Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort

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INTRODUCTION

The Federal Tort Claims Act (FTCA)\(^1\) subjects the federal government to tort liability largely to the same extent as a private individual under like circumstances.\(^2\) Unlike private parties, however, the federal government is protected under the FTCA by the discretionary function exception\(^3\) which, as its name suggests, shields the United States from liability based on its officials' exercise of "discretionary" functions. The discretionary function exception presents a substantial obstacle for tort claimants to surmount, limiting the federal government's exposure by perhaps billions of dollars a year and unquestionably preventing many of those injured from receiving compensation. Despite over forty-five years of implementation, no coherent framework for applying the discretionary func-

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1. The Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (1988). In recent years over 3000 FTCA suits have been pending against the United States at any one time, involving claims of approximately five billion dollars. New suits have been filed at a rate of over 1,500 a year, and more than ten times that number of administrative claims have been filed each year. L. Jayson, Handling Federal Tort Claims § 1, at 1–9 (1990).


3. 28 U.S.C. § 2680(a) (1988). The discretionary function exception excludes claims "based upon the exercise or performance 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, whether or not the discretion involved be abused." Id.
tion exception exists. The ambiguous language of the exception, in tandem with the absence of any prior or subsequent direction from Congress, has left the contours of the exception unformed.

This Article will re-examine the discretionary function exception to ascertain when the federal government should be immune for conduct that would be actionable in tort if committed by private parties. Most agree that separation of powers concerns furnish part of the justification for the government's retained immunity. In the absence of immunity, judicial review of agency actions through the medium of a tort action might interfere with agency decision and policy making. Yet, the question remains why the federal government should not be forced—like any private entity—to internalize the costs of its actions by paying tort judgments. If the theory of tort law is in part to compel private entities to become more efficient in light of potential tort liability, then there is no apparent reason why potential liability should not similarly force the government to be more prudent in its operations. Part of the answer to that puzzle lies in the deterrence provided by the administrative process. Unlike private parties, government actors are at times constrained by political forces that minimize the potential for wrongdoing. Indeed, our structure of government suggests that judges should be reluctant to second-guess the efficacy of those political checks. Based primarily on the link between deterrence and the separation of powers doctrine, this Article proposes a new approach to the discretionary function exception as a means of improving the current liability system.

4. The term "discretionary function" is probably the source of most of the difficulty. Discretion exists every time there is room for choice, whether in filing criminal charges, predicting weather, or deciding when to brake on an icy street. Construing the "discretion" in discretionary function that broadly, however, would gut almost the entire FTCA, permitting tort challenges of only the most ministerial government actions.

5. See infra text accompanying notes 23–24.

6. This Article does not address the perplexing question of what level of liability would produce optimal deterrence. Subjecting the government to liability to the same extent as a private party could conceivably over-deter the government because it cannot enjoy or internalize the benefits of its nonnegligent conduct. Cf. Mashaw, Civil Liability of Government Officers: Property Rights and Official Accountability, 42 LAW & CONTEMP. PROBS. 8, 26–28 (1978). On the other hand, because of the vast array of policy objectives underlying any governmental act, the government might not be as deterred by monetary liability as private parties. Irrespective of the optimal level of deterrence, however, the prospect of tort damages can be expected to deter the federal government at least to some extent. The question, therefore, remains whether governmental immunity is appropriate in a large category of cases, namely those involving the exercise of discretionary functions.
In Part I, this Article surveys the history and early applications of the discretionary function exception, focusing upon the approaches developed by the Supreme Court and the circuit courts. Courts have expressed considerable solicitude for separation of powers principles, declining to second-guess certain agency actions through the medium of a tort suit. For the most part they have agreed that the nature of the governmental action challenged is dispositive in determining whether the discretionary function exception applies. Various tests have been articulated: courts at times have shielded the discretion implicated in discharging all uniquely governmental functions; in carrying out all regulatory programs of government; in formulating all governmental decisions at the planning, as opposed to the operational, stage; and most recently, in protecting all governmental decisions grounded in social, economic, or political policy.

Part II of this Article argues that the courts' exclusive focus on the nature of the governmental action involved has ignored considerations of deterrence and, from a separation of powers perspective, has over-protected the government. From a deterrence perspective, applying the discretionary function exception removes a potentially critical check upon government wrongdoing. The exception, therefore, should be applied, if possible, only when other forces adequately constrain government actions. Although it may be impossible to gauge the effectiveness of various political checks upon government action, a relatively powerful check lies in the process by which agencies formulate policy. A policy generally reflects

7. Courts therefore have attempted to delineate which types of discretion should be protected. A few courts, following a signal in the Supreme Court's decision in Dalehite v. United States, 346 U.S. 15 (1953), stressed the status of the government official involved; the more senior the official, the more likely the action would be protected by the discretionary function exception. For the most part, though, courts have focused exclusively on the nature of the governmental action challenged. See infra notes 8–11.

8. See, e.g., Dalehite, 346 U.S. at 32–34.

9. See, e.g., Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986); Proctor v. United States, 781 F.2d 752 (9th Cir.), cert. denied, 476 U.S. 1183 (1986).

10. See, e.g., Dalehite, 346 U.S. at 42; E. Ritter & Co. v. Dep't of the Army, Corps of Eng'rs, 874 F.2d 1236 (8th Cir. 1989); Alabama Elec. Coop., Inc. v. United States, 769 F.2d 1523 (11th Cir. 1985).

the contributions of many within the agency, and its prospective reach ensures that future contingencies have been considered. On the other hand, nondeliberative actions by agency personnel—whether consisting of decisions by government physicians, inspectors, or drivers—have not been similarly tempered by prior deliberation and debate. Thus, because its actions are at times circumscribed by the administrative process and the accompanying safeguards of generality, prospectivity, and deliberation, the federal government may be more readily deterred from wasteful conduct than private enterprises.

The separation of powers perspective largely converges with that of deterrence. Separation of powers principles suggest protecting governmental acts stemming directly from purposeful policy, for such actions embody the political judgment of the agency. Just as courts would never second-guess the wisdom or reasonableness of legislation, despite possible negligence, so they should leave deliberative agency actions undisturbed. Review of those actions under state negligence law, coupled with the threat of substantial damages, threatens the integrity of agency policy making. The discretionary function exception should therefore generally hinge, not on the nature of the governmental action challenged, but on the process by which that action is reached.

Even in the absence of a deliberate policy, however, separation of powers principles should still protect the government from challenges to prosecutorial discretion, agency inaction, or other agency conduct which would not otherwise be reviewable under administrative law principles. Because judges may lack the capacity to exercise meaningful review of the internal decision making of agencies in such contexts, awarding damages under the auspices of the FTCA could severely disrupt governmental policy making and implementation efforts. But those instances are few and far between; there is nothing sacrosanct about every discretionary action undertaken by an agency official or employee that immunizes it from judicial review. Judges routinely second-guess agency exercises of discretion in other settings without threatening the agency's ability to carry out its functions.

12. The Supreme Court has held that such actions are presumptively immune from judicial review. See, e.g., Heckler v. Chaney, 470 U.S. 821 (1984) (holding reviewable challenge to FDA's refusal to initiate enforcement proceedings under the Federal Food, Drug and Cosmetic Act).

13. Indeed, one of the primary functions of the Administrative Procedure Act (APA) is to subject the discretion inherent in most agency rule makings and adjudications to judicial review. 5 U.S.C. § 706 (1988) (prescribing abuse of discretion standard
acts should automatically be equated with the discretionary functions of government that the FTCA exception shields. Thus, the discretionary function exception should apply to protect government functions either when the federal government official's action stems from a deliberate agency policy or, more rarely, when the official's action cannot be subject to meaningful judicial review in any context.

Finally, Part III of this Article applies the process approach to a sampling of decisions analyzing the exception. As a descriptive matter, this approach is largely consistent with the results, though not the reasoning, in the handful of Supreme Court decisions addressing the discretionary function exception. Yet understanding the discretionary function exception in the larger framework of a governmental tort system will help clarify future analysis, and indeed may also require re-examining the results that have been reached recently by a number of lower courts.

I. DEVELOPMENT OF THE DISCRETIONARY FUNCTION EXCEPTION

The history of the FTCA in general and the discretionary function exception in particular has been related before. A brief recapitulation, however, may prove helpful in understanding the courts' current efforts to define the discretionary function exception.

For the first 150 years of the nation's existence, tort victims could not recover against the federal government in court. The doctrine of sovereign immunity barred all suits. Those injured by

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the government could only seek political redress through the cumbersome mechanism of private bills, which are legislative enactments awarding compensation to petitioning individuals.\textsuperscript{16}

With the increasing complexity and breadth of federal regulatory activities, the private bill mechanism became less palatable to Congress. Irrespective of Congress’ questionable ability to select deserving plaintiffs, the deliberations themselves prevented Congress from addressing other national concerns.\textsuperscript{17} Congress partially responded in 1920 and 1925 by opening the courthouse doors to victims of maritime torts under the Suits in Admiralty and Public Vessels Acts,\textsuperscript{18} and by allowing department heads to settle claims for property damage not exceeding one thousand dollars.\textsuperscript{19} Bills to create a more comprehensive liability scheme were debated at every session of Congress thereafter.

After numerous revisions, Congress enacted the Federal Tort Claims Act in 1946.\textsuperscript{20} The Act waives the government’s tort immunity, but subjects that waiver to articulated exceptions. The discretionary function exception precludes all claims “based upon the exercise or performance 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, whether or not the discretion involved be abused.”\textsuperscript{21} The word “discretionary” is far from clear—no indication of the contemplated discretionary functions or duties is given. Judicial precedents are of limited help, particularly given the somewhat vague analyses of what was considered discretionary at common law.\textsuperscript{22}

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\textsuperscript{16} See generally Holtzoff, The Handling of Tort Claims Against the Federal Government, 9 Law \& Contemp. Probs. 311 (1942); Shimomura, supra note 15.
\textsuperscript{17} In 1942, Holtzoff estimated that an average of 20% of such tort bills introduced were enacted, and that meritorious claims took years to process to conclusion. Holtzoff, supra note 16, at 321; see also Borchard, Government Liability in Tort, 34 Yale L.J. 1 (1924).
\textsuperscript{19} Act of Dec. 28, 1922, ch. 17, 42 Stat. 1066.
\textsuperscript{21} Id. at 845.
\textsuperscript{22} The discretionary function exception probably had three antecedents. First, as a matter of common law, courts determined that they would only issue writs of mandamus against officers discharging ministerial, as opposed to discretionary, governmental tasks. See, e.g., Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958); Kendall v. Stokes, 44 U.S. (3 How.) 87 (1845). Second, at the time the FTCA was enacted (and until recently, see Westfall v. Erwin, 484 U.S. 292 (1988)), government officials were absolutely immune from any common-law tort involving discretion committed within the outer scope of their duties. Congress has recently expanded government officials’ immunity to include all acts in the scope of their employment, whether involving discre-
The legislative history also does not clarify the scope of the exception. A Justice Department official justified the exception on the ground that discretionary administrative action should not be tested by tort actions, and that damage actions should not be allowed to interfere with the discretionary authority exercised by regulatory agencies such as the Federal Trade Commission. He also testified that the exception would in effect codify the common-law tradition of refusing to interfere through mandamus with the discretionary acts of government officials. Finally, the pertinent House Report explained that the exception exempts from the bill claims based upon the performance or non-performance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused. This is a highly important exception, intended to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion.

Thus, Congress plainly intended that some agency negligence would be exempted, but the scope of the exception was left undefined.

