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SUSCEPTIBLE TO FAULTY ANALYSIS:
UNITED STATES v. GAUBERT
AND THE RESURRECTION OF
FEDERAL SOVEREIGN IMMUNITY

*Bruce A. Peterson**
Mark E. Van Der Weide†

Let every man make known what kind of government would command his respect and that will be one step toward obtaining it.

—Henry David Thoreau
Concord Lyceum (February 1848)

INTRODUCTION

The king can do no wrong. That legal fiction, while perhaps equalled in transparency only by *the jury will disregard that*, nonetheless characterized a century and a half of federal sovereign immunity in this country.¹ The king's invulnerability finally ended in 1946, after a thirty-year siege, when the 79th Congress passed the Legislative Reorganization Act, Title IV of which has become known as the Federal Tort Claims Act (FTCA). Except for several carefully considered exceptions, American citizens suffering injury at the hands of their gov-

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1 See, e.g., *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law upon which the right depends."); see also 1 WILLIAM BLACKSTONE, COMMENTARIES, *237-45. For a different view of this maxim, see *Langford v. United States*, 101 U.S. 341 (1880).

ernment could now sue for damages. The most significant of these exceptions protected from liability "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."² While the contours of this "discretionary function exception" blurred and shifted during the ensuing forty-five years,³ the exception was always focused on the uniquely governmental activity of making and executing public policy. Governmental decisions based on the more objective factors that motivate the bulk of private sector activity remained open to judicial challenge.

In 1991 the United States Supreme Court, with an unexpected and unexplained turn of phrase, significantly expanded the scope of insulated government conduct. In *United States v. Gaubert*,⁴ Justice Byron White, writing for all members of the Court except Antonin Scalia, declared that the discretionary function exception encompassed all discretionary government actions that were "susceptible to policy analysis," whether or not the erring official actually considered policy factors, or for that matter, whether he considered any factors at all. This phrase is now raised by the government's lawyers in countless negligence lawsuits against the United States, and it has greatly restricted the federal government's tort liability for all but the most mundane transgressions. Since *Gaubert*, the government has been winning far more discretionary function exception cases, and it has been winning them more often without going to trial.

The authors learned the hard way about how far-reaching the rule of *Gaubert* can be. We represented three members of a small-town Minnesota family who were infected with the HIV virus through a blood transfusion the father received during National Guard basic training. He passed the virus on to his wife, and she passed it on to their daughter. In spite of the Army's confessed lack of consideration for the special problems of blood screening in a military setting, the Eighth Circuit refused to allow the case to proceed to trial because, regardless of what the Army actually did, its decision regarding blood screening procedures was "susceptible to policy analysis."⁵

The harshness of this result has caused us to think hard about the proper scope of government liability in tort. We have concluded that the justifications for tort law and sovereign immunity suggest a better approach to the FTCA's discretionary function exception, aspects of

2 28 U.S.C. § 2680(a) (1994).

3 See *United States v. Varig Airlines*, 467 U.S. 797, 811 (1984).

4 499 U.S. 315, 325 (1991).

5 *C.R.S. v. United States*, 11 F.3d 791 (8th Cir. 1993).

which many state courts have already instinctively adopted. We propose that the true policy-making discretion necessary for effective governance would be adequately protected by insulating from tort suits only those government decisions made by officials who were authorized to and actually did consider genuine policy factors. Part I of this article discusses the historical focus of the discretionary function exception to the FTCA. Part II analyzes and criticizes the Supreme Court's decision in *United States v. Gaubert*. Part III demonstrates the significant effect that *Gaubert* has had in narrowing governmental tort liability. Part IV sets forth and justifies what we believe to be the proper scope of discretionary function immunity.

I. THE DISCRETIONARY FUNCTION EXCEPTION BEFORE *GAUBERT*

The origins of the discretionary function exception have been extensively documented elsewhere,⁶ and for present purposes we pause only to highlight the original *raison d'être* for the exception and to identify the overarching principle that should guide its application. The principal congressional committee report on the exception explained that Congress designed it to encompass activities such as the exercise of regulatory authority by the Federal Trade Commission or the Securities and Exchange Commission, the use of the Treasury Department's black listing or freezing power, or testing the constitutionality of legislation or the legality of a rule or regulation.⁷ Given the language of the exception and the examples offered by the committee, the first Supreme Court opinion to examine the meaning of the discretionary function exception concluded in 1953 that it was intended to protect uniquely governmental activities:

The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Gov-

6 See, e.g., *Dalehite v. United States*, 346 U.S. 15 (1953); Barry R. Goldman, *Can the King Do No Wrong? A New Look at the Discretionary Function Exception to the Federal Tort Claims Act*, 26 GA. L. REV. 837 (1992); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 875 n.14 (1991) (citing sources).

