sign at the event; although "BONG HiTS" may have quickened her step, it was the physical banner itself that got her feet moving. It is difficult, in any case, to imagine the same principal who ripped down Frederick's sign allowing a student to hold up a similarly juvenile banner reading "this school sucks." The school, however, explicitly decided to punish Frederick because of the perceived content of his speech, not because of the inappropriateness of his choice of time, place, or verbal medium. In its opinion the Court, like the school principal, made this case emphatically about drugs; but no matter how weighty the Court, the school, or the government as a whole may find the issue of drug use to be, it cuts into the core of the First Amendment to say that it is a topic too important for student dissent to be heard.

II. FEDERAL JURISDICTION AND PROCEDURE

A. Civil Procedure

Pleading Standards. — In 1938, Dean Charles Clark and the other drafters of the Federal Rules of Civil Procedure created the liberal notice pleading standards of Rule 8,[1] which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[2] Fifty years ago, the Supreme Court declared in *Conley v. Gibson*[3] that Rule 8 means that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[4] Last Term, in *Bell Atlantic Corp. v. Twombly*,[5] the Supreme Court abandoned *Conley*'s broad interpretation of Rule 8 by holding that a complaint brought under section 1 of the Sherman Act[6] alleging "parallel conduct unfavorable to competition" must, in order to survive a Rule 12(b)(6) motion to dismiss, allege "some factual context suggesting agreement, as distinct from identical, independent action."[7] The majority, motivated by legitimate concern over the large costs that discovery places on defendants, had good intentions. But a judicial opinion is the wrong forum for enacting a major change to settled interpretations of the Federal Rules. Instead of resolving the case by looking to the Rules' text, their original understanding, and the

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[1] Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 433 (1986).

[2] FED. R. CIV. P. 8(a)(2).

[3] 355 U.S. 41 (1957).

[4] *Id.* at 45–46.

[5] 127 S. Ct. 1955 (2007).

[6] 15 U.S.C. § 1 (2000 & Supp. IV 2004).

[7] *Twombly*, 127 S. Ct. at 1961.

Court's precedent interpreting Rule 8, the Court engaged in an ad hoc cost-benefit analysis. Rather than changing procedural rules through decisions in individual cases, judges should leave such alterations to institutions that have the ability to evaluate the costs and benefits of potential changes via empirical analysis.

In 1982, the American Telephone and Telegraph Company (AT&T) entered into a consent decree to settle a Sherman Act suit brought by the United States.[8] Under the decree's terms, AT&T divested itself of its local telephone service operations.[9] Seven regional Bell operating companies were authorized to act as monopolies for local telephone service within their respective regions.[10] More than a decade later, Congress passed the Telecommunications Act of 1996,[11] hoping to encourage competition in both local and long-distance telephone service.[12] Under the terms of the Act, incumbent local exchange carriers (ILECs) must provide access to competing local exchange carriers (CLECs).[13] Despite the law, CLECs have found little success penetrating the local telephone market in the decade since the Act's passage.[14]

Alleging that the ILECs conspired to keep CLECs out of the local telephone market, consumers brought a class action against the four major ILECs[15] under section 1 of the Sherman Act in the United States District Court for the Southern District of New York.[16] Upon the defendants' motion, Judge Lynch dismissed the complaint,[17] finding that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement," did not state a claim for purposes of Rule 12(b)(6).[18]

The Second Circuit vacated the district court's judgment. Writing for a unanimous panel, Judge Sack[19] observed that, under the Federal Rules, only those actions subject to Rule 9's heightened pleading requirements — which do not include antitrust actions[20] — must be

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8 Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003).

9 *Id.*

10 *Id.*

11 Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

12 *Twombly*, 313 F. Supp. 2d at 177.

13 *Id.*

14 *Id.* at 178.

15 Since the consent decree broke up AT&T's monopoly, the seven Bell operating companies have been consolidated into four service providers: Verizon Communications, Inc. (formerly Bell Atlantic Corporation), SBC Communications, Inc., Qwest Communications International, Inc., and BellSouth Corporation. *Twombly*, 127 S. Ct. at 1962 n.1.

