

NOTE

IMMUNITY FOR “DISCRETIONARY” FUNCTIONS: A PROPOSAL TO AMEND THE FEDERAL TORT CLAIMS ACT

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I. INTRODUCTION

I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.¹

The fulfillment of John Jay’s “wish” is today unfinished business. To be sure, there never has been in the United States a truly absolute bar on legal relief from federal official action;² and in 2012 citizens may seek such relief through a remarkable variety of avenues.³ For a century and a half, however, the judicial doctrine of sovereign immunity ensured that tort claims against the federal government was not one of them.⁴ As this Note recounts in Part

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¹ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793) (opinion of Jay, C.J.), *superseded by constitutional amendment*, U.S. CONST. amend. XI. Of course, state rather than federal sovereign immunity was at issue in *Chisholm*. The latter question, Chief Justice Jay continued, “ought not to be thus collaterally and incidentally decided: I leave it a question.” *Id.*

² See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 527 (2003) (“The basic point is that ‘sovereign immunity’ has never been a complete immunity from litigation for the government; it has never barred all remedies for governmental wrongs, even some remedies that could affect the treasury or government property.”).

³ See generally PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983); GREGORY C. SISK, *LITIGATION WITH THE FEDERAL GOVERNMENT* (ALI-ABA 4th ed., 2006) (citizens may seek relief from federal official action through various kinds of administrative claims, through officer suits for constitutional violations, through mandamus actions and other claims for equitable relief, and through actions for money damages pursuant to the Tucker Act or the FTCA).

⁴ 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* § 2.01 (2011), available at LexisNexis HFEDTC. During this period, victims of government torts could seek relief only through direct appeal to Congress or by suing the offending officials as individuals. Neither was a particularly promising option. See *id.* (noting that officials often lacked the financial resources to satisfy judgments and that private bills in Congress were

II, the United States thus enjoyed “a privileged position of legal irresponsibility for the torts of its employees”⁵ until 1946, when Congress enacted the Federal Tort Claims Act (“FTCA”).⁶ This legislation largely waived the U.S. government’s sovereign immunity in tort, while also partially enshrining it through a number of important statutory exceptions to the general waiver.⁷

The most sweeping of these exceptions bars claims “based upon the exercise or performance [of] or the failure to exercise or perform a discretionary function or duty.”⁸ The intended scope of this provision has never been entirely clear.⁹ Some commentators have argued that sharp, well-defined tests for the application of discretionary immunity simply cannot be formulated.¹⁰ Nevertheless, a federal “discretionary function” jurisprudence has gradually developed in the years since 1946,¹¹ and under current doctrine the government’s immunity from tort claims for discretionary functions is formidable.¹² Since the Supreme Court’s test was last modified in 1991,¹³ the government’s success rate in asserting the exception, as reflected in reported cases, has risen to approximately seventy-six percent.¹⁴ The exception now bars claims arising not only from high-level planning decisions or agency regulations, but also from routine, low-level actions such as a postal official’s decision where to place a mailbox,¹⁵ a Forest Service ranger’s decisions about how to maintain a campsite,¹⁶ and a mass transit official’s decisions about when and how station floors should be mopped.¹⁷ Some federal judges and commentators have concluded that the exception has nearly swallowed

often a “hopeless route to recovery”); Jackson, *supra* note 2, at 555 n.131 (noting that various limitations on officer suits arose beginning in the mid-nineteenth century).

⁵ JAYSON & LONGSTRETH, *supra* note 4, § 2.01.

⁶ 28 U.S.C. §§ 1346(b)(1), 1402(b), 2401(b), 2402, 2671–80 (2006). The FTCA became law as Title IV of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (codified as amended in scattered sections of 28 U.S.C. (2006)).

⁷ See *infra* Part II.C; 28 U.S.C. § 2680 (2006).

⁸ 28 U.S.C. § 2680(a) (2006); see also Jackson, *supra* note 2, at 563–64 (“[T]he statute has a number of significant limitations. Of these, the most important is the ‘discretionary function’ exemption.”) (citations omitted). A similar form of discretionary immunity is reserved by many U.S. states through their own tort claims legislation. See, e.g., MASS. GEN. LAWS ch. 258, § 10(b) (2010) (“any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty”).

⁹ See *infra* Part III.A.

¹⁰ See, e.g., William P. Kratzke, *The Supreme Court’s Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 56 (1993) [hereinafter Kratzke, *Recent Overhaul*] (“[T]he discretionary function exception is not susceptible to ready formulae and precise tests.”).

¹¹ See *infra* Part III.

¹² See *infra* Part III.C.

¹³ See *United States v. Gaubert*, 499 U.S. 315 (1991).

¹⁴ Stephen L. Nelson, *The King’s Wrongs and the Federal District Courts: Understanding the Discretionary Function Exemption to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259, 296 (2009) (reporting that the government’s overall success rate after *Gaubert* and through 2007 was 76.3%, compared to 69.9% before *Gaubert*).

¹⁵ See *Riley v. United States*, 486 F.3d 1030, 1034 (8th Cir. 2007).

¹⁶ See *Rosebush v. United States*, 119 F.3d 438, 444 (6th Cir. 1997).

¹⁷ See *Wash. Metro. Transit Auth. v. Tinsley*, 32 A.3d 75, 88 (Md. Ct. Spec. App. 2011).

the FTCA's general rule of government responsibility for the torts of its agents.¹⁸

What does the discretionary function exception not cover? As an attorney in the Justice Department's Torts Branch recently explained, only claims alleging the violation of an agency's own rules, the utter failure to address a clearly hazardous condition, or careless driving are now outside its scope.¹⁹ The exception thus confers on the government enormous advantage, both substantive and procedural, in responding to tort claims. No mere affirmative defense, the discretionary function exception limits the jurisdiction of the federal courts to hear tort claims against the United States.²⁰ Accordingly, when wielded successfully the exception empowers the government to have claims against it dismissed at the earliest stages of litigation, before the merits are ever reached.²¹ What is more, the Supreme Court's current test allows the government to obtain this result on the mere showing that official actions alleged to have caused injury were "susceptible to policy analysis."²² In other words, as soon as the government cites a conceivable policy rationale for the official action at issue—whether or not any policy considerations actually played a role in the decision²³—the case must be dismissed.²⁴ As this Note argues in Part III, current discretionary function doctrine is too

¹⁸ See, e.g., *Rosebush*, 119 F.3d at 444 (Merritt, J., dissenting) ("Our Court's decision in this case means that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the [FTCA]. It decimates the Act."); Mark C. Niles, "Nothing But Mischief": *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1334 (2002) (arguing that current doctrine constitutes a "veritable reassertion of [the] discarded limitation" of federal sovereign immunity in tort).

¹⁹ See David S. Fishback, *The Federal Tort Claims Act is a Very Limited Waiver of Sovereign Immunity – So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*, U.S. ATT'YS' BULL., Jan. 2011, at 16, 19–26, available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5901.pdf.

²⁰ 28 U.S.C. §§ 1346(b)(1), 2680(a) (2006); see also, e.g., *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009) ("At the pleading stage, plaintiffs must invoke the court's jurisdiction by alleging a claim that is facially outside of the discretionary function exception.") (internal quotation marks and citations omitted); *Tippett v. United States*, 108 F.3d 1194, 1196 (10th Cir. 1997) ("If the discretionary function exception applies to the challenged governmental conduct, the United States retains its sovereign immunity, and the district court lacks subject matter jurisdiction to hear the suit."); Fishback, *supra* note 19, at 28–29 (discussing the discretionary function exception as a threshold jurisdictional question).

²¹ See, e.g., *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989) ("[N]egligence is simply irrelevant to the discretionary function inquiry."); Niles, *supra* note 18, at 1329 ("The innovation of *Gaubert's* 'susceptibility' analysis drastically limits the potential exposure of the United States to liability by making it easier to dispose of FTCA claims at an early stage of the proceedings, specifically, pursuant to a [rule 12(b)(1)] motion to dismiss.")

²² *United States v. Gaubert*, 499 U.S. 315, 324–25 (1991); see also *infra* Part III.C.

²³ *Gaubert*, 499 U.S. at 325 ("The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken . . .").

²⁴ *Id.* Occasionally, however, judges scrutinize and reject the government's proffered policy rationale. See, e.g., *Bolt v. United States*, 509 F.3d 1028, 1033–35 (9th Cir. 2007) (rejecting the government's argument that policies of preserving scarce resources and "promoting self-help and responsibility" brought Army's failure to plow snow and ice at a housing complex within the FTCA's discretionary function exception).

expansive, and substantially narrows Congress's waiver of federal sovereign immunity in tort.

The supposed justifications of sovereign immunity for discretionary functions are taken up in Part IV. Occasionally commentators have cited the protection of the public purse as a *raison d'être* for the exception.²⁵ While this may be among its functions or consequences, it cannot be a justification. After all, Congress's refusal to pay its former employees' pensions would also keep government coffers full. The question is, does the exception protect government finances justifiably?

The best case to be made for discretionary immunity has to do instead with the separation of powers, and with the related value of policymaking independence.²⁶ In the course of adjudicating tort claims against the United States, judges might take the opportunity to "second-guess" the considered policy judgments of coordinate branches of government in undesirable ways.²⁷ But some commentators have worried that an appointed judiciary is not well-situated to make binding political judgments about which courses of action are, and which are not, in the public interest.²⁸ To allow judges actually to displace executive and legislative branch policymaking through common law tort judgments (as opposed to constitutional judgments, for example) could be thought to involve a particularly worrying form of the "counter-majoritarian difficulty."²⁹

Without denying the importance of policymaking independence and the separation of powers, the present Note argues that discretionary function immunity is nevertheless unnecessary to protect these values.³⁰ Adjudication on the merits of tort claims against the government, even those based upon some policy decision, would not require judges to exceed their authority or to set aside policies made by the political branches.³¹ Nor, given the powerful safeguards against undue liability that already exist within the common law of torts and in other provisions of the Federal Tort Claims Act ("FTCA"), would it inappropriately jeopardize the public purse. The discretionary function exception is largely redundant because most of the claims it now bars would ultimately fail on the merits, even absent immunity.³² It is not harmless, however. The exception sweeps more broadly than these un-

²⁵ See *infra* Part IV.B.

²⁶ See *infra* Part IV.C.

²⁷ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) ("Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.").

²⁸ See, e.g., Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 907 (2010) (arguing that unelected judges have no special competence to review policy decisions).

²⁹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press 2d ed. 1986) (1962).

³⁰ See *infra* Part IV.C.

³¹ See *infra* notes 234–41 and accompanying text.

³² See *infra* Part IV.C.

derlying safeguards do, unfairly precluding potentially meritorious tort claims against the government, while securing nothing of value except perhaps a modest savings in litigation costs.

Amendment of the FTCA is therefore in order. This Note proposes in Part V that Congress should eliminate the troubling and troublesome discretionary function exception once and for all.³³ Even where policy considerations may have grounded a government agent's allegedly tortious acts or omissions, the United States should be liable for the negligence of its agents under standard tort law principles. In order to allay the federalism concern that such liability would rashly put the federal government at the mercy of state common law, the Note argues that a prohibition on recovery for pure economic loss should also be incorporated into the Act.³⁴ Such a provision would provide adequate security against the threat of undue liability without precluding adjudication, as the discretionary function exception now does, of potentially meritorious claims against the government.

II. THE FEDERAL TORT CLAIMS ACT (FTCA) AND ITS HISTORY

A. *The Background of Federal Sovereign Immunity*

Scholars have frequently recounted the story of the judicial doctrine of sovereign immunity.³⁵ This Note does not undertake a complete retelling, but aims only to provide some essential background on the traditional immunity of the U.S. government from tort claims.³⁶

To what extent the federal government's immunity from suit was assumed by the Constitution and its framers is a matter of enduring scholarly debate.³⁷ On the one hand, Article III clearly extends the judicial power "to controversies to which the United States shall be a party."³⁸ Professor Randall reads this provision as granting to the federal judiciary "a fundamental governmental authority not subject to unexpressed and extraconstitutional

³³ See *infra* Part V.A.

³⁴ See *infra* Part V.B.

³⁵ For the most comprehensive discussion of sovereign immunity from tort claims, see Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924); Edwin M. Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1 (1926) [hereinafter Borchard, *Responsibility in Tort 1926*]; Edwin M. Borchard, *Governmental Responsibility in Tort*, VI, 36 YALE L.J. 1039 (1927); Edwin M. Borchard, *Governmental Responsibility in Tort: VII*, 28 COLUM. L. REV. 577 (1928); Edwin M. Borchard, *Theories of Governmental Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928). Professor Borchard's classic series of articles appeared more or less contemporaneously with repeated attempts in Congress to pass a general federal tort claims bill, none of which would be signed into law until 1946. See JAYSON & LONGSTRETH, *supra* note 4, § 2.09. For a more recent treatment, see Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992).

³⁶ For illuminating discussions of the doctrine of federal sovereign immunity and alternate modes of redress for official wrongs, see generally Jackson, *supra* note 2; Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439 (2005).

³⁷ See Sisk, *supra* note 36, at 443–46 (discussing arguments on each side).