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24. H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5–6 (1946). Indeed, the terse legislative history that exists is at least somewhat consistent with all recent elaborations of the discretionary function exception, including my own proposal. See infra text accompanying notes 149–151.
The Supreme Court first addressed the discretionary function exception explicitly in *Dalehite v. United States*. As part of the effort to provide food for a ravaged Europe after World War II, the United States decided to ship fertilizer overseas. The fertilizer contained ammonium nitrate, which is highly combustible. Explosions caused by fertilizer stored for export to France levelled the port of Texas City, Texas in 1947 with severe loss of life and property. In a 4–3 decision, the Court held that the discretionary function exception protected the government’s actions, both in formulating the plan to export the fertilizer, and in implementing the plan through packaging, labelling, and issuing shipping directives. The Court stressed that the discretion protected in the Act referred to “the discretion of the executive or the administrator to act according to one’s judgment of the best course.” Thus, “it . . . 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.” The Court seemingly protected any act made “at a planning rather than

25. 346 U.S. 15 (1953). The Court had mentioned the exception in *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, the Court held that the Federal Tort Claims Act was not available to members of the armed services who wished to sue the United States for injuries sustained in service. Despite any explicit exception in the Act for members of the military, the Court justified its result on several grounds. First, the Court reasoned that, because the United States is only liable to the same extent that a private party is, and because no private party can raise an army, liability should not lie. *Id.* at 141–42. Second, it reasoned that, because the military is so distinctly federal, Congress could not have intended judges to second-guess relationships in the military on the basis of state law. *Id.* at 142–44. Third, because Congress already provided veterans’ benefits for injuries incident to service, the Court asserted that Congress could not have intended the FTCA to duplicate such pre-existing remedies. *Id.* at 145. The Court has since defended the *Feres* decision on the ground that Congress could not have intended to provide such a vehicle to disrupt military discipline. *United States v. Brown*, 348 U.S. 110, 112 (1954). For a blistering critique of *Feres*, see *United States v. Johnson*, 481 U.S. 681, 692–701 (1987) (Scalia, J., dissenting).

Lower courts prior to *Dalehite* construed the exception in widely divergent ways. Compare, e.g., *Thomas v. United States*, 81 F. Supp. 881 (W.D. Mo. 1949) (operative details arising out of discretionary projects such as flood control protected by exception) with *Ure v. United States*, 93 F. Supp. 779 (D. Or. 1950) (exception does not immunize government from damage caused by negligent canal construction). The lack of consensus was vividly illustrated in the *Steel Seizure* case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), when the district court judge presiding over the motion for a temporary restraining order opined that the discretionary function exception would not bar a tort action if courts ultimately determined that the President exceeded his authority in seizing the steel mills. Incredibly, counsel for the government initially agreed. A. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE 43 (1990 ed.).

27. *Id.* at 34.
28. *Id.* at 35–36.
operational level"29 given that even the agency's directions for storing the fertilizer had been approved at a high level.30

Justices Jackson, Black, and Frankfurter agreed with the majority that the army's formulation of the fertilizer plan fell within the discretionary function exception. But they argued that the army's failure to conduct a wider inquiry regarding the dangers of shipping the fertilizer, and its subsequent failure to warn of those dangers, were not protected by the discretionary function exception:

the common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.31

Only when the government's negligence involves "policy decisions of a regulatory or governmental nature, [not] actions akin to those of a private manufacturer," should the exception apply.32

Although the Supreme Court did not squarely revisit the discretionary function exception for decades,33 two years after Dalehite it issued a pair of opinions directly bearing upon construction of the exception. In Indian Towing Co. v. United States,34 plaintiff sued for lost cargo when a tug ran aground allegedly because of the Coast Guard's negligent failure to repair a lighthouse. The government conceded that the discretionary function exception would not excuse its alleged negligence, but it argued—consistent with language in Dalehite 35—that it could not be liable because the activity involved was uniquely governmental.36 The Court rejected the government's argument, holding that the distinction between proprietary and governmental actions was untenable.37 And in

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29. Id. at 42.
30. Id. at 37.
31. Id. at 58 (Jackson, J., dissenting).
32. Id. at 60.
35. "[I]t was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function." 346 U.S. at 28.
36. 350 U.S. at 64. The government relied on a restrictive reading of 28 U.S.C. § 2674 (1988), which provides for government liability for tort claims "in the same manner and to the same extent as a private individual under like circumstances."
37. 350 U.S. at 65. The Court reasoned that such a distinction had long plagued the law of municipal corporations, was "inherently unsound," and was unlikely to clarify application of the FTCA. Id. Because so many functions exercised by the federal government are or can be executed by private parties, there are no adequate benchmarks to distinguish those functions that are uniquely governmental.
United States v. Union Trust Co.,\textsuperscript{38} plaintiffs sued the government for the negligence of a federal air traffic controller. Despite the fact that the government raised the discretionary function defense in Union Trust Co., the Court summarily affirmed liability on the basis of Indian Towing.\textsuperscript{39} Those two cases cast doubt on the proper scope of Dalehite, particularly because the dissenters in Dalehite were in the majority in Indian Towing, and the Justices in the majority in Dalehite were in the dissent. The Court apparently signalled that negligence at the operational level—failing to repair a lighthouse and misdirecting air traffic—is not protected under the FTCA even if the activity in question could be considered purely governmental.

For the next thirty years, the lower courts applied the planning versus operational level distinction, with varying emphases. In general, broad policies formulated by government were protected, but applications of those policies were not. For instance, the decision to warn pilots whenever flight conditions posed a hazard was held to be protected by the discretionary function exception; but application of that policy to particular hazardous conditions was subject to suit.\textsuperscript{40} Determining where to place power lines was held to fall within the exception, but negligently stringing the wires or failing to warn of their existence was not.\textsuperscript{41} Some cases are simply difficult to fit into any pattern, such as courts' conclusions that the discretionary function exception protected national park employees' handling of a marauding bear,\textsuperscript{42} the government's supervision of migratory workers,\textsuperscript{43} or government engineers' negligence in performing dredging operations.\textsuperscript{44} Due to its amorphous nature, the planning versus operational level approach received much criticism from commentators.\textsuperscript{45}

\begin{footnotes}
\item[38] 350 U.S. 907 (1955) (per curiam).
\item[39] Id.
\item[40] Wenninger v. United States, 234 F.2d 499 (D. Del. 1964), aff'd, 352 F.2d 523 (3d Cir. 1965).
\item[41] United States v. Washington, 351 F.2d 913 (9th Cir. 1965).
\item[43] Goodwill Indus. v. United States, 218 F.2d 270 (5th Cir. 1954).
\item[44] Boston Edison Co. v. Great Lakes Dredge & Dock Co., 423 F.2d 891 (1st Cir. 1970).
\item[45] See, e.g., Jayson, supra note 14; Peck, supra note 14; Reynolds, supra note 14; Comment, Discretionary Function Exception, supra note 14; Comment, Federal Tort Claims, supra note 14.
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The Supreme Court left the contours of the discretionary function exception untouched until its unanimous 1984 decision in United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines). There, the Court held that the discretionary function exception barred plaintiffs' challenge to the decision of the Federal Aviation Administration to delegate responsibility for compliance with FAA safety regulations to the aircraft manufacturer and to monitor compliance by means of a spot check system. The Court stressed the exception's purpose "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." Although the Court did not advert to the planning versus operational level distinction, it noted that the status of the actor was not dispositive: "it 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."

In a companion case to Varig, United Scottish Insurance Co. v. United States, plaintiffs alleged that FAA employees certified installation of a cabin heater in an airplane later involved in a crash, despite the fact that the heater was installed in violation of FAA regulations. The record was unclear whether the FAA employees actually inspected the airplane. Without extensive discussion, the Court held that actions of the FAA employees in executing the inspection program were also protected by the discretionary function exception.

46. The Court in 1963 held that a federal prisoner could sue under the FTCA for injuries sustained in prison, but did not address the exception explicitly. United States v. Muniz, 374 U.S. 150 (1963). After Congress enacted a comprehensive scheme to compensate those federal prisoners injured by government personnel, the Court barred recovery under the FTCA. United States v. Demko, 385 U.S. 149 (1966).
48. Id. at 820.
49. Id. at 814.
50. Id. at 813.
52. Lower courts attempting to apply the teachings of Varig disagreed over two fundamental issues affecting the discretionary function exception. First, a conflict arose over whether all regulatory acts of government are protected by the discretionary function exception. Compare Proctor v. United States, 781 F.2d 752 (9th Cir.) (FAA regulatory process immune from review), cert. denied, 476 U.S. 1183 (1986) and Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986) (OSHA inspection scheme protected from review) with Collins v. United States, 783 F.2d 1225 (5th Cir. 1986) (holding that discretionary function exception does not protect all mine inspections under auspices of Mine Safety and Health Administration) and McMichael v. United
The Supreme Court attempted to clarify the exception once more in *Berkovitz v. United States*.\(^53\) Plaintiff asserted that he contracted polio after receiving a vaccine approved by the National Institute of Health's Division of Biologic Standards. He alleged first that the Institute failed to obtain certain information from the manufacturer, as mandated by the regulatory scheme, prior to issuing a license.\(^54\) Despite the regulatory context, the Court held that "[w]hen a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply."\(^55\) The plaintiff next alleged that the Food and Drug Administration's Bureau of Biologics was negligent in releasing the specific lot of vaccines because the lot did not comply with FDA standards. The Court noted that "the discretionary function exception bars any claims that challenge the Bureau's formulation of policy as to the appropriate way in which to regulate the release of vaccine lots."\(^56\) The Court explained further that, if the policies formulated by the Bureau "allow room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion."\(^57\) But if the policies leave no room for discretion, directing FDA officials instead to reject all nonconforming lots, then the discretionary function exception would not apply.

Finally, lower courts have continued to struggle with application of the discretionary function exception in the wake of *Berkovitz*. The disagreement turns on whether the discretionary

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54. *Id.* at 542.
55. *Id.* at 544.
56. *Id.* at 546.
57. *Id.* As this Article went to press, the Supreme Court in *United States v. Gaubert*, 59 U.S.L.W. 4244 (1991), elaborated on the analysis pursued in *Farig* and *Berkovitz*. In holding federal banking regulators immune from a challenge to their oversight of a savings and loan, the Court rejected the continuing validity of the planning versus operational level distinction, explaining that the "permissible exercise of policy judgment," *id.* at 4247, can exist at the operational as well as at the planning level. If choice exists, and that choice is "susceptible" to policy analysis, then the discretionary function exception applies.
function exception protects agency actions that inherently involve a certain level of discretion (though the nature of that discretion remains in dispute), or only those agency actions that are actually products of that discretion. For instance, in *Boyd v. United States*, plaintiff’s decedent, while snorkeling in a lake administered by the United States Army Corps of Engineers, was struck and killed by a boat. The Corps did not warn swimmers of the potential danger from boats. The Tenth Circuit held that, even though the decision not to warn could have been based on policy considerations grounded in social or economic policy, there was no evidence that it was and, therefore, the decision was not protected by the discretionary function exception.

In contrast, the Third Circuit in *United States Fidelity & Guaranty Co. v. United States* held that the discretionary function exception protected the Envi-

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58. Lower courts also continue to disagree whether “technical” or “professional” discretion is protected by the discretionary function exception. *Compare Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1031 (9th Cir. 1989) (technical and scientific judgment not protected as policy) *with Ayer v. United States*, 902 F.2d 1038, 1043–44 (1st Cir. 1990) (technical judgment in determining not to erect safety railings on platform protected). For instance, does the professional judgment of a government engineer or physician warrant the same protection as a policy decision reached by the head of an agency? While never explicitly addressing the issue, the Court did hold in *Dalehite v. United States*, 346 U.S. 15, 40–41 (1953), that the “technical” determination of how to store fertilizer was protected. Similarly, in *Berkovitz*, 486 U.S. at 544, the Court indicated that the discretion to determine whether a particular lot of vaccine conformed with agency regulations would also be protected. Indeed, because Congress delegates such technical authority to agencies in light of those agencies’ presumed expertise, protecting all exercise of policy making authority, whether grounded in political or professional judgment, appears warranted. This is not to suggest that all professional actions are automatically protected; rather, as discussed in *infra* notes 118–130 and accompanying text, that all professional “policy” judgments merit such protection. The Supreme Court in *Gaubert* apparently agreed, reasoning that discretion may be exercised in applying technical skills, as well as in formulating broader public policy.

59. 881 F.2d 895 (10th Cir. 1989).

60. *Id.* at 898 n.3; *accord Dube v. Pittsburgh Corning*, 870 F.2d 790, 797–98 (1st Cir. 1989) (government’s failure to warn about asbestos hazard was not protected, because there was no evidence that the failure stemmed from policy considerations as opposed to mere oversight).

