WEATHERING CONSTITUTIONAL CHANGE

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The problem of sovereign immunity is of great concern to today's legal scholars. Recently, constitutional scholars have begun to analyze the effect of the Eleventh Amendment and sovereign immunity on constitutional change. In his most recent article on the subject, Professor Mark Brown responds to Professor John Jeffries's support for the Supreme Court's recent immunity jurisprudence.

His response takes two distinct shapes. First, Professor Brown argues that rather than providing structural advantages, fostering the development of constitutional law, and protecting state treasuries, sovereign immunity suppresses constitutional filings, thereby retarding the growth of constitutional law. He further argues that even if immunity does bring about constitutional change, it is impossible to know its quality and quantity. After developing this argument, Professor Brown attempts to answer the question: What role do immunities serve? Noting that immunities contradict the principles of fairness and reliance, Professor Brown concludes that immunities serve neither as a catalyst for constitutional change nor as an accurate predictor of society's expectations.

I. INTRODUCTION

"Hell is paved with good intentions." John Ray, *English Proverbs* (1670).[1]

Prominent on the legal horizon today is the problem of sovereign immunity. Should government be held financially accountable for its wrongs? The last five years have brought controversial (though not unexpected) answers. *Alden v. Maine*,[2] *Seminole Tribe of Florida v. Flor-*

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1. JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 136 n.8 (15th ed. 1980).

2. 527 U.S. 706 (1999) (holding that states are protected from suit for monetary damages in their own courts by constitutional sovereign immunity).

ida,[3] the two *College Savings Bank* cases,[4] and *Kimel v. Florida Board of Regents*[5] have extended state immunities and have divested Congress of the bulk of its authority to hold to the contrary. Long on law and short on reason, the Supreme Court's constitutional codification of sovereign immunity has been rightly (in my view) criticized.[6]

Although not agreeing with the details of these opinions, Professor John Jeffries has long lent normative support to the Court's immunity jurisprudence. He has argued, for example, that corrective justice,[7] overdeterrence,[8] and a threatened "dilution" of juridical judgment[9] all support some form of governmental immunity. In his most recent essay in the *Yale Law Journal*,[10] Jeffries expands this last thesis and argues that holding government financially accountable for constitutional wrongs risks an overly cautious judiciary, deters legal evolution, and interrupts constitutional law.[11] In short, money damages discourage judicially inspired constitutional evolution.[12]

In contrast, Jeffries asserts that prospective relief is ideal because it promotes reform while it protects state treasuries.[13] Sovereign immunity, according to Jeffries, has "deep structural advantages,"[14] "fosters the development of constitutional law,"[15] and causes "a rolling redistribution of wealth from older to younger, as the societal investment in constitutional law is channeled toward future progress and away from backward-looking relief."[16]

This essay challenges Jeffries's support for governmental immunity on two fronts. Part II questions whether governmental immunities in-

3. 517 U.S. 44 (1996) (holding that Congress cannot use its Commerce Clause powers to override states' constitutional sovereign immunity).

4. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that Congress cannot extract constructive waivers to suit in federal court from states under the Commerce Clause); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (holding that Congress cannot justify subjecting states to suit for patent infringement in federal court under Section 5 of the Fourteenth Amendment).

5. 528 U.S. 62 (2000) (holding that Congress does not have authority under Section 5 of the Fourteenth Amendment to override states' Eleventh Amendment immunity and subject them to suit in federal court for age discrimination).

6. *See, e.g.*, James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1276–73 (1998).

7. *See* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 93–96 (1989) (arguing that corrective justice demands that official liability only follow from willful violations of the Constitution).

8. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 73–78 (1998) (arguing that overdeterrence skews officials' decisions toward inaction).

9. *See id.* at 78.

10. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

11. *See id*. at 90–91.

12. *See id.* at 90 ("Put simply, limiting money damages for constitutional violations fosters the development of constitutional law.").

13. *See id.* at 98.

14. *Id*. at 90.

15. *Id*.

16. *Id.* at 90.

spire constitutional evolution.[17] Chaos theory teaches that minute events, like stones cast on the water, ripple across time with exaggerated consequences. A butterfly's flapping wings in Brazil, for example, may cause tornadoes in Texas.[18] Like the weather, law is a fragile tapestry of tipping points; the slightest nudge may cause a catastrophe.[19] As it ripples across the American legal system, Jeffries's judicial nudge could deter constitutional evolution. Governmental immunities encourage the fiscal branches of government to act extrajudicially, without supervision, and discourage victims from filing suit. Immunities, therefore, suppress the frequency of constitutional filings, which threatens the evolution Jeffries seeks.

Moreover, knowing whether more or better law follows immunity is an intractable task. Chaos theory not only teaches that tinkering with complex systems risks catastrophic results, it also demonstrates that the outcome of any particular tinkering is relatively indeterminate.[20] Even if a nudge's impact can be modeled and predicted, it is impossible to know what the system would have looked like without it.[21] Complex systems, like law and weather, can be altered, but whether for better or worse is anyone's guess. Injecting immunity into the constitutional equation may bring change, but assessing its quality and quantity is shear guesswork.

Part III is more ambitious. Because arranging the pace and direction of constitutional law is impossible, immunities are indeterminate catalysts at best. The question is then, "What role do (or ought) they serve?" Most commentators today, including Jeffries, assert that immunities, if nothing else, promote stability by insulating government and governmental officials from unpredictable constitutional developments.[22] Fairness and reliance are served because governmental officials are

17. *See infra* notes 24–133 and accompanying text.

18. *See generally* JAMES GLEICK, *The Butterfly Effect*, *in* CHAOS: MAKING A NEW SCIENCE 9 (1987). Gleick acknowledges several sources in his bibliography, including a paper by Edward N. Lorenz, entitled *Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?* *See* GLEICK, *supra*, at 322 (referring to source in bibliography).

19. *See* GLEICK, *supra* note 18, at 16–17 ("A small numerical error was like a small puff of wind—surely the small puffs faded or canceled each other out before they could change important, large-scale features of the weather. Yet in Lorenz's particular system of equations, small errors proved catastrophic.").

20. *See id.* at 17, 21.

21. *See id.* at 21.

22. *See* Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 537, 581 (1999) ("The Court maintains that qualified immunity promotes fairness to public officials, prevents overdeterrence of those officials, and limits social costs to both individual defendants and to society."); Jeffries, *supra* note 8, at 73 (explaining that damage liability has the potential to deter "socially desirable conduct" on behalf of government: "[in] the language of tort, the problem is that strict liability would force government to 'internalize' all accident costs, potentially depressing the activity level of government"); Larry Kramer & Alan O. Sykes, *Municipal Liability Under Section 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 299 (arguing that without immunity a municipality might engage in "self-protective behavior" with "potentially adverse effects on the quality of municipal services"); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 840 (1992) (arguing that immunity is desirable because individual official liability may distort decisions).

shielded from constitutional decisions that could not be foreseen or reasonably anticipated.

Contrary to conventional wisdom, I argue that immunities *contradict* or *ignore* the twin principles of fairness and reliance.[23] Because principled judicial decision making is disrupted in either case, the end result is a disjointed constitutional composite whose pieces bear little semblance to one another or to the picture as a whole. Immunities not only fail as constitutional catalysts, but also fail as support for society's settled expectations.

II. REMEDIES AND IMMUNITIES IN CONSTITUTIONAL LITIGATION

Governmental immunities are well known to students of civil rights. They protect states and government officials from claims premised on state law as well as those grounded in the Federal Constitution. For the latter, constitutional sovereign immunity (formerly known as "Eleventh Amendment immunity") protects states from money damages,[24] while judicially crafted individual immunities ("absolute"[25] and "qualified"[26]) protect government officials. Local governmental institutions, too, are protected from constitutional claims, though their protection is not packaged in sovereign immunity's garb. Instead, local government is protected by the "impunity" created by *Monell v. Department of Social Services*,[27] which requires a "policy or custom" for local liability.[28] Whatever the terminology, immunities often defeat monetary damages.[29]

This does not mean that victims are without redress. The fiction of *Ex parte Young*[30] allows some victims, in appropriate cases, to obtain

23. *See infra* notes 134–69 and accompanying text.

24. *See* Alden v. Maine, 527 U.S. 706 (1999) (looking beyond the language of the Eleventh Amendment to the Constitution's structure, its history, the historical context of the ratification of the Eleventh Amendment, and the Court's authoritative interpretations to support constitutional sovereign immunity).

25. *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 46 (1998) (holding that legislators, local as well as state and federal, are entitled to absolute immunity); Kalina v. Fletcher, 522 U.S. 118, 123–27 (1997) (describing when prosecutors are entitled to absolute immunity); Stump v. Sparkman, 435 U.S. 349, 363 (1978) (holding that judges are entitled to absolute immunity).

26. *See* Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982) (holding that executive officials acting in a discretionary capacity are entitled to qualified immunity).

27. 436 U.S. 658 (1978).

28. Local government, technically speaking, has no "immunity." *Owen v. City of Independence*, 445 U.S. 622 (1980), held that local governmental units, like cities, counties, and school boards, are not entitled to qualified immunity, *see id.* at 650; *Lincoln County v. Luning*, 133 U.S. 529 (1890), found that they are not entitled to the protections of the Eleventh Amendment. *See id.* at 530–31. Still, the fault requirement of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), protects local government from having to pay monetary damages—hence, the term "impunity." *See Monell*, 436 U.S. at 694.

29. In this essay, unless its reference is further qualified by "Eleventh Amendment," "sovereign," "qualified," or "absolute," immunity means not paying monetary damages for admitted constitutional wrongs.

30. 209 U.S. 123 (1908). Eleventh Amendment immunity, sovereign immunity, absolute immunity, and qualified immunity do not defeat a properly pleaded claim for prospective relief. Still, other

prospective relief against governmental officials.[31] The practical result is that this prospective relief prevents government, be it local or state, from causing future harm of a constitutional dimension. The holding in *Ex parte Young* and governmental immunities therefore conspire to favor prospective over retrospective relief.

This dichotomy is not without its critics. Some have argued that we need to rethink our concept of immunity because it tends to "freeze" constitutional law.[32] Others assert that denying retrospective relief for admitted constitutional wrongs contradicts established notions of accountability and fairness.[33] For its own part, the Supreme Court has largely ignored these complaints. Indeed, some on the high bench have questioned the need for even prospective relief.[34] Defensive arguments in suits brought by states against citizens, according to some, are sufficient.[35]

Professor Jeffries is unique in offering a wide array of rationales to support governmental immunities. His arguments range from predictability and fairness[36] to his most recent (and controversial) claim that constitutional evolution needs governmental immunities.[37] Like his prior theses,[38] Jeffries's latest argument contradicts conventional assumptions.