³⁸ U.S. CONST. art. III, § 2, cl. 1.

common law limitations” like sovereign immunity.³⁹ On the other hand, the Constitution is also clear in conferring exclusively on Congress the power to make monetary appropriations,⁴⁰ presumably including payments in satisfaction of judgments against the United States, as well as the power to establish lower federal courts.⁴¹ And when Congress did establish such courts with the Judiciary Act of 1789, it granted them jurisdiction over suits brought by the United States, but not apparently over suits brought against it, “in which the federal government would be defendant.”⁴² In addition, important constitutional framers publicly endorsed the tradition of sovereign immunity.⁴³ Alexander Hamilton insisted, for example, that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”⁴⁴ These and other countervailing considerations suggest that, as Professor Jackson has explained, “[t]he tensions within the constitutional scheme on the question of sovereign immunity were . . . considerable.”⁴⁵

Nevertheless, early in its history the Supreme Court adopted the position that the United States could not be sued absent congressional consent.⁴⁶ In 1834 it was apparently uncontroversial among then-members of the Court, as well as among the litigants of a claim against the federal government, that “[a]s the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of [C]ongress, or the court cannot exercise jurisdiction over it.”⁴⁷ Of course, during this period legal claims often could be brought against individual federal government agents for relief from their official conduct,⁴⁸ including

³⁹ Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 40 (2002).

⁴⁰ U.S. CONST. art. I, § 9, cl. 7.

⁴¹ U.S. CONST. art. III, § 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”); see also *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (“Courts created by statute can have no jurisdiction but such as the statute confers.”); Jackson, *supra* note 2, at 543–48 (discussing support for federal sovereign immunity in the Constitution).

⁴² See Sisk, *supra* note 36, at 446.

⁴³ See *id.* at 443–44 (citing remarks by Hamilton, Madison, and Marshall). But see Randall, *supra* note 39, at 70–85 (arguing that isolated statements of Hamilton, Madison, and Marshall are insufficient to support the conclusion that Article III was understood or intended to leave “common law sovereign immunities” untouched).

⁴⁴ THE FEDERALIST NO. 81, at 397 (Alexander Hamilton) (Terence Ball ed., 2003).

⁴⁵ Jackson, *supra* note 2, at 550.

⁴⁶ The earliest, if tepid, recognition of this principle came in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821) (Marshall, C.J.) (“The counsel for the defendant . . . have laid down the general proposition, that a sovereign independent State is not suable, except by its own consent. This general proposition will not be controverted.”).

⁴⁷ *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834) (Marshall, C.J.) (citing no authority); see also *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846) (“[T]he [federal] government is not liable to be sued, except with its own consent, given by law.”).

⁴⁸ See Jackson, *supra* note 2, at 553–57. Jackson discusses the availability of and limitations on officer suits, and concludes that such claims were “moderately effective vehicles” for legal relief from government action. *Id.* at 554.

actions for damages to redress common law wrongs.⁴⁹ A closely divided Supreme Court in 1882 held that sovereign immunity does not generally bar such claims.⁵⁰ However, the availability of officer suits for relief other than damages was later restricted significantly,⁵¹ and today the Westfall Act immunizes federal employees from individual liability for common law torts committed while acting within the scope of their employment.⁵²

The doctrine of federal sovereign immunity has retained its vigor and constitutes the essential common law background, or default rule, whenever civil suit is brought against the United States or its departments or agencies. It “stands as a bar to the lawsuit unless and until Congress chooses to lift that bar and then only to the extent or degree that Congress chooses to do so.”⁵³ In the years prior to the FTCA’s 1946 enactment, then, it was “a well settled rule of law that the government [was] not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases [aside from an individual officer suit was] by appeal to Congress.”⁵⁴

B. *Ad Hoc Redress: Congress and Private Bills*

Appeal to Congress, in the form of a request that the legislature enact a private bill granting relief to the injured party, was frequently made.⁵⁵ By the mid-twentieth century, just before the FTCA’s enactment, the number of claims brought per Congress reached as high as 2,300.⁵⁶ The difficulties attending legislative adjudication of such claims were not new. In 1832, then-Representative John Quincy Adams complained that “[o]ne-half of the time of Congress is consumed by [the adjudication of private claims], and there

⁴⁹ See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.) (affirming a damage award against a U.S. Navy captain whose seizure of a Danish ship, although carried out pursuant to orders from the Secretary of the Navy, constituted trespass at common law).

⁵⁰ *United States v. Lee*, 106 U.S. 196 (1882).

⁵¹ See *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Professor Sisk helpfully summarizes: “[U]nder the *Larson-Malone* sovereign immunity doctrine, a suit may be maintained against a government officer . . . [only] when [he or she] acts beyond legitimate authority, in either statutory or constitutional terms” Sisk, *supra* note 36, at 457.

⁵² See *infra* notes 95–97 and accompanying text. Outside the context of common law claims, federal officials generally have qualified immunity from damage suits for alleged constitutional or statutory violations. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁵³ Sisk, *supra* note 36, at 456.

⁵⁴ *German Bank of Memphis v. United States*, 148 U.S. 573, 579 (1893).

⁵⁵ For an informative and concise history of such appeals, and of the burden that they placed on Congress, see JAYSON & LONGSTRETH, *supra* note 4, §§ 2.02, 2.08.

⁵⁶ 86 CONG. REC. 12,018 (1940) (statement of Rep. Emanuel Celler (D-N.Y.)); see also S. REP. NO. 79-1400, at 30–31 (1946) (discussing the number of private bills introduced and enacted in several Congresses from the sixty-eighth to the seventy-ninth); H.R. REP. NO. 79-1287, at 2 (1945) (same).

is no common rule of justice for any two of the cases decided.”⁵⁷ Congress, he concluded, should not be in the business of entertaining such bills at all: “[a] deliberative assembly is the worst of all tribunals for the administration of justice.”⁵⁸

The subsequent history bears out this dismal assessment. Even after Congress in 1855 created the Court of Claims, which provided a judicial forum for many claims against the United States, though not those sounding in tort,⁵⁹ private bills continued to deluge the legislature.⁶⁰ Both chambers of Congress had developed procedures for handling such bills, but inefficiency, arbitrariness, and unfairness were endemic.⁶¹ On this point the 1926 testimony of Representative Charles L. Underhill (R-Mass.), who then chaired the House committee with jurisdiction over private bills, is particularly striking and worth quoting at some length:

To-day there is nothing adequate, scientific, or equitable relative to tort claims against the Government. It is a tremendous burden and expense to Congress in time and labor and embarrassment to individual Congressmen in their inability to get favorable action. Justice now awaits upon political considerations or the popularity of a Congressman or the influence of a Senator. . . .

. . . .

How can we adjudicate these claims here? The power vested in the chairman of the Committee on Claims is tremendous and absolutely wrong. I can either refuse arbitrarily to consider your claim or I can take up each and every one of your claims to suit my convenience. . . .

. . . .

I have one case that has passed five different Congresses, one branch or the other, and has failed of passage in both branches the same year, not because it did not have justification but because it was too late; it got caught in the jam; it could not get through; and

⁵⁷ 3 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, at 480 (Charles Francis Adams, ed., J. B. Lippincott & Co. 1876).

⁵⁸ *Id.*

⁵⁹ See JAYSON & LONGSTRETH, *supra* note 4, § 2.03 (explaining that, although the jurisdictional provisions of the Court of Claims Act were silent as to whether the new tribunal would hear tort claims, both the Court of Claims and the Supreme Court quickly indicated that it would not, and could not, do so).

⁶⁰ See *id.* § 2.04 (“Despite the passage of the Court of Claims Act of 1855, and its amendments, the high volume of private claim bills continued to plague the Congress. Tort claims evidently comprised a substantial portion of these bills.”); *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 49–55 (1942) [hereinafter *Tort Claims Hearings*] (cataloguing critiques by Members of Congress of the private bill system).

⁶¹ See *id.* § 2.08; PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT 6–7 (2012).

these claimants have been waiting all of these years for relief in the payment of a debt which the United States owes them.⁶²

In spite of these and other powerful critiques, proposals to enact a general waiver of sovereign immunity in tort, and thus to take such claims “before a proper court,”⁶³ continually failed.⁶⁴ No fewer than thirty general tort claims bills were considered by Congress between 1921 and 1946.⁶⁵ One of these bills did pass both the House and Senate during the Coolidge Administration, but in 1929 the President pocket-vetoed it, apparently objecting to the legislation’s conferral on the Comptroller General of the authority to defend the government against tort claims.⁶⁶ Subsequent versions of this bill, introduced in 1930 and 1931 and amended to meet the objection, nevertheless failed to pass the Congress.⁶⁷ It would be another fifteen years until a general waiver of federal sovereign immunity in tort would finally become law in the United States.⁶⁸ Meanwhile, ad hoc redress in the halls of Congress through the private bill system, with all its disadvantages, remained the norm.⁶⁹

C. *The FTCA and Its Exceptions*

In 1946, all of this changed. Congress enacted the FTCA⁷⁰ as Title IV of the Legislative Reorganization Act.⁷¹ This statute effectively put the private bill system to rest,⁷² and the federal district courts now had exclusive jurisdiction to hear tort claims against the United States.⁷³ Under the FTCA’s jurisdictional grant, § 1346(b)(1), such courts may adjudicate

civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government

⁶² 67 CONG. REC. 7,526–27 (1926); see also *Tort Claims Hearings*, *supra* note 60, at 52.

⁶³ 67 CONG. REC. 7,527 (1926) (statement of Rep. Charles L. Underhill)(R-Mass.)).

⁶⁴ See JAYSON & LONGSTRETH, *supra* note 4, § 2.09. However, “Congress did enact a long series of statutes which, in hodge-podge fashion, permitted limited tort relief for specific types of claims arising from certain activities of particular governmental agencies.” *Id.* § 2.07.

⁶⁵ *Id.* § 2.09.

⁶⁶ *Id.* For a discussion of the circumstances surrounding President Coolidge’s veto, see O. R. McGuire, *Tort Claims Against the United States*, 19 GEO. L.J. 133, 134–39 (1931).

⁶⁷ See JAYSON & LONGSTRETH, *supra* note 4, § 2.09 n.22 and accompanying text.

⁶⁸ See *infra* Part II.C.

⁶⁹ See JAYSON & LONGSTRETH, *supra* note 4, § 2.08.

⁷⁰ See *supra* note 6.

⁷¹ Pub. L. No. 79-601, 60 Stat. 812 (1946) (codified as amended in scattered sections of 28 U.S.C. (2006)).

⁷² Under Title I of the Legislative Reorganization Act, Congress could no longer consider private bills seeking redress that might be attained through a lawsuit pursuant to the FTCA. See FIGLEY, *supra* note 61, at 8–9. Importantly, however, claims barred by the FTCA’s various statutory exceptions may still be pursued in Congress.

⁷³ 28 U.S.C. § 1346(b)(1) (2006).

while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁷⁴

Importantly, the FTCA does not set out its own standards for liability but instead incorporates the existing state common law of torts,⁷⁵ within the limits set by this jurisdictional provision and other statutory protections.⁷⁶ Claims not encompassed by the provision—whether because they seek non-monetary redress,⁷⁷ because they do not involve a “negligent or wrongful act or omission,”⁷⁸ or because they allege facts on which the government would not be liable at common law if a private person⁷⁹—fall outside the subject matter jurisdiction of the federal courts.

The FTCA’s several statutory exceptions also explicitly withhold or withdraw from the scope of § 1346(b)(1) jurisdiction various types of claims that Congress did not intend to form the basis for federal government liability in tort.⁸⁰ Among these are exceptions for claims arising from “the loss, miscarriage, or negligent transmission of letters or postal matter,”⁸¹ from the “combatant activities of the military . . . during time of war,”⁸² and from intentional torts of various kinds,⁸³ as well as exceptions for damages caused by “the imposition or establishment of a quarantine,”⁸⁴ or by “the fiscal operations of the Treasury or . . . the regulation of the monetary system.”⁸⁵

⁷⁴ *Id.*

⁷⁵ FIGLEY, *supra* note 61, at 18. Whether or not a government agent is acting within the scope of employment likewise depends on the state law of respondeat superior. *Id.* at 16. For a discussion of the federalism implications of making the United States liable in tort under standards controlled by the several states, see *infra* notes 248–250 and accompanying text.

⁷⁶ Additional statutory protections are both procedural and remedial. In the former category are the FTCA’s requirement that administrative remedies be sought prior to suit, 28 U.S.C. § 2675; its statutes of limitations, *id.* § 2401(b); and its rule requiring bench rather than jury trial, *id.* § 2402. In the latter category are its rules against punitive damages, *id.* § 2674; against pre-judgment interest, *id.*; and against damages in excess of the amount demanded in a plaintiff’s prior administrative claim, *id.* § 2675(a); as well as its incorporation of any state law caps on damages, *id.* § 2674. See also FIGLEY, *supra* note 61, at 62–63.

⁷⁷ See, e.g., *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 863 (10th Cir. 2005) (“[T]he district court lacks subject matter jurisdiction under the FTCA to provide injunctive and declaratory relief.”).

⁷⁸ See, e.g., *Laird v. Nelms*, 406 U.S. 797, 799 (1972) (holding that claims for strict or absolute liability do not allege “negligent or wrongful acts or omissions” of the kind that may be redressed through FTCA suit).

⁷⁹ See, e.g., *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 477–78 (1994) (holding that constitutional torts are not cognizable under the FTCA because a private person would not be liable at common law for such violations).

⁸⁰ 28 U.S.C. § 2680.

⁸¹ *Id.* § 2680(b).

⁸² *Id.* § 2680(j).

⁸³ *Id.* § 2680(h) (“assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights”).

⁸⁴ *Id.* § 2680(f).

⁸⁵ *Id.* § 2680(i).