61. 837 F.2d 116 (3d Cir.), *cert. denied*, 487 U.S. 1235 (1988). Disputes also exist within the courts themselves. *Compare Boyd*, 881 F.2d 895 (government’s failure to warn is not within discretionary function exception, because its failure was not based on policy considerations) *with Flynn v. United States*, 902 F.2d 1524, 1531 (10th Cir. 1990) (protecting Park Service employees’ response to an automobile accident, even though no evidence indicated that their response stemmed from a concerted policy); *compare Dube*, 870 F.2d 790 (government is not exempted from liability for its breach of state law duty to warn, because there was no evidence that this failure was motivated by policy considerations) *with Shuman v. United States*, 765 F.2d 283, 290 (1st Cir. 1985) (shielding government’s failure to warn employees of asbestos danger despite no evidence of concerted policy).
rnonmental Protection Agency's cleanup efforts at a toxic waste site. The court indicated that, as long as the subject matter of an agency's activity involves policy considerations, "it is irrelevant whether the government employee actually balanced economic, social, and political concerns in reaching his or her decision." 62

II. ACCOMMODATING THE NEED FOR DETERRENCE WITH THE CONCERN FOR PRESERVING THE SEPARATION OF POWERS

The discretionary function exception serves principally to maintain the allocation of powers among the branches. 63 If Con-

62. 837 F.2d at 120; see also Gordon v. Lykes Bros. Steamship Co., 835 F.2d 96, 100 (5th Cir.) ("[I]nact of due care in promulgating a policy, or in having no policy or program at all on an issue, however imprudent it might seem, is encompassed within the discretionary function exception.") (emphasis added) (quoting Shuman, 765 F.2d at 290, cert. denied, 488 U.S. 825 (1988).

63. The FTCA as a whole also serves a compensation goal, although many deserving parties are excluded from its ambit. In light of the compensation goal, the discretionary function exception arguably should apply only to protect government actions that are likely to produce many victims, so that the loss will at least be spread to a certain extent. Activities affecting mass transportation, nationwide energy supplies, or financial markets are somewhat likelier to cause widespread harm than the Department of Agriculture's regulation of apples. If a certain crop of apples becomes tainted with alar, however, the question might be closer. Additionally, if the loss falls upon an organized group, such as cable television operators, we might be more willing to allow such a loss. Organized groups generally are able to protect their interests, either by bargaining for compensation or by obtaining some consideration in exchange for accepting the possibility of tortious losses. Interpreting the discretionary function exception in that fashion, however, does not seem workable, and there is certainly no authority in the text itself for such an approach.

Some have suggested instead that the discretionary function exception should be viewed as a safety valve which Congress intended courts to use to protect the federal budget from unforeseen demands. See, e.g., Gray v. Bell, 712 F.2d 490, 511 (D.C. Cir. 1983) (arguing that discretionary function exception is necessary to limit the chances that enormous and unpredictable liability will be imposed upon the government), cert. denied, 465 U.S. 1100 (1984); Reynolds, supra note 14, at 122–23 (same). Perhaps Congress feared that there would arise disasters so large, such as Chernobyl or the current savings and loan debacle, that some mechanism should be available to cut off liability. If so, the exception is a crude tool for achieving that end because it does not limit the government's exposure to damages in any rational way. Recovery for huge disasters might or might not be blocked by application of the discretionary function exception. The most widespread calamities might be caused by simple negligence that could not be characterized as "discretionary" by any stretch of the imagination—for instance, by a technician falling asleep at the switch of a nuclear facility.

In other respects, the FTCA does limit the government's exposure to large damage awards. The FTCA precludes juries from deciding liability and damage issues under the FTCA, 28 U.S.C. § 2402 (1988); prohibits punitive damages and pre-judgment interest, id. § 2674; and bars claims arising either "out of the loss, miscarriage, or negligent transmission of letters or postal matter," or out of "the assessment or collection of any tax or customs duty," id. § 2680(b), (c).
gress had simply waived the government's immunity in tort, the impact on government operations would likely have been dramatic. Judicial review of agency conduct under a general reasonableness standard, in tandem with damage awards, might substantially impede agency activities as well as afford the judiciary considerable influence over agency policy. In light of such possible consequences, the greater the need to preserve vigorous decision making and policy making by agency officials, the greater the case for application of the discretionary function exception. Yet, because application of the exception removes a critical check upon agency behavior, the availability of other forms of deterrence must also be considered in formulating the contours of the exception. Immunizing governmental acts completely from tort scrutiny may lead to wasteful government conduct. In short, application of the discretionary function exception should be sensitive to both the need for deterrence and the need for protecting government agencies from judicial intrusion.

A. The Deterrence Function

By waiving the government's immunity from suit, the FTCA evinces a concern for deterring repeated government negligence. Although some injuries may be unavoidable, just like any private enterprise—would minimize the sum of prevention and accident costs if forced to internalize the costs of its actions. Yet for each application of the discretionary function exception, the deterrent impact of the FTCA will be lost.

64. A tort system might well subject the government to liability regardless of the "wrongdoing" of the government's conduct. Yet presumably because the FTCA in part uses the term "wrongful," see id. §§ 1346(b), 2672, the Supreme Court held that the Act does not permit the United States to be sued under a theory of strict liability. Laird v. Nelms, 406 U.S. 797, 799, 802-03 (1972). In any event, the availability of recovery against the government in the absence of negligence is not directly germane to the proper scope of the discretionary function exception.

65. Of course, if the costs of avoiding the injury exceed the cost of the injury itself, then economists would say that there is no negligence. R. Posner, Economic Analysis of the Law § 6.2, at 151-52 (1986).

66. Monetary liability is not necessary to achieve deterrence. Other mechanisms to attain deterrence include punitive sanctions, injunctions, and administrative review. However, a tort system which provides only injunctive relief might not impose sufficient deterrence. Many torts are not ongoing and, in any event, government officials might believe that they are allowed one free bite at the apple and thus not be sufficiently careful in pursuing government objectives.
1. Deterrence From the FTCA Compensation Scheme

The FTCA imposes liability on the government under a theory of *respondeat superior* or enterprise liability. The liability scheme can be expected to deter government wrongdoing at least to some extent.67 While the cost of tort judgments can be passed on to taxpayers,68 agencies may suffer various repercussions from high damage awards, such as reduced budgets or other forms of discipline from either Congress or the Office of Management and Budget.69 The very existence of many lawsuits, and the resulting need to prepare a defense, may hamper the effective workings of an agency. Government officials in turn may seek to avoid liability, even though the damages do not come from their own pockets. Some officials identify with the government's interests and will thus try to minimize exposure of the government.70 Others may be motivated to avoid liability by more personal incentives, whether to avoid the stigma of being found negligent or to avoid possible disciplinary action by their superiors.71 Thus, the compensation scheme established in the FTCA will, in general, serve to deter government

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67. *See supra* note 6. If liability were instead imposed directly upon government officials, the officials would likely become quite cautious in carrying out the government's tasks for fear of incurring personal liability of potentially staggering proportions. The difficulty with personal liability, however, is one of over-deterrence. The fear of suit may chill even the most responsible government official from taking vigorous action. Although the possibility of indemnification (or contractual arrangements such as insurance) may minimize the deterrent value of a tort suit against government officials, officials may still be over-deterred if the prospect of indemnity is uncertain, or if the officials need to expend funds to defend themselves prior to the indemnity decision. To the extent immunity doctrines shield government officials, the deterrent effect of tort actions would correspondingly be reduced. *See generally* P. SCHUCK, *SUING GOVERNMENT* 89–98 (1983).

68. Officials realize that any monetary judgment will come not from their own pockets, but from the government as a whole. 28 U.S.C. § 2414. The agencies' budgets likewise will remain unaffected: agencies are only required to pay for judgments under $2500. *Id.* § 2672. *See generally* Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 CASE W. RES. 509, 529–31 (1984–85).


71. Indeed, the system of enterprise liability adopted may in some ways attain greater deterrence than if a regime of personal liability had been selected. For instance, some government negligence may be hard to attribute to any particular individual due to the aggregation of factors that can contribute to an injury. Suing the government as a whole, however, may allow recovery. *Cf.* Whitman, *Government Responsibility for Constitutional Torts*, 85 Mich. L. REV. 225 (1986) (noting cases in which the Supreme
officials from future negligent conduct, even if deterrence could be achieved more completely through other methods.

Application of the discretionary function exception, therefore, removes the deterrence afforded by the FTCA. To be sure, the threat of future tort liability may still be an effective deterrent, particularly in light of the difficulty in predicting when the exception applies. But to the extent that application of the discretionary function exception becomes more certain and thereby allows agency officials to predict when their actions will be protected, the deterrent value of the FTCA is correspondingly diminished.

2. Deterrence From the Administrative and Political Process

Deterrence, however, may stem not only from monetary liability, but from the administrative and political process as well. If the agency already has sufficient political incentives to be careful, the added deterrence provided by the FTCA may not be critical. Unlike private enterprises, the federal agency may be constrained by various political checks. 72 Ideally, the entire web of internal and external constraints can be examined to determine the need for a tort suit.

For instance, those injured or likely to be injured by government activities may be able to force government agencies to internalize the costs of accidents through political pressure, without recourse to a tort action. Potential victims may have sufficient political clout to lobby Congress and the agency either to change the governmental activities in question or to provide benefits for those injured. As an example, although veterans cannot recover under the FTCA in light of the Feres doctrine, 73 they previously obtained special congressional statutes to ensure some redress for injuries suffered, whether stemming from a discretionary function or not. 74 Federal employees also can recover for employment-re-

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72. In the private sector, shareholders can exercise some kind of constraint on corporate action, but in light of their relative inability to control corporate managers, shareholders probably cannot be expected to deter corporate negligence. Although internal political checks do not constrain private enterprises, external political checks exist in some fashion. To the extent that the negligence of private enterprises is pervasive and visible, as with oil spills, such conduct risks direct governmental regulation. However, measuring the deterrent force provided by the omnipresent threat of government regulation is difficult.

73. See supra note 25.

lated injuries from the Federal Employees Compensation Act (FECA) irrespective of the nature of the activity which inflicted the injury.\textsuperscript{75} If a separate compensation scheme exists, government officials to some extent can be expected to internalize the costs of injuries suffered by military personnel and federal employees.\textsuperscript{76}

The political process check of interest groups, however, is generally of limited utility in checking the conduct of government officials. Most governmental accidents potentially affect widely dispersed individuals who are unlikely to be organized or capable of wielding effective influence in Congress. In Berkovitz,\textsuperscript{77} for instance, the possibility of injury from a defective polio vaccine existed nationwide, but it was impossible to predict which children were most likely to sustain injury. In addition, the low probability of injury made it even less likely that the public could form an effective coalition to lobby Congress, the HHS, or the FDA for relief.\textsuperscript{78} Similarly, in Varig,\textsuperscript{79} even though one group potentially suffering from negligent FAA inspections—airline companies—could hold its own in lobbying with the agency, the other affected group—all potential airline passengers (perhaps even nonflyers unlucky enough to be hurt by an airplane crashing to the ground)—was too diffuse to organize itself effectively, particularly given the low likelihood of injury. In Dalehite as well, potential victims could not have been expected to band together to influence the agency’s activities, at least not before the explosions.\textsuperscript{80} Public interest groups certainly

\textsuperscript{75} 5 U.S.C. §§ 8101–8193. FECA is the exclusive remedy for federal employees if the United States is liable under the Act’s provisions. \textit{Id.} § 8116(c). \textit{See generally} Hammond \textit{v.} United States, 786 F.2d 8, 14 (1st Cir. 1986) (injuries that cannot be redressed by virtue of the discretionary function exception might be compensable under Veteran Benefits Act and FECA).

\textsuperscript{76} Indeed, victims of the explosions in Dalehite were ultimately successful in obtaining some relief from Congress. Texas City Disaster Relief Act, ch. 864, 69 Stat. 707 (1955) (limiting recovery to $25,000 per death or per injury to property or person).

\textsuperscript{77} 486 U.S. 531 (1988).