16 *Twombly*, 313 F. Supp. 2d at 176–77.

17 *Id.* at 189.

18 *Id.* at 180.

19 Judges Raggi and Hall joined Judge Sack's opinion.

20 *See* FED. R. CIV. P. 9(b) (requiring fact-specific pleading for "all averments of fraud or mistake").

pleaded with factual specificity.[21] The court rejected Judge Lynch's contention that Second Circuit precedent established more rigorous pleading requirements in antitrust cases.[22] Because the allegations in the plaintiffs' complaint were "sufficient to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" the court vacated the district court's dismissal and remanded.[23]

The Supreme Court reversed and remanded. Writing for the Court, Justice Souter[24] began by noting that, though parallel anticompetitive conduct may serve as evidence of a conspiracy, plaintiffs must ultimately prove that defendants actually agreed not to compete.[25] Looking at Rule 8 and several Supreme Court cases interpreting it over the years, Justice Souter derived "general standards"[26]: although complaints do not require "detailed factual allegations," they do need "more than labels and conclusions," and "[f]actual allegations must be enough to raise a right to relief above the speculative level."[27] Applying these principles, Justice Souter determined that stating a section 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."[28] This rule does not involve a probability requirement, but merely "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[29]

The high cost of discovery in antitrust cases justifies requiring plausibility at the pleading stage, Justice Souter reasoned.[30] In the case at hand, discovery would involve examining "reams and gigabytes of business records" relating to many millions of telephone service customers over a seven-year period in order to find "unspecified (if any) instances of antitrust violations."[31] Justice Souter argued that a rigorous pleading standard was needed to curb the abuse of discovery, since neither pretrial management nor summary judgment had proven particularly effective.[32]

Justice Souter proceeded to examine *Conley*'s broad interpretation of Rule 8. On a "focused and literal reading" of *Conley*'s "no set of facts" language, Justice Souter observed, "a wholly conclusory state-

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[21] Twombly v. Bell Atl. Corp., 425 F.3d 99, 107 (2d Cir. 2005).

[22] *Id.* at 108–09.

[23] *Id.* at 118–19 (omission in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[24] Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito joined Justice Souter's opinion.

[25] *Twombly*, 127 S. Ct. at 1964.

[26] *Id.* at 1965.

[27] *Id.* at 1964–65.

[28] *Id.* at 1965.

[29] *Id.*

[30] *Id.* at 1967.

[31] *Id.*

[32] *See id.*

ment of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."[33] Finding that "*Conley*'s 'no set of facts' language ha[d] been questioned, criticized, and explained away" by commentators and later cases, Justice Souter determined that "this famous observation ha[d] earned its retirement."[34] What the Court in *Conley* actually meant was that *once* a plaintiff has adequately stated a claim, *then* the claim "may be supported by showing any set of facts consistent with the allegations in the complaint."[35] Applying the proper interpretation of Rule 8 to the present case, Justice Souter found that the alleged parallel anticompetitive conduct by the ILECs was suggestive not of a conspiracy, but merely of rational, self-interested behavior on the part of each ILEC.[36]

In a final footnote, Justice Souter rejected the contention that the Court was applying a "'heightened' pleading standard" and improperly widening the application of the specific fact pleading requirements in Rule 9.[37] The problem in the instant case was not that the alleged facts were insufficiently particularized, but rather that the complaint "failed *in toto* to render plaintiffs' entitlement to relief plausible."[38]

Justice Stevens dissented,[39] calling the majority's opinion a "dramatic departure from settled procedural law."[40] Justice Stevens argued that the plaintiffs' complaint clearly stated a claim and that the majority could not order the complaint dismissed merely because it found the claim implausible.[41]

