I conclude that it makes no difference which of the two major theoretical approaches one chooses to adopt, since under either theoretical model it is clear that at the point at which the forced subsidization takes place the defendant has not been provided with the requisite procedural protections to constitutionally justify even a preliminary conclusion of fault. At that point I will explore the implications of modern Supreme Court doctrine, which dictate the exact same conclusion.

## ii. The Theory of Procedural Due Process: Implications for Defendant Producer-Pays Discovery

There are basically two often-conflicting theoretical foundations to rationalize the guarantee of procedural due process. The first—and the one currently employed by the Supreme Court in shaping its doctrinal approach<sup>42</sup>—is the utilitarian model. Under this model, all that matters is attaining the most accurate conclusion in the most

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42. *Mathews v. Eldridge*, 424 U.S. 319 (1976); see discussion *infra* Section III.B.2.c.iii.

efficient manner.<sup>43</sup> To achieve that end, this approach dictates use of a pragmatic analysis which balances the interests of the parties, the extent to which accuracy is threatened by the lack of procedural protections, and the burdens on government that would result from insertion of those protections.

In contrast to such a starkly utilitarian approach, many years ago Professor Jerry Mashaw fashioned his “dignitary” theory of procedural due process, an approach that focuses on noninstrumental values which, he argues, are properly seen to underlie the constitutional guarantee.<sup>44</sup> From this normative perspective, the mere fact that the process provided is likely to reach an accurate decision is at best a necessary rather than a sufficient condition to satisfy due process. Instead, the defendant must also be given the opportunity to participate in his own defense. In the words of Professor Frank Michelman,

A participatory opportunity may . . . be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential.<sup>45</sup>

Note that mutual exclusivity between these two theoretical models of procedural due process does not necessarily exist. It is certainly conceivable that a utilitarian approach would usually satisfy the dictates of a dignitary approach. Indeed, on occasion the Court has chosen to ignore a slavish allegiance to decisional accuracy in favor of an approach focused primarily on dignitary concerns. The classic example is the area of coerced confessions, where the fact that as a result of coercion a suspect has accurately revealed the location of a victim's body, thereby likely establishing his own guilt, will not prevent a coerced confession from being deemed a due process violation.<sup>46</sup>

From either theoretical perspective, it should be clear that penalizing a defendant at the discovery stage on the assumption of some finding of fault contravenes both normative models of procedural due process. The only bases for such a finding at that point are the unilateral, unproven factual allegations made by a self-interested party—the plaintiff in her complaint. This is hardly grounds to find by

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43. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 472 (1986).

44. Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 899 (1981).

45. Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII, at 126, 127–28 (J. Roland Pennock & John W. Chapman eds., 1977).

46. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (holding that “the use of the confessions [obtained by police violence] as the basis for conviction and sentence was a clear denial of due process”).

even a probability that the defendant is at fault, much less viable proof. This is true both as a utilitarian matter and a dignitary matter. As a utilitarian matter, because it is impossible to make any determination of fault on the basis of unilateral, self-interested, unproven allegations, the accuracy of any conclusion of fault is of course highly suspect. From a dignitary perspective, the defendant has been given no opportunity to challenge the accuracy of the plaintiff's self-interested allegations because the plaintiff has not yet provided convincing proof of the defendant's fault. This is not a criticism of the plaintiff; it simply means that at the discovery stage—the point at which the defendant's property is taken to subsidize the plaintiff's discovery—the litigation system does not allow for such proof. That inquiry comes at a later stage in the process.<sup>47</sup>

Absent any opportunity for the defendant to challenge the truth of the plaintiff's allegations, there is no assurance of an accurate determination or assumption of the defendant's fault to justify the deprivation of his property. Such an approach, then, quite clearly contravenes the foundation of the utilitarian model of procedural due process. Nor does it satisfy the requirements of the dignitary model. How can the litigant's dignity be preserved when he is denied any opportunity to participate to challenge the accuracy of the plaintiff's claims or to disprove their truth?