The most sweeping of these statutory exceptions shields the government from claims “based upon [a government agent’s] exercise or performance [of] or . . . failure to exercise or perform a discretionary function or duty.”⁸⁶ Asked to interpret this provision, the Supreme Court noted early that “Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.”⁸⁷ The discretionary function exception served to remove such claims from the purview of Congress’s general consent to suits sounding in tort, leaving them barred under the default rule of sovereign immunity.⁸⁸ The discretion that Congress sought to protect with the exception was that “of the executive or the administrator to act according to one’s judgment of the best course.”⁸⁹ Whatever the intended scope of this exception,⁹⁰ it was not meant to preclude claims alleging “the ordinary common-law torts,” such as “negligence in the operation of [a] vehicle[].”⁹¹

To understand the effect of the FTCA’s exceptions, it is crucial to grasp that these provisions are not mere affirmative defenses of which the government may avail itself in opposing a plaintiff’s *prima facie* case. Instead, the exceptions actually withdraw the claims that they cover from the FTCA’s grant of jurisdiction.⁹² When an exception applies, therefore, the court must dismiss the claim before ever reaching its merits. This is why courts sometimes state that negligence is simply “irrelevant” to the threshold question whether the discretionary function exception applies or not,⁹³ which is a jurisdictional matter.⁹⁴ The FTCA’s exceptions thus have significant procedural bite that ordinary defenses lack. Furthermore, since Congress’s 1988 enactment of the Westfall Act,⁹⁵ the immunity allowed by the FTCA’s statutory exceptions unequivocally protects not only the United States but also its in-

⁸⁶ *Id.* § 2680(a). Professor Jackson has called this provision the “most important” of the FTCA’s several exceptions. Jackson, *supra* note 2, at 564. It is also apparently the most litigated. *See, e.g.*, James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000).

⁸⁷ *Dalehite v. United States*, 346 U.S. 15, 32 (1953).

⁸⁸ *See Sisk, supra* note 36; *supra* text accompanying note 53.

⁸⁹ *Dalehite*, 346 U.S. at 34.

⁹⁰ *See infra* Part III and notes 187–195 and accompanying text.

⁹¹ *Dalehite*, 346 U.S. at 28.

⁹² 28 U.S.C. § 2680 (2006) (“The provisions of this chapter and section 1346(b) of this title shall not apply to . . .”).

⁹³ *See, e.g.*, *Lopez v. United States*, 376 F.3d 1055, 1056 (10th Cir. 2004); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989).

⁹⁴ *See, e.g.*, *CNA v. United States*, 535 F.3d 132, 144 (3d Cir. 2008); *Hinsley v. Standing Rock Child Protective Servs.*, 516 F.3d 668, 672 (8th Cir. 2008); *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1175–76 (10th Cir. 2008); *Abreu v. United States*, 468 F.3d 20, 23 (1st Cir. 2006). *But see Williams v. Fleming*, 597 F.3d 820, 823 (7th Cir. 2010) (treating the FTCA’s exceptions as “mandatory rules of decision” rather than restrictions on the federal courts’ subject matter jurisdiction).

⁹⁵ Federal Employees Liability Reform and Tort Compensation Act (Westfall Act) of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended in scattered sections of 28 U.S.C. (2006)).

dividual agents from suit.⁹⁶ Under current law, the FTCA remedy against the government is “exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the [federal] employee whose act or omission gave rise to the [FTCA] claim or against the estate of such employee.”⁹⁷ With tort claims against individual government officers off the table, recourse to Congress—rarely a promising prospect⁹⁸—is the only remaining vehicle for redress once an FTCA claim has been dismissed pursuant to the discretionary function or some other statutory exception.

In addition to these exceptions, the FTCA incorporates significant procedural limits on government tort liability. It requires plaintiffs, before filing suit, to commence an administrative action⁹⁹ within two years of their claim’s accrual,¹⁰⁰ and then to file an FTCA suit in federal district court within six months of the administrative claim’s final denial.¹⁰¹ The FTCA also bars trial by jury, in which the federal government might unfairly be treated as the ultimate “deep-pockets” defendant;¹⁰² instead, trial must be before a judge in federal district court.¹⁰³

The FTCA also incorporates meaningful remedial limits. Under the Act neither punitive damages nor pre-judgment interest may be awarded.¹⁰⁴ Damages in excess of the amount demanded in the plaintiff’s prior administrative claim are prohibited.¹⁰⁵ And, finally, the Act incorporates any state law caps on damages,¹⁰⁶ “even if [the United States] does not comply with all the procedures and filing requirements of the state statutes that create those limits on recovery.”¹⁰⁷

⁹⁶ See, e.g., Robert D. Lee, Jr., *Federal Employees, Torts, and the Westfall Act of 1988*, 56 PUB. ADMIN. REV. 334 (1996); Daniel A. Morris, *Federal Employees’ Liability Since the Federal Employees Liability Reform & Tort Compensation Act of 1988 (The Westfall Act)*, 25 CREIGHTON L. REV. 73 (1991).

⁹⁷ 28 U.S.C. § 2679(b)(1).

⁹⁸ But see, e.g., Radiation Exposure Compensation Act, Pub. L. No. 101-426, § 2, 104 Stat. 920 (1990) (codified at 42 U.S.C. § 2210 (2006)); Sisk, *supra* note 28, at 920 (“After the Court held the government immune from liability in *Dalehite*, Congress provided a legislative remedy by enacting a private bill providing compensation to the victims of the Texas City Disaster.”).

⁹⁹ 28 U.S.C. § 2675.

¹⁰⁰ *Id.* § 2401(b).

¹⁰¹ *Id.*; see also *Willis v. United States*, 719 F.2d 608, 613 (2d Cir. 1983) (FTCA claim barred by six month statute of limitations even though filed less than two years after claim’s accrual).

¹⁰² See, e.g., Niles, *supra* note 18, at 1300.

¹⁰³ 28 U.S.C. § 2402.

¹⁰⁴ *Id.* § 2674.

¹⁰⁵ *Id.* § 2675(b).

¹⁰⁶ *Id.* § 2674.

¹⁰⁷ FIGLEY, *supra* note 61, at 62–63.

III. IMPLEMENTING THE FTCA'S DISCRETIONARY FUNCTION EXCEPTION

In the years immediately following the FTCA's enactment, the extent of the federal government's retained immunity for discretionary functions was uncertain.¹⁰⁸ Early on, the Supreme Court indicated that because the FTCA constituted a "clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions," courts should not expand the Act's exceptions by statutory construction.¹⁰⁹ In a 1949 FTCA case, the Court approvingly quoted Judge Cardozo's avowal that, as sovereign immunity "involves hardship enough where consent has been withheld," courts should not "add to its rigor by refinement of construction where consent has been announced."¹¹⁰ The Court would apparently permit any FTCA claim not clearly precluded by the statutory text or legislative history.¹¹¹ In *Feres v. United States*, however, the Court adopted a much stricter approach to Congress's waiver of sovereign immunity in tort, reading into the FTCA an implied exception for claims brought by active duty military personnel.¹¹² These conflicting approaches formed the backdrop of the lower federal courts' early attempts to implement the discretionary function exception.¹¹³

A. *Dalehite (1953)*, *Indian Towing (1955)*, and *Rayonier (1957)*

The Supreme Court's first effort to provide guidance in that process of implementation, in *Dalehite v. United States*,¹¹⁴ was occasioned by "the worst industrial disaster in American history."¹¹⁵ The 1947 Texas City disaster, in which nearly 3,000 tons of fertilizer bound for famine-stricken Europe

¹⁰⁸ See Lawrence Kaminski, Comment, *Torts—Application of Discretionary Function Exception of Federal Tort Claims Act*, 36 MARQ. L. REV. 88, 88 (1952) (noting early confusion about proper scope of the exception); Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 27 IND. L.J. 121, 126–28 (1951) (contemporary discussion of early cases).

¹⁰⁹ *United States v. Yellow Cab Co.*, 340 U.S. 543, 548 n.5 (1951) (quoting *Emp'rs' Fire Ins. Co. v. United States*, 167 F.2d 655, 657 (9th Cir. 1948)).

¹¹⁰ *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949) (quoting *Anderson v. Hayes Constr. Co.*, 153 N.E. 28, 30 (N.Y. 1926) (Cardozo, J.)).

¹¹¹ *Id.* at 370 (permitting subrogation claims under the FTCA).

¹¹² 340 U.S. 135 (1950). The "Feres Doctrine," which bars active-duty members of the armed forces from bringing FTCA claims against the government, has been fiercely criticized. See, e.g., *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.") (internal quotation marks and citations omitted); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 71 (2003) ("[T]he *Feres* doctrine . . . can be accurately described as one of the Supreme Court's most ill-conceived, inequitable, and unjustifiable creations"). But see, e.g., Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393 (2010).

¹¹³ See generally sources cited *supra* note 108. For a discussion of the tension between these approaches to FTCA construction, see JAYSON & LONGSTRETH, *supra* note 4, § 3.05.

¹¹⁴ 346 U.S. 15 (1953).

¹¹⁵ BILL MINUTAGLIO, *CITY ON FIRE: THE FORGOTTEN DISASTER THAT DEVASTATED A TOWN AND IGNITED A LANDMARK LEGAL BATTLE* 195 (2003).

exploded while stored aboard two moored ships, killed at least 581 people¹¹⁶ and injured some three thousand more.¹¹⁷ Texas City's harbor was utterly demolished.¹¹⁸

Survivors later brought a series of FTCA suits against the United States for negligence.¹¹⁹ In *Dalehite*, a test case, the district court found for the plaintiffs on the grounds that the government had been negligent "in drafting and adopting the fertilizer export plan as a whole," in manufacturing the fertilizer, and in failing to "police" the loading of the two ships at Texas City.¹²⁰ A majority of the court of appeals sitting en banc later reversed, holding that a subset of the claims were precluded by the discretionary function exception and that the rest were not supported by the evidence.¹²¹ The Supreme Court granted certiorari, noting that "the case presented an important problem of federal statutory interpretation;"¹²² namely, the question how narrowly or widely the FTCA's discretionary function exception properly swept. A divided Court affirmed the decision below,¹²³ leaving the Texas City survivors with recourse only to Congress.¹²⁴

Writing for a majority of the Court, Justice Reed began his analysis of the discretionary function exception with a sketch of the FTCA's legislative history.¹²⁵ Despite the Act's general waiver of sovereign immunity in tort, Justice Reed wrote, "it was not contemplated [by Congress] that the Government should be subject to liability arising from acts of a governmental nature or function."¹²⁶ Above all, the FTCA was meant to open the federal government to claims for "the ordinary common-law torts,"¹²⁷ but not to "claims, however negligently caused, that affected the governmental functions."¹²⁸

But what counts as a relevant "discretionary function" for purposes of the exception? How capacious is the federal government's immunity under

¹¹⁶ *Id.* at 209 (this number includes people deemed missing).

¹¹⁷ Sisk, *supra* note 28, at 913.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 915.

¹²⁰ *Dalehite v. United States*, 346 U.S. 15, 23–24 (1953).

¹²¹ *In re Texas City Disaster Litigation*, 197 F.2d 771, 778 (5th Cir. 1952) (en banc).

¹²² *Dalehite*, 346 U.S. at 17.

¹²³ *Id.* at 15–45.

¹²⁴ As Professor Sisk notes, "[a]fter the Court held the government immune from liability in *Dalehite*, Congress provided a legislative remedy by enacting a private bill providing compensation to the victims of the Texas City Disaster." Sisk, *supra* note 28, at 920.

¹²⁵ *Dalehite*, 346 U.S. at 24–30; see also *infra* notes 187–195 and accompanying text.

¹²⁶ *Dalehite*, 346 U.S. at 28 (citation omitted). The Court would later reject the proposition that any conduct involving a "uniquely governmental function" is shielded from liability under the FTCA simply because it has no private analogy. See *Indian Towing Co. v. United States*, 350 U.S. 61, 67–69 (1955); *infra* notes 140–145 and accompanying text.

¹²⁷ *Dalehite*, 346 U.S. at 28.

¹²⁸ *Id.* at 32.

this provision of the FTCA? The Court declined to provide a complete answer to these questions.¹²⁹ Instead, it simply held that

the “discretionary function or duty” that cannot form a basis for suit under the [FTCA] includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.¹³⁰

The Court held that the discretionary function exception may cover not only high-level planning decisions, but also lower-level operational decisions made pursuant to “official directions.”¹³¹ Crucially, only where policy judgment was or might have been involved in the government conduct at issue does the discretionary function exception apply.¹³²

In his dissenting opinion, Justice Jackson objected to the proposition that every policy decision necessarily falls within the scope of the discretionary function exception. “We cannot agree,” he wrote, joined by Justices Black and Frankfurter, “that all the way down the line [of government decisionmakers] there is immunity for every balancing of care against cost, of safety against production, of warning against silence.”¹³³ On such a broad construction of the discretionary function exception, the United States would nearly always succeed in invoking immunity under the FTCA, even where “the housekeeping side of federal activities”¹³⁴ is concerned, since in citing costs and other considerations the government “can clothe official carelessness with a public interest.”¹³⁵ Nevertheless, the *Dalehite* dissenters did not propose that every governmental activity should be subject to tort liability; “it is not a tort for government to govern,” Justice Jackson quipped.¹³⁶ Instead, they sought to distinguish so-called “housekeeping” activities, in which the federal government (in its role as a property owner, for example) engages in conduct “indistinguishable from [that] performed by private persons” from official exercises of federal authority “in a manner which legally

¹²⁹ *Id.* at 35 (“It is unnecessary to define, apart from this case, precisely where discretion ends.”).

¹³⁰ *Id.* at 35–36.

¹³¹ *Id.* at 36.