First, Justice Stevens examined the historical context of the Federal Rules of Civil Procedure. The Rules were drafted to avoid the problems created by the highly technical and complex English pleading rules and the confusing fact/conclusion distinction used in New York's Field Code and other nineteenth-century civil procedure rules.[42] Against this historical background, the Federal Rules' liberal pleading standards were intended "not to keep litigants out of court but rather to keep them in."[43]

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[33] *Id.* at 1968 (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 45 (1957)).
[34] *Id.* at 1969.
[35] *Id.*
[36] *Id.* at 1971.
[37] *Id.* at 1973 n.14.
[38] *Id.*
[39] Justice Ginsburg joined all but the final part of Justice Stevens's dissent.
[40] *Twombly*, 127 S. Ct. at 1975 (Stevens, J., dissenting).
[41] *See id.*
[42] *Id.* at 1975–76.
[43] *Id.* at 1976.

Looking to *Conley*, Justice Stevens cited a dozen instances where the Court had cited the "no set of facts" language,[44] and he contended that the majority's "opinion [was] the first by any Member of th[e] Court to express *any* doubt as to the adequacy of the *Conley* formulation."[45] Justice Stevens acknowledged the majority's concerns about discovery's costs, but he argued that the Court's solution was inconsistent with the Federal Rules' underlying philosophy that unmeritorious claims were best weeded out in the pretrial discovery process or at trial itself, not through pleading standards.[46]

Examining the facts of the case on the majority's own terms, Justice Stevens found it plausible that the defendants had conspired.[47] But more importantly, Justice Stevens thought it unwise to let judges dismiss cases they found implausible based on the pleadings, and "fear[ed] that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence."[48]

Writing only for himself in the final part of his dissent, Justice Stevens contended that the ostensible justification for the majority's ruling — an "interest in protecting antitrust defendants . . . from the burdens of pretrial discovery" — could not possibly explain the decision, given the vast wealth of the defendants.[49] Justice Stevens argued that the real motivation for the Court's decision was "a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly serious factual allegations."[50]

Justice Stevens was half right. The majority's view runs counter to the text of the Rules, Supreme Court precedent, and the historical purpose of notice pleading. But what drove the majority's opinion was not a lack of faith in trial judges' abilities to manage discovery; rather, it was a lack of confidence in the Federal Rules' system of discovery itself. The Court's concern over the very real problems with discovery is admirable. Yet its method in overturning *Conley* is troubling. The Court relied on an ad hoc cost-benefit analysis that failed to account for all of the effects that the new plausibility requirement might have on civil litigation. *Twombly* demonstrates that major procedural changes should not be accomplished through judicial opinions, which are inevitably focused on the facts of individual cases and in

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[44] *Id.* at 1978 n.4.
[45] *Id.* at 1978.
[46] *Id.* at 1983.
[47] *Id.* at 1985–86.
[48] *Id.* at 1988.
[49] *Id.* at 1989.
[50] *Id.*

which Justices rarely have before them the empirical data necessary to evaluate new procedural innovations. If the Court was convinced that heightened pleading is the solution to the problems with discovery, the Court could have used *Twombly* to suggest that the Judicial Conference's Advisory Committee on Civil Rules study whether a heightened pleading standard would prove socially beneficial, perhaps leading to an amendment of the Federal Rules. But the Court should not have ventured outside its expertise by sub silentio amending the Rules through reinterpretation.

Although it is at present hard to say how big of an effect *Twombly* will ultimately have on pleading practice,[51] it seems clear that Justice