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doctrines, especially standing requirements found in Article III of the U.S. Constitution, limit prospective relief.

31. *See* Mark R. Brown, *The Failure of Fault Under Section 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1536–38 (1999) (describing limitations on obtaining injunctive relief under *Ex parte Young*); Jeffries, *supra* note 10, at 114 (arguing that the "fiction of *Ex parte Young* routinely allows civil rights plaintiffs to evade the Eleventh Amendment when they seek injunctive relief").

32. *See, e.g.*, Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 193 (1993) (observing that qualified immunity may render it unnecessary for courts to reach merits and hence retards the development of constitutional law); Richard H. Fallon, Jr. & Daniel L. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1795 (1991) (same).

33. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) ("Simply put, governments have neither 'sovereignty' nor 'immunity' to violate the Constitution. Whenever they do act unconstitutionally, they must in some way undo the violation by ensuring that victims are made whole. In many cases, only governmental liability can provide the assurance."); Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen*?*, 79 IOWA L. REV. 273, 275, 293, 295 (1994) (arguing that compensation and deterrence support governmental liability and that countervailing considerations, such as reliance, fairness, and predictability, are unpersuasive).

34. *See* Webster v. Doe, 486 U.S. 592, 612 (1988) (Scalia, J., dissenting).

> I turn, then, to the substance of the Court's warning that judicial review of all "colorable constitutional claims" arising out of the respondent's dismissal may well be constitutionally required. What could possibly be the basis for this fear? Surely not some general principle that *all* constitutional violations must be remediable in the courts.

Id.

35. *See* Amar, *supra* note 33, at 1486. Amar observes Chief Justice Marshall's opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821):

> [The opinion] seemed to imply that full vindication of constitutional rights against states might not require affirmative suits against the state; individual rights, Marshall hinted, might be fully protected by affirmative suits against individual officers in their private capacity, and by the ability of citizens to invoke constitutional rights defensively in suits brought *by* states.

Amar, *supra* note 33, at 1486.

36. *See* Jeffries, *supra* note 8, at 94.

37. *See id*. at 78.

38. *See, e.g.*, Jeffries, *supra* note 8 (arguing that the Eleventh Amendment, interpreted as codi-

Many have argued that immunities cause constitutional complacency by "freezing" constitutional law.[39] Jeffries's argument points in the other direction; immunities do not retard law, they encourage it.[40] Without immunities to fall back on, a judicial fear of governmental bankruptcy might restrict constitutional judgment.[41]

A. Encouraging Evolution

Professor Jeffries claims that barring courts from awarding money damages against the government but allowing them to declare rights prospectively produces the most constitutional evolution. In comparison, a defensive model is too austere,[42] a full remedial approach too frightening. Something in between, Jeffries argues, is needed.

Conventional wisdom supports the claim that constitutional evolution reaches its lowest ebb under a defensive model.[43] Barring affirmative relief discourages viable claims that one cannot or will not raise by way of defense.[44] Even assuming good faith on behalf of the government, happenstance alone will reduce the frequency of constitutional litigation. Only those victims assuming a defensive posture, after all, would be able

fying sovereign immunity, is sound because it supports a fault-based regime for constitutional litigation); Jeffries, *supra* note 7 (arguing that corrective justice supports governmental immunities).

39. *See* John M.M. Greabe, Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damage Actions*, 74 NOTRE DAME L. REV. 403, 410 (1999) (arguing that qualified immunity "tends, if not to 'freeze' constitutional law, then at least to retard its growth through civil rights damages actions"); *cf.* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 307–32 (1995) (arguing that qualified immunity distorts constitutional doctrine).

40. *See* Jeffries, *supra* note 10, at 90 ("[L]imiting money damages for constitutional violations fosters the development of constitutional law.").

41. *See id*. at 98 ("If constitutional tort doctrine were reformed to assume full remediation, the costs of compensation would constrict the future of constitutional law.").

42. *See id.* at 88–89.

> It may be that the only constitutionally mandatory, as distinct from normatively desirable, remedial scheme is the right of a target of government prosecution or enforcement to defend against that action on the ground that it violates the superior law of the Constitution. Even for those willing to settle for something less, full individual remediation remains the ideal.

Id. (footnotes omitted).

43. *See* Amar, *supra* note 33, at 1489–90 (describing how limiting constitutional arguments to defensive actions would leave some constitutional rights unprotected). Amar also observes:

> [T]he dominant view of the Federalists was that full vindication of constitutional rights would sometimes require direct suit against government. Even in the absence of today's more expansive vision of affirmative rights, the framers recognized that affirmative relief would often be essential to protect negative rights—especially where the government violation could not be prevented ex ante, and where the government would enjoy the fruits of its past violations.

Id.

44. A lack of retrospective relief negates one's incentive to bring constitutional claims. *See* Fallon & Meltzer, *supra* note 32, at 1805 ("The *Harlow* regime undoubtedly discourages plaintiffs from bringing, and courts from deciding, some claims that would deserve to prevail on the merits."). Whether this necessarily means that there will be less constitutional litigation is more difficult to assess. It may be that all claims can be brought defensively; governmental coercion, through criminal penalties, for example, then might be a perfect proxy for affirmative incentives. However, the happenstance of postural pleading is certain to narrow the number of claims brought defensively.

to raise constitutional claims. Whether one is a plaintiff or defendant might very well be left to chance.[45]

Of course, government does not always act in good faith. It might instead seek to alter the status quo illegally and extrajudicially.[46] The result is self-help, less judicial involvement, and less evolution.[47] Fourth Amendment cases present a modern example of how police react to judicial meddling. Knowing that a court might not endorse a warrant application, and recognizing that ex post affirmative relief is limited, more than one police officer has resorted to self-help.[48] Cases arise every day

45. Consider *Marbury v. Madison*, 5 U.S. 137 (1803). Imagine that William Marbury has a twin, Walter, whom President Adams also appoints. Assume that William's commission is by chance lost or left behind (as is likely the case). *See generally* GERALD GUNTHER, CONSTITUTIONAL LAW 11 (11th ed. 1985) (discussing John Marshall's brother's (James) failed delivery of Marbury's commission). Walter's commission, on the other hand, is duly delivered by James. Under a defense-only model, Walter can assert his constitutional claim, although William cannot. Because Walter has his commission, he is now a justice of the peace. If Madison were to sue Walter to get the commission back, Walter could raise a defense using the substantive arguments outlined by Chief Justice Marshall in the real *Marbury* opinion. William, on the other hand, who never received his commission, requires affirmative relief. (History proves this true because William Marbury never gained his judicial office.)

Of course, William might attempt to place himself in a defensive posture by assuming office and awaiting Madison's suit to have him removed. Madison, however, need not sue. Rather, because William cannot obtain affirmative relief, Madison only need forcibly remove William from office. Legal or not, William Marbury could not do anything about it. Similarly, Madison might attempt to force Walter into a plaintiff's role by stealing his commission. Walter, then, could not assert his constitutional claims in a replevin action to force the return of his commission. But all this proves is that the distinction between affirmative and defensive relief is arbitrary and at best encourages lawless executive action.

46. Again consider *Marbury v. Madison*. Assume that James Marshall is in the process of delivering Marbury's commission when Madison accosts him. Knowing that only defensive arguments succeed, Madison blocks Marshall from delivering the commission. Marbury may file suit to force Madison to deliver the commission, but he cannot win because he seeks affirmative relief.

47. One possible solution is to require judicial approval and prohibit self-help. Government would be prohibited from altering the status quo without judicial assistance. Government instead would be put to the burden of seeking judicial approval ex ante, which would provide the citizen-defendant an opportunity to assert a constitutional defense. The impact of such a rule should not be lost. Government could never act without prior judicial approval. This strays so far from our current legal culture, *see* Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for* Parratt*,* Hudson *and* Daniels, 28 B.C. L. REV. 813 (1987) (explaining that government need not always obtain prior judicial approval because factually there may be no need for or opportunity to afford prior process), that it would rearrange the modern separation of powers. Indeed, this approach would be more intrusive than allowing courts to order affirmative relief.

Moreover, enforcing such a rule would require affirmative relief. What if government simply ignored it? Without authority to correct its breach, the rule would be meaningless. Hence, this solution is not one at all; it begs the question.

48. Anyone who has spent time with police officers knows this is true. I have taught criminal procedure courses for several years and have often used police chiefs, beat officers, and federal agents to speak to my students. I have also had several former police officers in my classes. Virtually all of them have confirmed my suspicion that when faced with questionable probable cause, they have conducted searches without warrants rather than risk having their application denied by a magistrate. A speaking engagement before a large collection of Florida chiefs of police confirmed this several years ago. A question from the audience focused on an automobile inside a warehouse. The chief wanted to know whether a warrant was necessary to get into the warehouse to search the car or whether the automobile exception, *see, e.g.*, *California v. Acevedo*, 500 U.S. 565 (1991), justified a warrantless search. I asked whether exigent circumstances were present, i.e., whether there was a chance of flight. The police chief responded that there was no flight risk because the owner of the car was in custody. I then answered that the "better practice" in this instance was to simply apply for a warrant. The police

where police search for evidence without probable cause and without warrants in hope of happening upon incriminating evidence.[49] They recognize that the risk of exclusion is small,[50] the risk of civil rights liability is smaller,[51] and the risk of criminal penalties or internal discipline is virtually zero.[52] With nothing to lose, police engage in extralegal, extrajudicial activities. And if this self-help occurs in criminal investigations where suspects can at least raise defensive arguments,[53] it is likely exaggerated in civil settings where the government does not plan to prosecute.[54]

Knowing that courts can affirmatively correct wrongs, on the other hand, government officials should be less willing to engage in self-help. Hence, the availability of affirmative relief should help resolve the problems of both incentive-based and random dilution of constitutional

chief disagreed. When I asked why, he said, "Because the judge may not give you a warrant." *See also* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 410 ("Liberals have often bemoaned the fact that police so rarely seek *ex ante* review, even with the advent of telephonic warrants, which vastly facilitate the process.").

49. For a particularly egregious example, consider the facts of *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1041–44 (9th Cir. 1999). Police were encouraged to continue questioning suspects who had invoked their rights to remain silent. *See id.* at 1041. Even though these statements could not be used by the prosecution to prove guilt, they could still be used for impeachment purposes and could lead police to other crimes and suspects. *See id.* In a training video, police were guaranteed by the instructor that they would not be held liable or criminally punished for violating the suspects' Fifth Amendment rights. *See* Linda Deutsch, *Police Training in California Tests "The Right to Remain Silent"*, ST. LOUIS POST-DISPATCH, Nov. 12, 1999, at A12 (reporting that video instruction queried, "Did any of these police officers get sued? Zero. Did any of these police officers get charged with a criminal offense? Zero.") (internal quotations omitted).