\textsuperscript{78} A coalition was formed to lobby Congress with respect to the swine flu vaccine, culminating in enactment of the National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (1976). The impetus for the Act, however, came not from victims, but from manufacturers fearful of extensive liability. \textit{See} Ducharme \textit{v.} Merrill-Nat’l Laboratories, 574 F.2d 1307, 1310–11 (5th Cir.), \textit{cert. denied}, 439 U.S. 1002 (1978).

\textsuperscript{79} 467 U.S. 797 (1984).

\textsuperscript{80} \textit{See supra} note 76.
exist, but they cannot be relied upon to exert effective political pressure upon the government in most contexts involving tortious conduct by the government. The added deterrence from an FTCA action, therefore, would still seem largely beneficial, irrespective of the possible political influence wielded by those groups whose members may suffer injury from government accidents.

More frequently, constraints exist if the challenged action is a product of the administrative process within an agency. Consider, for instance, the facts in *Mitchell v. United States*.

There, a cropduster collided into guy wires maintained by the Bonneville Power Agency (BPA), a federal agency. Plaintiff argued and persuaded the district court that the BPA’s failure to mark the wires to warn air traffic was negligent. The BPA countered that it routinely marked the wires according to safety standards set by the Federal Aviation Administration, the federal agency most intimately involved in regulating aviation safety. There was no dispute that the FAA did not require the BPA to mark the particular wires in question. By showing that its failure to mark stemmed from a considered and reflective policy, the BPA demonstrated that some internal checks protected against wrongful government conduct.

The very act of making policy to control future behavior constrains agency

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81. With respect to internal constraints, agency employees and officials may be deterred from wrongdoing by their own self-interest. To the extent such personnel are penalized severely for negligent actions (or rewarded amply for not taking negligent steps), they may already be sufficiently deterred. Nonetheless, as in the private sector, the possibility of discipline does not generally supply a satisfactory check. Supervisors may not know of the negligence, supervisors may condone the negligence, or supervisors may value the employee to such an extent that discipline for the negligent acts is unlikely.

82. 787 F.2d 466 (9th Cir. 1986), cert. denied, 484 U.S. 856 (1987).

83. The decision to rely on the FAA may well have been negligent because the FAA was primarily concerned with interstate air traffic, not cropdusters. However, the BPA’s decision to rely on the FAA stemmed from considerations of both institutional expertise and finances. At least several BPA officials had collaborated in formulating the policy, the policy was circulated within the agency, and the policy had been in effect for a period of time prior to the accident.

Moreover, interested cropduster pilots had the opportunity to meet with the BPA and lobby for more extensive use of warning markers. The BPA’s policy decision to rely on the FAA was published in the BPA Transmission Manual, which was available to the public. In turn, the FAA’s safety regulations, including those with respect to cropdusters, see 14 C.F.R. §§ 137.29–59 (1990), are public, subject of course to the scrutiny and lobbying of interest groups such as the National Agricultural Aviation Association. Indeed, prior to FAA approval of the lines in question, the BPA had conducted public hearings on the overall electrification project.
discretion,\textsuperscript{84} and the precedential effect of policy suggests that a significant number of people will be interested in the outcome of the policy formulated by agency officials.\textsuperscript{85} That level of interest in turn provides added incentive for care.

The deterrence perspective also helps shed light on the courts' general agreement that the discretionary function exception should not apply when officials violate statutory or regulatory requirements. For instance, in \textit{Berkovitz}, plaintiff suffered severe injury after being inoculated with a dose of polio vaccine. Plaintiff alleged in part that federal officials violated a federal regulation by releasing a lot of polio vaccine which did not comply with government standards. The Court suggested that if the agency officials had "no rightful option but to adhere to the directive" then "there is no discretion in the conduct for the discretionary function exception to protect."\textsuperscript{86} Therefore, if the FDA officials had no choice but to reject each nonconforming lot, then the discretionary function exception would not apply.

The reasoning in \textit{Berkovitz}, however, is unpersuasive.\textsuperscript{87} Although I would have no quarrel with an ultimate finding of liability—presuming the officials' conduct was negligent—discretion may still underlie an official's decision to deviate from pre-existing rules and regulations. For instance, agency officials may determine that a particular vaccine lot, though technically not conforming to the mandated standards, poses no appreciable safety hazard. Indeed, officials frequently exercise discretion in determining whether to follow regulations given what they perceive to be unique circumstances. FBI agents, for instance, may determine that seizing several hundred pounds of cocaine, despite the lack of a search warrant, is more important than risking the loss of the cocaine if they


\textsuperscript{85} From a deterrence perspective, immunizing agency policies, but not nondeliberative actions, may seem perverse since it is likely that more people will be injured by negligent policies than by negligent nondeliberative actions. As discussed previously, however, predicting whether negligent policies or nondeliberative actions can lead to greater injury is quite difficult. See supra note 63. In addition, the administrative process checks the government in the former context much more clearly than it does in the latter.


\textsuperscript{87} In addition, the Court reasoned that if an agency official negligently determines that a lot is conforming, such action is protected; however if the official reasonably determines that a lot is nonconforming, but then negligently fails to reject it, the exception does not apply. See id. at 544–45. The difficulty of disaggregating the officials' tasks for purposes of the Court's inquiry is troubling.
wait to obtain a warrant. Agents might also allow informants more play than the regulations allow in order to infiltrate an organized crime group. While these examples may be controversial, at times we may want government officials to exercise such discretion, despite the existence of regulations to the contrary.\textsuperscript{88} A tort suit may still be appropriate, but not because of any absence of discretion.

Consider as well the facts in \textit{Collins v. United States}.\textsuperscript{89} There, plaintiffs alleged that an official from the Mine Safety and Health Administration (MSHA) negligently failed to reclassify a salt mine as "gassy" when the mine’s level of methane exceeded permissible levels. Officials did not close the mine, as would be required after such a finding, and the subsequent explosion led to loss of life and severe injuries. The court concluded that, in light of the detailed regulations, the official did not exercise permissible discretion in failing to reclassify the mine.\textsuperscript{90} While affirming the government’s liability, the court conceded that an emergency might arise which would justify a failure to reclassify despite the MSHA regulations.\textsuperscript{91} In other words, the court apparently concluded that the official’s exercise of discretion in this instance was unreasonable, not that it was impermissible per se.

The results in \textit{Berkowitz} and in \textit{Collins} can be explained more readily from a deterrence perspective. Even though government officials may exercise discretion in deviating from established policy, the tort action is needed to monitor that discretion when—unlike in \textit{Mitchell}—no internal checks on administrative action exist. Almost by definition, departures from established policy do not reflect considered agency policy—they set no precedent for the future.\textsuperscript{92} There is no evidence of deliberation within the agency.

\textsuperscript{88} Officials who deviate from pre-existing guidelines are not necessarily negligent, especially if an emergency exists. A loose analogy lies in the role of custom in tort litigation. A defendant who does not exercise the customary precautions is not automatically negligent. The defendant’s choice to observe different precautions may in fact reflect a reasonable course of action. See \textit{generally} Coburn \textit{v.} Lennox Homes, Inc., 186 Conn. 370, 441 A.2d 620 (1982); Besette \textit{v.} Enderlin School Dist. No. 22, 310 N.W.2d 759 (N.D. 1981).

\textsuperscript{89} 783 F.2d 1225 (5th Cir. 1986).

\textsuperscript{90} \textit{Id.} at 1230–31.

\textsuperscript{91} \textit{Id.} at 1231.

\textsuperscript{92} As is discussed \textit{infra} text accompanying notes 118–130, there is similarly no need to protect such agency actions from a separation of powers perspective. To the extent that government officials can demonstrate that a departure from pre-existing policy establishes a new policy to be followed in future situations, the departure itself constitutes policy and warrants protection. The more senior the official announcing the departure, the more likely such an announcement constitutes a new policy. \textit{Cf.} National Automatic Laundry & Cleaning Council \textit{v.} Shultz, 443 F.2d 689 (D.C. Cir. 1971)
Moreover, taken on its face, the Court's reasoning in Berkowitz seemingly creates a perverse incentive for agencies to permit government officials and employees to exercise more unguided discretion. According to the Court, the more that agencies vest their personnel with discretion, the greater the likelihood that the discretionary function exception will shield the government from tort liability.\textsuperscript{93} Certainly, an agency may have many reasons to limit the discretion of its own officials—whether to increase control within the agency, or to strive for uniformity—despite the disadvantage of exposing itself to liability. Nonetheless, the Court's reasoning may spur some agencies, at least at the margin, to grant more discretion to subordinate officials, for as long as the officials violate no established policy, they apparently are immune from tort liability. Such a result is difficult to reconcile with a deterrence objective.

In response, it could be argued that, even though there may be no internal check upon the discretionary judgment of individual employees, the agency may stand accountable for the initial policy decision to delegate unfettered responsibility to its personnel.\textsuperscript{94} In Berkowitz, for instance, the senior FDA officials may have made a policy decision to grant FDA inspectors the discretionary power to determine whether to interdict shipments of nonconforming vaccine lots. The argument could proceed that the senior officials remain politically accountable for the ultimate action taken by the inspectors, even if negligent. In other words, the policy decision to delegate authority is itself checked by political forces.

To be sure, agencies are to some extent politically accountable for every delegation of authority, and thus an external check of sorts exists to prevent government wrongdoing. If public pressure warrants, a high ranking official may rescind the delegation or change its terms. The efficacy of such a check, however, is open to question.\textsuperscript{95} More to the point, while a loose political check may constrain the initial delegation decision, no comparable check influ-


\textsuperscript{94} Indeed, even without a specific delegation, high level agency officials may acquiesce in the subordinate officials' actions, and thus arguably should be held accountable for actions of their subordinates. See Schuck, Municipal Liability Under Section 1983: Some Lessons From Tort Law and Organization Theory, 77 Geo. L.J. 1753, 1773–74 (1989).

\textsuperscript{95} In general, such external political checks are unlikely to provide adequate deterrence. See infra text accompanying notes 97–99, 123–125. Political scientists suggest that governmental entities, most notably Congress, can more easily delegate authority in the first instance than change the terms of the delegation once made. \textit{Cf.}
ences the subsequent exercise of delegated authority. The decision by the vaccine inspector in *Berkovitz* was neither subjected to criticism from other agency officials nor formed in such a way as could be applied in future situations. The possibility that officials will be disciplined by their superiors always exists, but by itself constitutes a relatively weak check against wrongdoing.\(^{96}\)

Similarly, even though Congress may in a sense be responsible for all authority it delegates,\(^{97}\) it does not remain directly accountable for the delegated authority exercised by administrative agencies.\(^{98}\) Such delegated authority cannot be linked as closely to Congress in the public eye and will not be subject to the same internal checks of bicameralism and presentment which constrain congressional policy making. So, too, when individual governmental employees make discretionary choices, those choices have not been leavened by internal deliberation or the need to consider future ramifications.\(^{99}\) Thus, a policy decision to delegate authority does not assure that the subsequent exercise of that delegated authority is itself sufficiently constrained.

Application of the discretionary function exception, therefore, should in part hinge on the need for deterrence. Government officials may be deterred not only by the prospect of a tort suit, but by the internal restraints inherent in the political and administrative process. The more effectively the administrative process checks agency activities, the less the need for the monitoring of a tort action.\(^{100}\) Although political forces can supply various checks, the

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\(^{96}\) *See supra* note 81.


\(^{99}\) *Cf.* INS v. Chadha, 462 U.S. 919 (1983) (invalidating legislative veto on ground that, even though Congress' initial decision to delegate is subject to bicameralism and presentment, the subsequent veto decision by one house of Congress or one committee is not so circumscribed).

\(^{100}\) Although the administrative and political process may at times be skewed, there is at least a greater chance that governmental actions emerging through that process have been subjected to meaningful checks. The process perspective helps clarify...
presence of a deliberate agency policy is a relatively reliable way of ensuring the existence of political safeguards.