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[51] Some scholars view *Twombly* as primarily an antitrust case. *See, e.g.*, Posting of Mike O'Shea to Concurring Opinions, http://www.concurringopinions.com/archives/2007/06/how_cautionary_1.html (June 6, 2007, 6:47 PM). If so, *Twombly* may do little to change the law. *See* Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 121, 123 (2007), http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf (observing that *Twombly* is "perhaps unremarkable from an antitrust perspective"); Posting of Einer Elhauge to The Volokh Conspiracy, http://volokh.com/archives/archive_2007_05_20-2007_05_26.shtml#1179785703 (May 21, 2007, 6:15 PM) (arguing that *Twombly* is "quite insignificant" because it merely ratified what was already common practice in the lower courts). Several years before *Twombly*, Professor Christopher Fairman wrote that many lower courts were already requiring heightened pleading in section 1 claims. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1014–15 (2003). More than twenty years ago, Professor Richard Marcus observed that lower courts had revived fact pleading in conspiracy cases generally. *See* Marcus, *supra* note 1, at 450. Notwithstanding the appellate panel's decision in *Twombly*, the Second Circuit had previously affirmed dismissals of antitrust conspiracy complaints that failed to allege sufficient facts. *See, e.g.*, Heart Disease Research Found. v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972).

Other scholars, however, argue that *Twombly*'s significance extends to civil actions generally, and consider the ruling a drastic departure from previous pleading practice. *See* Dodson, *supra*, at 124 (reading *Twombly* as holding "that mere notice pleading is dead for all cases and causes of action"); Posting of Michael Dorf to Dorf on Law, http://michaeldorf.org/2007/05/end-of-notice-pleading.html (May 24, 2007, 7:35 AM) (predicting that *Twombly*, if not limited to the antitrust context, will "likely do great damage in the lower courts"). Professor Michael Dorf argues that the final footnote of Justice Souter's opinion, which denied creating a heightened pleading standard, is "simply false." Posting of Michael Dorf to Dorf on Law, *supra.* This conclusion is supported by the fact that *Twombly* interpreted Rule 8, which applies to all civil actions except for the few governed by Rule 9's special pleading requirements. *See* FED. R. CIV. P. 9(b). It is possible, however, that even viewed as a broad civil procedure opinion, *Twombly* is not as significant as Professor Dorf and others believe. Just as the majority and dissent in *Twombly* disagreed about the extent to which *Conley*'s "no set of facts" formulation had been followed, scholars disagree about the extent to which the federal system is, in practice, a notice pleading regime. Professor Fairman announced before *Twombly* that notice pleading had become a "myth," Fairman, *supra*, at 988, and Professor Marcus declared in 1986 that notice pleading was a "chimera," Marcus, *supra* note 1, at 451.

Some commentators contend that *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam), which the Supreme Court decided shortly after deciding *Twombly*, limits *Twombly*'s impact. *Erickson*, citing *Twombly*, held that the Tenth Circuit, in affirming the dismissal of a prisoner's 42 U.S.C. § 1983 claim for failure to allege sufficient facts, had "depart[ed] in so stark a manner from the pleading standard mandated by the Federal Rules" that a summary reversal was necessary. *Id.* at 2198. Several commentators have argued that *Erickson* shows that *Twombly* should be read

Stevens has the better of the purely interpretive argument at stake in the case. The text of the Rules does not justify the Court's holding. Rule 9 creates clear exceptions to the rule that facts do not need to be pleaded with any specificity; thus, the actions to which Rule 9 is inapplicable must not require particularized pleading of facts.[52] Bolstering this argument is the Rules' Form 9, which offers the following example of a complete claim to relief that would comport with Rule 8's requirements: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."[53] The example contains no further details about the alleged negligence, nor any facts that render the allegation particularly "plausible" — it simply states that the unlawful act occurred. Form 9 appears to be "a wholly conclusory statement of claim," which under *Twombly* would not meet the requirements of Rule 8.[54] But such a result is impossible because, according to Rule 84, the forms "are sufficient under the rules."[55]

Nor does precedent justify the Court's holding. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[56] the Court held that, unless the Federal Rules were amended, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims."[57] Just five years before *Twombly*, the Court in, *Swierkiewicz v. Sorema N.A.*,[58] explicitly rejected the notion that a complaint must seem plausible to survive a motion to dismiss: "Rule 8(a) establishes a pleading standard *without regard to whether a claim will succeed on the merits*."[59]

The Court's holding also does not square with the history of the Federal Rules. The Rules' drafters hoped to avoid the problems with

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less expansively than some have suggested. *See, e.g.*, Posting of Mike O'Shea, *supra*. *But see* Posting of Scott Dodson to Civil Procedure Prof Blog, http://lawprofessors.typepad.com/civpro/2007/06/dodson_on_erick.html (June 12, 2007).