7 See H.R. REP. NO. 77-2245, at 10 (1942); S. REP. NO. 77-1196, at 7 (1946); H.R. REP. NO. 79-1287, at 5-6 (1945); *Dalehite*, 346 U.S. at 29 n.21; *Hearings Before the House Judiciary Comm. on H.R. 5373 and H.R. 6463*, 77th Cong. 33 (1946); 2 LESTER S. JAYSON, *HANDLING FEDERAL TORT CLAIMS* § 246 (1993 Supp.).

ernment should be subject to liability arising from acts of a governmental nature or function.⁸

The Supreme Court has more recently reaffirmed this central focus of the exception: “[W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.”⁹

The best theoretical justification for the discretionary function exception closely tracks this intended focus. Legislators and government bureaucrats regulating private conduct must perforce be guided by notions of the public good and how it can be achieved— notions that are at best hotly contested and at worst inarticulable.¹⁰ “Prohibiting murder” to a pro-life activist is “infringing upon women’s rights” to a pro-choice activist. An Army Corps of Engineers’ masterpiece is a Sierra Club disaster. Courts generally should not enter this public policy fray.¹¹ For courts to review the policies established by Congress and the President and implemented by administrators and agencies does violence to the separation of powers. On a more practical level, courts have little ability to evaluate the propriety of conduct guided by disputed notions of public policy. The usefulness of the reasonable person standard ends when reasonable and even wise men and women can and do legitimately disagree.

The Supreme Court has clearly articulated this rationale as it has defined the contours of the discretionary function exception. For example, in the 1984 *Varig Airlines* case, the Court explained that Congress’s purpose in carving out the exception was to prevent judicial “second guessing” of legislative and administrative policy decisions:

This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial “second guessing” of legislative and administrative decisions grounded in so-

8 *Dalehite*, 346 U.S. at 20, 27-28. The Court went on to say: “One only need read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.” *Id.* at 32.

9 *United States v. Varig Airlines*, 467 U.S. 797, 813-14 (1984).

10 *See, e.g.*, ALASDAIR MACINTYRE, *AFTER VIRTUE* 6-11 (1984).

11 Of course, a strong case can be made that courts should ensure that the government follows its own procedures and meets minimal standards of rationality. *See, e.g.*, 5 U.S.C. § 706 (1994) (prescribing, *inter alia*, “abuse of discretion” standard for review of informal rule making and adjudications and “substantial evidence” standard for review of formal rule making and adjudications); Krent, *supra* note 6, at 874 n.13.

cial, economic and political policy through the medium of an action in tort.¹²

At the other end of the spectrum from the policy judgments courts cannot handle are the objective decisions they do have the capacity to review. In *Berkovitz v. United States*, the Court explained that applicability of the discretionary function exception turned on whether objective standards underlay the challenged conduct or whether policy choice was involved:

Petitioners contend that the determination involves the application of objective scientific standards . . . whereas the Government asserts that the determination incorporates considerable "policy judgment" In making these assertions, the parties have framed the issue appropriately; application of the discretionary function exception to the claim that the determination of compliance was incorrect hinges on whether the agency officials making that determination permissibly exercised policy choice.¹³

12 *Varig Airlines*, 467 U.S. at 814.

13 *Berkovitz v. United States*, 486 U.S. 531, 545 (1988). In a thoughtful decision about the application of the discretionary function exception to medical decisions, the Second Circuit discussed the need for objective standards at length and concluded that courts ought "to inquire whether state law standards can adequately evaluate the course of action contemplated by federal statute or regulation." *Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969); see also Donald N. Zillman, *Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act*, 110 MIL. L. REV. 115, 118 (1985). The Court in *Hendry* observed that state tort standards could not adequately control governmental decisions based on public policy rather than established professional standards or standards of general reasonableness. *Id.* The Court ultimately concluded that the judgment involved in that case, whether to find a merchant marine officer mentally unfit for service was "not different in kind or complexity from those which courts are accustomed to entertain when tort suits are brought against private physicians. The fact that judgments of government officials occur in areas requiring professional expert evaluation does not necessarily remove those judgments from the examination of courts by classifying them as discretionary functions under the Act." *Id.*; see also *Jablonski v. United States*, 712 F.2d 391, 397 (9th Cir. 1983) ("Courts should encounter no difficulty in evaluating the official's action, since they are experienced in deciding medical malpractice cases."); *Lindgren v. United States*, 665 F.2d 978, 980 (9th Cir. 1982) ("In addition to examining the level at which the act/omission occurred, this Court has also considered the ability of the judiciary to evaluate the agencies' act/omission.").