50. *See* United States v. Leon, 468 U.S. 897, 951 n.11 (1984) (Brennan, J., dissenting) (citing data indicating that motions to suppress were "successful in only 0.7% of the 7,500 cases studied").

51. *See* Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 772–76 (1993) (describing why civil rights litigation is not effective).

52. *See* Idaho v. Horiuchi, No. CR 97-097-N-EJL, 1998 U.S. Dist. LEXIS 7667, at *31–34 (D. Idaho May 14, 1998) (dismissing criminal charges filed against a federal official for killings at Ruby Ridge); Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 501–02 (1993) (observing that police are rarely prosecuted for abusive behavior).

53. *See Leon*, 468 U.S. at 924 n.25 (finding that because criminal charges are likely to be filed against the defendant (the victim of the Fourth Amendment violation), "the magnitude of the benefit conferred on defendants by a successful motion makes it unlikely that litigation of colorable claims will be substantially diminished [by the good faith exception]").

54. For example, consider how governmental takings of property might proceed under a defense-only model. If government goes to court first, it risks having its action declared unconstitutional. Hence, it is encouraged to avoid litigation and simply take the property. Knowing that the victim cannot prevail as a plaintiff, the government risks nothing by seizing property without judicial assistance. Moreover, unlike a criminal proceeding, because there needs to be no subsequent prosecution—which would afford the victim a defensive posture—the government has no risk at all. If police are encouraged to circumvent courts knowing there is some risk of eventually having evidence excluded, a complete absence of risk would cause even more self-help. Because the Court has interpreted the Fifth Amendment to require retroactive relief for takings, *see* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 306–07 (1987), government is not encouraged in this fashion. Except for takings and taxes, however, *see, e.g.*, Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442, 443–45 (1998) (finding that a state cannot deny retroactive relief to a taxpayer who reasonably relied on a general refund statute), states are not constitutionally compelled to provide retroactive relief for constitutional wrongs.

litigation.[55] Officials who know that their wrongs can be judicially corrected ex post have less incentive to avoid the courtroom in the first place. And even if this is not true, victims will have more impetus to go to court knowing courts offer relief.[56]

The question then is how much affirmative relief to offer? Jeffries concludes that prospective relief is sufficient.[57] Courts, too, experience disincentives. Concerned about bankrupting government, courts might avoid expansive constitutional rulings. Experience with the Fourth, Fifth, and Sixth Amendments teaches that courts can be cautious with rights given too much remedy.[58] *Miranda v. Arizona*[59] may have come out differently if the Court were forced to apply it retroactively.[60]

55. Professor Jeffries observes that "forcing the government to bear all losses and to spread them among citizens generally . . . would [cause] fewer constitutional violations and greater compliance with constitutional norms." Jeffries, *supra* note 10, at 104. Drawing from this logic, one might also argue that fewer constitutional violations mean fewer opportunities to decide constitutional issues, and less constitutional evolution. The argument appears sound. However, assuming that remediation is required, the frequency of victims taking their cases to court will be at its highest point. Under defense-only and prospective-only models, the frequency of litigation will be lower and the number of cases actually litigated will certainly be reduced. Although the raw number of violations is important, so is the frequency of litigated violations. Litigation, after all, affords courts the opportunity to interpret the Constitution. Suffice it to say that in the absence of empirical testing, it is uncertain whether a fully remedial model, a prospective-only model, or a defense-only model provides the greatest opportunity for constitutional evolution. It is this uncertainty that defeats Jeffries's thesis.

56. *See* Fallon & Meltzer, *supra* note 32, at 1805 ("The *Harlow* regime [of qualified immunity] undoubtedly discourages plaintiffs from bringing, and courts from deciding, some claims that would deserve to prevail on the merits.").

57. *See* Jeffries, *supra* note 10, at 90 ("Limitations on damages, together with modern expansions in injunctive relief, shift constitutional adjudication from reparation toward reform.").

58. *Gates v. Illinois*, 462 U.S. 213 (1983), presents a good example in the Fourth Amendment context. The substantive question in *Gates* was whether local police had probable cause to justify a search. Under the established *Aguilar-Spinelli* test, it appeared that they did not. Before the Supreme Court, it was argued that a remedial exception, now called the "good faith" exception to the exclusionary rule, should be created so that reasonable crime-control efforts are not punished and discouraged. *See Leon*, 468 U.S. at 908–13. Rather than recognize an exception at this time, however, the Supreme Court simply modified that *Aguilar-Spinelli* test so that it is now easier to establish probable cause. If the good faith exception were in place, chances are *Aguilar-Spinelli* would not have been changed.

Miranda v. Arizona, 384 U.S. 436 (1966), offers a Fifth Amendment example. *Miranda* did not precisely define the required warnings prior to police questioning. In subsequent cases, like *Duckworth v. Eagan*, 492 U.S. 195 (1989), the Court found that *Miranda* tolerated ambiguous warnings. Justice O'Connor, in *Duckworth*, proposed an alternative solution—limiting *Miranda* to direct appeals and prohibiting its use in collateral proceedings seeking federal habeas corpus. *Id*. at 205 (O'Connor, J., concurring). If Justice O'Connor's approach had captured a majority, one wonders whether ambiguous warnings would have become constitutionally acceptable. Last, *Gideon v. Wainwright*, 372 U.S. 335 (1963), was applied retroactively so that all felons convicted without counsel were entitled to new trials. If applied prospectively, subsequent substantive limitations placed on *Gideon*, *see, e.g.*, *Scott v. Illinois*, 440 U.S. 367 (1979) (holding five-to-four that the Sixth Amendment right to counsel does not apply to defendants who face no risk of jail time), might have come out differently.

59. 384 U.S. 436, 444 (1966) (holding that suspects in custody must be warned of their right to remain silent and right to counsel before questioning).

60. *See* Fallon & Meltzer, *supra* note 32, at 1810 ("*Miranda* illustrates why non-retroactivity might sometimes be appropriate."); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889 (1999) (citing *Miranda* and stating that "[n]onretroactivity facilitates—and may be a prerequisite for—the creation of new rights by reducing the costs of inventing them").

Empirical research lends support. Professor Pamela Karlan has found that clandestine racial discrimination in jury selection, outlawed by *Batson v. Kentucky*,[61] is more prevalent (in part) because of the Court's refusal to allow harmless error analysis in jury selection.[62] Knowing that they must reverse, appellate courts are more likely to accept neutral explanations for de facto discrimination.[63]

Jeffries's complaint that courts might be deterred from developing rights because of remedial concerns is thus credible. Past courts have manipulated decisions because of remedial concerns, and future courts are not likely to change.[64] Indeed, *Griffith v. Kentucky*[65] and *Harper v. Department of Taxation*,[66] which limit courts' authority to deny retroactive relief in the criminal and civil spheres, respectively, increase the potential for remedial backlash. Like Jeffries, I think it fair to assume that the Justices worry over the financial impact of their decisions.[67]

Recognizing that financial considerations bear on judicial decision making, however, does not resolve the query. The question remains, which of the models produces the most constitutional law? Denying ret-

61. 476 U.S. 79, 96–98 (1986) (holding that racial discrimination in jury selection violates the Fourteenth Amendment).

62. *See* Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2020–22 (1998) (noting effect of automatic reversal on claims of racial discrimination).

63. *See* Levinson, *supra* note 60, at 891–92 (citing "strong evidence that the scope of the *Batson* right on appeal has been diminished by the reversal remedy. We might expect substantially more *Batson* violations on appeal if, for example, a harmless error standard were in effect.").

64. *See, e.g.*, *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Gates v. Illinois*, 462 U.S. 213 (1983). Consider also the concurring remarks of Justice Scalia in *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 200 (1990) (Scalia, J., concurring), *overruled by* Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993). *Smith* held that an Arkansas tax discriminated against out-of-state commerce in violation of the Dormant Commerce Clause. The Court relied on a prior decision, *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), which struck down a similar law. The remedial question in *Smith* was whether *Scheiner* should be applied retroactively to taxes collected before 1987. A plurality held that *Scheiner* should not be applied retroactively. Scalia explained his vote, which was necessary to achieve a majority, as follows:

> Something is wrong . . . if I must [apply *Scheiner* retroactively] with respect to the pre-*Scheiner* taxes at issue in the present case. Believing that Arkansas was fully entitled to impose the taxes, I would nonetheless make the fifth vote to penalize it for having done so even during the period (pre-*Scheiner*) when our opinions announce it could lawfully do so—and I would impose this injustice in the name of *stare decises*, that is in the interest of protecting settled expectations. That would be absurd.

Smith, 496 U.S. at 204–05 (Scalia, J., concurring). Justice Scalia's remedial concerns altered the outcome in *Smith*. (For better or worse, *Smith* was overruled by *Harper* in 1993. *See Harper*, 509 U.S. 86 (1993)).

65. 479 U.S. 314, 328 (1987) (holding that in criminal cases on direct review, new principles of constitutional law must be applied retroactively).

66. 509 U.S. 86, 97 (1993) (holding that in civil cases new principles of constitutional law must be applied retroactively in all cases still open on direct review).

67. *See, e.g.*, Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 113 (1993) (O'Connor, J., dissenting) (complaining that government liability "imposes crushing and unnecessary liability on the States, precisely at a time when they can least afford it"); American Trucking Ass'ns v. Smith, 496 U.S. 167, 182–83 (1990) (O'Connor, J., plurality) (arguing that institutional liability for unlawfully collected taxes "could deplete the state treasury"); Owen v. City of Independence, 445 U.S. 622, 670 (1980) (Powell, J., dissenting) (arguing against municipal liability because "many local governments lack the resources to withstand substantial unanticipated liability under § 1983").

rospective relief may encourage bigger constitutional steps, but it may, like a defensive model, result in fewer cases and fewer judicial opportunities to declare constitutional rights. The questions are how much opportunity is lost and whether this translates into a net loss for constitutional law.