[52] *See* Leatherman v. Tarrant County Narcotics Intel. & Coordination Unit, 507 U.S. 163, 168 (1993) (citing the *expressio unius* maxim to support the proposition that civil actions other than those to which Rule 9(b) applies do not need to be pleaded with particularity).

[53] FED. R. CIV. P. Form 9.

[54] *See Twombly*, 127 S. Ct. at 1968.

[55] FED. R. CIV. P. 84. Professor Randy Picker interprets Form 9 similarly, arguing that "Form 9 tells the plaintiff to plead the facts that she can know before she undertakes discovery." Posting of Randy Picker to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2006/11/reading_twombly.html (Nov. 28, 2006, 9:46 AM).

[56] 507 U.S. 163.

[57] *Id.* at 168–69.

[58] 534 U.S. 506 (2002).

[59] *Id.* at 515 (emphasis added); *see also id.* ("[I]t may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)) (internal quotation mark omitted)).

both the English common law pleading rules[60] and the overly technical Field Code;[61] they sought to ensure that cases were decided on their merits, not based on the technicalities of pleading.[62] As a judge on the Second Circuit, Charles Clark interpreted Rule 8 to permit an "inartistically" drawn complaint to survive a Rule 12(b)(6) motion because it was clear from the complaint what claim the plaintiff was alleging.[63] Later, then–Chief Judge Clark emphasized that pleadings under the Federal Rules "do not require detail. [They] require a general statement."[64]

Given *Twombly*'s conflict with text, precedent, and historical sources, it seems clear that the Court was motivated by other considerations. In particular, the Court seemed motivated by a desire to increase efficiency by allowing judges to dismiss the cases in which discovery seems least likely to be fruitful.[65] There is clearly merit to the Court's concern. Discovery is widely believed to be a major problem with the American civil justice system.[66] It can be extraordinarily expensive[67] and is frequently abused by aggressive litiga-

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[60] According to Professor Lawrence Friedman, "English common-law pleading was an elaborate contest of lawyerly arts, and winning a case did not always depend on who was in the right or who had the law on their side. The winner might be the better pleader." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 96 (3d ed. 2005).

[61] Dean Clark argued that the Field Code's requirement that plaintiffs plead material facts had been unsuccessful because "the codifiers and the courts failed to appreciate that the difference between statements of fact and statements of law is almost entirely one of degree only." Charles E. Clark, *History, Systems, and Functions of Pleading*, 11 VA. L. REV. 517, 534 (1924).

[62] *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 186–87 (1957).

[63] *See* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

[64] Clark, *supra* note 63, at 181*; see also* Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase — Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) ("There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail.").

[65] *See Twombly*, 127 S. Ct. at 1966–67; Posting of Randy Picker to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2007/05/closing_the_doo.html (May 21, 2007, 4:45 PM) ("It is the fear of discovery run amok that drives the majority opinion . . . ."). The Court was almost certainly influenced by law and economics ideas. *See Twombly*, 127 S. Ct. at 1966 (citing Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) (arguing for a plausibility pleading standard in patent antitrust cases because of their "inevitably costly and protracted discovery phase[s]")).

[66] For example, in 1989 Judge Frank Easterbrook noted that the vast majority of federal judges were concerned about discovery's problems. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989). Judge Paul Niemeyer, as Chair of the Advisory Committee on Civil Rules, concluded that, while discovery "work[s] effectively and efficiently in . . . 'routine' cases," it is perceived as "unnecessarily expensive and burdensome" in cases in which lawyers use it actively. Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 523 (1998).