### iii. Procedural Due Process Doctrine: Implications for Defendant Producer-Pays Discovery

Not surprisingly, given the clear implications of procedural due process theory, controlling Supreme Court doctrine similarly dictates the conclusion that defendant producer-pays discovery is unconstitutional. As far back as its 1972 decision in *Fuentes v. Shevin*, the Court has made clear that “[t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions.”<sup>48</sup> The Court explained this conclusion in the following manner: “The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . .”<sup>49</sup> The Court further established that “a fair process of decisionmaking”

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47. See, e.g., FED. R. CIV. P. 50 (judgment as a matter of law, both before and after verdict); FED. R. CIV. P. 56 (summary judgment).

48. 407 U.S. 67, 80 (1972).

49. *Id.* at 80–81.

necessarily included the stipulation that “[p]arties whose rights are to be affected are entitled to be heard.”<sup>50</sup> In the discovery cost allocation context, because the defendant is being deprived of his property without ever being given a meaningful opportunity to dispute his fault, it is beyond doubt that the current producer-pays system violates the foundational premises of procedural due process set out in *Fuentes*.

The Supreme Court has never overruled its foundational statements in *Fuentes*. However, the Court’s procedural due process doctrine took a major step with the formal adoption of a starkly utilitarian calculus in its 1976 decision, *Mathews v. Eldridge*.<sup>51</sup> The Court’s test included a blend of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>52</sup>

Conspicuously absent from the Court’s calculus was any concern over the type of dignitary values about which Professor Mashaw was so concerned.<sup>53</sup> Nevertheless, with only minor subsequent modification,<sup>54</sup> this test continues to control.

Applying the *Mathews* factors to defendant producer-pays discovery (and adopting the premise that the only constitutionally valid justification for making a defendant subsidize what are properly deemed the plaintiff’s discovery costs is that the defendant is somehow at fault), the most important consideration is likely the second—“the risk of an erroneous deprivation” absent further safeguards.<sup>55</sup> Absent some meaningful inquiry into the truth or falsity of the plaintiff’s self-serving allegations and an opportunity for the defendant to challenge any proffered proof of his fault, it is impossible to have any assurance that the wholly unsupported assumption of the defendant’s wrongdoing is accurate.

Measuring the government’s interest is arguably somewhat more complicated. There is no issue of providing greater procedural protection to the defendant at the discovery stage that might increase the administrative costs to the government. The probable effect of depriving the defendant of his property is simply to make the plaintiff pay the costs of the discovery he has requested and that benefits only

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50. *Id.* at 80.

51. 424 U.S. 319 (1976).

52. *Id.* at 335.

53. Mashaw, *supra* note 44, at 899; *see* discussion *supra* Section III.B.2.

54. *See* discussion *infra* notes 56–57 and accompanying text.

55. 424 U.S. at 335.

him. True, if the plaintiff cannot afford that discovery, the plaintiff will never be able to obtain that information. But that ignores another conceivable alternative: creation of a societal fund to subsidize the costs of the discovery. One might argue that creation and operation of such a fund does in fact impose significant administrative burdens on the government. But surely that fact cannot, as a matter of equal protection, justify random imposition of that full cost on an individual litigant for whom there is no basis to rationalize selecting him out for special treatment. In any event, the government's interest in avoiding administrative burdens is not avoided simply by imposing the costs of the plaintiff-requestor's discovery on the defendant-producer.

In its subsequent decision in *Connecticut v. Doehr*, the Court expanded the *Mathews* test somewhat.<sup>56</sup> In *Mathews*, the only parties involved were the claimant and the government. By contrast, *Doehr* involved two private parties—a plaintiff and a defendant. Hence the Court quite reasonably expanded the *Mathews* test to include an inquiry into the impact on the plaintiff as well as the defendant in a purely private litigation.<sup>57</sup> Thus, it might be argued that the negative impact on the plaintiff caused by its financial inability to obtain discovery from the defendant must now be taken into account in conducting the *Mathews* utilitarian calculus. But such reasoning dangerously proves too much. Nothing, of course, prevents the plaintiff from conducting the discovery if he pays for it—much as a litigant is required to incur its costs in managing litigation. By this reasoning, then, a defendant could be required to pay an indigent litigant's litigation costs—clearly an extreme result.