B. Lost Opportunities

Immunities retard constitutional law in two ways: first, they cause courts to avoid constitutional claims and "freeze" constitutional law;[68] second, they reduce victims' incentives to file suit.[69] Although the first problem has been partly solved by instructing courts to address the merits of constitutional claims notwithstanding the defense of qualified immunity,[70] absolute immunities, like those afforded prosecutors, judges, and legislators, as well as the immunity found in the Eleventh Amendment, still stand as formidable obstacles to judicially managed and directed constitutional doctrine.[71] Until exceptions are developed to allow

68. *See* Greabe, *supra* note 39, at 410; *cf.* Chen, *supra* note 39, at 307–32; Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Federal Courts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 38 n.229 (1997) (arguing that qualified immunity is conceptually inaccurate and constitutionally invalid).

69. Money offers an obvious incentive. Most economic models look to whether and how much money damages can be recovered to assess the likelihood of litigation. *See, e.g.*, Theodore Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 742 (1988).

> The plaintiff will file suit if the expected recovery from the suit outweighs the expected costs. . . . [T]he expected recovery is the plaintiff's estimate of the amount awarded if the plaintiff wins at trial, . . . discounted by the plaintiff's estimate of the likelihood that he will win . . . . The costs, . . . are all the plaintiff's expected litigation costs, including the plaintiff's costs of filing, discovery, lawyers, and the plaintiff's time and aggravation. Assume that the plaintiff pays for its costs whether it wins or loses the case (the American rule). The plaintiff, then, will file suit if and only if [expected recovery exceeds costs].

Id. (footnotes omitted). Because immunity defeats the recovery of money damages, all else being equal it will tend to discourage plaintiffs from filing suit. *See also* Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627, 652 (1999).

> The relative likelihood that municipal governments will have sufficient assets to satisfy a judgment has given plaintiffs a strong incentive to try to establish that they have been victimized pursuant to a municipal policy even when at first glance it would appear that any violation occurred at the hands of individual municipal employees.

Id.; *see also* Christina B. Whitman, *An Essay on* Texas v. Lesage, 51 MERCER L. REV. 621, 635 (2000) ("Although section 1983 plaintiffs have understandably tried to make as much as they can of the damage possibilities that survived *Carey* [*v. Piphus*, 435 U.S. 247 (1978) (limiting damages that can be recovered for Due Process Violation)], the Court's opinion in *Carey* itself seems designed to discourage plaintiffs as much as possible.").

70. *See* Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.").

71. The Court has yet to address whether courts should reach constitutional questions notwithstanding the availability of prosecutorial, judicial, or legislative immunity. Because Eleventh Amendment immunity is quasi-jurisdictional, it seems unlikely that federal courts will reach the merits of controversies barred by the Eleventh Amendment. *Cf.* Green v. Mansour, 474 U.S. 64, 67–68 (1985) (stating that the federal court is not permitted to declare federal rights after the injunctive portion of the suit becomes moot and the Eleventh Amendment precludes an action for damages).

courts to address the merits of claims notwithstanding absolute immunities, constitutional opportunities will continue to be lost.

Reduced incentives magnify the problem of lost opportunities. Most agree that because immunities reduce victims' chances of success, victims are less inclined to retain counsel[72] and file suit.[73] Moreover, a government that stands to risk only prospective relief is encouraged to act ex parte, free from judicial scrutiny. It has "everything to gain and nothing to lose by failing to comply" with the law.[74] Because government cannot be punished for any of its actions until told to stop, it has no incentive to enlist judicial assistance or seek judicial approval.[75] Like a

72. Fee-shifting statutes, like 42 U.S.C. § 1988(b), mitigate the problem, but the frequency of actions still will be lower. Without fee-shifting, moreover, plaintiffs will tend to be "haves" as opposed to "have-nots," which, at best, will skew constitutional evolution toward a stagnant status quo. It may even push the United States into an even more entrenched hierarchy.

73. Although the matter is in some doubt, I will assume that prospective relief is available for most constitutional victims. In most cases, relief can only come from money damages. This is true of virtually all harms caused by ad hoc governmental conduct. Without a governmental policy directing the wrongdoing, declaratory and injunctive relief are rare. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), for example, the Court held that the victim of a police choke hold had no standing to seek declaratory and injunctive relief banning the choke holds' future use. *See id.* at 105. Because municipal policy did not require choke holds, the Court found it speculative that the victim would ever be choked again. *See id.* Similarly, in *Allen v. Wright*, 468 U.S. 737 (1984), the Court found that black parents and schoolchildren could not challenge the IRS's failure to police racially discriminatory schools receiving tax exempt status. *See id.* at 753. Again, the IRS had no policy allowing tax exempt status. As in *Lyons* and *Allen*, ad hoc harms frequently fall outside the corrective powers of the courts.

74. Edelman v. Jordan, 415 U.S. 651, 692 (1974) (Marshall, J., dissenting) ("Absent any remedy which may act with retroactive effect, state welfare officials have everything to gain and nothing to lose by failing to comply with the congressional mandate that assistance be paid with reasonable promptness to all eligible individuals."); LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER 790 (1994) ("Justice Marshall's dissent suggests that *Edelman* encourages a state administrator to violate federal law as long as possible, knowing that by so doing she can enrich the funds she administers without penalty.").

75. This phenomenon is best illustrated by the Fourth Amendment's exclusionary rule and its "good faith" exception. Generally speaking, evidence seized in violation of the Fourth Amendment must be suppressed. *See* Mapp v. Ohio, 367 U.S. 643 (1961). However, if it is reasonably seized in reliance on what later turns out to be a defective warrant, or a court clerk's computer error, exclusion is not required. *See* Arizona v. Evans, 514 U.S. 1 (1995); United States v. Leon, 468 U.S. 897 (1984). Most courts have refused to extend this remedial exception to nonjudicial errors. *See, e.g.*, Shadler v. State, 761 So. 2d 279 (Fla. 2000) (finding that a nonjudicial clerical error does not excuse warrantless seizure). One reason is that courts want to encourage police to enlist judicial assistance. Extending the good faith exception beyond judicial errors would negate any incentive to first seek a warrant. *Cf. Leon*, 468 U.S. at 955 (Brennan, J., dissenting).

> [T]he Court's "reasonable mistake" exception to the exclusionary rule will tend to put a premium on police ignorance of the law. Armed with the assurance provided by today's decisions that evidence will always be admissible whenever an officer has "reasonably" relied upon a warrant, police departments will be encouraged to train officers that if a warrant has simply been signed, it is reasonable, without more, to rely on it. Since in close cases there will no longer be any incentive to err on the side of constitutional behavior, police would have every reason to adopt a "let's-wait-until-it's-decided" approach in situations in which there is a question about a warrant's validity or the basis for its issuance.

Id.

government that risks only defensive relief, government that faces only prospective relief is encouraged to avoid judicial meddling.[76]

Thus, it appears likely that limiting courts to prospective relief generates fewer cases than would allowing both prospective and retrospective relief.[77] But by how much? If only a small loss, perhaps constitutional evolution will not suffer. A significant loss in volume, on the other hand, could threaten the pace and direction of constitutional innovation. The question is whether legal evolution is as much a function of litigation frequency as remedial deterrence. If it is, or if frequency is more important than deterrence, then encouraging courts to take bolder steps will not increase the pace or mass of constitutional law.[78]

C. Quality Versus Quantity

Professor Jeffries, I suspect, would argue that quality, not quantity, is what matters.[79] Even conceding a loss in constitutional volume, the argument goes, constitutional brilliance flows from big, bold steps rather than a plethora of cases. Watershed cases like *Miranda v. Arizona*[80] and *Brown v. Board of Education*[81] would never have come about, or would have come about much later,[82] if the Court were forced to provide retroactive relief. The brilliance of *Brown*, in particular, demonstrates the need for an uninhibited high Court.

The notion that litigation frequency may be as important to the quality of constitutional law as the Supreme Court's unbridled creativity

76. Consider again *Marbury v. Madison*. Contrary to history, assume that Marshall delivers William Marbury's commission. Jefferson then instructs Madison to unseat the "midnight judges" by any means available, legal or not. Knowing that Marbury can gain no retrospective relief, Madison decides to physically throw Marbury out of office, lock the door, and impound his salary. Madison rationalizes that the longer he keeps Marbury out of office the better. Marbury can obtain prospective relief, but he cannot recover for past wrongs. Madison then has no incentive to act lawfully until told to do so. Marbury might preempt Madison's illegality by immediately filing suit and asking for prospective relief. Because they lack the natural motivation that accompanies suits for monetary relief, however, pre-enforcement actions are not likely to mimic the frequency of actions for damages. The lack of monetary incentives not only discourages plaintiffs, but also makes counsel harder to enlist. Contingency arrangements are impossible, meaning that counsel could be had only on a fixed or hourly rate.

77. *See* Fallon & Meltzer, *supra* note 32, at 1804 ("[D]octrines that withhold remedies when a claimant relies on new law curtail the incentive for litigants to raise novel arguments and, correspondingly, the opportunities for courts to recognize new rights.").

78. Professors Fallon and Meltzer conclude that "this argument, when framed in constitutional terms, fails to survive careful analysis, at least as long as non-retroactivity doctrine is kept within sensible, traditional bounds." *Id*.

79. Professor Jeffries's reliance on watershed cases like *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Green v. County School Board*, 391 U.S. 430 (1968), leads me to believe that his central concern is quality. *See* Jeffries, *supra* note 10, at 100–02.

80. 384 U.S. 436, 467–73 (1966) (holding that criminal suspect has the right to remain silent and speak with an attorney prior to questioning).

81. 347 U.S. 483, 495 (1954) (striking down "separate but equal" public school systems).

82. The debate is often cast as one of timing, as opposed to result. *See, e.g.*, Fallon & Meltzer, *supra* note 32, at 1821 (assuming that nonretroactivity "facilitat[es] an accelerated pace of doctrinal change").

may seem odd. Is it not more likely that some spark of genius brought the decision to life? And if this is true, does not society need a resident genius like the Supreme Court? How else could cases like *Brown* evolve?

Lessons from the world around us demonstrate the power of numbers. Biology teaches that change is a product of natural selection.[83] Species evolve through trial and error, a plodding process more dependent on quantity than quality.[84] The key is adaptability, which demands small steps and lots of trials.[85] More trials, more failures, more successes, more genetic innovation.

In his award-winning book, *Guns, Germs, and Steel*,[86] Jared Diamond translates this conventional wisdom from biology to technology. He explains how certain Eurasian civilizations, like those in the Fertile Crescent (Mesopotamia) and China, developed crops, weapons, and written languages long before others, and why these societies came to dominate world history.[87] Diamond rejects the claim that these civilizations were intellectually superior to others,[88] as well as the ancillary argument that important innovation resulted from genius (or even above-average intelligence).[89] Instead, Diamond concludes that technological evolution follows sedentary living[90] and population density.[91] Although the complete picture is complex, Diamond argues that technological in-

83. *See* VERNE GRANT, THE EVOLUTIONARY PROCESS: A CRITICAL STUDY OF EVOLUTIONARY THEORY 83–90 (2d ed. 1991); *see also* JULIAN HUXLEY, EVOLUTION: THE MODERN SYNTHESIS 466–78 (1942).