[67] One study of nearly 1000 civil cases involving some discovery expenses found discovery responsible for, on average, half of the total cost of litigation. *See* THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE 15 (1997).

tors.[68] Defendants attempt to thwart plaintiffs by burying them in documents;[69] plaintiffs abuse interrogatory requests to go on "fishing expeditions" and to pressure defendants to settle possibly unmeritorious claims.[70] Making matters worse, courts have little ability to distinguish legitimate uses of the discovery process from abuses.[71]

There is also merit to the Court's unstated assumption that procedural rules should ultimately be normatively evaluated under a social welfare calculus.[72] While Justice Stevens thought it significant that antitrust defendants "are some of the wealthiest corporations in our economy,"[73] this consideration is irrelevant to an evaluation of the discovery system. Even if they are borne by wealthy corporations, the costs of discovery are social costs that should be avoided if discovery as it exists does not create a correspondingly greater social benefit.

Yet even if procedural rules should be normatively evaluated according to their costs and benefits, it does not follow that judges should perform the normative analysis in deciding cases. On the contrary, a judicial opinion is simply the wrong forum for engaging in a consequentialist revision of procedural rules. The Court's institutional competence lies in interpreting legal sources, not in speculating about the real-world consequences of its rulings.[74] Unlike the Advisory Committee on Civil Rules, which can commission empirical research[75] into the costs and benefits of heightened pleading, the Court can rely only on the facts of the case before it and the Justices' own intuitions. In *Twombly*, the Court assumed that a heightened pleading standard was a desirable solution to discovery's problems, but it did not mar-

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[68] *See, e.g.*, Easterbrook, *supra* note 67, at 636; *see also* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1299 (1978).

[69] W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 901 (1996).

[70] Brazil, *supra* note 69, at 1322. The drafters of the Federal Rules were at least somewhat aware of this potential problem. *See* Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 871 (1933) (noting courts' rejection of the argument that "unrestricted discovery would permit one to go on a 'fishing expedition' to ascertain his adversary's testimony" (quoting *In re* Abeles, 12 Kan. 451, 453 (1874))*; see also* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

[71] *See* Easterbrook, *supra* note 67, at 638–39.

[72] *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1164–86 (2001).

[73] *Twombly*, 127 S. Ct. at 1989.

[74] *See* Jonathan Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1793 n.161 (2004) ("In our constitutional structure, judges arguably should not make the legislative-type policy judgments that their institutional position renders them ill-equipped to make.").

[75] *See, e.g.*, THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 3 (1996).

shal any evidence that a plausibility requirement would improve social welfare. Rather, the Court proceeded on a hunch. It is especially troubling that the Court encouraged judges to dismiss cases based on their own perceptions of plausibility, which, at the pleading stage, may represent little more than the judge's own uninformed biases and predispositions. But given that the Court's decision was premised on the Justices' confidence in their ability to intuit the empirical effects of the new pleading standard, it is perhaps unsurprising that the standard is itself premised on faith in judges' abilities to intuit how meritorious claims are before seeing any evidence.

There is no doubt that a heightened pleading standard will reduce the costs that discovery imposes generally, because fewer complaints will survive Rule 12(b)(6) motions and reach the discovery phase. Yet the heightened standard might result in the dismissal of some complaints that would be highly socially beneficial if successful. Consider *Twombly* itself. Discovery would undoubtedly have been very expensive. But if the allegations in the complaint were true, the costs of discovery would pale in comparison to the potentially massive social cost of the defendants' anticompetitive practices.[76] If so, the Court did society a great disservice by dismissing the complaint. Of course, the claim in *Twombly* might have lacked merit; but even if the Court's new pleading standard weeds out numerous meritless claims, it might still be detrimental to social welfare if it results in the dismissal of valid claims whose benefits would exceed the costs of meritless claims.

Nor did the Court consider the fact that heightened pleading standards increase the cost of litigation for all plaintiffs, not merely those filing meritless claims. After *Twombly*, lawyers will have to spend more time obtaining facts and drafting complaints in order to ensure survival of a motion to dismiss. While the high costs of discovery in cases like *Twombly* are particularly salient,[77] it is not clear that they are ultimately greater than the large number of small costs that heightened pleading requirements impose on plaintiffs throughout the system.