The final factor—the “private interest” impacted by the “official action” (that is, imposition of the plaintiff's discovery costs on the defendant without any basis for assuming defendant's fault)—arguably suggests a sliding scale. The more expensive the discovery that the plaintiff requests, the greater the need for an accurate decision. But because requiring the defendant to pay for the plaintiff's discovery costs absent showing the slightest evidentiary basis of the defendant's fault or wrongdoing is so unlikely to produce an accurate result, even imposition of a small discovery cost on the defendant cannot be justified as a matter of utilitarian calculus. Discovery must require *some* hearing before a defendant may be deprived of its property,<sup>58</sup> and in the case of the current producer-pays discovery cost allocation model, the

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56. 501 U.S. 1 (1991).

57. *Id.* at 10–11.

58. Redish & Marshall, *supra* note 43, at 475.

defendant is forced to subsidize the plaintiff's discovery costs with no hearing at all.

It should be recalled that the discovery stage is reached only after the defendant has had a full opportunity to move to dismiss a plaintiff's complaint for failure to state a claim under Rule 12(b)(6).<sup>59</sup> But as previously explained, this opportunity cannot possibly be considered a meaningful hearing, since such a motion assumes, solely for purposes of argument, the truth of the plaintiff's nonconclusory allegations.<sup>60</sup> In *Doehr*, the Court expressly rejected consideration of a motion to dismiss for failure to state a claim as an adequate hearing designed to assure accuracy of decisionmaking. "Permitting a court to authorize attachment [of a defendant's property] . . . because the plaintiff can make out a facially valid complaint," the Court stated, "would permit the deprivation of the defendant's property when the claim would fail to convince a jury [or] when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute . . . ."<sup>61</sup> The Court added that "[i]t is self-evident that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions,"<sup>62</sup> also noting that "even a detailed affidavit would give only the plaintiff's version of the confrontation."<sup>63</sup> Thus, at least as a doctrinal matter if not also as a matter of common sense, the question of whether the opportunity to move to dismiss can be considered an adequate hearing has now been foreclosed.

One might suggest that in order to rationalize the defendant producer-pays model as a matter of equal protection, it should be deemed sufficient that only probable cause of the defendant's fault be shown. Determinative proof of such fault, the argument proceeds, need not be established. But even conceding this point solely for purposes of argument, this softening of what needs to be established prior to the deprivation of the defendant's property helps in reducing neither the equal protection nor procedural due process problems of the current cost allocation model. With the only procedural opportunity for a defendant to challenge the assumption of its fault being the wholly inadequate

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59. FED. R. CIV. P. 12(b)(6); see discussion *supra* Section III.B.2.b.

60. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (assuming factual allegations as true for the purposes of deciding a Rule 12(b)(6) motion).

61. *Doehr*, 501 U.S. at 13–14.

62. *Id.* at 14.

63. *Id.*

Rule 12(b)(6) motion,<sup>64</sup> there exists no basis, at the point of discovery, even to make a finding of probable cause of a defendant's fault.<sup>65</sup>