Naturally, to the extent that the government activity at issue has a private sector analogue, discretionary function protection is less appropriate. Bagby and Gittings point out that the private sector analogue may limit the applicability of the discretionary function exception in cases of negligent policy implementation: "When the implementation of a discretionary policy requires activities commonly done in the private sector, and which involve little policy-based judgment, these activities should not be protected by the DFE." John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*,

In *Berkovitz*, the Supreme Court developed a seemingly straightforward test for applying the exception by consolidating the prior law into a two-part inquiry.¹⁴ First, a court should look to the nature of the challenged conduct and consider whether the conduct involved an element of judgment or choice. Understandably, the exception would not apply where a federal statute or regulation "specifically prescribes a course of action for an employee to follow."¹⁵ Second, if the controlling regulations permitted some choice, the court should determine whether the judgment exercised "is of the kind that the discretionary function exception was designed to shield," i.e., whether the administrative action was based on consideration of social, economic, or political policy.¹⁶

This kind of traditional discretionary function analysis produced some harsh but understandable results. Harm done to citizens by the government for public policy reasons, impossible to evaluate objectively, was not redressable through the FTCA. For example, soldiers and civilians who were subjected to atomic radiation, Agent Orange, or asbestos exposure obtained no recovery.¹⁷ Likewise, people injured in national parks because of the natural, primitive condition in which the parks were deliberately maintained received no compensation.¹⁸ On the other hand, victims of the government's bad technical, non-policy decisions received compensation through the FTCA. For example, victims of poor engineering decisions by government officials¹⁹

30 AM. BUS. L.J. 223, 239 (1992); see also Kenneth P. Purcell, *A Unified Standard for Construing the Discretionary Function Exception of the Iowa Tort Claims Act*, 73 IOWA L. REV. 183, 199-202 (1987).

14 The *Berkovitz* test is the prevailing standard for applying the discretionary function exception. See James A. Brown & John C. Anjier, *Recent Developments Affecting Louisiana's Discretionary Function Exception: Will Louisiana Follow Gaubert?*, 53 LA. L. REV. 1487, 1489 (1993); Angela L. Martin, *The Discretionary Function Exception Returns Sovereign Immunity to the Throne of Douglas County—Once Again, the King Can Do No Wrong: Jasa v. Douglas County*, 28 CREIGHTON L. REV. 247, 260 (1994).

15 *Berkovitz*, 486 U.S. at 536.

16 *Id.*

17 See, e.g., *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31 (2d Cir. 1989); *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194 (2d Cir. 1987).

18 See, e.g., *Zumwalt v. United States*, 928 F.2d 951 (10th Cir. 1991); *Valdez v. United States*, 837 F. Supp. 1065 (E.D. Cal. 1993); *Schmitz v. United States*, 796 F. Supp. 263 (W.D. Mich. 1992).

19 See, e.g., *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1031 (9th Cir. 1989) (government built faulty canal); *Arizona Maintenance Co. v. United States*, 864 F.2d 1497, 1504 (9th Cir. 1988) (government used excessive amount of dynamite).

and victims of medical malpractice committed by government doctors²⁰ routinely obtained recovery.

II. *UNITED STATES V. GAUBERT* AND HYPOTHETICAL POLICY DECISIONS

Into this status quo stepped an angry Thomas A. Gaubert demanding \$100 million from the federal government. Gaubert had been the chairman of the board and largest shareholder of Independent American Savings Association (IASA), a Texas chartered and federally insured savings and loan. In 1984 officials of the Federal Home Loan Bank Board (FHLBB) sought to have IASA merge with Investex Savings, a failing Texas thrift institution. The FHLBB and the Federal Home Loan Bank—Dallas (FHLB—D), one of FHLBB's offspring, asked Gaubert to sign a "neutralization agreement" removing him from IASA's management and to post a \$25 million interest in real property as security for his personal guarantee that IASA's net worth would exceed regulatory minimums. Gaubert agreed to both conditions.