B. Preserving the Allocation of Powers Among the Branches

The discretionary function exception\(^{101}\) unquestionably preserves the allocation of powers among the branches.\(^{102}\) This section will address both the threat that tort liability poses to agency policy making, which stems primarily from the peculiarities of review in the tort context, and the related danger of direct interference with the decision making process of agency officials.\(^{103}\)

why it may not be as troubling when Congress exempts itself from general requirements, such as Title VII, that are applicable to all other public and private entities. Members of Congress, much more than personnel managers of private companies, are publicly accountable not only for their decision to exempt themselves, but for their hiring and firing decisions as well. There is at least some check at work restraining political favoritism; certainly a greater check than shareholders can exert in monitoring personnel decisions of private enterprises. And those political checks are sometimes effective, as can be seen in Congress' failure to vote its members a pay raise due to adverse publicity. See, e.g., Kenworthy, House, Senate Reject 51% Salary Increase, Wash. Post, Feb. 8, 1989, at A1, col. 5.

101. Although less frequently in issue, the first segment of 28 U.S.C. § 2680(a), which exempts "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," also serves separation of powers principles by immunizing challenges to good faith application of regulations, even if the regulations are later invalidated.

102. The FTCA addresses the separation of powers concerns in several other ways of arguably less importance. First, Congress has subjected the federal government to liability only to the same extent as a private individual under like circumstances, which protects the government, to some degree, from judicially crafted standards set to monitor its conduct. See Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955); Dalehite v. United States, 346 U.S. 15, 43-44 (1953); Feres v. United States, 340 U.S. 135, 141 (1950). Congress has also restrained judicial over-reaching in applying the Act by subjecting judicial officials as well to the waiver of immunity. Act of Nov. 18, 1988, Pub. L. No. 100-694, § 3, 102 Stat. 4564 (codified at 28 U.S.C. § 2671 (1988)). Second, the Act exempts some actions from judicial scrutiny, such as "[a]ny claim arising out of the combattant activities of the military or naval forces, or the Coast Guard, during time of war," 28 U.S.C. § 2680(j) (1988), any "claim arising in a foreign country," id. § 2680(k) (1988), and any "claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system." Id. § 2680(i) (1988).

103. In addition, imposing liability could conceivably have an "activity-level" effect, forcing the government to curtail its regulatory or proprietary actions. In marginal contexts, the government could conclude that continued regulation is not cost effective given the potential for tort liability. As is suggested infra note 159, whether there would be an activity-level effect in most contexts is doubtful, and whether such an effect would even be harmful is also unclear. In any event, a possible activity-level effect exists whenever the costs of government activity are increased due to a finding of government liability. This is particularly true in regulatory contexts. Any stringent effort, therefore, to avoid the possibility of an activity-level effect would compel a drastic revision in the FTCA as a whole.
1. Threat to Agency Policy Making

The difficulty posed by plenary judicial review of agency actions should be self-evident. Imagine that the judiciary could scrutinize congressional acts to determine if Congress were negligent in approving plans to construct a particular bridge or in failing to address the savings and loan crisis earlier. The judiciary would become the final arbiter of "good" government. Under our majoritarian form of government, however, a legislator has the discretion to be both reasonable and unreasonable. Any recourse lies at the ballot box and not in court.

Congress, of course, has delegated considerable amounts of its own power to agencies within the executive branch, for a variety of hotly debated reasons. Agencies, no less than Congress, fashion policies that bind the nation. Permitting judicial oversight of executive branch policy decisions through tort suits would likewise threaten to frustrate agency policy making. In the absence of any immunity, state negligence law could trump federal policies. Texas negligence standards might impede the FDIC's ability to advise or pressure failing thrifts, just as California good samaritan law would have thwarted the FAA inspection policies challenged in Varig. Subjecting all agency policies to the check of state negligence law


105. Similarly, one would hardly expect judges to allow tort suits against other judges for negligent judicial decisions, although such decisions certainly exist.

106. See Owen v. City of Independence, Mo., 445 U.S. 622, 648 (1980) (common law immunity for municipalities in part "was grounded not on the principle of sovereign immunity, but on a concern for separation of powers," and "][f]or a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government").

107. See supra note 97 and accompanying text.

108. Similar concerns underlie the Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In deferring to an agency's construction of an ambiguous statutory term, the Court reasoned that if Congress delegates policy making authority to agencies, courts should not second-guess the wisdom of that policy on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . .

Id. at 865.
could undermine the supremacy of agency policy making—a result that Congress presumably did not intend.

At the same time, judicial review under the FTCA subjects federal agencies to inconsistent standards throughout the country. Because the FTCA incorporates the law of the state in which a challenged action took place, states may impose different standards of care upon federal agencies, forcing the agencies either to adopt the most stringent standard or to change their conduct dependent upon location. In Varig,\(^\text{109}\) while California may have imposed a duty of care requiring more than spot checks to carry out aircraft safety investigations, Washington or Oregon may have adopted less demanding standards in order to encourage good samaritans. As a result, the FAA might have been forced to abandon its spot check inspection program throughout the country (due to the uncertainty of where it might be sued) or to implement different inspection programs in different parts of the country at the expense of uniformity and efficiency.

Moreover, the judiciary's power to impose damages for unreasonable agency conduct furnishes a strong incentive to agencies to conform their conduct to whatever the judiciary is likely to deem reasonable (under state law). Not only may the judiciary disagree with the agency, as it currently can through Administrative Procedure Act (APA) review, but that potential disagreement has a stronger impact—the prospect of substantial damage awards.\(^\text{110}\)


\(^{110}\) Commentators have remarked that providing only for damages relief minimizes the danger of judicial intrusion into the affairs of the legislative and executive branches, because it affords the government the greatest room for discretion—the government need not change its conduct, it only must pay for the accidents it causes. See, e.g., P. Schuck, supra note 67, at 17–18. The threat of a damage award, however, might deter a risk averse or even rational agency from experimenting with policies that might conceivably expose it to liability. In comparison, review of agency policy under the APA in most circumstances is more deferential. If a court finds a challenged rule arbitrary or capricious, the agency retains the discretion to fashion the policy anew, perhaps even to choose the same policy buttressed merely with a different justification. There is little likelihood under the APA that a court would impose a structural injunction against an agency, robbing it entirely of discretion. Thus, review through the medium of a tort action is much more inhibiting to an agency than is review under the APA.

The prospect of damages might excessively deter agency formulation of new policies. If agency officials are too concerned about incurring liability, they might become overly cautious in carrying out governmental responsibilities. Agency officials might wrap themselves in paper work as a means of insulating the government from liability. Creating a paper trail itself delays government action and adds to the cost of implementation or enforcement. The Food and Drug Administration, for example, might fail to evaluate new drugs expeditiously for fear of incurring governmental tort liability, even
Because of the large amount of money at stake in the Federal Reserve Board’s financial decisions or HUD’s allocation of grants, the judiciary’s power would be enhanced considerably if it reviewed these agency decisions in the context of a tort action. The costs and course of agency deliberations would change dramatically.

Furthermore, subjecting agency policies to tort suit not only threatens the supremacy and uniformity of federal law, it also denies interested parties the chance to help formulate national policy through direct review or informal pressure. Under the liberal standing provisions in the APA, most interested parties can challenge agency actions, and parties in disagreement with plaintiffs’ claims can and often do intervene to protect their own interests. Even those policies that are not subject to notice and comment procedures still may be shaped by the lobbying efforts of affected interest groups. The ability of interest groups to gain an agency official’s ear is notorious. Yet under the FTCA, only an injured party has though the public as a whole may suffer from the delay. See P. Schuck, supra note 67, at 76; Cass, supra note 11, at 1522.


112. Cf. Ascot Dinner Theatre, Ltd. v. Small Business Admin., 887 F.2d 1024 (10th Cir. 1989) (holding that exception bars challenge to SBA’s denial of loan application); Williamson v. United States Dep’t of Agric., 815 F.2d 368 (5th Cir. 1987) (denial of a loan); Pennbank v. United States, 779 F.2d 175 (3d Cir. 1985) (refusal to grant a loan is protected by discretionary function exception).

113. As it stands, some have argued that the judiciary’s comparatively restrained power under the APA is excessive. Judicial review under the APA has arguably diminished some agencies’ effectiveness by skewing their resource allocations. See, e.g., R. Melnick, Regulation and the Courts: The Case of the Clean Air Act (1983); Mashaw & Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257, 295 (1987).


115. See generally M. Bernstein, Regulating Business By Independent Commission (1955); R. Noll, Reforming Regulation (1971); Langbein, Money and Access: Some Empirical Evidence, 48 J. Pol. 1052, 1060 (1986); Smith, Advocacy, Interpretation, and Influence in the U.S. Congress, 78 Am. Pol. Sci. Rev. 44 (1984); Wright, Contributions, Lobbying, and Committee Voting in the U.S. House of Representatives, 84 Am. Pol. Sci. Rev. 417 (1990). Furthermore, the Freedom of Information Act requires agencies to publish “statements of general policy” in the Federal Register and thus open such policies to public scrutiny, including that of concerned parties. 5 U.S.C. § 552(a)(1)(D) (1988). This is not to suggest that interested parties will always be apprised of all relevant agency policies—but, in general, such groups have the opportunity to lobby the agency should their interests be adversely affected. Enhanced visibil-
standing to sue, and all other individuals interested in the agency rule must sit out the contest, even if the plaintiff is a poor advocate for their interests. The case may lack the ventilation of opposing viewpoints that marks many APA actions, and development of administrative law may suffer as a consequence.

Finally, review of administrative conduct in a tort action is likely to be biased due to the presence of a concrete injury, which predisposes the decision maker to finding the action wrongful. Review cannot proceed as in the more detached context of an APA suit.\textsuperscript{116}

The question remains, however, how to draw a line between those agency actions that represent public policy, and therefore warrant deference, and those that do not. The discretionary function exception should insulate all agency actions that, like congressional enactments themselves, reflect national policy. Plainly, all agency regulations and rules should be protected because, much like legislation itself, they are responsive in some way to the democratic process. But it is not as clear which other agency actions similarly reflect national policy and, therefore, merit protection under the discretionary function exception.\textsuperscript{117}

Separation of powers concerns, like those of deterrence, suggest that the discretionary function exception should protect agency policy making, but not nondeliberative or ad hoc actions. Agency policies are generally formulated only after considerable debate and input from different levels within the agency itself. The presence of prior deliberation and intended prospectivity indicates that the agency considers the issue to be of sufficient importance to warrant

\textsuperscript{116} Cass, \textit{supra} note 11, at 1519.

\textsuperscript{117} The Supreme Court has attempted to define the government actions that should be shielded by focusing on whether they are grounded in "social, economic [or] political policy," United States v. Varig Airlines, 467 U.S. 797, 814 (1984), or at least "susceptible to policy analysis," United States v. Gaubert, 59 U.S.L.W. 4244, 4247 (1991). Even though I am sympathetic to the "policy" line, almost every government action, no matter how ministerial, can be viewed as grounded in social, economic, or political policy. Thus, a failure to expend the resources necessary to repair a lighthouse can be grounded in economic policy, as can an abbreviated inspection. The Court's test provides an insufficient limiting principle. The question should not be whether the challenged action in some way is tied to policy considerations, whatever they may be, but rather whether the challenged action is itself attributable to a deliberate policy. Justice Scalia, in his recent concurrence in \textit{Gaubert}, similarly stressed that the inquiry should not be merely whether an official acted "'within the purview' of the relevant policy without himself making policy decisions," but whether the official has "exercised policy making responsibility." \textit{Id.} at 4250.
expenditure of agency resources.\footnote{118} Agency policies, therefore, likely reflect the political judgment or expertise which presumably prompted Congress initially to delegate authority to the agency.