¹³² *See id.* at 34 (“The ‘discretion’ protected by the [discretionary function exception] is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one’s judgment of the best course . . .”).

¹³³ *Id.* at 58 (Jackson, J., dissenting).

¹³⁴ *Id.* at 60. “Many official decisions even in this area,” the dissent continues, “may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril and we think it is not within the exception of the statute.” *Id.*

¹³⁵ *Id.* at 50.

¹³⁶ *Id.* at 57.

binds one or many . . . [as] no private person could.”¹³⁷ While the discretionary function exception rightly bars claims arising from the latter sort of activity, it should not bar those arising from the former, even where the relevant “housekeeping” decisions “involve a nice balancing of various considerations.”¹³⁸

The dissenting opinion thus put some weight, as did the majority,¹³⁹ on the existence or not of a private analogy for any given allegedly tortious government conduct. Two years after *Dalehite*, the Court had occasion to consider this question directly, when a barge charterer brought suit against the United States for the Coast Guard’s allegedly negligent operation of a lighthouse.¹⁴⁰ Justice Frankfurter, one of the *Dalehite* dissenters, authored the majority opinion in the Court’s 5-4 decision in *Indian Towing v. United States*.¹⁴¹ The Court held that the FTCA does not always or categorically “exclud[e] liability in the performance of activities which private persons do not perform.”¹⁴² Thus the federal government could be held liable under the FTCA for negligence in the maintenance and operation of a lighthouse, notwithstanding the fact that private persons do not engage in this activity.¹⁴³ Importantly, however, the holding of *Indian Towing* did not technically concern the scope of the discretionary function exception; instead, it involved construction of the FTCA’s main liability provision.¹⁴⁴ The same goes for the Court’s holding two years later, in *Rayonier, Inc. v. United States*, that the federal government could be liable for negligence in firefighting, notwithstanding the absence of an identical private activity.¹⁴⁵

It was nearly three decades before the Supreme Court again addressed the discretionary function exception.¹⁴⁶ During the interim, the lower federal courts experienced great difficulty implementing the exception consistently.¹⁴⁷

¹³⁷ *Id.* at 59.

¹³⁸ *Id.* at 60.

¹³⁹ *Id.* at 49 (majority opinion) (“Congress has defined the tort liability of the Government as analogous to that of a private person.”).

¹⁴⁰ *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

¹⁴¹ *Id.* at 61.

¹⁴² *Id.* at 64. Justice Frankfurter explained, “we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence of identical private activity.” *Id.* at 67.

¹⁴³ *Id.* at 68–69.

¹⁴⁴ *Id.* at 64–65. That provision, 28 U.S.C. § 2674 (2006), begins: “The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual *under like circumstances*” (emphasis added).

¹⁴⁵ *Rayonier, Inc. v. United States*, 352 U.S. 315, 318–19 (1957).

¹⁴⁶ See *infra* Part III.B.

¹⁴⁷ See, e.g., Harold J. Krent, *Preserving Discretion without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV., 871, 880 (1991) [hereinafter Krent, *Preserving Discretion*] (discussing cases).

B. Varig Airlines (1984), Berkovitz (1988), and Gaubert (1991)

The continuing relevance of *Dalehite's* distinction between planning and operational decisions was put to the test in *United States v. Varig Airlines*, a pair of cases alleging negligence in the Federal Aviation Administration's ("FAA") certification of various commercial aircraft.¹⁴⁸ Chief Justice Burger, writing for a unanimous Court, explained that the focus of inquiry in applying the discretionary function exception should be on the allegedly tortious conduct itself, and not on the position of the government agent(s) whose conduct it was.¹⁴⁹ "Thus, the basic inquiry concerning the application of the . . . exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."¹⁵⁰ The Court went on to explain that in enacting the FTCA with this particular exception, Congress sought to check "judicial 'second-guessing,'" through the adjudication of tort claims, "of legislative and administrative decisions grounded in social, economic, and political policy."¹⁵¹

Applying this principle, the Court held that the FAA's "spot-check" procedure for inspecting aircraft, whereby less searching techniques could be used for aircraft produced by manufacturers having strong quality control records, was protected by the discretionary function exception.¹⁵² Indeed, the exception was held to bar claims arising not only from the FAA's basic decision to implement the "spot-check" compliance system, but also from FAA engineers' day-to-day execution of that system.¹⁵³ Chief Justice Burger explained:

The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. In administering the "spot-check" program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals.¹⁵⁴

¹⁴⁸ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 799 (1984).

¹⁴⁹ *Id.* at 813 ("[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.")

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 814.

¹⁵² *Id.* at 819.

¹⁵³ *Id.* at 820.

¹⁵⁴ *Id.*

In other words, the FAA employees charged with carrying out the “spot-check” system on the ground were themselves exercising policy discretion of the sort that Congress sought to protect.

As commentators have noted, *Varig Airlines* clarified little about where the discretionary function exception does not apply.¹⁵⁵ Four years later, however, in *Berkovitz v. United States*,¹⁵⁶ the Court adopted a more schematic test for discretionary function immunity under the FTCA and in the process explicitly identified two scenarios in which government conduct is not protected by the exception.¹⁵⁷ Justice Marshall, writing for a unanimous Supreme Court,¹⁵⁸ explained that a judge who is asked to determine whether or not the discretionary function exception bars a given claim must first consider “whether the [allegedly tortious] action [was] a matter of choice for the acting employee” of the federal government.¹⁵⁹ If not—if, in the Court’s words, “a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow”—then the exception does not apply to that employee’s conduct.¹⁶⁰ Thus whenever a government agent violates mandatory regulations, the United States will not enjoy discretionary function immunity from claims arising from such violation.¹⁶¹ If the government agent does have discretion, however, a court under *Berkovitz* goes on to consider whether the allegedly tortious decision was “based on considerations of public policy”¹⁶² or “incorporate[d] considerable policy judgment.”¹⁶³ If so, the discretionary function exception applies and the plaintiff’s claim is barred. If not, the exception provides no protection to the government; the plaintiff’s FTCA claim can proceed.

Just three years after *Berkovitz*, the Court established its current last word on the FTCA’s discretionary function exception in *United States v. Gaubert*.¹⁶⁴ The case involved claims brought by the major shareholder of a savings and loan association, alleging that the Federal Home Loan Bank

¹⁵⁵ See, e.g., Andrew Hyer, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV. 1091, 1100 (2007).

¹⁵⁶ 486 U.S. 531 (1988).

¹⁵⁷ See JAYSON & LONGSTRETH, *supra* note 4, § 3.48 (discussing circumstances in which the discretionary function exception does not apply under *Berkovitz*); Hyer, *supra* note 155, at 1103 (same).

¹⁵⁸ *Berkovitz*, 486 U.S. at 532.

¹⁵⁹ *Id.* at 536. This is generally characterized as the first prong of the Court’s discretionary function test. See, e.g., Hyer, *supra* note 155, at 1102.

¹⁶⁰ *Berkovitz*, 486 U.S. at 536. However, the initial promulgation of the statute, regulation, or policy will itself be protected under this test. See *Gaubert v. United States*, 499 U.S. 315, 324 (1991) (“[I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation.”).

¹⁶¹ *Berkovitz*, 486 U.S. at 547.

¹⁶² *Id.* at 537.

¹⁶³ *Id.* at 545 (internal quotation marks omitted). This is generally characterized as the second prong of the Court’s discretionary function test. See, e.g., Hyer, *supra* note 155, at 1102.

¹⁶⁴ 499 U.S. 315 (1991).

Board (“FHLBB”) and the Federal Home Loan Bank of Dallas (“FHLB-D”) had negligently caused economic loss through their supervision and day-to-day management of the savings and loan.¹⁶⁵ Gaubert sought \$100 million in damages.¹⁶⁶ The district court granted the government’s motion to dismiss, finding that the FTCA’s discretionary function exception barred Gaubert’s claims.¹⁶⁷ The Fifth Circuit later reversed in part, holding that the government was protected by the exception only up to the point at which its agents’ involvement “became operational in nature.”¹⁶⁸

The Supreme Court granted certiorari in part to correct the Fifth Circuit’s proposition that “operational” or low-level management decisions necessarily fall outside the scope of the government’s discretionary function immunity. Writing for a majority of the court, Justice White explained that “[a] discretionary act is one that involves choice or judgment; [and] there is nothing in that description that refers exclusively to policymaking or planning functions.”¹⁶⁹ Indeed, the “[d]ay-to-day management of banking affairs . . . regularly requires judgment as to which of a range of permissible courses is the wisest.”¹⁷⁰ As such, the conduct of FHLBB and FHLB-D officials at issue in the case was protected by the FTCA’s exception for discretionary functions.¹⁷¹

Although *Gaubert* was largely consistent with the Court’s prior holdings in *Varig Airlines* and *Berkovitz*, it did include a significant innovation. There had long been an ambiguity in the case law as to whether a government agent’s action, in order to fall within the discretionary function exception, must have actually been the product of policy judgment.¹⁷² One of the Justices brought up this point during oral argument in *Gaubert*, asking the government’s attorney, “[d]oes your exception apply whenever policy considerations *might* influence the judgment, or when they *do* influence the judgment?”¹⁷³ Raising the specter of enormous increases in litigation, including “a full-scale trial in every case that involves the raising of the defense of discretionary function,” the government urged the Court to require only that the challenged action was “susceptib[le]” to policy judgment.¹⁷⁴ A majority of the Justices, indeed all but Justice Scalia,¹⁷⁵ were persuaded. Justice White declared in his majority opinion:

¹⁶⁵ *Id.* at 319–20.

¹⁶⁶ *Id.* at 320.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 321 (quoting *Gaubert v. United States*, 885 F.2d 1284, 1289 (5th Cir. 1989)).

¹⁶⁹ *Id.* at 324.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 326.

¹⁷² The ambiguity goes all the way back to *Dalehite*. What does it mean for there to be “room for policy judgment” in a government official’s conduct? See *supra* notes 130–132 and accompanying text.

¹⁷³ Oral Argument at 21:02, *Gaubert v. United States*, 499 U.S. 315 (1991) (No. 89-1793), available at http://www.oyez.org/cases/1990-1999/1990/1990_89_1793/argument.

¹⁷⁴ *Id.*

¹⁷⁵ *Gaubert*, 499 U.S. at 334–40 (Scalia, J., concurring).

When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.¹⁷⁶

No authority was cited; the *Gaubert* presumption is a judicial invention¹⁷⁷ presumably crafted in order to save the government and FTCA plaintiffs from expending litigation costs needlessly. As the quotation makes apparent, the Court also sought to furnish lower federal courts with clear parameters by which to adjudicate motions to dismiss based on the discretionary function exception.

C. What Current Doctrine Means for FTCA Litigation

The *Gaubert* presumption has had its effects. Professor Nelson's empirical study of all reported¹⁷⁸ district court cases reveals that the government's success rate in asserting the discretionary function exception has risen to 76.3 percent post-*Gaubert*, as compared to 69.9 percent pre-*Gaubert*.¹⁷⁹ This apparently modest 6.4 percentage-point rise in the government's success rate might understate *Gaubert*'s significance, since in the wake of the Supreme Court's decision the government has asserted the exception in nearly twice as many cases as it did in the forty-four years of FTCA litigation prior to *Gaubert*.¹⁸⁰

The effect of the *Gaubert* presumption can also be understood qualitatively, in terms of the types of cases that are denied adjudication on the merits under current doctrine. Even where federal officials apparently or admittedly have failed to consider relevant policy considerations in undertaking certain conduct, the discretionary function exception nevertheless shields the United States from resultant tort claims, as long as some conceivable

¹⁷⁶ *Id.* at 324–25 (majority opinion).

¹⁷⁷ See Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 456–61 (1997) (discussing the “tenuous origins” of *Gaubert*'s susceptibility analysis in three circuit court opinions).

¹⁷⁸ Although reported cases constitute a limited sample, there is no prima facie reason to suppose that they constitute a biased sample. Nelson, *supra* note 14, at 285–86.

¹⁷⁹ *Id.* at 292–93.

¹⁸⁰ *Id.* There were 494 reported FTCA discretionary function exception cases after *Gaubert* (1991) at the time of Professor Nelson's study (2009), as compared to 266 cases prior to that decision. *Id.* at 301.

policy judgment *could have* informed the allegedly tortious conduct.¹⁸¹ The only way in which a plaintiff can rebut this presumption is by persuading a court that no conceivable policy consideration could have justified the allegedly tortious conduct, a standard that is difficult to meet when the government can nearly always cite scarce resources.¹⁸²

The title of a recent article by a Justice Department Torts Branch attorney sums up current discretionary function doctrine quite well: “The Federal Tort Claims Act is a *Very Limited* Waiver of Sovereign Immunity – So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems.”¹⁸³ Insofar as the article’s title makes a claim about congressional intent in enacting the FTCA, that claim is dubious.¹⁸⁴ But in light of the Supreme Court’s construction of the discretionary function exception, it is accurate as a statement of current law.

IV. THE JUSTIFICATION OF DISCRETIONARY IMMUNITY

This Note has considered the background and history of Congress’s waiver of federal sovereign immunity in tort,¹⁸⁵ and has argued that judicial construction of the discretionary function exception, particularly the Supreme Court’s holding in *U.S. v. Gaubert*, serves to narrow that general waiver.¹⁸⁶ The question arises whether the federal government’s discretionary function immunity is now broader than the enacting Congress intended. This inquiry has significant limitations, however. To begin with, it has never been clear just how widely Congress meant to cast the net of discretionary immunity in enacting the FTCA. As scholars have long recognized, the statutory text itself is open-ended and ambiguous.¹⁸⁷ The legislative history is also equivocal. From the only paragraph of House and Senate reports addressing the exception—a paragraph that appears repeatedly in congressional docu-

¹⁸¹ See, e.g., *C.R.S. v. United States*, 11 F.3d 791, 797–98 (8th Cir. 1993) (Army officials did not consider special policy considerations involved in administering blood screening program in a military setting). The attorneys who represented the *C.R.S.* plaintiffs critique this result forcibly. Peterson & Van Der Weide, *supra* note 177, at 448–49.