In the spring of 1986 the regulators threatened to close IASA unless its management and board of directors were replaced. All the new officers and directors were recommended by FHLB—D. FHLB—D officials also began playing a direct role in the day-to-day management of IASA.²¹ After a year of this kind of help from the government, IASA had a substantial negative net worth. On May 20, 1987, the Federal Savings and Loan Insurance Corporation (FSLIC) placed IASA in receivership. Gaubert filed an administrative claim, and later a federal lawsuit, seeking \$75 million for the lost value of his shares and \$25 million for the property he had forfeited under his personal guarantee. He charged the federal officials with negligence in selecting the new officers and directors and in participating in the day-to-day management of IASA. Gaubert's administrative claim was denied, and the district court dismissed his lawsuit on discretionary function

²⁰ See, e.g., *Lather v. Beadle County*, 879 F.2d 365 (8th Cir. 1989); *Jablonski v. United States*, 712 F.2d 391 (9th Cir. 1983); *Jackson v. Kelly*, 557 F.2d 735 (10th Cir. 1977).

²¹ The Supreme Court's opinion identifies the following specific regulatory actions by FHLB-D: recommending the hiring of a consultant to advise IASA on operational and financial matters; advising IASA about whether, when, and how its subsidiary should be placed into bankruptcy; mediating salary disputes; reviewing the draft of a complaint to be used in litigation; urging IASA to convert from a state to a federal charter; actively intervening when the Texas Savings and Loan Department attempted to install a supervisory agent at IASA. *Gaubert*, 499 U.S. at 319-20.

exception grounds.²² The Court of Appeals for the Fifth Circuit found that the regulators' earlier advice on the merger, the neutralization agreement, the guarantee, and the replacement of the board of directors was protected by the discretionary function exception, but that their advice on day-to-day operations was not.²³

Thomas Gaubert did not get his \$100 million back. In dismissing all of Gaubert's claims, the Supreme Court applied the established two-prong *Berkowitz* test, but made crucial revisions to the second part of the test. As to the first prong, no one questioned the absence of precise mandatory statutes or regulations:

Both the district court and the Court of Appeals recognized that the agencies possessed broad statutory authority to supervise financial institutions. The relevant statutory provisions were not mandatory, but left to the judgment of the agency the decision of when to institute proceedings against a financial institution and what mechanism to use.²⁴

As to the kind of decisions the regulators made in supervising the day-to-day operations of the bank, Gaubert argued that they involved the mere application of technical skills and business expertise. In reviewing what burden Gaubert would have to carry in order to prevail in the second part of the test, however, the Supreme Court added two heavy encumbrances.

A. *The Gaubert Test*

The Court's first revision was to establish a novel presumption that policy making had taken place. The Court pronounced that if an agency's regulations allowed employee discretion, then "the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to promulgation of the regulations."²⁵

The Court cited no authority for this new development, and it is nowhere evident in the earlier cases. Although the Court did discuss the scope of its new presumption, it offered little in the way of justification.²⁶ The Court explained that even though agencies may rely on

22 *Gaubert v. United States*, No. CA3-87-2989-T (N.D. Tex. Apr. 1988).

23 *Gaubert v. United States*, 885 F.2d 1284, 1290 (5th Cir. 1989), *rev'd and remanded*, 499 U.S. 315 (1991).

24 *Gaubert*, 499 U.S. at 329.

25 *Id.* at 324.

26 Bagby and Gittings contend that the *Gaubert* presumption "necessarily follows" from the *Gaubert* premises that (1) implementation decisions that do not violate mandatory regulations are protected by the discretionary function exception; and (2) implementation decisions that do violate mandatory regulations are not protected.

case-by-case decisionmaking or internal guidelines rather than published regulations, the text of the controlling statute will most often make evident its general aims and policies. Apparently the Court intended the presumption also to protect administrative conduct not directly based on regulations. According to the Court, whenever established government policy, however expressed, allows a government official to exercise discretion "it must be presumed that the agent's acts are grounded in policy when exercising that discretion."²⁷ It is then incumbent upon the plaintiff to allege facts to overcome the presumption.