84. *See* GRANT, *supra* note 83, at 83–90.

85. *See id*.

86. JARED M. DIAMOND, GUNS, GERMS, AND STEEL (1997).

87. *See id.* at 13–32, 86, 98–99, 218, 247.

88. Diamond also downplays the argument that innovation is inspired by capitalism and its law of patents. *See id.* at 244.

> [T]he commonsense view of invention that served as our starting point reverses the usual roles of invention and need. It also overstates the importance of rare geniuses, such as Watt and Edison. That "heroic theory of invention," as it is termed, is encouraged by patent law, because an applicant for a patent must prove the novelty of the invention submitted. . . . In reality, even for the most famous and apparently decisive modern inventions, neglected precursors lurked behind the bald claim "X invented Y".

Id.; *see also id.* at 250 ("[T]hese hypotheses are plausible. But none of them has any necessary association with geography. If patent rights, capitalism, and certain religions do promote technology, what selected for those factors in postmedieval Europe but not in contemporary China or India?").

89. *See id.* at 241 ("An alternative view rests on the heroic theory of invention. Technological advances seem to come disproportionately from a few very rare geniuses, such as Johannes Gutenberg, James Watt, Thomas Edison, and the Wright Brothers.").

90. *See id.* at 260 ("Sedentary living was decisive for the history of technology, because it enabled people to accumulate nonportable possessions.").

91. *See id*. at 287–88. Sedentary living allowed for more dense societies. *See id*. at 89. Food production was extremely important. *See id.* at 261 ("Besides permitting sedentary living and hence the accumulation of possessions, food production was decisive in the history of technology for another reason. It became possible, for the first time in human evolution, to develop economically specialized societies consisting of non-food-producing specialists fed by food-producing peasants."); *see also id*. at 87 (observing that the factors leading to "large, dense, sedentary, stratified societies" include the number of suitable species, ease of distribution, domestication of plants and animal species, and the orientation of the continental axis).

novation is closely correlated with density.[92] Numerically dense civilizations[93] "mean more inventors and more competing societies."[94] Numbers, in short, translate into quality.[95]

Diamond's thesis supports the claim that more cases mean more (and more adaptable) constitutional law. Trial and error, the basis of natural selection, produce superior results. If true for technology, why not law? This is not to say (necessarily) that volume is more valuable to constitutional law than judicial creativity; but it does suggest that the value of raw numbers can be too easily overlooked.

D. Chaos, Numbers, and Incentives

To some, sacrificing a portion of the country's constitutional claims may seem a small price for judicial creativity. Opportunities are lost, but their relative number is surely small when compared with the number of constitutional arguments that are made daily in federal court. Professor Jeffries, for example, claims that the number of remediless victims is "vanishingly small."[96] Professors Fallon and Meltzer in a similar vein assert that defensive actions and suits for prospective relief offer sufficient remedies to plug any gaps.[97] Conventional wisdom thus seems to accept the proposition that not much is lost to immunity.

I suspect that Jeffries underrates the frequency of lost opportunities.[98] Fallon's and Meltzer's conventional wisdom, meanwhile, is not skeptical enough. My studies convince me that the frequency of lost opportunities is larger than most realize (or let on).[99] Still, if the ratio of

92. *See id.* at 287–88.

93. *See id.* at 263 ("The differences in population [of the continents] are glaring: Eurasia's (including North Africa's) is nearly 6 times that of the America, nearly 8 times that of Africa's, and 230 times that of Australia's.").

94. *Id*; *see also id*. at 407 ("A larger area or population means more potential inventors, more competing societies, more innovations available to adopt—and more pressure to adopt and retain innovations, because societies failing to do so will tend to be eliminated by competing societies.").

95. *See id.* at 244–45 ("But the question for our purposes is whether the broad pattern of world history would have been altered significantly if some genius inventor had not been born at a particular place and time. The answer is clear: there has never been any such person.").

96. Jeffries, *supra* note 8, at 81 ("the area where Eleventh Amendment immunity actually bars all relief (functionally) against states is vanishingly small").

97. *See* Fallon & Meltzer, *supra* note 32, at 1804–05.

> While governmental decisions relating to employment, the use of public facilities, and entitlement to benefits generally can be challenged in suits for injunctive relief, other kinds of official action—for example, isolated instances of police misconduct—cannot. Even within this category, however, courts sometimes will have the opportunity to decide the underlying constitutional questions in motions to suppress evidence in criminal trials.

Id.

98. *See* Brown, *supra* note 31, at 1505 ("Professor Jeffries's suggestion that sovereign immunity 'functionally' bars only a small ratio of damage actions is quite suspect."); *id*. at 1536 ("Constitutional remedial decisions over the past two decades suggest that few alternative remedies exist for the have-nots in American society.").

99. *See id*. at 1505, 1536; Mark R. Brown, *Accountability in Government and Section 1983*, U. MICH. J.L. REFORM 53 (1991); Mark. R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625; Brown, *supra* note 47; Brown, *supra* note 33.

lost opportunities is small, an emboldened Supreme Court does not necessarily overshadow the value of numbers. Even a small loss in the number of cases can cause profound ripples across the current of constitutional law.

Mathematicians and meteorologists have long recognized that minor events, and their absence, can bring on catastrophic phenomena. This is called the Butterfly Effect. The earth's climate, for example, is laden with instability. Small changes can "cascade[] upward through a chain of turbulent features, from dust devils and squalls up to continent-size eddies that only satellites can see."[100] Meteorologists make only short-term predictions because changes surge in exponential fashions.[101] Forecasts beyond a handful of days are guesswork.[102]

Minor legal tinkerings too can "cascade upward" to "continent-size" constitutional storms. If immunity discourages even a small measure of litigation, constitutional law might lose forever a case of continent-size proportions. School children are familiar with the prose:

For want of a nail, the shoe was lost;
For want of a shoe, the horse was lost;
For want of a horse, the rider was lost;
For want of a rider, the battle was lost;
For want of a battle, the kingdom was lost![103]
[For want of a case, the Constitution was lost.]

Most lawyers, judges, and commentators, I suspect, are willing to bet against a legal analog to the Butterfly Effect. Federal and state court dockets are so congested that every federal issue worth litigating is already being considered. So what if a few cases fail to find their way into court? This reaction is understandable, though shortsighted. True, it may appear that all of *today's* important constitutional issues are being litigated. But what of tomorrow's? Who would have predicted fifty years ago that abortion[104] and the rights of gays and lesbians[105] would present momentous constitutional questions? Lost cases today can alter the constitutional dialogue of tomorrow.[106]

100. GLEICK, *supra* note 18, at 20.
101. *See id*. at 21.
102. *See id*. at 20.
103. *Id*. at 23.
104. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that a woman has the right to choose an abortion).
105. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–35 (1996) (holding that the State's repeal of local ordinance protecting gays from discrimination violates Equal Protection).
106. My friend, teacher, and former colleague, Kit Kinports, has pointed out that the congested state of the federal docket might arguably limit the development of constitutional law. At some point the docket might become so saturated that only a few cases can be decided, or can only be decided at some subpar level. I recognize that in order to maintain a juridical development of constitutional doctrine, the judicial docket must be kept manageable. This may require thinning the docket to allow judges time to address constitutional issues. Populations, after all, often bump up against natural barriers, which cause their growth rates to "flatten out." *See* CARL SAGAN, BILLIONS AND BILLIONS: THOUGHTS ON LIFE AND DEATH AT THE BRINK OF THE MILLENNIUM 14 (1997) ("[E]xponential

Unfortunately, no one knows what the future holds. Nor can anyone predict how a particular tinkering will change things. Climate, for example, can be manipulated by human elements, but whether the change is good, bad, or neutral is anyone's guess:

> You could make [the weather] do something different from what it would otherwise have done. But if you did, then you would never *know* what it would otherwise have done. It would be like giving an extra shuffle to an already well-shuffled pack of cards. You know it will change your luck, but you don't know whether for better or worse.[107]

Similarly, the presence (or absence) of a particular case or legal principle can certainly change the Constitution. But for better or worse is beyond the ken of lawyers and law professors. Jeffries's immunity only shuffles an already shuffled deck. While immunity's impact is self-evident—one need only read the current U.S. Reports—no one knows what constitutional law would have looked like without it. Without a proper comparison, who is to say that the present state of the Constitution is better or worse?

Consider Jeffries's argument that *Brown*'s implementation required sovereign immunity.[108] According to Jeffries, sovereign immunity was necessary to "jump start" desegregation because the potential of large monetary awards would have deterred the Supreme Court from ordering relief. "Who knows what the Court would have done if announcing an 'affirmative duty' to eliminate racially identifiable schools had meant huge damages judgments against Southern school districts?"[109]

It is equally plausible, however, that governmental liability would have caused the same result. The key is to inquire of immunity's impact across a larger time frame. The Supreme Court, remember, validated American apartheid four generations earlier in *Plessy v. Ferguson*.[110]

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growth . . . always bumps into some natural obstacle. . . . The exponential curve flattens out."). Further development could be stymied. I am not convinced, however, that immunity is suited to the task of maintaining a manageable docket while allowing a sufficient number of cases into the federal courts to promote the development of constitutional law. I have argued elsewhere that the "litigation explosion," viewed as a function of people's litigiousness, the number of lawyers, and the quantity/quality of rights, is largely a myth. *See* Brown, *supra* note 31, at 1518–22. The better answer to the problem of docket congestion, it seems, is more courts and more judges. Of course, I recognize that government cannot forever appoint judges to deal with congestion; some type of filtering doctrine may eventually be needed. A doctrine that neutrally or randomly selects cases for annihilation may serve this goal. However, current immunity is not neutral. Rather, it favors property rights. For instance, states are only fully exposed to retrospective relief when taxes and takings are at stake. *See* Brown, *supra* note 33, at 299 ("Courts may issue large monetary awards against states only in tax refund litigation and takings cases."). Moreover, for the reasons posited in part III, I am not willing to embrace immunity as a particularly efficient alternative. The cost to reliance and fairness is simply too high.

107. GLEICK, *supra* note 18, at 21.

108. *See* Jeffries, *supra* note 10, at 103 ("There is no way to be sure, but it seems entirely plausible that [*Green v. County School Board*, 391 U.S. 430 (1968),] might have come out differently under a regime of strict liability in money damages.").