¹⁸² But see, e.g., *Faber v. United States*, 56 F.3d 1122, 1125–27 (9th Cir. 1995) (discretionary function exception did not bar claims arising from national park officials’ failure to post adequate warning signs to protect divers, where the failure to post at the location of injury had no conceivable policy basis and a general policy to post such warnings existed); *Andrulonis v. United States*, 952 F.2d 652, 655 (2d Cir. 1991) (discretionary function exception did not bar claims arising from a federal scientist’s failure to warn the plaintiff of an imminent and clear danger of which the scientist was aware).

¹⁸³ Fishback, *supra* note 19, at 16.

¹⁸⁴ See *infra* notes 187–195 and accompanying text.

¹⁸⁵ See *supra* Part II.

¹⁸⁶ See *supra* Part III.C.

¹⁸⁷ See, e.g., Krent, *Preserving Discretion*, *supra* note 148, at 872 (noting the exception’s ambiguous language); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 82 (1968) (calling the exception “vague and ambiguous” (quoting Hugh C. Stromswold, *The Twilight Zone of the Federal Tort Claims Act*, 4 AM. U. INTRAMURAL L. REV. 41, 42 (1955))).

ments from 1942 until the FTCA's eventual passage in 1946¹⁸⁸—one learns that the discretionary function exception was

intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid.¹⁸⁹

Were these the only types of suit that Congress intended to bar with the discretionary function exception, the purpose of discretionary immunity would appear to be limited to securing the government a procedural advantage—allowing it to have cases dismissed on a threshold jurisdictional issue—and thereby saving it the costs of litigation, since all suits in which “no negligence on the part of [the defendant] is shown” would necessarily fail on the merits under the common law of torts, even without the bar of immunity.¹⁹⁰ The congressional reports then go on to explain, however, that the discretionary immunity retained by the FTCA is also intended to shield federal regulatory agencies¹⁹¹ from claims that are “based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved,” as well as claims “test[ing] the validity of or provid[ing] a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion.”¹⁹²

In this light, the intended scope of discretionary immunity appears to be much wider than Congress's initial language suggests. Even suits that might in principle succeed on the merits, suits in which negligence (i.e., breach of duty) can be proved, are meant to be barred. Suits in which the facts alleged support a judgment that the government agent abused his or her discretion are similarly covered. This much Congress makes clear. But notice that the intended scope of immunity is still uncertain, and depends on how broadly the term “discretionary acts” is understood. Apparently hinging on this term, the legislative history is scarcely more illuminating than the statutory text itself, which leaves courts to determine what is, and what is not, a “discretionary function.”¹⁹³ Little guidance is offered by the declaration in the same House and Senate reports that “such common-law torts as an automo-

¹⁸⁸ *Dalehite v. United States*, 346 U.S. 15, 29 n.21 (1953) (quoting H.R. REP. NO. 77-2245, at 10 (1942)); S. REP. NO. 77-1196, at 7 (1942); H.R. REP. NO. 79-1287, at 5-6 (1945); *Tort Claims Hearings*, *supra* note 60, at 33).

¹⁸⁹ *Id.*

¹⁹⁰ *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 281(b) (1965).

¹⁹¹ Notably, the executive agencies listed as examples in this paragraph—namely, the Federal Trade Commission, the Securities and Exchange Commission, and the Treasury Department—are all involved in financial regulation. *See Dalehite*, 346 U.S. at 29 n.21.

¹⁹² *Id.* at 29 n.21 (citations omitted).

¹⁹³ *See* 28 U.S.C. § 2680(a) (2006).

bile collision caused by the negligence of an employee of . . . [a] Federal agency” are not meant to fall within the scope of the government’s discretionary immunity.¹⁹⁴ This is apparently the only specific example offered in the legislative history of a claim that Congress did not intend the government’s discretionary immunity to bar. And the example rules out only the most liberal construction of the modifier “discretionary.”¹⁹⁵

There is a more substantive reason, aside from the ambiguity of the legislative history, for looking beyond congressional intent in evaluating the current scope of the U.S. government’s discretionary immunity in tort. Even if the correct reading of the FTCA and its legislative history support the Supreme Court’s expansive implementation of the discretionary function exception, there remains the legislative or policy question whether the exception is desirable, all things considered—whether, in other words, it achieves some good without unduly harming other important values. This Note takes up that question directly, reconsidering the supposed justifications for governmental discretionary immunity in tort.

A. Tradition

Perhaps the most frequently invoked feature of sovereign immunity is its pedigree: whatever else may be said, the doctrine of sovereign immunity is undeniably traditional.¹⁹⁶ It has deep roots in English law.¹⁹⁷ In the United

¹⁹⁴ *Dalehite*, 346 U.S. at 29 n.21 (citations omitted).

¹⁹⁵ As courts have noted, on the most capacious reading even driving could be understood as a “discretionary” act or function, within the broad limits set by traffic laws. *See, e.g.*, *United States v. Gaubert*, 499 U.S. 315, 325 n.7 (1991) (noting that operation of a vehicle demands “constant exercise of discretion”). Dean Krent notes that although “[d]iscretion exists every time there is room for choice, whether in filing criminal charges, predicting weather, or deciding when to brake on an icy street,” to construe the discretionary function exception “that broadly . . . would gut almost the entire FTCA, permitting tort challenges of only the most ministerial government actions.” Krent, *Preserving Discretion*, *supra* note 147, at 872 n.4.

¹⁹⁶ *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 98 (1996) (Stevens, J., dissenting) (“In sum, as far as its common-law ancestry is concerned, there is no better reason for the rule of sovereign immunity ‘than that so it was laid down in the time of Henry IV.’” (quoting O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897))); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 126 (1984) (Stevens, J., dissenting) (calling sovereign immunity an “ancient doctrine”); *Nguyen v. United States*, 556 F.3d 1244, 1255 (11th Cir. 2009) (same) (citations omitted); Jackson, *supra* note 2, at 542–43 (discussing the tradition of sovereign immunity in English common law at the time of the U.S. Constitution’s adoption).

¹⁹⁷ *See* Borchard, *Responsibility in Tort 1926*, *supra* note 35, at 30–31.

[B]y the end of the fifteenth century it was coming to be recognized that the king could not be sued for a tort and also, contrary to the earlier law, that the king’s officer or agent was alone liable—a rule which in the sixteenth century developed into the modern theory that the king could do no wrong, in the sense that he was incapable of doing wrong.

Id. Professor Borchard reminds us that there was in fact an older, medieval tradition according to which “an impairment or violation [of private rights] by public authority constituted a wrong for which redress must be accorded.” *Id.* at 17. In the England of Edward I, for exam-

States the federal government's immunity from suit absent congressional consent "has always been treated as an established doctrine."¹⁹⁸ Admittedly, tradition is generally cited to explain, and not necessarily to justify, sovereign immunity's continuing presence in U.S. law. Nevertheless, Dean Chemerinsky's reminder that appeal to doctrinal pedigree leaves open "the central question" whether the tradition of federal sovereign immunity should continue is a helpful one.¹⁹⁹ What is needed for a normative defense of the doctrine is some account of the positive good that it achieves. Conversely, the defender of federal sovereign immunity in tort must identify what would be lost if Congress repudiated the doctrine entirely. What would be lost, in particular, if Congress eliminated the FTCA's exception preserving discretionary function immunity? Appeal to tradition cannot suffice here.

B. *Protecting the Public Purse*

Sovereign immunity and, in particular, the FTCA's discretionary function exception have sometimes been defended on the ground that they protect government coffers and thereby help to preserve resources for public purposes.²⁰⁰ Indeed, there can be no doubt that protection of the public purse is an actual effect of sovereign immunity doctrine, insofar as it is reasonable to suppose that at least some of the claims now barred by immunity would be successful were they adjudicated on the merits. Nevertheless, defenders of immunity sometimes risk overstating the fiscal effects of provisions like the discretionary function exception, apparently implying that all of the claims presently barred by sovereign immunity would, if adjudicated, lead to judgments against the United States.²⁰¹ That is, defenders sometimes simply ignore the myriad other limitations on liability embodied in the common law of torts and in the FTCA; and, whatever their intent, this omission encourages the erroneous idea that the government's discretionary function immunity is the only shield protecting it from runaway liability.²⁰² Consider in this regard the assertion that the discretionary function exception "saves the gov-

ple, the king was so far from above the law that "his or his officials' interference with vested rights had to be made good and remedied." *Id.* at 23.

¹⁹⁸ *United States v. Lee*, 106 U.S. 196, 207 (1882).

¹⁹⁹ Erwin Chemerinsky, *Against Sovereign Immunity*, 53 *STAN. L. REV.* 1201, 1223 (2001).

²⁰⁰ *See, e.g., id.* at 1216–17 (arguing that a concern to protect the treasury underlies all of the Supreme Court's decisions on sovereign immunity); Levine, *supra* note 86, at 1549 ("The [discretionary function] exception serves a vital fiscal function. Despite the prevailing theoretical justifications . . . one of the main roles of the discretionary function exception is to limit the government's liability.").

²⁰¹ *See, e.g.,* Levine, *supra* note 86, at 1550–52 (crediting the discretionary function exception with "protect[ing] the government" from massive tort liability). Although strictly correct, this formulation is potentially misleading insofar as it invites the reader to imagine a counterfactual scenario in which the federal government is liable for every (or nearly every) tort claim now precluded by sovereign immunity.

²⁰² For a discussion of these other important safeguards, see *infra* notes 251–263 and accompanying text.

ernment ‘perhaps billions of dollars a year.’”²⁰³ In the same vein, the Assistant Attorney General of the Justice Department’s Civil Division once testified before Congress that the same exception “is probably the most important reason that the [FTCA’s cost] does not exceed several billion dollars in additions to the deficit every year.”²⁰⁴

Leaving aside the accuracy or not of estimates of sovereign immunity’s fiscal effects, there is a more basic problem with appealing to the protection of the public purse in defense of sovereign immunity. That a government norm or procedure secures certain cost savings is not sufficient to conclude that it is justified. After all, the groundless withholding of refunds due to taxpayers, for example, would also ensure significant cost savings. The question is: does the measure secure those savings justifiably? In the case of sovereign immunity, are the victims of government torts denied redress justifiably? Dean Chemerinsky identifies the implicit assumption underlying the public fisc defense of sovereign immunity: “that protecting the government treasury is more important than the benefits of liability in terms of ensuring compensation and deterrence.”²⁰⁵ Without denying that some such assumption is indeed implicit in claims that governmental immunity is justified by the cost savings it ensures, this Note would describe the benefits to be had by waiving immunity in quite different terms. The stark opposition between immunity and liability is unhelpful, because it obscures the presence of the several other (non-immunity) limitations on liability embodied within the FTCA and tort law itself.²⁰⁶ Furthermore, the benefits of waiving immunity are not best understood in terms of compensation or deterrence, but in terms of the opportunity for legal redress that such a waiver would secure for the victims of government torts.²⁰⁷

C. Separation of Powers & Policymaking Independence

The government’s discretionary function immunity has been defended as serving “to maintain a proper balance among the branches of the federal

²⁰³ Levine, *supra* note 86, at 1550 (quoting Krent, *Preserving Discretion*, *supra* note 147, at 871).

²⁰⁴ *Discretionary Function Exemption of the Federal Tort Claims Act and the Radiation Exposure Compensation Act: Hearings on H.R. 1095, H.R. 2372, and H.R. 2536 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 101st Cong. 91 (1989) [hereinafter *Discretionary Function Hearings*] (statement of Stuart M. Ger-son, Assistant Att’y. Gen., Civil Division, Department of Justice).

²⁰⁵ Chemerinsky, *supra* note 199, at 1217.

²⁰⁶ See *infra* notes 231–238, 250–263 and accompanying text.

²⁰⁷ A full defense of this claim, especially its negative part, is outside the scope of this Note; such a defense would require a lengthy discussion of the author’s general approach to tort law and some comparison with other leading theories. However, the argument for repealing the FTCA’s discretionary function exception, see *infra* notes 264–290 and accompanying text, goes some way in identifying the benefits of waiving immunity in terms of the guarantee of opportunities for legal redress. For a helpful discussion and an abbreviated defense of this general approach, see JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 47–69 (2010).

government.”²⁰⁸ By denying federal courts the jurisdiction to entertain tort claims arising from government employees’ policy-based decisions, the FTCA’s discretionary function exception reflects “a proper commitment to majoritarian rule”²⁰⁹ and protects a sphere of legislative and executive policymaking from “judicial intervention.”²¹⁰ This supposed justification of discretionary function immunity is widely cited in judicial discussions of the FTCA²¹¹ and has been endorsed by scholars, even those critical of sovereign immunity generally, who emphasize the need to protect policymaking independence.²¹² On this account, the “permissible exercise of policy judgment”²¹³ by officials in the political branches—and, by extension, majority rule—would be compromised were such judgment subject to judicial review through the adjudication of tort claims.