In contrast, nondeliberative actions, such as the reaction of an employee or official to a particular situation, may not be followed if similar situations arise in the future. Such actions rarely stem from internal agency deliberations, usually embody no more than one employee's judgment and therefore unlikely reflect the agency's mission to act as Congress' partner in fashioning national policy.\footnote{119} Judicial review in that context is unlikely to disturb any policy making function. Moreover, there is less likely to be any need for uniformity if the challenged conduct stems from a nondeliberative action as opposed to a concerted policy. Finally, the lack of a policy also suggests that widespread participation in the government's action may not even be feasible. If an agency relies only on an individual's judgment, then the public cannot effectively participate in that decision.\footnote{120}

\footnote{118} As a practical matter, the form of an agency action can be quite important. Some agencies require all policies to be published and available to the public; others require that certain judgments be made at a particular level only after input is received from various segments within the agency, if not from without as well. For instance, litigation divisions in the Department of Justice cannot pursue appeals until the Solicitor General has reviewed comments from participating agencies and other concerned litigation divisions. Similarly, in Mitchell v. United States, 787 F.2d 466 (9th Cir. 1986), cert. denied, 484 U.S. 856 (1987), the BPA memorialized its decision to rely on the FAA for warning markers, and in Dalehite v. United States, 346 U.S. 15 (1953), the Army memorialized its views as to the required steps for shipping and storing fertilizer. The process line is certainly imperfect, yet no other approach captures so well the type of agency action which represents political policy worthy of deference.

\footnote{119} This is not to suggest that agency employees reaching situation-specific decisions do not affect agency policy. See Schuck, supra note 94, at 1777–78. Nonetheless, the need to distinguish between an exercise of professional expertise and a policy formulated to guide exercise of that professional expertise is familiar in the social sciences. See generally M. Lipsky, Street-Level Bureaucracy (1980); C. Perrow, Complex Organizations (3d ed. 1986).

\footnote{120} Indeed, similar distinctions have been made in an effort to distinguish those administrative acts that require individualized hearings prior to implementation from those that may be implemented immediately after emerging from the political process. The more a decision is situation-specific, the more due process requires an individualized hearing. Compare Londoner v. City of Denver, 210 U.S. 373 (1908) (small group of taxpayers exceptionally affected by tax increase entitled to individualized hearings) with Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (a general tax increase does not entitle taxpayers to individualized hearings). To the extent the administrative decision cuts across a wide field, however, due process does not require an individualized hearing. Rather, resort to the administrative agency or legislative body serves as an adequate safeguard. As discussed earlier, policies of general applicability are more readily checked by the political process than are nondeliberative judgments or situation-specific decisions.
That separation of powers and deterrence concerns converge should come as no surprise. Our system of separated powers was largely designed to promote good government by confining the powers of each branch and by establishing a web of checks and balances to control the emergence of "factions" or narrow interest groups. Checks both internal and external to each branch deter government wrongdoing, and the policy resulting from that system of checks and balances is correspondingly entitled to deference.

With respect to internal checks, Congress, for instance, can generally only bind those outside itself through bicameralism and presentment. Those checks ensure that the two different houses of Congress agree on any proposal and that they are willing to risk political repercussions by presenting the proposal to the President.\textsuperscript{121} In other words, the internal checks seek to deter government leaders from making bad policy decisions. When the internal checks operate most effectively, there is correspondingly less need for external constraints (such as judicial review).\textsuperscript{122} Just as congressional enactments are protected by internal checks, so are some agency actions, even if not leavened by the requirement of bicameralism and presentment. Agency policies, unlike nondeliberative actions, are generally formulated only after considerable debate among various interested groups within the agency and only after consideration of future ramifications. Judges should be reluctant to substitute their judgment for such deliberate policy.

External checks similarly constrain government wrongdoing. For instance, the power of judicial review and of the presidential veto restrain legislative excesses. Although the external checks circumscribing agency actors are generally weak,\textsuperscript{123} agencies are more accountable for their policies than for nondeliberative actions. Congress can use oversight hearings to monitor and control policies formulated by agencies,\textsuperscript{124} particularly when the issues are relatively

\textsuperscript{121} I have elsewhere discussed that aspect of the separation of powers. See Krent, \textit{Separating the Strands in Separation of Powers Controversies}, 74 VA. L. REV. 1253 (1988).

\textsuperscript{122} Fearing legislative hegemony, the framers circumscribed Congress by creating both internal and external checks. See \textit{generally} G. WOOD, \textit{THE CREATION OF THE AMERICAN REPUBLIC} 1776–1787, at 524–53 (1969).

\textsuperscript{123} \textit{See supra} notes 94–99 and accompanying text.

\textsuperscript{124} To be sure, some might argue that judicial second-guessing of agency policies might further good government by providing Congress with added incentive not to delegate and therefore to fashion such policies itself. Congress indeed would be immune from any tort challenges to that policy making. Yet Congress presumably cannot or will not operate without the aid of administrative agencies; nor is it clear that Congress optimally should involve itself in the relative minutiae of questions such as how the
visible to the public. Judicial review may also be available to hold agency actions to the constraints set by Congress in the delegation.\textsuperscript{125} Neither Congress nor the judiciary, however, can readily monitor nondeliberative actions before they occur—only ex post review is possible. Thus, because of the comparatively greater internal and external checks constraining formulation of policy, both deterrence and separation of powers concerns suggest distinguishing between governmental actions embodying purposeful agency policy and those which do not.

Consider the Supreme Court’s decision in \textit{Varig}.\textsuperscript{126} There, the Court examined an FAA practice of inspecting airlines through a spot check system. The FAA determined that not all airplanes would be inspected for compliance with regulations and that the frequency of inspections would depend upon the FAA’s opinion of the carrier’s trustworthiness. The agency reached that course of action only after considerable experience, and after receiving recommendations from various levels within the agency. Congress probably would not have intended such judgment, based as it was on social and economic variables, to be subject to the vagaries of state law. The question of an agency’s priorities and allocation of resources is of particularly federal concern, to be judged if at all by Congress. Application of the discretionary function exception preserves the supremacy of federal law.

On the other hand, judicial interference with nondeliberative agency decisions is less likely to disrupt the appropriate balance of powers. Those implementing actions are not the stuff of which national policy is made. In a companion case to \textit{Varig},\textsuperscript{127} plaintiffs

\footnotesize{BPA should mark guy wires or how HHS should scrutinize lots of polio vaccine. In any event, the Court has recently adhered to the view that judicial deference to Congress includes deference to its delegates in the executive branch. See \textit{supra} note 108.}

\textsuperscript{125} For instance, in \textit{Miller v. United States}, 522 F.2d 386 (6th Cir. 1975), tort claims arose out of a TWA airliner’s crash during its landing at the Greater Cincinnati Airport. Plaintiffs alleged in part that the crash was attributable to the FAA’s inadequate air safety regulations. \textit{Miller v. United States}, 378 F. Supp. 1147, 1148 (E.D. Ky. 1974), \textit{aff’d}, 522 F.2d 386 (6th Cir. 1975). These regulations, however, reflected the agency’s delegated authority to provide for aviation safety, and could have been challenged under the APA. See also \textit{Adras v. Nelson}, 917 F.2d 1552 (11th Cir. 1990) (dismissing challenge to INS defective rule making); \textit{Caban v. United States}, 671 F.2d 1230 (2d Cir. 1982) (dismissing challenge to INS promulgation of regulations defining alien’s right to enter country). Relatively few agency actions challenged under the FTCA, however, are likely to be subject to an APA challenge.

\textsuperscript{126} 467 U.S. 797 (1984).

charged that the FAA negligently certified a plane under the applicable regulations as airworthy despite the presence of a faulty cabin heater. If the FAA agents in fact negligently inspected the plane, their failure to detect the cabin heater hardly stemmed from any considered policy or judgment. Resolution of that claim would not have unduly interfered with the agency's mission.

Similarly, in Berkovitz, even if the officials in their professional expertise had determined that an individual vaccine lot conformed to federal requirements, it is unlikely that such judgment, though highly discretionary, could be ascribed to the political mission of the agency. Accordingly, separation of powers concerns militate for a process approach—the discretion protected by the discretionary function exception should not be dependent upon the nature of the governmental action, but its form.

2. Threat to Agency Decision Making

The process approach, however, does not fully address separation of powers concerns. The discretionary functions of government lie not only in the formulation of policy, but also in the implementation of policy when essential to protect the vigorous decision making of agency officials. Under general separation of powers principles, even nondeliberative governmental actions should be protected if the judiciary cannot review such actions without undermining the efficacy of the agency endeavor.

Government officials' nondeliberative actions are most directly threatened by judicial oversight in those few areas, such as prosecutorial discretion or agency inaction, in which any review by judges could well chill effective decision making. A prosecutor who must explain and justify her choices may not be as capable in the

128. 692 F.2d at 1212.
131. See generally P. Schuck, supra note 67, at 68–77. The ability of officials at Exxon to make vigorous decisions may also be affected by tort liability, but, from a separation of powers perspective, there is no comparable reason to protect that decision making. The aim of Exxon, presumably, is to maximize profits rather than serve the public good, except insofar as maximizing profits fulfills that goal. The federal government, in contrast, only exists to promote the public welfare, including perhaps checking the corporate behavior of Exxon. The decision making of Exxon officials is likely to be less public-oriented than that of government officials.
future. Similarly, officials in the State Department cannot always justify foreign policy initiatives without jeopardizing future flexibility. The judiciary is not equipped to gauge the reasonableness of certain executive actions and, as a result, review in such contexts would substantially interfere with the decision making process. For fear of incurring liability, law enforcement officials may decline to order investigations that would definitely redound to the public’s benefit, or the Office of Thrift Supervision might fail to investigate savings and loans which appear to be mismanaged until too late.

A compelling analogy exists between the discretionary function exception and section 701(a)(2) of the APA, which both immunize certain agency actions from judicial review. Section 701(a)(2) states that review is precluded when “agency action is committed to agency discretion by law,” despite the fact that agency actions are generally reviewable under the APA for any abuses of discretion. Courts have struggled to reconcile the exception with the

132. See, e.g., Piechowicz v. United States, 885 F.2d 1207 (4th Cir. 1989) (discretionary function shields Assistant U.S. Attorney’s failure to offer protective custody to witness in drug trial); Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983) (decisions on when, where, and how to prosecute are shielded by discretionary function exception), cert. denied, 465 U.S. 1100 (1984); Smith v. United States, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967).


135. Of course, other pressures on law enforcement officials, such as hope of advancement or publicity, may counteract the bias towards inaction. See Kramer & Sykes, Municipal Liability Under § 1983: A Legal and Economic Analysis, 1987 SUP. CT. REV. 249, 274–275.

136. Cf. FDIC v. Mmhat, 907 F.2d 546 (5th Cir. 1990) (discretionary function exception shields FDIC’s failure to intervene earlier to protect a failing savings and loan); Emch v. United States, 630 F.2d 523, 527 (7th Cir. 1980) (discretionary function exception shields various agency officials concerning bank supervision and regulation), cert. denied, 450 U.S. 966 (1981).


138. Id. § 706(2)(A). The Court first suggested that section 701(a)(2) should be applicable when “there is no law to apply.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). That formulation is problematic, however, since standards can always be derived from constitutional, statutory, or common law. The question is rather one of institutional competence, whether the courts should be overlooking the agency's shoulders on that particular issue. The Court’s more recent pronouncements on section 701(a)(2) have backed off from the “no law to apply” formulation,
underlying purpose of the APA which, much like the FTCA, seeks to curb arbitrary government action. Justice Scalia explained his view of the APA exception in *Webster v. Doe* in terms relevant to understanding the discretionary function exception. Even though there are always some conceivable judicial standards to apply to any agency action, whether in the form of constitutional, statutory, or common law standards, section 701(a)(2) can be understood as reflecting "a body of jurisprudence that had marked out, with more or less precision, certain issues and certain areas that were beyond the range of judicial review." To allow review and award damages under the FTCA in those limited circumstances would frustrate agency officials’ decision making.

For instance, agency failures to act are considered presumptively unreviewable. Because of the complex matrix of resource and strategy concerns involved, courts generally refuse to review challenges to agency failures to regulate or failures to consider a


140. *Id.* at 608 (Scalia, J., dissenting). Lower courts have applied *Webster* as well as *Chaney* in a variety of situations, faithful in the main to Justice Scalia's analysis. See, e.g., *Scalise v. Thornburgh*, 891 F.2d 640 (7th Cir. 1989) (Attorney General's refusal to request transfer of prisoner incarcerated in England to United States immune from review, cert. denied, 110 S. Ct. 1815 (1990); *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347 (10th Cir. 1989) (termination of Head Start funds not subject to review).