109. *Id*.

110. 163 U.S. 537, 548–52 (1896) (upholding "separate but equal" public facilities).

Around this same time, in the *Civil Rights Cases*,[111] the Court divested Congress of its authority to override those state laws that require separation of the races,[112] a power that was not recovered until 1964.[113] Sovereign immunity was in full force in postbellum America,[114] which, according to Jeffries's thesis, must have made the Court's decision in the *Civil Rights Cases* a less-bitter pill to swallow.[115] Were the Court required to award damages against the national government,[116] the *Civil Rights Cases* may have come out differently. The federal antidiscrimination legislation at issue would have remained intact, Congress might have expanded its efforts, and Jim Crow might have died long before 1954.[117]

111. 109 U.S. 3, 25–26 (1883) (striking down congressional prohibition on racial discrimination in public accommodations).

112. The *Civil Rights Cases*, 109 U.S. 3 (1883), struck down federal legislation banning apartheid in public accommodations, meaning inns, public conveyances, and public amusement. *See id.* Although schools were not included, it seems plausible that the demise of apartheid in public accommodations would have reached schools before 1954. *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 922 (3d ed. 2000) ("Following its initial flurry of legislation, Congress, reflecting the changed political climate of the post-Reconstruction era, ceased for three quarters of a century its efforts to enforce the Civil War Amendments.").

113. *See* Katzenbach v. McClung, 379 U.S. 294, 300–05 (1964) (recognizing that Congress has the power under Article I's Commerce Clause to ban racial discrimination); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249–62 (1964) (same).

114. *See* Hans v. Louisiana, 134 U.S. 1 (1890) (holding that states are protected by Eleventh Amendment immunity); United States v. Lee, 106 U.S. 196 (1882) (holding that the United States is protected by sovereign immunity).

115. *See* Jeffries, *supra* note 10, at 90 ("[L]imiting money damages for constitutional violations fosters the development of constitutional law.").

116. I recognize that Professor Jeffries's thesis speaks to state immunity rather than that of the national government. One might argue that because state immunity caused *Brown*, only state immunity should be removed to test the hypothesis. Given national immunity, then, the *Civil Rights Cases* would have come out the same way, and *Brown* would still be necessary in 1954. Because my point is that immunity has ambiguous results, I do not feel a need to separate state from national immunity. Moreover, even if one were to focus on only state immunity, the same argument (that *Brown* may have been rendered unnecessary without immunity) can be made. For instance, state liability would have caused cases like *Lochner v. New York*, 198 U.S. 45 (1905), to come out in favor of social welfare. Redistribution of wealth would have provided poor whites and blacks greater economic clout, which would have translated into political power. The political processes then would have ended Jim Crow in the half century before *Brown.*

117. It was clear in the late nineteenth century (as it has been since the founding of the United States) that sovereign immunity protects the U.S. government from an action at law for damages. *See* United States v. Lee, 106 U.S. 196, 207 (1882) ("[T]he principle [of sovereign immunity] has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."). By way of contrast, there was some doubt in 1954 whether *Brown* exposed local school boards to monetary damages. School boards, since the time of *Lincoln County v. Luning*, 133 U.S. 529 (1890), have not been protected by constitutional sovereign immunity. Although *Monroe v. Pape*, 365 U.S. 167 (1961), which invigorated 42 U.S.C. § 1983, was not decided until 1961, constitutional cases commonly proceeded as "direct," "implied" constitutional actions before and after *Monroe*. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 712 (1978) (Powell, J., concurring) (discussing whether the Court should "imply cause of action directly from the Fourteenth Amendment"). As things turned out, local government was not held financially accountable following *Brown*; but damage actions were filed in federal courts, *see, e.g.*, Gainer v. School Bd., 135 F. Supp. 559, 570 (N.D. Ala. 1955) (holding that the Eleventh Amendment precluded an action seeking money damages filed by black school teachers against local school board), and liability was at least a possibility. *See* Grady County v. Dickerson, 257 F.2d 369, 371 (5th Cir. 1958) (holding that a county has no Eleventh Amendment protection). Notwithstanding Jeffries's suggestion that courts would hold school boards liable if *Brown* were decided today, the weight of authority holds to the contrary. Local governmental institutions, includ-

The same can be said of other landmark decisions. Would the Court have been as willing to strike down New York's maximum-hour law in *Lochner v. New York*[118] if it had to award damages against New York (and several other states)?[119] And what of Roosevelt's New Deal legislation that was invalidated prior to 1937?[120] Requiring the U.S. government to pay money damages, if Jeffries is correct, would have caused the Court to think twice about striking down social-welfare legislation. Early legislative attempts at social reform (aborted by the Court in the years preceding the Second World War)[121] might have redistributed enough wealth to obviate the need for Warren Court cases like *Gideon v. Wainwright*.[122]

Even assuming that *constitutional* revision is needed, Congress is authorized under the Civil War Amendments[123] to enforce (and interpret) many of the Constitution's most cherished propositions.[124] That Congress's authority wanes today is itself arguably a result of judicial activism brought on by sovereign immunity.[125] One wonders whether cases like *City of Boerne v. Flores*,[126] which struck down the Religious Freedom

ing school boards, are not "strictly liable" for enforcing state law. *See* Brown, *supra* note 31, at 1517 (responding to assumptions that holding local government liable for enforcing state law is "horrendous").

118. 198 U.S. 45, 53 (1905) (holding that a state maximum-hour law violates Due Process).

119. States were, of course, protected from suit in federal court by the Eleventh Amendment. *See* Hans v. Louisiana, 134 U.S. 1, 10 (1890).

120. *See, e.g.*, Carter v. Carter Coal, 298 U.S. 238, 297–315 (1936) (striking down the Bituminous Coal Conservation Act under the Commerce Clause); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 529, 542 (1935) (striking down parts of National Industrial Recovery Act under the Commerce Clause and nondelegation doctrine); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330, 362 (1935) (striking down federal compulsory retirement and pension plan under the Commerce Clause).

121. *See* TRIBE, *supra* note 112, at 1344 n.4 ("The standard estimate is that the Supreme Court invalidated state or federal regulations pursuant to the Due Process Clause, usually coupled with another provision such as the Equal Protection Clause, in 197 cases between 1899 and 1937 . . . .").

122. 372 U.S. 335, 344–45 (1963) (holding that indigent defendants charged with felonies are entitled to free legal assistance).

123. U.S. CONST. amends. XIII to XV.

124. *See id*.

125. Modern federalism decisions have increased both state and individual rights at the expense of Congress. In *United States v. Lopez*, 514 U.S. 549 (1995), for example, the Court struck down under the Commerce Clause a federal law banning gun possession in or near primary and secondary schools. *See id*. at 549. This decision upset almost fifty years of precedent that had ceded to Congress the authority to define and regulate "commerce." The decision was divisive, resulting in a five-to-four split on the Court. In the absence of sovereign immunity protecting the U.S. government from damage actions brought by individuals like Lopez (who was prosecuted under federal law), one wonders whether one vote might have shifted to uphold the federal prohibition.

126. 521 U.S. 507, 519 (1997) (holding the Religious Freedom Restoration Act (RFRA) unconstitutional because it exceeded Congress's Fourteenth Amendment powers). *Boerne* involved a church's challenge to a local zoning board's refusal to grant the church a building permit. *See id.* at 511. The church claimed this refusal violated the RFRA, passed by Congress in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See id*. at 512. The zoning board argued that the RFRA violated Section 5 of the Fourteenth Amendment. *See id*. The Supreme Court agreed with the zoning board, holding that the RFRA violated States' rights. *See id.* at 533–34. One wonders if the Court would have reached this decision if it risked awarding damages to the States for Congress's violation of the Fourteenth Amendment.

Restoration Act, would have been decided differently if the United States were required to pay damages for interfering with States' rights. Similar questions arise with many of the Court's recent structural decisions, including *United States v. Lopez*,[127] *Printz v. United States*,[128] *Seminole Tribe of Florida v. Florida*,[129] *Alden v. Maine*,[130] both *College Savings Bank* cases,[131] and *Kimel v. Florida Board of Regents*.[132] The Court may have been less willing to empower States at the expense of Congress if the United States had no sovereign immunity and had to pay damages.[133] Viewed in this light, sovereign immunity is more a matter of who causes change rather than change itself. The battle is over the ultimate power to control legal evolution. Should it rest with Congress or the courts?

III. REMEDIES AND RELIANCE

Part II demonstrates that manipulating remedial rules in order to accelerate the development of constitutional law is futile. Immunizing government is no more likely to increase constitutional doctrine than is strict liability. Nor can some optimal mix of immunity and liability be trusted to produce constitutional law. Like it or not, predicting the path, velocity, and acceleration of constitutional law is impossible.

The question then is how remedial rules should be structured. Like Professor Jeffries, I believe that courts *should* fret over the remedial consequences of their decisions. However, rather than worry about making more or better constitutional law, courts should focus their remedial attention on reliance. Cast as an instrument of change, the judicial objective should be to preserve settled expectations.[134] Although perhaps not

127. 514 U.S. 549, 552 (1995) (striking down federal legislation that criminalized the possession of guns in schools as exceeding the Commerce Clause).

128. 521 U.S. 898, 935 (1997) (striking down federal legislation requiring local police to conduct background checks on handgun purchasers as violating Tenth Amendment).

129. 517 U.S. 44, 47 (1996) (striking down federal legislation that made states amenable to suit in federal court as violating Eleventh Amendment). *See generally*, Kit Kinports, *Implied Waiver After* Seminole Tribe, 82 MINN. L. REV. 793 (1998).

130. 527 U.S. 706, 712 (1999) (holding that states are protected from suit for monetary damages in their own courts by constitutional sovereign immunity).

131. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 680–84 (1999) (holding that Congress cannot extract constructive waiver to suit from states under Commerce Clause); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 630 (1999) (holding that Congress cannot justify subjecting states to suit for patent infringement under section 5 of the Fourteenth Amendment).

132. 528 U.S. 62 (2000) (holding that Congress does not have authority under Section 5 of the Fourteenth Amendment to override States' Eleventh Amendment immunity and subject them to suit in federal court for age discrimination).

133. If strict liability discourages judicial activism, then it must also deter the Court from invalidating congressional legislation that enhances civil rights. Evolution caused by Congress's enhanced role could easily make up for whatever is lost to judicial passivity. It might take a different, congressionally paved path, but it would be change nonetheless.