The Supreme Court's new presumption makes sense within certain regulatory schemes. If an operational regulation not only grants discretion to an official but also informs her of the policy criteria to apply in exercising that discretion, a court is probably warranted in presuming that the resulting action followed from application of the guiding criteria. It is equally likely, however, that the designers of a regulatory scheme grant discretion to a lower level official not for her to make her best judgment in light of all the agency's goals, but simply for her to exercise professional expertise. The statutory mission of the FHLBB may be to protect the solvency of the nation's thrift institutions, but every employee of the FHLBB is not consciously pursuing that goal with every exercise of discretion. The statutory mission of the Department of Defense may be to protect the nation's security, but not every action of every Defense Department employee is taken with that goal in mind. A government official may simply be trying to run a bank or a hospital in exactly the same way her private counterpart would.²⁸

A presumption may shift the burden of proof,²⁹ but it can be overcome. Had the Supreme Court ceased refining *Berkovitz* after establishing the new presumption, the impact on sovereign immunity jurisprudence might have been slight. But Justice White also revised

Bagby & Gittings, *supra* note 13, at 242. However, *Gaubert's* presumption applies to regulations allowing discretion rather than mandating conduct. The premises regarding mandatory regulations identified by Bagby and Gittings do not seem to warrant a presumption about the policy basis for government employee conduct based on discretionary rather than mandatory regulations.

²⁷ *Gaubert*, 499 U.S. at 324.

²⁸ One commentator has observed that issues surrounding the presumption will be among those that will "likely dominate the next generation of discretionary function cases following *Gaubert*." Goldman, *supra* note 6, at 848 n.62. This prophecy has not been borne out by the post-*Gaubert* case law. See *infra* Part III.

²⁹ See Brown & Anjier, *supra* note 14, at 1492. But see *Prescott v. United States*, 973 F.2d 696, 702 n.4 (9th Cir. 1992) (stating that "*Gaubert*, of course, did not deal with the burden of proof question").

the test in a way that made his new presumption and, for that matter, all evidentiary issues irrelevant in discretionary function exception cases. He went on to write a single sentence that changed the entire focus of the exception: instead of looking to what the challenged government employee *actually* considered, courts should look to whether the employee's decision *conceivably* could have been guided by policy factors. "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis."³⁰ The inquiry moved from the realm of the factual to the realm of the hypothetical.

B. *The Origins of "Susceptibility" Analysis*

Justice White provided neither explanation nor authority for his transformation of the second prong of the *Berkovitz* test from consideration of what regulators actually considered to what they might have considered.

The history of the *Gaubert* litigation provided Justice White no support for his "susceptibility" test. The unreported district court opinion contained no discretionary function analysis whatsoever.³¹ The Fifth Circuit distinguished between the decision to merge IASA with Investex and the decision to replace the IASA Board of Directors, which were protected policy decisions, from the operational control of IASA, which was not a protected set of decisions.³² The Fifth Circuit never indicated whether or not the government presented evidence about the nature of the actual deliberations carried out by the federal thrift regulators. Nor did the Fifth Circuit explain why the merger and reshuffling of the Board were policy decisions, but the day-to-day operational decisions were not. In its brief to the Supreme Court, the government did not identify a shred of evidence about what the regulators actually considered in their decision-making process. Yet the government asserted that the allegedly "operational" decisions of the regulators were made in pursuit of the agency's regulatory goal of preserving the soundness of U.S. thrift institutions.³³ No attempt was made to distinguish this goal from that of any bank manager. In response, Mr. Gaubert argued that the regulators' decisions were based on business judgment and technical expertise,

30 *Gaubert*, 499 U.S. at 325.

31 *Gaubert v. United States*, No. CA3-87-2989-T (N.D. Tex. Apr. 1988).

32 *Gaubert v. United States*, 885 F.2d 1284, 1290 (5th Cir. 1989), *rev'd and remanded*, 499 U.S. 315 (1991).