One might also suggest that the constitutional problem I raise, even if it is assumed to be correct, can be dealt with simply by authorizing postresolution compensation. If the plaintiff wins, then there would be no need for such compensation, since the necessary finding of the defendant's fault would be made. If the defendant wins, the due process problem could be solved by then requiring that the plaintiff reimburse the defendant for the costs of discovery that did not aid the defendant in preparation of his case. It is true that the courts on occasion upheld postdeprivation due process in situations in which it is infeasible to provide a predeprivation hearing.<sup>66</sup> But in the context of defendant producer-pays discovery, this line of decisions is irrelevant for a number of reasons. First of all, it should be noted that this is not our system: even a victorious defendant has no legal right to recover costs—even those that were properly deemed to be the costs of the plaintiff requesting party. Moreover, even if a defendant were given such a right, he would be faced with an impenetrable Catch-22: The only situations in which it would arguably be rational to transfer the plaintiff's discovery costs to the defendant would be those in which the plaintiff could not afford to pay those costs.<sup>67</sup> But it is in just these situations that a postdeprivation hearing would be meaningless for the simple reason that a losing plaintiff would be financially unable to reimburse the defendant. Thus, the fact that the defendant will ultimately be given the opportunity for his subsidization of the plaintiff's costs does not moot the need for some sort of meaningful hearing at the time the forced subsidization takes place.

#### IV. CRITICISMS OF THE CONSTITUTIONAL CHALLENGE TO THE DEFENDANT PRODUCER-PAYS MODEL: A RESPONSE

In an interesting and provocative article, Professor Benjamin Spencer has challenged the conclusion that defendant producer-pays

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64. See discussion *supra* Section III.B.2.b.

65. In *Doehr*, the Court found the availability of a motion to dismiss to be a constitutionally inadequate basis on which to determine even a finding of probable cause of defendant's liability on the merits. 501 U.S. at 13–14.

66. See *Parratt v. Taylor*, 451 U.S. 527 (1981) (“The prior cases which have excused the prior-hearing requirement [of due process] have rested in part on the availability of some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities.”), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986) (overruling *Parratt*'s holding that lack of due care can constitute a deprivation of life, liberty, or property under the Fourteenth Amendment).

67. See discussion *supra* Section III.B.1.

discovery cost allocation is unconstitutional.<sup>68</sup> Because Professor Spencer's arguments are, I believe, worthy of careful consideration, I have chosen to respond to them here.

Professor Spencer first argues—quite correctly—that “[t]o the extent that the litigation expenses in question are expended for the benefit of the party incurring the cost, no constitutionally cognizable deprivation can be said to have occurred.”<sup>69</sup> As I have already made clear,<sup>70</sup> I fully agree with this statement. There would have to be some sort of judicially supervised process to allocate costs between plaintiffs and defendants. But none of that alters the fact that the constitutional problem remains for discovery produced by the defendant that benefits the defendant not at all.

Professor Spencer runs into problems, however, when he asserts the following:

[W]hen the information produced tends to confirm the defendant-producer's liability . . . [the constitutional argument against the producer-pays model] should fail because the producer has unclean hands; a litigant should have no equitable claim to a right to withhold information tending to refute its litigation position or to saddle the requester with the expense of discovering such information.<sup>71</sup>

What does “unclean hands” have to do with a constitutional challenge to a judicial practice when no equitable relief is sought? True, unclean hands will traditionally prevent a party from invoking equity. But when we speak of constitutional rights, traditional limits on the availability of equitable relief have no relevance when such relief is not requested. In any event, while it would be a waste of time to debate the esoteric historical limits of equity, I seriously doubt that the strategic benefit of discovery to the plaintiff would render the defendant guilty of unclean hands in the first place. But that is beside the point when no equitable relief is sought. Just as important a failure in Professor Spencer's argument is his incorrect assumption that the issue is whether the defendant is allowed to withhold the information in question. No one is arguing that the defendant has a right to withhold information; the only issue is whether the defendant can summarily be forced to subsidize what are properly seen as the plaintiff's costs in producing that information.

As weak as Professor Spencer's “unclean hands” argument is, his next contention degenerates into naked question-begging and logical circularity. “[I]f the information has evidentiary value in a live dispute,” he reasons, “the court and all parties are entitled to access it, and those

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68. Spencer, *supra* note 1.

69. *Id.* at 786.