Professor Stephen Burbank has criticized the Supreme Court for approving amendments to the Federal Rules without adequate empirical investigation of their costs and benefits.[78] *Twombly* represents an even greater failure by the Court to think seriously about the proce-

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[76] *See* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 552 n.6 (1969) (explaining how monopoly pricing creates deadweight loss).

[77] *Cf.* Cass R. Sunstein, *The Availability Heuristic and Cross-Cultural Risk Perception*, 57 ALA. L. REV. 75, 87–92 (2005) (explaining how risks that are more available, or familiar, will appear greater, regardless of their actual magnitude in relation to less available risks).

[78] Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993).

dural changes it approved. The Court could have, and should have, left the decision to implement heightened pleading in the hands of institutions equipped to make legislative-type policy judgments[79] — either the Judicial Conference or Congress, which has the ultimate authority to establish the rules of federal civil procedure.[80]

The Court may be correct that requiring plausibility of complaints is the solution to discovery's problems. But the Court had very little reason to be sure that it was applying the correct remedy to a perceived sickness in the civil justice system. *Twombly* demonstrates the dangers of uncautious, consequentialist judging. Perhaps a new set of reformers should rewrite the Federal Rules in light of what we now know about the failings of discovery. But the Court, which has a limited ability to rigorously consider the impact of procedural innovations, should stick to interpreting the Federal Rules using traditional methods of legal interpretation. If so, the Court will, at the very least, be sure it is not making things worse.

B. Jurisdictional Status of Rules

Statutory Time Limits to Appeal. — The longstanding practice of treating time limits to federal appeals as jurisdictional[1] had been unsettled by the Court's recent, and often unanimous, campaign to apply the "jurisdictional" label to similar limits with a newly sparing hand.[2] Last Term, a sharply divided Court halted that campaign in *Bowles v. Russell*.[3] The Court insisted that *statutory* time limits to appeal are necessarily jurisdictional, and therefore mandatory. The Court's recent campaign had lacked a limiting principle, and the attempt in *Bowles* to find one was a step forward. But by ruling that the mere

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[79] *See* Molot, *supra* note 75, at 1792–93.

[80] *See* 28 U.S.C. §§ 2074–2075 (2000).

[1] Jurisdictional limits are treated by the courts as external limits. The courts must apply such rules sua sponte, and the parties may neither waive nor forfeit their effect. *See, e.g.*, United States v. Scarfo, 263 F.3d 80, 87 (3d Cir. 2001). *See generally* 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.1 & nn.7–8 (3d ed. 1999 & Supp. 2007) (stating flatly that because time limits to appeal are considered jurisdictional, "[n]o excuses for a late filing are tolerated," and collecting cases).

[2] Notable cases in the campaign include *Scarborough v. Principi*, 541 U.S. 401 (2003) (7–2 decision); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (unanimous); *Eberhart v. United States*, 126 S. Ct. 403 (2005) (per curiam and unanimous); and *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006) (unanimous). The category "claim processing rules" was created for limits formerly held jurisdictional. "Claim processing rules" are forfeitable, but not waivable, and more open to equitable alteration (much as statutes of limitations are subject to equitable tolling), though still "inflexible." *See, e.g*, *Eberhart*, 126 S. Ct. at 407; *Kontrick*, 540 U.S. at 456.

[3] 127 S. Ct. 2360 (2007). The decision was 5–4. The possibility of such a halt was manifest earlier in the Term. *See* Rockwell Int'l Corp. v. United States, 127 S. Ct. 1397, 1405–06, 1411 (2007) (holding certain statutory requirements for *qui tam* actions under the federal False Claims Act to be jurisdictional and therefore mandatory). Unlike *Bowles*, however, *Rockwell* made no direct change to the Court's underlying jurisdictionality doctrines.