A weak version of the theory emphasizes incentives. Some commentators have argued, for example, that the imposition or threat of FTCA liability distorts government regulation, making it less efficient and less responsive to majoritarian pressures than it otherwise would be.²¹⁴ It is doubtful, however, that any incentives created by tort liability exert significant force on ordinary government agents. After all, the Westfall Act prevents such agents from being held personally liable for claims arising from conduct “within the scope of [their] office or employment.”²¹⁵ And a central Judgment Fund established by Congress, rather than agency funding, is used to pay FTCA judgments and settlements.²¹⁶ Accordingly, the budget of a negligent offi-

²⁰⁸ Krent, *Reconceptualizing Sovereign Immunity*, *supra* note 35, at 1530.

²⁰⁹ *Id.*

²¹⁰ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984).

²¹¹ *See, e.g.*, *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (“[T]he purpose of the exception is to ‘prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.’” (quoting *Varig Airlines*, 467 U.S. at 814)); *McMellon v. United States*, 387 F.3d 329, 349 (4th Cir. 2004) (“[S]eparation-of-powers concerns . . . drove Congress to create the discretionary function exception to the FTCA.”); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1021 (9th Cir. 1989) (noting that the FTCA’s discretionary function exception is “[g]rounded in” concerns for the separation of powers); *Molchatsky v. United States*, 778 F.Supp. 2d 421, 430 (S.D.N.Y. 2011) (noting that the separation of powers and the protection of policymaking are among the “core principles” that discretionary immunity serves).

²¹² *See, e.g.*, *Kenneth Culp Davis, Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 386 (1970) (arguing that the FTCA’s discretionary function exception is “essential” and that “something of the sort” must be preserved); Niles, *supra* note 18, at 1341. *But see* Erwin Chemerinsky, *supra* note 199, at 1217–19 (rejecting separation of powers and the safeguarding of government discretion as plausible justifications for sovereign immunity of any kind).

²¹³ *Berkovitz v. United States*, 486 U.S. 531, 537 (1988).

²¹⁴ *See, e.g.*, Hyer, *supra* note 155 (proposing reform of the discretionary function exception in order to eliminate incentives for inefficient regulation that are rooted in the threat of FTCA liability).

²¹⁵ Federal Employees Liability Reform and Tort Compensation Act (Westfall Act), 28 U.S.C. § 2679(b)(1) (2006).

²¹⁶ *See* FIGLEY, *supra* note 61, at 75–77. Since 1977, all FTCA judgments, plus settlements in excess of \$2,500, have been paid from Congress’s Judgment Fund, a permanent appropriation that is not linked to any particular agency’s budget. *Id.* at 77.

cial's particular agency is unlikely to be affected by tort litigation, at least in the near term.²¹⁷

There is, however, a stronger version of the policymaking independence theory on offer. This version stresses that the government must be able to make difficult political choices without the threat that any resulting loss will be charged to the public purse by court order.²¹⁸ Public policymaking nearly always involves adverse consequences—especially adverse fiscal consequences—for someone. When the Environmental Protection Agency promulgates air pollution regulations, the energy industry is likely to face increased costs.²¹⁹ When the Federal Deposit Insurance Corporation regulates the sale of mortgage-backed securities, lenders may lose profits and low-income and minority communities may end up with poorer access to credit.²²⁰ Discretionary immunity is necessary, on this view, to prevent courts from entertaining claims that would make the United States liable for such routine costs or losses. To permit claims of this kind would allow litigants to demand (and might tempt judges to award) compensation on the theory that a government agent's poor judgment or unwise policy choice amounted to negligence.

This supposed justification of discretionary immunity is grounded in deep concerns about the malleability of negligence law, and especially about its reasonableness standard. According to Professor Sisk, “if the courts were to accept common-law review on the merits of an allegedly negligent or otherwise wrongful governmental action that hinges on disputed questions of policy, the traditional legal standard of reasonableness would too easily shade into an evaluation of political wisdom.”²²¹ Immunity is thought to be necessary on this account because in such cases, courts simply cannot determine whether the government breached a duty of reasonable care toward the plaintiff—that is, whether the government agent's action was objectively unreasonable in light of the duty owed—without thereby weighing precisely

²¹⁷ Admittedly, there is nevertheless some risk that an official's agency could suffer in the long run, or that her relationships with colleagues and prospects for promotion could be harmed, if her conduct is the basis for a successful tort claim against the government. *See, e.g.*, Nicholas A. Giannatasio, *The Discretionary Function Exemption: Legislation and Case Law*, 29 PUB. ADMIN. Q. 202, 225 (2005) (warning officials and employees of possible “whiplash effect[s]” from causing liability to be imposed on the government).

²¹⁸ *See, e.g.*, Sisk, *supra* note 28, at 916–20.

²¹⁹ *See, e.g.*, Michael Janofsky, *E.P.A. Backs Bush Plan to Cut Air Pollution by Power Plants*, N.Y. TIMES, Oct. 28, 2005, at A15.

²²⁰ *See, e.g.*, Edward Wyatt & Ben Protess, *Advocates and Bankers Join to Fight Loan Rules*, N.Y. TIMES, June 2, 2011, at B1.

²²¹ Sisk, *supra* note 28, at 919; *cf.* William P. Kratzke, *Convergence of the Discretionary Function Exception to the Federal Tort Claims Act with Limitations of Liability in Common Law Negligence*, 60 ST. JOHN'S L. REV. 221, 223–24 (1986) [hereinafter Kratzke, *Convergence*] (“A finding of discretion in fact turns only upon the ability of a court to evaluate the government's conduct against an objective standard of negligence. Beyond this, it is not possible to conceive a more sophisticated test of discretion.”).

the sort of “social, economic, and political policy”²²² considerations that the agent presumably consulted in the first place.²²³ As another scholar succinctly put it, “[w]hen courts cannot judge whether conduct is unreasonable, they ought not to try.”²²⁴

Helping to fuel this sort of worry about the negligence standard is a regulatory or “public law” conception of tort, influential among progressives and conservative reformers alike,²²⁵ that gives short shrift to the law’s doctrinal substance.²²⁶ This conception frames tort law as a generic “device for empowering ordinary citizens” (the progressive version),²²⁷ or else as a particularly inefficient and counter-majoritarian “species of regulatory law” (the conservative version),²²⁸ without sufficient attention to the fact that genuine torts are not mere misfortunes, but injurious “wrongs inflicted by one on another.”²²⁹ From within this regulatory model of tort, the worry that adjudication of negligence claims against the government could undermine policymaking independence, or compromise the separation of powers, comes naturally:

One can assert that tort suits against government officials are a means of forcing, for example, a police or human services department to adopt better internal procedures. But doing so only invites a standard rejoinder that seems to strike a chord with many U.S. courts: “Even if it is our business to regulate the conduct of private actors through tort suits, it is emphatically not our business to instruct officials in a coordinate branch of government how to go about their jobs.”²³⁰

The worry is exaggerated. The common law that defines cognizable injuries, duties of care, standards for breach, and causation requirements is no “mere hodgepodge of pro-liability and anti-liability measures,”²³¹ but a set of significant substantive limits that together aim to provide legal redress only where genuine torts have been committed. What counts as a “genuine

²²² *Berkovitz v. United States*, 486 U.S. 531, 537 (1988) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).

²²³ “If we waive sovereign immunity too precipitously or expand governmental liability too extravagantly, we injudiciously ask jurists to step out of their constitutionally-assigned legal role and instead speak as political or moral actors.” Sisk, *supra* note 28, at 907.

²²⁴ Kratzke, *Recent Overhaul*, *supra* note 10, at 55.

²²⁵ The understanding of tort law exclusively in terms of (a) the forum that it provides aggrieved plaintiffs and (b) the regulatory function that tort judgments play in shaping behavior often “tends to be mistaken for tort law itself.” John C. P. Goldberg, *Tort in Three Dimensions*, 38 PEPP. L. REV. 321, 328 (2011).

²²⁶ *Id.* at 324–28.

²²⁷ *Id.* at 330.

²²⁸ *Id.* at 327.

²²⁹ *Id.* at 329.

²³⁰ *Id.* at 334.

²³¹ *Id.* at 328.

tort” obviously is not immutable,²³² and cannot be determined algorithmically. But neither is it a matter of unbounded choice for the judicial will. Common law courts do not adjudicate tort (or any other) claims on a blank slate. Instead, judges must “determine whether the plaintiff has alleged a wrong that is cognizable on the basis of existing law or a reasonable extension or revision of it.”²³³

Given tort law’s internal substantive limits, most claims presently barred by the discretionary function exception—and certainly those asserting little more than that some government policy was unwise or undesirable—would fail on the merits, even absent immunity.²³⁴ Professor Kratzke has rightly observed that when federal courts invoke the discretionary function exception to adjudicate FTCA claims, “they could just as easily discuss whether the government owed a particular plaintiff a duty, acted unreasonably, or inflicted an injury of a sort that is compensable under tort law.”²³⁵ In a similar vein, the author of an early discussion of the FTCA hazards that “the whole [discretionary function] exception might well be removed without jeopardizing government efficiency or economy,” because “the great majority of claims which would validly be denied by [the] exception in reality are not torts and would not create government liability” even if they were adjudicated on their merits.²³⁶ The present Note concurs in that analysis. Whenever a case hinges on questions of policy about which reasonable people disagree, plaintiffs will be hard pressed to prove to the satisfaction of

²³² As Professor Goldberg writes, to give tort doctrine its due—to insist on this third “dimension”—is not “to deny that the roster of wrongs to be treated as torts will and should change over time with changes in economic, political, and social conditions.” *Id.* at 333.

²³³ *Id.*

²³⁴ Certainly this goes for cases like *Dalehite* and *Gaubert*, in which the allegedly tortious conduct involved close judgment calls on which reasonable people would disagree. See *supra* Parts III.A, III.C. The recent case of *Bailey v. United States*, 623 F.3d 855 (9th Cir. 2010), is also instructive in this regard. The case involved a wrongful death claim alleging that Army Corps of Engineers personnel had negligently failed to place warning signs at a submerged dam on California’s Yuba River, proximately causing the decedent’s drowning. The discretionary function exception applied because the decision not to place signs involved considerations of public policy. *Id.* at 862. Even without immunity, however, Bailey’s claims would likely have failed on the breach element. Four days before the accident, the Corps had attempted to replace warning signs that had been washed away by strong current, but “judged that the Yuba was so turbulent as to threaten the safety of its workers who had to ford the river to attach new signs and buoys.” *Id.* at 858. Given these conditions and the Corpsmen’s efforts to replace the warning signs, it seems unlikely that a court would find their failure to do so within four days to be objectively unreasonable. Of course, not *all* claims presently barred by the government’s discretionary function immunity would fail if adjudicated on the merits. (If that were the case, then the exception would have no real disadvantage). It is the preclusion of precisely those claims which are potentially meritorious at common law and yet barred by discretionary function immunity that stands in need of justification, and that constitutes the “cost” of current doctrine. See *infra* notes 264–74 and accompanying text.

²³⁵ Kratzke, *Convergence*, *supra* note 221, at 223. Professor Kratzke is not, however, a critic of discretionary immunity. See Kratzke, *Recent Overhaul*, *supra* note 10, at 55–56 (discussing the discretionary function exception’s importance).

²³⁶ Note, *supra* note 108, at 129.

an Article III judge²³⁷ that the government agent taking the decision acted carelessly and thereby breached a valid duty of care.²³⁸

Nor do judges overstep their legal authority or competence in making such assessments.²³⁹ The question presented by a tort claim that arises from some federal employee's policy-based decision is not whether, in the abstract, the decision taken was sound or wise. The question presented is not what kind of policy or decision in like circumstances is legally mandated. Instead, courts adjudicating FTCA claims are asked to resolve the much narrower question whether, in light of existing case law, the allegedly tortious acts or omissions at issue constituted breach of some valid duty of care owed to the plaintiffs.²⁴⁰ This is a structured legal inquiry, not a generic evaluation of "political wisdom."²⁴¹ And at stake in such an inquiry is not the legal abrogation of some existing government policy, but only the possible award of money damages to the particular plaintiff or plaintiffs seeking relief.

The concerns underlying the separation of powers account of discretionary function immunity have undeniable force. While this Note affirms that the government should be answerable for its negligence under standard tort law principles,²⁴² public officials' authority to make bona fide policy judgments that are within their discretion should nevertheless be protected—especially where difficult choices must be made among a range of options,

²³⁷ Trial by jury is not permitted for claims brought pursuant to the FTCA. 28 U.S.C. § 2402 (2006). It is true that federal magistrate (Article I) judges may sometimes adjudicate FTCA claims. *See, e.g.,* Bonilla-Olmedo v. United States, 677 F.Supp. 2d 511 (D.P.R. 2009). But such adjudications are always subject to review by an Article III judge. *See, e.g.,* Moe v. United States, 668 F.Supp. 2d 497 (W.D.N.Y. 2009).

²³⁸ *See, e.g.,* Holbrook v. United States, 749 F.Supp. 2d 446 (S.D. W. Va. 2010) (alleging that the Federal Aviation Administration was negligent in issuing an airworthiness certificate). Consider also in this connection the general rule at common law that defendants have no duty to avoid causing pure economic loss. *See, e.g.,* Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000). Importantly, under the terms of the FTCA's private person analogy, 28 U.S.C. § 1346(b)(1), the federal government would not benefit from common law "public duty" rules according to which municipal entities do not owe duties of care to individual citizens. *See* JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 443-53 (2d ed. 2008); *see, e.g.,* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).

[R]ead[ing] the statute as imposing liability in the same manner as if [the United States] were a municipal corporation and not as if it were a private person . . . would thus push the courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations. . . . The Federal Tort Claims Act cuts the ground from under [sovereign immunity] doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts.