70. See *supra* note 25.

71. Spencer, *supra* note 1, at 788–89.



in possession of the information have a duty to provide it.”<sup>72</sup> But that is the very issue that is the subject of debate—hardly a persuasive response. In any event, at least as a historical matter, Professor Spencer is simply wrong. Until promulgation of the Federal Rules of Civil Procedure in 1938, the understanding was the exact opposite of Professor Spencer’s conclusory assertion. It was only then that widespread compelled discovery was introduced into the federal civil litigation system. Prior to that point, parties had absolutely no “duty” to provide such information to their litigation opponent.

Professor Spencer’s final argument is that “the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action.”<sup>73</sup> He reasons that “the incidents of complying with properly instituted judicial action may not be cast as deprivations warranting due process protections.”<sup>74</sup> He is certainly correct in suggesting that incidental financial costs from complying with governmental orders are generally not viewed as deprivations of property for purposes of either the Takings or Due Process Clauses of the Fifth Amendment.<sup>75</sup> But that is not the issue. The question, rather, is whether a defendant can be forced to absorb litigation costs that are not properly his own, as a means of subsidizing his private opponent. Rather than incur a procedural cost that “is a part of the necessary contribution of the individual to the welfare of the public,”<sup>76</sup> the defendant is being made to transfer his wealth to another private party—the very party that is suing him. This is a far cry from a defendant being forced to absorb the costs of preparing his own defense or to comply with a governmental investigation.

## CONCLUSION

When the dust settles, the conclusion that the current producer-pays model of discovery cost allocation, at least when applied to defendants, violates both equal protection and procedural due process protections embodied in the Constitution is inescapable. Any legitimate legal or moral theory must view the costs incurred in ferreting out information that assists one party to a litigation as that party’s cost,

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72. *Id.* at 789.

73. *Id.* at 791 (quoting *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980)).

74. *Id.* at 792.

75. U.S. CONST. amend. V, cls. 4–5.

76. Spencer, *supra* note 1, at 793 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

even if another party must initially bear the expense of producing that information.<sup>77</sup>

It may well be appropriate, as a political or moral matter, for the government to wish to subsidize a plaintiff's discovery costs (though counterarguments also exist).<sup>78</sup> But absent some determination of the defendant's fault or wrongdoing, there exists no rational basis on which to selectively impose that cost on the defendant to the litigation rather than spread the cost among all taxpayers. By way of analogy, recall the hypothetical mentioned previously: a legislative plan under which all of the plaintiff's discovery will be subsidized by one person, to be chosen by means of a random drawing.<sup>79</sup> Despite the absence of a suspect classification, such a wholly irrational classification would have to be deemed a violation of equal protection. Unless the defendant has been proven to be at fault (or, at the very least, probable cause of his fault has been established),<sup>80</sup> he is in no different position from the unfortunate individual selected through the hypothetical random drawing. But at the discovery stage, the defendant has not been provided with anything even approaching a meaningful hearing to challenge the proof of his fault. Indeed, no evidence of his fault has even been introduced, and no independent adjudicator has made any determination of fault following such a hearing. To make a defendant incur the unreimbursed costs of the plaintiff's discovery, then, simultaneously constitutes a violation of both equal protection and procedural due process.

Admittedly, constitutional restraints on the operation of the Federal Rules of Civil Procedure have generally played at best only a limited role in controlling abuses of the process. But in situations such as this one, where the violation of the defendant's constitutional rights is stark and unambiguous, we owe it to our constitutional system and the premise of constitutional supremacy to assure that the process complies with such important constitutional directives.

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77. See discussion *supra* Part III. See generally Redish & McNamara, *supra* note 2 (explaining the current approach of the U.S. legal system requires the producing party to bear all costs associated with a discovery request).

78. See Spencer, *supra* note 1, at 788–90 (responding to the argument that parties are being forced to subsidize their adversaries without due process).

79. See discussion *supra* Section III.B.1.

80. See discussion *supra* Part III.