134. I recognize that a host of policies motivate remedial concerns. I address here only the argument that immunity has the desirable side effect of producing bolder constitutional decisions.

an "all costs" imperative, remedies, like the substance of law, should avoid surprise by charting a predictable course.

Principled, predictable decision making seems to be the ideal in America. Inequality, instability, and capriciousness flow from indeterminacy. Along these lines, much has been written about legal realism, formalism, and the American uneasiness over the neutrality of "law."[135] Although no consensus has emerged, it seems that most lawyers, judges, and professors agree on three basic propositions: first and foremost, anticipating every plausible case is impossible; second, general rules are about the best that can be done; and third, applying these general rules to particular facts produces uncertain results.[136] I know no lawyer (or professor) worth his salt who would tell clients that they have foolproof claims.[137] Fact and law each present their share of risks.

Legal evolution is inevitable precisely because legal decision making is uncertain. No one can say with perfect confidence how a particular case will be decided. Further, the direction of the next case cannot be known. And the outcome of a third case in this logical progression is even more uncertain. Legal "evolution" is necessarily a function of uncertainty, which is inevitable in a system that applies general rules to particular facts.

Notwithstanding inevitable legal evolution, courts should be hesitant about changing their minds, altering positive law, and interpreting legal principles in unpredictable fashions.[138] The arguments for this constitutional stasis differ; some argue that this follows the nation's democratic ideal,[139] others point to the policies that support stare decisis,[140] still others argue that law is timeless and constant.[141] Still, for whatever rea-

135. *See, e.g.*, John M. Farago, *Intractable Cases: The Role of Uncertainty in the Concept of Law*, 55 N.Y.U. L. REV. 195, 208 (1980) ("The realists . . . argue that concern about the certainty of a legal system is necessarily concerned about practice rather than theory."); Allan C. Hutchinson & Patrick J. Monohan, *Law, Politics and the Critical Legal Studies Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 204–05 (1984) (describing the realists as questioning the "power of rationality"); Frederick Schauer, *Formalism*, YALE L.J. 509, 510 (1988) (describing "formalism").

136. *See* Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implication of Metamathematics*, 43 HASTINGS L.J. 1439, 1448–56, 1487–88 (1992) (describing why Americans aspire to legal formalism and what they likely believe it to be).

137. *See* City of Burlington v. Dague, 505 U.S. 557, 563 (1992) (noting that "no claim has a 100% chance of success").

138. Legislative bodies are allowed to push into uncharted waters, but courts should sail a safer course. *But see* Fallon & Meltzer, *supra* note 32, at 1802 ("To call such a role 'legislative' is a misnomer. Even when its primary emphasis is on norm declaration, a court is presented with a dispute defined by the request for judicial relief, not with a general question of public policy . . . .").

139. *See, e.g.*, Jesse Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830 (1974) ("In the main, the effect of judicial review in ruling legislation unconstitutional is to nullify the finished product of the lawmaking process. It is the very rare Supreme Court decision on constitutionality that affirmatively mandates the undertaking of government action.").

140. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) ("The obligation to follow precedent begins with necessity . . . .").

141. Those who adhere to this view tend to argue that law is discovered, not developed, by the

son, most in the legal community agree that courts should avoid surprise and strive for certainty.[142]

All of this may seem uncontroversial if not self-evident. After all, Oliver Wendell Holmes observed a century ago that law is a prediction of judicial decision making: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[143] There may be some disagreement over how likely a particular outcome is, but most accept Holmes's proposition that law is (at least in some sense) a prediction.[144]

Also unobjectionable is the notion that rights are creatures of remedies. Holmes stated it best: "[F]or legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it . . . ."[145] Without a remedy, what Holmes called "the public force . . . brought to bear," there is no right.[146] Connecting the two was easy for Holmes.

Jeffries, like many modern theorists,[147] is comfortable with a "shortfall between the aspirations we call rights and the mechanisms we call remedies."[148] Declaring rights (substance) and redressing wrongs (remedies) are seen as distinct enterprises.[149] Substance may favor the plaintiff, but redress (or a lack thereof) favors the defendant. This is intellectually tolerable because the policies that support substance might differ from those that direct relief.[150]

courts. *See, e.g.*, Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 94 (1993) (holding that courts must apply new constitutional rules retrospectively because courts discover law). The argument that law is "true and timeless" seems arcane. *See, e.g.*, Fallon & Meltzer, *supra* note 32, at 1759 ("insistence that judges could simply find the true and timeless rule . . . now seems anachronistic"). It also tends to reject the notion of legal evolution. However, it too shuns surprise.

142. *See, e.g.*, Norman Barry, *The Classical Theory of Law*, 73 CORNELL L. REV. 283, 286 (1988) ("Law deals with the actions of private agents and has no purpose beyond providing a predictable framework for individuals to pursue their private ends with the minimum of collision with each other."); Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995) ("The attractiveness of rules stems largely from their clarity and predictability."); Schauer, *supra* note 135, at 539 ("One of the things that can be said for rules is the value variously expressed as predictability or certainty.").

143. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897); *see also* Fallon & Meltzer, *supra* note 32, at 1763 ("Legal rules and principles are new to the extent that, ex ante, their recognition as authoritative would have been viewed as relatively unlikely by competent lawyers.").

144. *See* Schauer, *supra* note 135, at 511 n.2 (collecting authorities who agree with Holmes).

145. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

146. *Id*.

147. *See, e.g.*, Fallon & Meltzer, *supra* note 32, at 1778 (arguing that remediation is a "principle, not an ironclad rule").

148. Jeffries, *supra* note 10, at 87.

149. *See generally id*. (arguing that remedies must be separately addressed in order to facilitate development of constitutional rights); *cf.* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 306 (1995) ("The question, however, is not whether every right does have a remedy, but whether every right should have one.").

150. *See* Bandes, *supra* note 149, at 306; *see also* Fallon & Meltzer, *supra* note 32 (discussing why separate treatment should be given to constitutional rights and constitutional remedies).

Like most,[151] I recognize that questions of substance and redress can sometimes produce contradictory conclusions. Unfortunate as it is, competing policies can create rights without remedies. However, I disagree with the common suggestion that reliance is one of these policies. Holmes teaches that the probability of a right follows the likelihood of a remedy.[152] A plaintiff has a three-in-four chance of success on the merits of her claim precisely because she has a three-in-four chance of having "the public force brought to bear" on the defendant. These odds do not change as the analysis moves from substance to redress.

Consider a simple tort: *A* strikes *B* with a baseball bat. *B*'s right to not be struck by *A* is a function of the likelihood, *p*, that the law will hold *A* accountable and will force *A* to make *B* whole.[153] If *p* is greater than one-in-two, *B* has a reasonable expectation that *A* cannot legally strike him. Casting *B*'s interest in terms of substance or redress does not change his odds or his rights.

On the other hand, *A*'s expectations are defined by the likelihood that the public force will not be brought to bear against her for striking *B*. This can be expressed as *p*'s negation ($\neg p$ or "not *p*") and is equal to $1 - p$.[154] Were the law not to act against *A*, *B* would have no right not to be struck by *A*. Stated in the affirmative, *A* would have a right to strike *B*. Because *A*'s right to strike *B* and *B*'s right not to be struck are complements,[155] whose likelihoods add up to one, they cannot coexist in the same case. *B*'s right negates *A*'s, and vice versa. And if *B* has a right it is because his expectations exceeded one-in-two, which means *A*'s were less than one-in-two. *B*'s right, therefore, means that *A* must have reasonably expected the public force of law to come to bear against her for her actions.

Immunities contradict reliance because they encourage courts to reach unpredictable conclusions about the meaning of the Constitution and protect government from predictable legal results (thus upsetting victims' expectations). Although readily apparent with absolute and sovereign immunities, which protect government and its officials at all costs, the same is true of qualified immunity. For example, in *Wilson v. Layne*,[156] a unanimous Court held that more than an arrest warrant is

151. *But see* Amar, *supra* note 33, at 1427 (arguing that government "must in some way undo the violation by ensuring that victims are made whole").

152. *See* Holmes, *supra* note 145, at 42.

153. *See* CHRISTOPHER CLAPHAM, THE CONCISE OXFORD DICTIONARY OF MATHEMATICS 220 (2d ed. 1996) ("The probability of an event A, denoted by Pr(A), is a measure of the possibility of the event occurring as the result of an experiment. For any event A, $0 \leq \Pr(A) \leq 1$.") (italics and boldface omitted).

154. *See id.* at 186 ("If *p* is a statement, then the statement 'not *p*', denoted by $\neg p$, is the negation of *p*.") (boldface omitted).

155. *See id.* at 241 ("If the set A is included in the set B, the difference set B\A is the (relative) complement of A in B, or the complement of A relative to B.") (italics and boldface omitted).

156. 526 U.S. 603, 614 (1999) (holding that an arrest warrant does not authorize media access to a home when "not in aid of the execution of the warrant").

needed to authorize media access to private homes.[157] The Court's unanimity on the merits suggests that its holding was predictable, judged on a more-probable-than-not basis.[158] Put another way, the plaintiffs' likelihood of prevailing on the merits was more than one-in-two and the government's chance was less than one-in-two. Thus, the government could not have reasonably expected to prevail. Denying relief to the victims contradicts the victims' reasonable expectations and supports the unreasonable expectations of the government (and its officials).[159]

The standard assumption behind the Court's qualified-immunity jurisprudence seems to be that predictable legal outcomes are sometimes unforeseeable to government officials. Requiring that the police (or government) pay remedies is inconsistent with governmental reliance interests. However, this argument ignores the fact that the rights of government officials complement the rights of victims. Put another way, the settled expectations of government (and its officials) are inversely related to those of victims. If a victim's probability of success is greater than one-in-two, the government's probability of success is necessarily less than one-in-two. The legal conclusion in *Wilson*, predictable as it was, means that government officials could not have reasonably expected to prevail.[160] And if government officials could not have expected to win, their loss was predictable and foreseeable.

One can always argue that the *Wilson* Court's decision on the merits was unpredictable. Eight Justices, after all, concluded that their decision

157. *See id.* at 615 ("We hold that it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful.").

158. Justice Stevens stated that:

> During my service on the Court, I have heard lawyers argue scores of cases raising Fourth Amendment issues. Generally speaking, the Members of the Court have been sensitive to the needs of the law enforcement community. In virtually all of them at least one Justice thought that the police conduct was reasonable. In fact, in only a handful did the Court unanimously find a Fourth Amendment violation. That the Court today speaks with a single voice on the merits of the constitutional question is unusual and certainly lends support to the notion that the question is indeed "open and shut."