141. Another more limited analogy lies in the doctrine of absolute official immunity. Courts have determined that prosecutors, judges, and presidents should be absolutely immune, at least in certain circumstances, from constitutional tort liability for fear otherwise of chilling those officials' ability to carry out their responsibilities. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (protection for President); *Stump v. Sparkman*, 435 U.S. 349 (1978) (absolute immunity protects all "judicial" acts of judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (immunity for district attorney who knowingly introduced perjured testimony at trial); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators immune for legislative activities). The doctrine of absolute immunity reflects the view that judicial review of functions discharged by certain individuals cannot be exercised without severely undermining the efficacy of those functions.

particular course of action. Courts cannot evaluate the agency officials’ overall regulatory priorities, allocation of resources, and estimates of regulatory effectiveness without arrogating much of the administrative function to themselves. 143

The need to protect vigorous decision making, however, does not justify wholesale application of the discretionary function exception. Many nondeliberative actions challenged under the FTCA do not include any decision making at all. A lack of care in controlling air traffic, 144 in keeping the steps of the post office safe for customers, 145 or in omitting to change the bulb in a lighthouse 146 simply does not encompass decision making. Analogous nondeliberative actions can be subject to judicial review in other contexts—whether through breach of contract actions, APA adjudications, or FLRA unfair labor practice challenges. In other words, there is nothing talismanic about every “discretionary” government act justifying complete immunity from judicial challenge.

Moreover, vigorous decision making may not be critical for government officials in all contexts. OSHA inspectors exercise discretion, yet the prospect of suit is not as likely to undermine their effectiveness as it might for law enforcement officers. To the extent that OSHA inspectors must inspect each plant, judicial review may augment the quality of inspection by requiring each inspection to be reasonably thorough. 147 Or, Congress may have limited the discretion of agency officials to such an extent that review for fidelity to

143. In any event, general negligence principles preclude many challenges to agency inaction. The government simply does not owe a general duty of care to all its citizens. The government’s duty is defined in part by reference to the scope and nature of its relationships, just like that of any private enterprise. Although the government might always take more precautions on the public’s behalf, cf. Grady, Untaken Precautions, 18 J. LEGAL STUD. 139 (1989) (discussing how precautions not taken by defendants factor into tort liability), it may not owe a duty to do so. The government is not negligent when it fails to consider that more lighthouses should be built, but it may be negligent because of the special relationship which arises when it builds a lighthouse and yet fails to maintain it properly. Similarly, the government has a duty to warn about dangers arising from its own conduct, such as when it constructs irrigation canals, but it has no duty to investigate whether private irrigation canals should be built in other areas or even to inform the public that private canals have been built negligently.


147. Cf. Irving v. United States, 909 F.2d 598, 603–05 (1st Cir. 1990) (suggesting that OSHA inspections should not be protected if OSHA policy requires inspectors to inspect thoroughly each plant selected for inspection). To the extent that inspectors use judgment to trust certain manufacturers and only spot check others, then the scheme
those constraints is possible.\footnote{See, e.g., Dunlop v. Bachowski, 421 U.S. 560, 567 (1975) (review of prosecutorial discretion possible if sufficient congressional restraints present); see also Chong v. United States Information Agency, 821 F.2d 171 (3d Cir. 1987) (administrative regulations sufficiently constrain discretion to permit judicial review).} In other words, much administrative discretion can coexist with the prospect of tort suits.

Pursuant to the vigorous decision making rationale, therefore, the discretionary function exception should be construed to immunize not only policies, but agency implementation of those policies that traditionally have been marked off limits to the judiciary. In both contexts, we accept that, in the long run, we are safer if the political and administrative process takes its course undisturbed by judicial intrusion through tort suits.

In sum, courts should apply the discretionary function exception to protect the administrative process. Although determining which agency actions are adequately checked by political forces and which actions reflect the agency’s delegated authority to implement policy may be impractical on a case-by-case basis, a rough approximation is possible; courts can largely accommodate deterrence and separation of powers concerns by focusing on the deliberative process leading up to the challenged agency action. Courts should apply the discretionary function exception to protect deliberate, considered policies formulated by agency personnel.

The process approach, in turn, should somewhat ease the courts’ formidable task of applying the discretionary function exception. Courts can scrutinize the contested agency action to determine whether it stemmed from a deliberative decision that is likely to be followed in the future or from a case specific judgment of an individual agency employee. Although such an approach would exact a toll on the agencies to the extent they must demonstrate the existence of a policy, courts can ascertain whether a policy exists from testimony concerning long-standing agency practices or from memoranda on agency guidelines. Fuzzy cases doubtless will remain, but the test itself is quite workable. Although agencies might adapt to the new approach by memorializing their practices and issuing more rules constraining employee discretion, such results should be welcomed since they are in fact consistent with the underlying goals of the FTCA.

more closely resembles prosecutorial discretion, which historically has rarely been subject to judicial review.
III. APPLICATION OF THE PROCESS APPROACH

The process approach suggested above combines elements of the various tests previously applied by the courts. Like the planning versus operational level test, it stresses that actions taken at the planning stage should be exempted from judicial review, not only because of the need to protect substantive agency policies, but also because such policies receive relatively widespread agency attention and are likely to be subject to the check of internal (if not external) review. The approach is also somewhat consistent with the Dalehite Court's focus on the stature of the government official charged with negligence, but only because actions pursued at a higher level within the agency more likely reflect the agency's purposeful efforts to carry out legislative policy. Like the proprietary versus governmental and regulatory versus nonregulatory distinctions, the process approach stresses that some agency actions more likely reflect delegated congressional policy making than do others, namely those of a more overtly political nature. The exercise of judgment by government officials carrying out proprietary or

149. Due to the protection afforded by these internal checks, the process approach would also shield any implementation efforts carried out pursuant to a considered policy, irrespective of the technical nature of the challenged action.

150. The governmental versus nongovernmental distinction might also be defended on the ground that it protects the allocation of activities between the public and private sectors. See generally Levinson, Takings, Torts and Special Interests (Feb. 18, 1991) (unpublished manuscript). If the government were immune from suit for all traffic accidents, it might be loath to contract out or privatize trucking operations when such a course might otherwise be in the public interest. In situations where the activities can be discharged by both sectors, the governmental versus nongovernmental distinction ensures that contracting-out or privatization decisions are not based upon the availability of a tort action.

Yet the symmetry achieved in the above approach is of dubious value in checking government wrongdoing. If the discretionary function exception were widely extended to government contractors, for instance, cf. Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (extending protection of discretionary function exception to military contractor), there would be no allocation problem, yet a very real problem of insufficient deterrence. Moreover, there may be a need to protect government policy in carrying out projects or functions that could also be discharged in the private sector, particularly because there are few activities in the government, aside perhaps from large-scale military operations, which have no private counterpart. For instance, just because private entities can operate prisons does not necessarily suggest that federal policy in administering a penal system should be subject to second-guessing in a tort suit.

151. Dean Cass points out that the error costs of allowing negligence suits in the regulatory context are likely to exceed those when the government acts in a proprietary context. Cass, supra note 11, at 1542–43. Perhaps, but as the Supreme Court recognized in Berkowitz, government officials at times discharge nondiscretionary authority in the regulatory context, which makes it difficult to justify blanket agency immunity from all challenges. Berkowitz v. United States, 486 U.S. 531, 536–39 (1988). Indeed, the error costs analysis, in the long run, collapses into the separation of powers inquiry.
nonregulatory functions is perhaps less likely to embody policy formulated in response to a congressional delegation.

Indeed, the results of the Supreme Court's decisions can largely be reconciled with the process approach. As previously discussed, the government's actions that were reviewed in Dalehite stemmed from an overall plan to export fertilizer. Even details such as the type of coating to use for the fertilizer and its storage temperature had been debated, approved, and widely disseminated. While perhaps negligent, those details reflected the agency's economic judgments about the most efficacious way to ship the fertilizer in light of the perceived need overseas.152 The dissenting Justices focused instead upon the government's failure both to conduct a more vigorous inquiry prior to deciding upon the plan and to warn of the possible dangers in shipping the fertilizer. The government's failure to make more of an inquiry, however, in all likelihood stemmed from a conscious resource decision,153 and the majority opinion suggests as much.154

In Indian Towing Co.155 and Union Trust Co.,156 the negligence asserted consisted of government actions that did not stem from concerted policies—in the former case government employees allegedly failed to repair a light, and in the latter an air traffic controller allegedly failed to advise the pilots properly. Under the approach suggested above, the discretionary function exception would not apply in either case because the challenged actions did not reflect policy making.

Results in the two most recent decisions can also largely be justified under the approach suggested above. In Berkovitz,157 the Court held that the discretionary function exception did not protect

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which, this Article has argued, suggests that blanket immunity in the regulatory context would be overprotective of the government.


153. In any event, challenging the government's failure to make a wider safety inquiry prior to determining whether to warn shippers may be the type of claim that is not amenable to judicial review due to the resource allocation questions involved. In addition, the government may simply have had no duty under state law negligence principles to conduct more tests than it already had completed. See supra note 143.

154. 346 U.S. at 37–38. The government knew of the dangers involved in shipping the fertilizer; in fact there had previously been a series of explosions. Nonetheless, the responsible officials proceeded to implement the plan, despite the known risks.


156. 350 U.S. 907 (1955) (per curiam).

157. 486 U.S. 531 (1988). In Gaubert, the regulatory activities challenged may well have stemmed from deliberate policy making. In all likelihood, the federal regulators made recommendations to hire certain consultants or to pursue certain legal avenues only after considerable internal debate.
agency officials' failure to follow rules requiring them to collect information from the vaccine manufacturers. On separation of powers and deterrence grounds, that result is justified because the failure to follow rules did not stem from any considered policy. In dicta, however, the Court indicated that the discretionary function exception would have protected other agency officials' decision not to reject a vaccine lot found to be nonconforming if the agency had vested the officials with such broad discretion. Yet the officials' failure to reject the lot does not in and of itself constitute policy and, as long as their exercise of professional judgment is not the type typically immune from all judicial second-guessing, the discretionary function exception should not apply. On the other hand, if the officials had previously decided that particular vaccine lots, even if nonconforming, should not be rejected, then the discretionary function exception should apply despite the absence of a formal regulation.

The Court's decision in Varig,158 as well, is largely consistent with the suggested process approach. The spot check system that was challenged in Varig plainly stemmed from a conscious policy of how best to ensure airplane safety. The agency had to decide how much resources to devote to inspection activities. Determining that a spot check program would be most cost effective is a prototypical policy question reflecting the agency's delegated authority to fashion an effective inspection and certification scheme. However, the agency's alleged negligence in failing to detect the faulty heater in the companion case to Varig, United Scottish, cannot be justified under the suggested approach. At best, that negligence can be characterized as reflecting the professional judgment of the inspector that the particular heater in question posed no safety hazard. Yet such professional judgments are unlikely to reflect delegated policy making, particularly when they have not been subject to internal constraints. Although an inspection was perhaps not required, once the FAA employees (allegedly) inspected the plane, this negligence cannot be excused on resource grounds alone.159

159. There is no apparent reason to believe that holding the government liable in such situations will cause the government to curtail its regulatory actions altogether and thus result in an undesirable activity-level effect. Congress may have required such inspections, or there may be political coalitions favoring continued monitoring, irrespective of the increased costs of inspection due to tort liability. Even if there is some reduction in the number of inspections made, the increased quality might more than compensate for the reduction.
The approach also casts a new light on Hataley v. United States.\(^{160}\) There, government officials in the Department of the Interior destroyed plaintiffs’ horses, which had been grazing on federal lands, under what they perceived to be the authority of the Utah abandoned horse statute. The statute provided that the local Board of County Commissioners could authorize elimination of abandoned horses on the open range. “Abandoned” was defined to include horses running at large which were either not branded or, if branded, on which the tax for the preceding year had not been paid. The Tenth Circuit unanimously agreed that the federal agents’ actions were justified under the Utah statute.\(^{161}\) The Supreme Court, however, reversed the Tenth Circuit, relying on Interior Department regulations that required the Secretary to serve notice prior to impoundment of the horses.\(^{162}\) The Court concluded that “[t]hese acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act.”\(^{163}\) But, surely, the government agent in charge exercised discretion in interpreting the Utah statute and pertinent federal regulations, just as did the Tenth Circuit and the Supreme Court. Construing legislation and regulations is at least as discretionary as determining the best temperature for storing fertilizer.