Indiana Towing Co., 350 U.S. at 65; *see also* FIGLEY, *supra* note 61, at 18 ("[T]he United States' liability is like that of a private person, not of a state or municipality." (citing United States v. Olson, 546 U.S. 43, 46 (2005))). *Olson* held that the FTCA waives immunity only where local law would make a private person, as distinguished from a state or municipal entity, liable, even where a "uniquely governmental function" is at issue. 546 U.S. at 46.

²³⁹ *Pace* Professor Sisk. *See supra* note 223 and accompanying text.

²⁴⁰ *See, e.g.,* Bear Med. v. United States, 192 F.Supp. 2d 1053 (D. Mont. 2002).

²⁴¹ *See supra* note 221 and accompanying text.

²⁴² *See infra* Part IV.A.

all of which may have adverse consequences for some group of persons or another. Negligence law offers a form of redress appropriate only to certain injuries caused by unreasonable carelessness in violation of a duty of care.²⁴³ It cannot replace the standard forms of democratic political accountability²⁴⁴ that are appropriate when policy judgments are simply imprudent, or unwise, or frustrate the public interest, without actually constituting negligence.

As this Note has argued, tort law's internal limits prevent plaintiffs from marshaling the FTCA merely to "test the validity"²⁴⁵ or soundness of a government agent's policy decision.²⁴⁶ On their own, however, these substantive limitations are unlikely to satisfy the defender of discretionary immunity. For at common law, extensions and revisions—"new theories of tort liability"²⁴⁷—are always possible. Even admitting that the law of negligence at present provides resources for limiting undue liability, a discretionary function exception might be necessary to provide the federal government with security against significant liability-generating evolutions of state common law. On this account the discretionary function exception would allay concerns not only about government liability in general, but also about the federalism implications²⁴⁸—potentially worrying without such an exception—of putting the federal government at the mercy of state common law definitions of a "negligent or wrongful act or omission."²⁴⁹ More specifically, the exception might be thought to protect against the possibility that states could impose strict liability for harms caused by certain essential federal government activities.²⁵⁰

Is this particular form of security against doctrinal innovation in state law governing torts—the discretionary function exception—worth its costs? This Note argues that it is not. First of all, the Supreme Court has held that

²⁴³ See generally GOLDBERG, SEBOK & ZIPURSKY, *supra* note 238.

²⁴⁴ As a Member of Congress once quipped of himself and his colleagues, "We are liable in November of every even-numbered year." *Discretionary Function Exemption of the Federal Tort Claims Act and the Radiation Exposure Compensation Act: Hearing on H.R. 1095, H.R. 2372, and H.R. 2536 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 101st Cong. 86 (1989) (statement of Rep. Willis D. Gradison, Jr. (R-Ohio)). Although the employees and officials of the federal government's administrative agencies are not, of course, directly accountable by election, the President who oversees most of those agencies is. See U.S. CONST. art. II, § 1. And less formal methods of holding government accountable for its poor policy judgments—for example, the various modes of public criticism and advocacy—are protected by the Constitution. See, e.g., U.S. CONST. amend. I.

²⁴⁵ *Dalehite v. United States*, 346 U.S. 15, 29 n.21 (1953).

²⁴⁶ See *supra* notes 231–38 and accompanying text.

²⁴⁷ Donald N. Zillman, *Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 715 (1989).

²⁴⁸ See, e.g., Krent, *Reconceptualizing Sovereign Immunity*, *supra* note 35, at 1546 ("[S]tate law would trump federal policies in the absence of the exception."). I thank John C.P. Goldberg for bringing this objection to my attention in comments on an earlier version of this Note.

²⁴⁹ 28 U.S.C. § 1346(b)(1) (2006).

²⁵⁰ I thank John C.P. Goldberg for suggesting this concern about strict liability in comments on an earlier version of this Note.

the terms of the FTCA's jurisdictional provision bar strict or absolute liability of any kind.²⁵¹ Even absent this holding, Congress could adequately protect against the imposition of strict liability by incorporating such a rule into the Act; for this narrow purpose, the discretionary function exception sweeps too broadly.²⁵²

The FTCA also includes significant procedural limits on government tort liability.²⁵³ Before filing suit, plaintiffs must commence an administrative action²⁵⁴ within two years of their claim's accrual,²⁵⁵ and must file an FTCA claim in federal district court within six months of the administrative claim's final denial.²⁵⁶ In addition, the FTCA bars trial by jury, instead requiring cases to be tried before a federal judge,²⁵⁷ which minimizes concern that the federal government might unfairly be treated as a "deep-pockets" defendant.²⁵⁸

Furthermore, the FTCA incorporates meaningful remedial limits.²⁵⁹ Neither punitive damages nor pre-judgment interest may be awarded under the Act.²⁶⁰ And damages in excess of the amount demanded in the plaintiff's prior administrative claim are also prohibited.²⁶¹ Finally, the Act incorporates any state law caps on damages,²⁶² whether or not the federal government "compl[ies] with all the procedures and filing requirements of the state statutes that create those limits on recovery."²⁶³

Given these numerous statutory safeguards against the possible expansion of common law standards for tort liability, the discretionary function exception is largely duplicative. At present, admittedly, it is the government's first line of defense, but it is by no means the only one.²⁶⁴ On the other hand, the exception has serious costs. It bars some claims that are potentially meritorious at common law, making adjudication on the merits impossible, and putting legal redress out of reach for the affected plaintiffs. Consider, for instance, *Shansky v. United States*, a case arising from a national historic site visitor's personal injuries sustained after tripping over an

²⁵¹ *Laird v. Nelms*, 406 U.S. 797, 799 (1972) ("Regardless of state law characterization, the [FTCA] itself precludes the imposition of liability if there has been no negligence or other form of misfeasance or nonfeasance on the part of the Government.") (internal quotation marks and citation omitted).

²⁵² It bars even potentially meritorious negligence claims against the federal government. See *infra* notes 265–74 and accompanying text.

²⁵³ See *supra* notes 99–103 and accompanying text.

²⁵⁴ 28 U.S.C. § 2675.

²⁵⁵ *Id.* § 2401(b).

²⁵⁶ *Id.*; see also *Willis v. United States*, 719 F.2d 608 (2d Cir. 1983) (FTCA claim barred by six month statute of limitations even though filed less than two years after claim's accrual).

²⁵⁷ 28 U.S.C. § 2402.

²⁵⁸ See, e.g., *Niles*, *supra* note 18, at 1300.

²⁵⁹ See *supra* notes 104–107 and accompanying text.

²⁶⁰ 28 U.S.C. § 2674.

²⁶¹ 28 U.S.C. § 2675(b).

²⁶² *Id.* § 2674.

²⁶³ FIGLEY, *supra* note 61, at 62–63.

²⁶⁴ See *supra* notes 201–204 and accompanying text.

antique threshold and falling down a short flight of steps.²⁶⁵ The plaintiff argued that National Park Service personnel were negligent in failing to install a handrail, and in failing to post adequate warning signs, at the exit where the incident occurred.²⁶⁶ Her FTCA claims were easily barred under the discretionary function exception, however, because the decision by the Park Service not to install a handrail or warning signs was understood by the court to involve a policy choice; it was “the product of a broader judgment call that favored aesthetics over safety.”²⁶⁷

A similar slip-and-fall claim was recently barred by the discretionary function exception in *Reichart v. United States*.²⁶⁸ The plaintiff in that case, while a visitor at the U.S.-owned Charlotte Pier in Rochester, New York, tripped over a hole in the concrete walkway and suffered personal injury.²⁶⁹ She alleged that the government agents in charge of the property negligently failed to inspect, maintain, and repair the pier, and negligently failed to warn the plaintiff of the dangerous condition.²⁷⁰ The district court had no difficulty finding that the property manager’s omissions were “grounded in considerations of public policy,” and were therefore protected by the FTCA’s discretionary function exception.²⁷¹

In *Irving v. United States*, a plaintiff who suffered horrific injuries in a workplace accident alleged that federal Occupational Safety and Health Administration (“OSHA”) officials had negligently conducted inspections of the factory where she worked, failing to note three serious violations of OSHA standards, and proximately causing her injuries.²⁷² The discretionary function exception was held to preclude this claim, as well, because “day-to-day decisions made by compliance officers . . . further OSHA’s enforcement policy of ensuring adequate safety in workplaces with a view toward efficient and effective use of limited enforcement resources, and are thus grounded in policy.”²⁷³ This despite the court’s admission that “[t]he government’s inspectors appear to have been negligent and the plaintiff suffered grievous harm.”²⁷⁴

V. AMENDING THE FTCA

These cases and others like them illustrate how the discretionary function exception precludes adjudication on the merits of claims that might very well succeed at common law. It thereby denies a set of potentially meritori-

²⁶⁵ 164 F.3d 688, 690 (1st Cir. 1999).

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 693.

²⁶⁸ 695 F.Supp. 2d 8 (W.D.N.Y. 2010).

²⁶⁹ *Id.* at 9–10.

²⁷⁰ *Id.* at 12.

²⁷¹ *Id.* at 15.

²⁷² 162 F.3d 154 (1st Cir. 1998).

²⁷³ *Id.* at 168–69.

²⁷⁴ *Id.* at 169.

ous claimants any genuine opportunity to seek legal redress. This is a significant harm. And what the exception gains in exchange—an overbroad layer of additional protection against undue governmental tort liability—cannot justify the harm. This Part proposes an alternative to the discretionary function exception that would provide the federal government with adequate security against undue tort liability, yet without effectively denying any potentially worthy FTCA claimants of legal recourse.

A. *Eliminating the Discretionary Function Exception*

Scholars have suggested a broad array of possible approaches to reining in the Supreme Court's discretionary function jurisprudence.²⁷⁵ Quite appropriately, these proposals have been addressed mainly to the judiciary.²⁷⁶ This Note's argument, by contrast, addresses the legislature. It takes up the question whether FTCA immunity for discretionary functions is worth preserving in its current statutory form. Given the availability of alternatives, this Note argues that it is not. The exception unjustifiably prevents a set of potentially meritorious claimants from arguing their claims on the merits, and it does so without any offsetting gains, except perhaps some savings in litigation costs.²⁷⁷

Congress should therefore amend the FTCA. Professor Peck has argued in this vein that the statutory text should clearly limit discretionary function immunity to cases in which a government agent, pursuant to his or her "discretionary authority," consciously weighed the risks and advantages of a possible course of conduct.²⁷⁸ While such an amendment would certainly be an improvement on the discretionary function exception under *Gaubert*, it does not go far enough. Professor Peck's proposal would still prevent adjudication on the merits of claims involving potentially genuine torts simply because the risk of harm was at some stage "encountered" by government

²⁷⁵ See Hyer, *supra* note 155, at 1116–47 (discussing and analyzing the proposed alternatives).

²⁷⁶ See *id.* But see Levine, *supra* note 86 (proposing administrative adjudication); Cornelius J. Peck, Laird v. Nelms: A Call for Review and Revision of the Federal Tort Claims Act, 48 WASH. L. REV. 391, 415–18 (1973) (proposing congressional amendment of discretionary function exception).

²⁷⁷ Many and perhaps most of the claims presently barred by the discretionary function exception do not involve genuine torts. Such claims would fail on the merits, at a later stage in the litigation, and would therefore cost the government some additional lawyering expense, see, e.g., Fishback, *supra* note 19, at 30 ("It does no one any favor to expend litigant and judicial resources on a case that the plaintiff cannot win."), but not any additional liability. Importantly, however, a subset of claims that are presently barred by the exception would likely succeed if fully adjudicated. See, e.g., *supra* notes 265–275 and accompanying text. Because the resulting liability would be wholly justified, the plaintiff having proven to a judge's satisfaction that some federal employee negligently caused his or her injury, avoiding such liability should not be counted a gain—not, at least, to a government that voluntarily opens itself to liability for genuine torts.

²⁷⁸ See Peck, *supra* note 276, at 416.

officials.²⁷⁹ To be sure, in the vast majority of cases reasonable people will disagree as to how much weight should be accorded various risks and advantages in crafting an official course of conduct. Where this is so, no objective standard of negligence is met, and no real tort has been committed. Nevertheless, it is conceivable that there are instances in which a government employee's weighing of the risks and advantages of a certain course of conduct—for instance, opting not to warn drivers of dangerous road conditions²⁸⁰—is such as no reasonable person would countenance.²⁸¹

This Note dissents²⁸² from the majority view among scholars that federal courts are not competent to make such determinations.²⁸³ The degree to which a court's reasonableness assessment involves untenable "second-guessing" has been greatly exaggerated. What is at stake in such an assessment, within an FTCA suit, is not the issuance *vel non* of a judicial order actually abrogating some existing government policy. FTCA plaintiffs do not ask the adjudicating tribunal to void the policy or regulation underlying a government tort. They ask, instead, for redress in the form of money damages²⁸⁴ where a government agent wrongfully caused injury through the breach of some duty owed to the plaintiffs. It might be protested that damage awards of this kind will have the practical effect of voiding, or at least of "chilling," the government policies at issue. But even granting for argument's sake that this may be so,²⁸⁵ such judgments still do not require courts to nullify, set aside, or declare illegal existing government policies. They do not require judges to step outside of their appropriate roles as adjudicators of tort claims.