Id. at 620.

159. It is not sufficient to argue that victims in cases like *Layne* may recover prospective relief. First, prospective relief does not redress their past harms and cannot restore their settled expectations. A right to do *x* must mean a right to do *x* now, not a right to do *x* less an initial invasion by the government and a subsequent successful suit. Second, it is by no means clear that victims in cases like *Layne* have standing to win prospective relief. *Layne* itself was an action for damages. Unless government has a policy requiring media presence during the execution of arrest warrants, standing is likely lacking. *See* Brown, *supra* note 31, at 1536 ("Injunctive relief has always been exceptional; in the universe of constitutional wrongs, it is granted in only a fraction of cases.").

160. Courts might simply refrain from delving into the merits of controversies where they find immunity is in order. This would at least prevent courts from reaching unpredictable substantive conclusions, although it would not assist victims whose rights have been predictably violated. Strangely, the Supreme Court has rejected this approach because "[d]eciding the constitutional question before addressing the qualified immunity question promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Layne*, 526 U.S. at 609. Although allowing courts to decide the merits notwithstanding immunity may promote a measure of clarity, it is unpredictable clarity at best. Immunity properly bestowed means that the victim's likelihood of success is less than or equal to one-in-two, which means he ought to lose on the merits.

was not foreseeable to the offending officers. Awarding immunity to the government would then prove consistent with the parties' expectations. The problem with this argument is that it assumes that unpredictable legal conclusions are acceptable. But if reliance means anything at all, this cannot be the case. A true reliance-based system must strive toward certainty and predictability. If a decision is unpredictable, why reach it in the first place? After all, the opposite holding is the more predictable of the two.

The meanings of "predictable" and "foreseeable" can also be twisted so that even predictable legal outcomes prove "unforeseeable." This appears to be the consensus approach today. Courts have gone so far as to create paradoxes like "reasonably unreasonable"[161] and "arguably probable"[162] to justify immunity. Even though decisions on the merits are predictable, they are not *so predictable* that courts should hold government wrongdoers liable. For example, in *Wilson* the Court's decision on the merits was certainly predictable (indeed, it was unanimous), but it was not open and shut. Governmental wrongdoers, the argument goes, should not be held liable in the absence of an almost-certain constitutional violation.

The problem with this approach is that it turns reliance on its head. It ignores victims' reasonable expectations and rewards wrongdoers' unpredictable expectations.[163] Granted, one can conceptually square the approach with reliance by treating victims' and wrongdoers' rights independently of one another (rather than as complements). If one assumes that one party's odds do not imply an opposing party's odds, one can argue that neither party has a greater likelihood of success. Indeed, using this logic, one can argue that neither party has a reasonable expectation of success.[164] Demanding extreme predictability (or even simple predictability) then would not upset the expectations of either party because neither could expect to prevail.[165]

161. Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 615–16 (1999) (describing the problem of reasonably unreasonable police conduct and offering a response).

162. Gold v. City of Miami, 121 F.3d 1442, 1445–46 (11th Cir. 1997) (finding that although police did not have "actual probable cause" to make an arrest, they had "arguable probable cause").

163. *See* Brown, *supra* note 33, at 291 ("These arguments [in favor of immunity] myopically assume reliance and fairness are exclusive governmental commodities. Citizens also have expectations and concomitant reliance interests.").

164. This seems to be the predominant view in the federal courts today, where courts immunize officials without addressing the expectations of the victim. Their assumption is that the victim could not have expected to win.

165. Some, like Professors Fallon and Meltzer, and more recently Professor Barbara Armacost, have attempted to rescue qualified immunity by arguing that the predictive powers it requires are less than "more probable than not." *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 589 (1998); Fallon & Meltzer, *supra* note 32, at 1794. Government officials should be held accountable unless the court's decision holding them liable is very unpredictable. Professors Fallon and Meltzer argue that immunity should attach only in cases of "extreme unpredictability." *Id.* ("It would take rather extreme unpredictability to upset the sort of reliance that would, independent of other considerations, deserve protection. In cases of reasonable doubt, reliance is un-

But this argument is premised on a faulty assumption. One cannot divorce one party's rights from another's. In any given case, a plaintiff's chance of success is (and must be) the defendant's likelihood of loss. The defendant's likelihood of loss complements the plaintiff's likelihood of success.[166] Consequently, if a plaintiff's chance of success, p, is less than one-in-two, the defendant's odds, $1 - p$, must exceed one-in-two. Conversely, a defendant with less than a one-in-two chance of success implies a plaintiff with more than a one-in-two chance. Their probabilities are not independent, and the parties' expectations cannot both be unreasonable (or reasonable).[167] Unless they are at equipoise, one party must have a better, more predictable legal argument.

If neither party's expectation is reasonable, as some might suggest, then rights and reliance are illusions.[168] For law to maintain its legitimacy, it must at least act as if it reaches principled, predictable outcomes. This requires pretending that one side's argument is more predictable, or better, than the other's. By holding for one party over another, all else being equal, a court implicitly holds that the prevailing party's right was the more persuasive (and predictable). The same is true if both parties are assumed to have reasonable or equal expectations. Principled decision making demands at least pretending that expectations and rights are not equal. One party wins and the other party loses, which must mean that one party's argument was more persuasive than the other's. Once courts concede that they cannot parse the relative reasonableness of expectations, they admit that they are not interested in reliance at all.[169]

justified, while the victim's interest in redress may be strong."). Professor Armacost, for her part, argues that *United States v. Lanier*, 520 U.S. 259 (1997), suggests that the foresight demanded by qualified immunity is analogous to the "fair warning" requirement of Due Process. *See* Armacost, *supra*, at 589; *see also Lanier*, 520 U.S. at 261 (holding that government official may be held criminally liable for constitutional violation notwithstanding that right had not been previously identified). Although these approaches are preferable to that employed by the Supreme Court, they too threaten reliance. Reliance concerns cannot explain why a court would want to reach an extremely unpredictable decision.

166. A defendant with a one-in-three chance of winning, for example, has a two-in-three risk of losing.

167. The Court has recognized this principle in the context of attorney's fees. *See* City of Burlington v. Dague, 505 U.S. 557, 561 (1992) ("[T]he attorney bears a contingent risk of nonpayment that is the inverse of the case's prospects of success: if his client has an 80% chance of winning, the attorney's contingent risk is 20%.").

168. I am not so bold to suggest that parties' expectations can be truly quantified. Rather than use odds or numbers, one can achieve the same logical conclusion by comparing the parties' expectations. The question is which party has a greater likelihood of success. If law is predictable and determinate, it ought to choose the more predictable path and rule for the party whose chances of success were, viewed ex ante, the greatest. The only other choice is to rule for the party whose chances were lesser. Selecting this less reasonable expectation, however, contradicts what law is all about.

169. This does not mean that an official who has been judged to have violated the Constitution must foot the bill. The official can always argue that her institutional employer, government, is responsible. If the official's expectations vis-à-vis her employer are reasonable, which I have argued should often be the case, then the employer should pay. *See* Brown, *supra* note 33, at 293 ("Holding the official responsible is unfair because government, the employer and beneficiary of her actions, should bear the loss."); *see also* Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 680. Governmental immunity upsets the settled expectations of the official.

IV. CONCLUSION

Professor Jeffries's goal is admirable. He seeks to afford courts the space they need to develop and interpret the U.S. Constitution. He believes that protecting the public fisc will encourage courts to develop constitutional norms by taking bold steps that might otherwise surprise government (and its treasury). The result, he insists, is a constitutional system with "a healthy capacity for change."[170]

Jeffries, however, fails to account for the incentives of victims and wrongdoers. Immunity may encourage bolder judicial steps, but it also might discourage victims from enlisting the aid of the courts and encourage self-help on behalf of wrongdoers. If this is true, courts will have fewer opportunities to interpret the Constitution. The result might be less, not more, constitutional change.

I cannot confidently argue that demanding that the government pay damages will cause greater evolution. Liability, too, only shuffles an already shuffled deck. But I am convinced that law's adaptability is furthered by volume. Be it biology, technology, or law, evolution thrives on quantity. The problem is one of method—how to generate the most cases without disrupting other worthwhile goals.

Nor am I arguing for increased litigation, or that all wrongs must be remedied.[171] Like many, I prefer to see the number of constitutional violations decrease. My suggestion is that if constitutional change is necessary, and if only courts can bring about change,[172] governmental immunities are not a particularly efficient alternative. A better approach is to allow natural constitutional evolution. Constitutional decisions should respond to the nation's changing political, technological, and cultural climate, not cause it.[173] If a less active, relief-adverse Court is the result, so be it. That is the price of constitutional democracy.

170. Jeffries, *supra* note 10, at 113. Jeffries also claims that immunity has "a redistributive bias in favor of the future." *Id*. Because Jeffries's claim that immunity causes a bias toward future redistribution is dependent on his assertion that immunity causes constitutional evolution, it too fails.

171. Statutes of limitations and res judicata are proper tools to limit liability. *See* Brown, *supra* note 31, at 1533–34 ("Claim and issue preclusion, as well as statutes of limitations, limit suits to a finite window of opportunity. Under § 1983, courts will not hear previously unsuccessful claims and claims arising outside a fixed temporal period."). Assuming a timely claim, there should be a presumption in favor of money damages for past wrongs. Injunctive relief would be available in exceptional cases.

172. Unpredictable change is tolerated with legislative bodies because of a shared democratic ideal and a need for societal adaptability. Confining representative bodies to predictable change contradicts majoritarian principles as well as the need for flexibility. Perhaps these arguments can be translated to the judicial realm. Courts, however, are not representative institutions. Moreover, it would seem that one outlet for change is enough. If legislative bodies are permitted to act in unpredictable fashions, then there would not seem to be a need for judicial flexibility.

173. Some will complain about a loss of judicial expertise. *See, e.g.*, Levinson, *supra* note 60, at 865.

> Courts, the argument must go, are uniquely well-qualified to deal with constitutional value judgments because of their commitment to principle and their relative insulation from political pressure. Congress, on the other hand, is more qualified to decide remedial questions because it has the capacity to find facts, make fact-specific compromises, and efficiently trade off costs and benefits in the service of effectuating constitutional values in the real world.

Id. Judges and justices, however, are not superior long-term planners. Like meteorologists, judges are expert at rendering specific results from isolated facts and established legal principles. Any expertise they possess deteriorates rapidly when they purport to project broad legal proclamations from finite facts. In this regard, they are no better than legislators. Nothing is therefore lost by requiring that courts reach predictable conclusions given concrete facts.