The Court’s decision may make more sense, however, if considered from the process perspective. The government agent’s construction of the Utah statute in all likelihood did not reflect a purposeful agency policy; rather, it reflected only one agent’s ad hoc judgment,\(^{164}\) and such judgments should generally be subject to the check of the FTCA.

Despite the close fit between the process theory and the results of most Supreme Court cases, the approach advocated above would unquestionably alter the analysis currently used by many lower courts. Indeed, recent decisions diverge probably more markedly from the suggested process approach than did the decisions issued in the twenty-five years following Dalehite. In decisions such as United States Fidelity & Guaranty Co. v. United States,\(^{165}\) the courts have focused exclusively upon the nature of the governmental ac-

\(^{161}\) Id. at 177.
\(^{162}\) Id. at 177–78.
\(^{163}\) Id. at 181.
\(^{164}\) The Court noted that the interpretation was put forward by one range manager, in addition to the government litigators post hoc. Id. at 180–81.
tion involved, following the language in Varig to the effect that where there is room for discretion, the discretionary function exception applies. In United States Fidelity & Guaranty Co., the plaintiff alleged that the EPA was negligent in attempting to clean up a toxic waste site. Without considering whether those allegedly negligent efforts stemmed from a purposeful policy, the court held that the discretion inherent in cleanup activities protected the government from liability under the discretionary function exception. In Judy v. United States Department of Labor, the Occupational Safety and Health Agency inspected a hydraulic shaping press at plaintiff’s place of employment and declared it up to standards, despite the fact that the press apparently lacked a required guard. The court, however, ruled that the inspector’s negligence was protected under the discretionary function exception because he did not breach a mandatory regulation as in Berkovitz. Finally, in Flynn v. United States, plaintiffs alleged that members of the National Park Service were negligent in failing to use due care at the scene of an automobile accident. Plaintiffs claimed that the employees, in activating the emergency lights on their vehicle and in driving to the side of the road when the accident was in the middle of the road, distracted the car behind them. That car continued ahead, colliding with the survivors of the first accident, killing several. The court held that the discretionary function exception applied: because there were “no fixed standards for training or use of emergency vehicles, the conduct of the federal employees falls within the discretionary function of the FTCA.”

166. Id. at 123.
167. 864 F.2d 83 (8th Cir. 1988).
168. Id. at 84–85; see also Lively v. United States, 870 F.2d 296 (5th Cir. 1989) (plaintiff longshoremen sued the United States for its alleged negligence in failing to warn them of asbestos dangers, and in failing to take adequate safety measures; the court held the discretionary function exception applicable, despite any evidence that the government officials’ actions, aside from the initial decision to stockpile the asbestos, furthered a deliberate policy); Galvin v. Occupational Safety & Health Admin., 860 F.2d 181 (5th Cir. 1988) (virtually identical to Judy).
169. 902 F.2d 1524 (10th Cir. 1990).
170. Id. at 1531. Decisions rejecting tort claims may rely on the discretionary function exception as a convenient means for resolving a case without addressing other, potentially controversial grounds. For instance, the above appellate decisions can perhaps be explained by the courts’ reluctance to subject the deep-pocket government to liability when it is not the primary tortfeasor. In United States Fidelity & Guaranty Co., the United States did not create the toxic waste dump; in Judy, the government did not mandate use of the hydraulic shaping press without the safety guard; and in Flynn, government employees did not drive either of the cars involved in the crash. Courts might wish to shield the government from liability when its culpability is slight in comparison to that of the primary tortfeasor. Absolving the government from liability
Berkovitz and Varig, therefore, are twofold. First, lower courts have inferred that, as long as government employees are left with discretion by regulation, that discretion is to be protected. Second, as long as agency officials do not violate agency rules, the discretionary function exception protects their actions, irrespective of the absence of any considered policy underlying their actions. The result is inadequate deterrence of government officials.\textsuperscript{171}

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At first blush, adopting a process approach in the context of the discretionary function exception would raise an unseemly incongruity in the law of governmental tort liability. Under section 1983, which subjects “persons” acting under state law to liability for some constitutional torts,\textsuperscript{172} municipalities, though considered “persons,” are exempt from liability under the theory of \textit{respondeat superior}. Rather, they can only be sued for policies and customs which de-

\textsuperscript{171} A process approach, while in general more generous to plaintiffs than that currently followed by the circuit courts, at times would benefit the government. For instance, in Summers v. United States, 905 F.2d 1212 (9th Cir. 1990), plaintiff was injured when she stepped on a hot coal inside a fire ring on a beach operated by the National Park Service. A Park Service policy allowed beachgoers to build fires inside the fire rings, and the Service warned beachgoers to build fires only inside the provided rings. The court held that the discretionary function exception did not protect the government because the government had not identified hot coals inside the rings as a potential danger prior to the accident. To be sure, the government may never have considered whether hot coals presented a particular trap to the unwary (although there was some testimony that it had). But the Park Service consciously determined that fires were to be permitted and that they would be limited to the areas inside the fire rings. It stretches the imagination to believe that the Park Service made that decision without considering in general the possible harms that could arise from use of the fire rings. See also Worley v. United States, 119 F. Supp. 719 (D. Or. 1952), (holding the United States liable for injuries received by a hunter and caused by a poison ejecting device set by a government official to kill coyotes, even though the “coyote getter” was evidently a fundamental, if misconceived, part of the government’s coyote eradication program).

prive individuals of rights protected under federal law.\textsuperscript{173} For instance, in \textit{Oklahoma City v. Tuttle},\textsuperscript{174} plaintiff sued the city for the excessive use of force by a police officer. Plaintiff argued that the city should be liable for its inadequate training of the police officer. The Court was split, but agreed that the city could not be liable for a single incident of excessive force.\textsuperscript{175} Similarly, in \textit{City of St. Louis v. Praprotnik},\textsuperscript{176} the Court held that a city could not be held liable for the allegedly unconstitutional personnel decisions of the directors of the city’s Urban Design and Community Development agencies. According to the plurality opinion, only the mayor, members of the Civil Service Commission, and the city aldermen could be considered policy makers. Although the city policy makers had delegated discretionary authority to the directors, the Court did not consider exercise of that delegated authority to be city policy.\textsuperscript{177} In other words, under the liability scheme constructed by the Court, municipalities pursuant to section 1983 can only be sued for policies and not for nondeliberative actions, the opposite of the approach suggested for the FTCA, which absolves the federal government of all liability whenever its policies are challenged but allows it to be sued for situation-specific actions.

The inconsistency, I think, is more apparent than real. The difference arises out of the Supreme Court’s rejection of \textit{respondeat superior} liability under section 1983. Because municipalities can only be liable for their own acts, and not those of their officials, liability only attaches to generalized policies and not situation-specific acts by municipal personnel. Redress for those situation-specific injuries must be obtained, if at all, from the officials themselves,

\textsuperscript{173} Monell v. Dep’t of Social Servs., 436 U.S. 658 (1978). The Court held that Congress did not intend to include states within the statutory definition of “person.” Plaintiffs can also sue for deprivation of certain federal statutory rights as well. Maine v. Thiboutot, 448 U.S. 1 (1980).

\textsuperscript{174} 471 U.S. 808 (1985).

\textsuperscript{175} Three Justices agreed with Justice Rehnquist that inadequate training could not constitute a policy absent proof that the city had deliberately chosen a training program which proved to be inadequate and that, in any event, municipalities could only be sued for unconstitutional policies. Justice Brennan, joined by two other Justices, agreed that, while a single incident could not constitute a policy, as long as such a policy “caused” the injury, the municipality could be liable. See also Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) (county prosecutor’s advice to police constituted policy).

\textsuperscript{176} 485 U.S. 112 (1988).

\textsuperscript{177} \textit{Id.} at 128–29. The Court has increasingly narrowed the range of municipal actions that can be considered policy. Justice Brennan, along with Justices Marshall and Blackmun, agreed for different reasons that the two directors did not exercise policy making authority. \textit{Id.} at 137–42.
who not only frequently make attractive defendants, but also are generously protected by common-law immunity doctrines.\textsuperscript{178} If the FTCA had embraced official liability instead of enterprise liability, then the liability rules may have evolved similarly.

Yet, from a deterrence and federalism perspective, the section 1983 liability rules make little sense. Policies of municipalities are more deserving of deference from a federalism perspective than are the situation-specific acts of municipal employees.\textsuperscript{179} By the same token, deterrence may be needed more in the nondeliberative situation than when municipal policies are themselves challenged. The immunity doctrines shielding city employees have eroded much of the deterrent force of official liability while political checks constrain municipalities in formulating policies, making deterrence less critical in that context.\textsuperscript{180} It should not be surprising that commentators of wide-ranging political views have condemned the Court's section 1983 jurisprudence.\textsuperscript{181} Current doctrine governing municipal liability strikes an even less sensible balance between deterrence and deference to the governmental entity than does contemporary elaboration of the discretionary function exception.

CONCLUSION

Examination of the discretionary function exception suggests that no coherent view of the exception may be possible. On the one hand, the exception helps protect vigorous decision making as well as preserve the integrity of agency policy making. On the other, the exception removes a possibly critical check upon agency wrongdoing. The goals of preserving discretion and ensuring deterrence appear incompatible. Yet, irrespective of that tension, courts can do better in fashioning the discretionary function exception. They

\textsuperscript{178} In addition to the doctrine of absolute immunity, see supra note 141, municipal officials are protected by qualified immunity, which cloaks them with immunity unless they should have known that their conduct would violate the plaintiffs' constitutional rights. See Harlow v. Fitzgerald, 457 U.S. 800 (1982).

\textsuperscript{179} Those federalism concerns perhaps explain why some Justices apparently believe that only unconstitutional policies of cities, as in Monell, should be subject to suit—as opposed to all policies depriving citizens of protected rights. Oklahoma City v. Tuttle, 471 U.S. 808, 824 n.7 (1985) (plurality opinion of Rehnquist, J.); Praprotnik, 485 U.S. at 128 (plurality opinion of O'Connor, J.).

\textsuperscript{180} If the political checks cannot be expected to work because of hostility to federal rights, then added deterrence may be needed to monitor municipal policies as well. There is little evidence currently to think that such widespread hostility exists.

have failed to focus on the critical connection between deterrence and the administrative process.

In short, agency actions should be protected in two situations. First, if courts in other contexts would decline to review agency acts for fear of skewing agency decision making, then the discretionary function exception should apply. Because prosecutorial decisions or challenges to agency inaction are rarely subject to judicial review under any scenario, they certainly should not be subject to damages under a reasonableness inquiry, even if no considered policy is implicated. Suits under the FTCA would not be available to deter government wrongdoing in this relatively unusual context, but the hands-off approach is justifiable in light of the overarching governmental framework. Second, the discretionary function exception should protect any deliberate social, economic, or political policy selected by an agency, whether or not that policy choice is negligent. Instead of stressing the nature of the governmental action, courts should focus on the decision making process underlying the governmental action challenged.

Consideration of both deterrence and the separation of powers supports this process approach. With respect to deterrence, the federal government should, if possible, be forced to internalize the costs of accidents unless the political and administrative process has provided adequate safeguards. Although these safeguards may exist in several forms, the presence of a deliberate policy represents some check against arbitrary action, suggesting that several layers within the agency have agreed on a certain course of conduct, that agency decision makers have considered future exigencies prior to agreeing on the policy, and that the agency decision affects a substantial number of people. The prospect of unreasonable agency action given these protections is diminished. Separation of powers concerns also support protecting any considered, deliberate policy of the agency from judicial oversight through the FTCA. As long as the agency is exercising delegated authority from Congress, its public policy efforts should be shielded from the prospect of damages and review under state negligence standards. When hallmarks of such deliberative efforts exist, redress should be obtained, if not through the APA or other statute, then from Congress itself.