Rather than alter the scope of the discretionary function exception, then, this Note proposes simply to repeal it. The "exercise or performance [of] or the failure to exercise or perform a discretionary function or duty"²⁸⁶ is not a helpful rubric under which to bar adjudication on the merits of a tort claim. While repeal of the exception would admittedly lead to some additional litigation, it cannot reasonably be predicted to create undue liability against the government—that is, liability beyond what the victims of genuinely tortious federal conduct are entitled to claim.²⁸⁷ It will undoubtedly be protested that to repeal this provision of the FTCA outright would be to open

²⁷⁹ See *id.*

²⁸⁰ See *Faber v. United States*, 56 F.3d 1122, 1125–27 (9th Cir. 1995).

²⁸¹ See *GOLDBERG & ZIPURSKY*, *supra* note 207, at 82–94 (discussing tort law's reasonable person standard for carelessness or "negligence").

²⁸² See *supra* notes 239–244 and accompanying text.

²⁸³ See *supra* notes 221–224 and accompanying text; Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 237 (1963) ("[A] court cannot undertake to determine whether complex government decisions are 'reasonable.'").

²⁸⁴ Strictly limited in the ways described *supra*, at notes 104–107 and accompanying text.

²⁸⁵ Recall, however, that successful FTCA claims are paid from a central federal Judgment Fund rather than from the offending agency's budget. See *supra* note 216 and accompanying text.

²⁸⁶ 28 U.S.C. § 2680(a) (2006).

²⁸⁷ See *supra* note 277.

the floodgates of government liability. But this is false; it ignores the extensive limitations on liability contained within the law of torts and the FTCA's other provisions.²⁸⁸ The discretionary function exception saves the federal government billions of dollars per year in the same way that a seventeenth and outermost moat protects a castle.²⁸⁹ It is a first line of defense, but hardly the unique one.²⁹⁰

B. No Recovery for Pure Economic Loss

Negligence law does not generally allow plaintiffs to recover for "pure" economic loss—that is, loss of wealth unrelated to physical harm or tangible property damage.²⁹¹ As a rule, in other words, defendants are under no duty to avoid negligently causing such losses.²⁹² In a minority of jurisdictions there has developed a limited exception for "particularly foreseeable" plaintiffs,²⁹³ and to one degree or another most jurisdictions recognize exceptions for certain defendant professionals, such as accountants and attorneys.²⁹⁴ Despite the limited nature of these exceptions, the worry that state tort law might evolve to permit recovery in additional circumstances of pure economic loss may have moved the framers of the FTCA's discretionary function exception.²⁹⁵ Earlier versions of the bill enacted as the FTCA included, rather than a generalized exception for discretionary functions, a set of exceptions for claims arising from the regulatory activities of the Federal Trade Commission and the Securities & Exchange Commission²⁹⁶—claims that presumably would have alleged pure economic loss.

Modern arguments for discretionary immunity likewise gain steam from the specter of recovery for pure economic loss. For example, when the plaintiff in *Gaubert* alleged purely financial losses on the order of \$100 million,²⁹⁷ Justice Department attorneys warned the Supreme Court of "an extraordinary [sic] grave danger of 'creating huge and unpredictable

²⁸⁸ See *supra* Part IV.C.

²⁸⁹ The imagery is inspired by Chelsea Sage Durkin, Comment, *How Strong Stands the Federal Tort Claims Act Wall? The Effect of the Good Samaritan and Negligence Per Se Doctrines on Governmental Tort Liability*, 39 ARIZ. ST. L.J. 269, 269–70 (2007) (quoting *Jaffee v. United States*, 592 F.2d 712, 717 (3d Cir. 1979)).

²⁹⁰ See *supra* Part IV.C (discussing additional limitations and protections within state common law and the FTCA's other provisions).

²⁹¹ GOLDBERG & ZIPURSKY, *supra* note 207, at 123–28.

²⁹² The leading case for this general rule is the Supreme Court's admiralty decision, *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927) (Holmes, J.).

²⁹³ *People Express Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 116 (N.J. 1985) (holding that defendants owe a duty of reasonable care to avoid causing pure economic loss to "an identifiable class" of plaintiffs whom the defendant knows "are likely to suffer such damages from [their] conduct"); see also *Aikens v. Debow*, 541 S.E.2d 576, 587–89 (W. Va. 2000) (discussing this limited exception as "the minority view").

²⁹⁴ See, e.g., GOLDBERG, SEBOK & ZIPURSKY, *supra* note 238, at 108–09.

²⁹⁵ See *supra* note 191 and accompanying text.

²⁹⁶ See, e.g., JAYSON & LONGSTRETH, *supra* note 4, § 12.02.

²⁹⁷ See *supra* note 166 and accompanying text.

governmental liabilities.’”²⁹⁸ Citing Gaubert’s prayer for damages, the government’s brief stressed that “the financial loss in any individual thrift failure is likely to be large indeed” and that, taken together, liability in such cases would impose “staggering financial losses” on the United States.

The concern that damage awards for pure economic loss could seriously impede federal regulation is legitimate, and this Note does not propose to open the government to such liability. But given the common law’s deep suspicion of such claims,²⁹⁹ the FTCA’s discretionary function exception as presently construed by the Supreme Court is far broader than necessary to meet the underlying concern.³⁰⁰ In place of a generalized and difficult-to-administer immunity for all “discretionary functions,” Congress should create a new exception barring recovery for claims alleging pure economic loss.³⁰¹ Such an exception would provide the federal government with modest but proportional security against the risk that new common law theories of tort liability would threaten the United States with undue financial burdens.

C. Discretionary Function Immunity and the Constitution

When Assistant Attorney General Francis Shea testified before Congress about the FTCA prior to its enactment, he suggested that the discretionary function exception was meant to codify anticipated judicial construction. Had the FTCA omitted this exception, he suggested, “the cases embraced within [it] would have been exempted” in any event by judges interpreting and implementing the Act.³⁰² “It is not probable,” Shea explained, “that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action.”³⁰³ The discretionary function exception was included in the FTCA simply to “make[] this specific.”³⁰⁴

Had the exception not been included in the Act, on what basis would courts have exempted the claims it embraces? Recent case law suggests that an answer may be found in constitutional separation of powers doctrine. The

²⁹⁸ Brief for Petitioner at 46, *United States v. Gaubert*, 499 U.S. 315 (1991) (No. 89-1793), 1990 WL 505727, at *46 (quoting *Gray v. Bell*, 712 F.2d 490, 511 (D.C. Cir. 1983)).

²⁹⁹ See *supra* notes 291–294 and accompanying text.

³⁰⁰ See *supra* Parts III.C, IV.

³⁰¹ The new exception covering “any claim for pure economic or financial loss” could be incorporated into 28 U.S.C. § 2680, which sets out the various excepted categories of cases to which “[t]he provisions of this chapter and section 1346(b) of this title shall not apply.” 28 U.S.C. § 2680 (2006).

³⁰² *Tort Claims Hearings*, *supra* note 60, at 29 (statement of Assistant Att’y Gen. Francis M. Shea).

³⁰³ *Id.*; see also *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984) (“It was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction . . .”).

³⁰⁴ *Id.*

Suits in Admiralty Act (“SAA”),³⁰⁵ which allows plaintiffs to bring maritime tort claims against the United States, contains no express discretionary function exception.³⁰⁶ Nevertheless, every federal Court of Appeals to consider the question has held that such an exception must be read into the SAA,³⁰⁷ lest the Act should run afoul of the Constitution’s framework of separated powers. The Second Circuit has declared, for instance, that “principles of separation of powers mandate that the judiciary refrain from deciding questions consigned to the concurrent branches of the government.”³⁰⁸ More recently, a Fourth Circuit majority agreed that adjudication on the merits of federal tort claims arising from discretionary functions would interfere with the Executive’s ability “faithfully [to] execute” the laws under Article II of the Constitution.³⁰⁹ It concluded that “separation-of-powers principles . . . are important enough to require courts to apply a discretionary function exception to statutes [such as the SAA] that are silent on the issue.”³¹⁰ To the extent that this is correct, this Note’s proposal to repeal the FTCA’s discretionary function exception might be thought to face serious constitutional difficulties.

A fully-elaborated argument against this proposition, that the Constitution would require discretionary function claims to be exempted from the FTCA, whatever Congress might say about the matter,³¹¹ is beyond the scope of this Note. Judge Luttig’s vigorous dissent in *McMellon v. United States* sets out the main contours of a persuasive reply. The proposition erroneously “equat[es] liability on behalf of the United States with infringement on the Executive’s power to execute the laws,”³¹² as if courts ruling on FTCA claims actually issued prospective orders vacating government policy. In fact, only the federal government’s post hoc liability to a particular plaintiff or plaintiffs is at stake in the adjudication of FTCA claims, and the “judicial

³⁰⁵ 46 U.S.C. §§ 30901–30918 (2006).

³⁰⁶ *Id.*

³⁰⁷ Sisk, *supra* note 3, at 192 (citing cases).

³⁰⁸ *In re Joint Eastern and Southern Districts Asbestos Litigation* (Robinson v. United States), 891 F.2d 31, 35 (2d Cir. 1989).

³⁰⁹ *McMellon v. United States*, 387 F.3d 329, 342 (4th Cir. 2004) (en banc), *cert. denied*, 125 S. Ct. 1828 (2005).

³¹⁰ *Id.* at 344.

³¹¹ The *McMellon* majority flirts with and comes close to accepting this proposition:

[T]he ability to withhold discretion in the first instance does not necessarily mean that Congress may undermine discretion affirmatively granted to the Executive branch through the imposition of boundless tort liability. That is to say that in areas where Congress has vested the Executive with discretion, we are not as certain that Congress could waive sovereign immunity and expressly provide that no exception to the waiver of immunity shall be made for the Executive’s performance of discretionary acts. In our view, such a statute might be subject to a constitutional challenge on separation-of-powers grounds.

Id. at 343–44 n.5.

³¹² *Id.* at 362 (Luttig, J., dissenting).

second-guessing³¹³ involved goes to the particular question whether a government agent breached a valid duty of care owed to the plaintiff, and not to the wisdom or reasonableness of some policy judgment in the abstract. Asking judges to adjudicate such claims no more impairs the separation of powers than does requiring them, under the Administrative Procedure Act, to hold unlawful agency actions that are arbitrary or involve an abuse of discretion.³¹⁴ Contrary to the suggestion that permitting adjudication of discretionary function claims on their merits would set the courts “on an aggressive course far afield of judicial competence,”³¹⁵ it seems plain that federal judges are equipped to apply state common law judiciously, and that limitations within that law and in the FTCA’s other provisions³¹⁶ eliminate any danger of aggressive or undesirable interference with government policy decisions.

It must nevertheless be conceded that in light of case law on the implied discretionary function exception of the SAA, simple repeal of the FTCA’s exception, without further statutory guidance, might be insufficient to give effect to this Note’s proposal. Simple repeal, in other words, might yield a version of the FTCA that courts would take to be “silent” on the question of discretionary function immunity.³¹⁷ To avoid this result, Congress should provide courts with a clear statement, amending the FTCA’s jurisdictional provision³¹⁸ explicitly to embrace claims “based upon the exercise or performance [of] or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government.”³¹⁹ Such a clear statement of congressional intent would minimize the likelihood of courts’ continuing to confer discretionary function immunity as a constitutional default rule.

VI. CONCLUSION

Chief Justice Jay’s wish for federal government accountability to the people it harms is overdue for fulfillment. Although Congress opened the federal government to responsibility through tort law by enacting the FTCA in 1946, that waiver of sovereign immunity was subsequently narrowed through judicial construction and implementation. Many potentially meritorious claims against the government, including claims in which a federal official’s carelessness can be proved, are now denied adjudication on the

³¹³ *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).

³¹⁴ *McMellon*, 387 F.3d at 369 (Luttig, J., dissenting).

³¹⁵ *Id.* at 353 (Wilkinson, J., concurring).

³¹⁶ *See supra* notes 231–238, 250–263 and accompanying text.

³¹⁷ *See, e.g., Limar Shipping Ltd. v. United States*, 324 F.3d 1, 7 (1st Cir. 2003) (requiring “express Congressional directive” for the authority to adjudicate discretionary function cases on their merits).

³¹⁸ 28 U.S.C. § 1346(b)(1) (2006).

³¹⁹ *Id.* § 2680(a) (discretionary function exception).

merits, in keeping with the United States' retained immunity for discretionary functions. Because the discretionary function exception is unnecessary to achieve its only plausible purposes—protecting policymakers' independence and maintaining the separation of powers—and because ample protections against undue liability are found in the common law of torts and in the FTCA's other provisions, it cannot justify these burdens. This Note has argued, accordingly, that Congress should amend the FTCA to eliminate the discretionary function exception, replacing it with a more modest exception that bars claims alleging pure economic loss.

Unfortunately, such a proposal is unlikely to gain traction in our Congress. No organized interests speak for the geographically and socioeconomically dispersed and prospectively unidentifiable victims of government torts.³²⁰ For the foreseeable future, such victims will continue to face a significant threshold hurdle in the FTCA's discretionary function exception. At least some plaintiffs with potentially meritorious claims will continue to be denied adjudication on the merits—and with it the accountability that citizens of a modern constitutional republic rightly demand from their government.

³²⁰ See, e.g., Ronald A. Cass, *The Discretionary Function Exception to the Federal Tort Claims Act*, 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 1503, 1548 (1987) (suggesting legislative clarification of the discretionary function exception, but noting that “no significant constituency is interested in working to correct the problems presented by [the exception’s] current construction”). The same cannot be said for opponents of the Feres Doctrine, which concerns victims who share in active-duty military service. The most recent congressional reform effort on their behalf was the Carmelo Rodriguez Military Medical Accountability Act, H.R. 1478, 111th Cong. (2009), which never reached the House floor for a vote.