33 Petitioner's Brief at Section B.2.a, *Gaubert* (No. 89-1793).

but he never contended that the discretionary function exception only applied where the government presented evidence in the record of policy considerations.³⁴

Although the *Gaubert* briefs did not address susceptibility analysis, three of the federal circuit courts had previously employed a similar methodology, and a handful of decisions even contained the phrase "susceptible to policy analysis." Only a few of these decisions attempted to justify the approach, however, and the efforts made were not very persuasive. The Sixth Circuit was the first to address the difference between actual and hypothetical policy considerations in the 1986 case of *Myslakowski v. United States*.³⁵ There the court found the U.S. Postal Service immune from claims that it negligently sold Jeeps with dangerously low rollover resistance to the public without proper warnings. The trial court had found the discretionary function exception inapplicable because the evidence did not show that departmental policymakers considered the pros and cons of requiring a warning. The Sixth Circuit disagreed, explaining that the discretionary function exception had to protect policymakers' failure to consider all relevant factors:

[E]ven the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made.

Indeed, it is, in part, to provide immunity against liability for the consequences of negligent failure to consider the relevant, even critical, matters in discretionary decision making that the statutory exception exists. If it were otherwise, a judgment-based policy determination made at the highest levels, to which all would concede that the statutory exception applies, the decision to sell surplus Jeeps, would result in no immunity if the decision could be shown to have been made without consideration of important, relevant factors, or was a decision negligently reached. If that reasoning were sound, the discretionary function exception would be inapplicable in every case in which the negligent "failure to consider" a relevant risk could be proved.³⁶

The Sixth Circuit in *Myslakowski* misinterpreted how an "actual policy decision" requirement for discretionary function immunity would operate. Unlike the straw man created and demolished by the court, such a requirement would not hold the government liable every time its decisionmaker failed to consider any "important, relevant"

34 Respondent's Brief at Section B, *Gaubert* (No. 89-1793).

35 806 F.2d 94 (6th Cir. 1986), *cert. denied*, 480 U.S. 948 (1987).

36 *Id.* at 97-98.

factor. So long as the government decisionmaker actually did consider a policy factor in making the decision, the decision would be immune from tort suits.

The next year, the Ninth Circuit employed susceptibility analysis to avoid what it perceived to be a different kind of problem in *In re Consolidated United States Atmospheric Testing Litigation*.³⁷ The case involved claims for personal injury and wrongful death brought by or on behalf of military and civilian participants in the United States atmospheric nuclear weapons testing program. One of the plaintiffs' claims was based on the government's failure before 1977 to warn participants of the dangers to which they had been exposed. The court identified several policy factors bearing on the decision to embark on a warning program—the assignment of a large number of employees and the expenditure of large sums of money, the public anxiety and health hazards inherent in the medical responses to the warning, and the impact on on-going and future tests.³⁸ The plaintiffs argued, however, that the discretionary function exception could not apply in the absence of a conscious decision. The court rejected this argument because it left no protection for government inaction:

If the decision to issue or not to issue a "warning" is within the discretionary function exception, then logically the failure to consider whether to issue one necessarily falls within the exception as well. Any other interpretation of the statute would create insurmountable problems in its administration: What would constitute a "decision"? Would a decision to defer decision be a "decision"? Would the government be subject to liability for failing to act where operational employees conducting the relevant research consider the evidence as yet insufficient for making a decision?³⁹

The court's concern seems exaggerated. The failure of a government official to make a decision is no more difficult to evaluate under the discretionary function exception than the *Myslakowski* problem of determining whether a decisionmaker neglected to consider all relevant factors. If agency inaction was due to policy considerations, the failure to act is protected. For example, if an agency decided that because of other social, economic, or political priorities it could not analyze a particular problem or would have to leave an entire problem to a later date, that government withdrawal should be protected by the exception.⁴⁰ Nor is there any problem defining what constitutes a

37 820 F.2d 982 (9th Cir. 1987).

38 *Id.* at 987.

39 *Id.* at 998-99.

40 Negligent and unwitting failure to recognize and address a serious peril, however, deserves no protection.

“decision.” The plaintiff always performs that function by identifying the negligent action or inaction that caused his damages. To determine the applicability of the discretionary function exception, all the court has to do is determine whether policy considerations motivated the action or inaction.⁴¹

In the following year, the Third Circuit relied upon *Myslakowski's* dubious reasoning in *United States Fidelity and Guaranty Co. v. United States*.⁴² There the court found that the discretionary function exception applied to claims against the government arising from an accident during the cleanup of an abandoned chemical facility. The trial court found that the EPA had been negligent in failing to take wind conditions into account when supervising the neutralization of a chemical tank. The court quoted *Myslakowski* at length and observed that it was irrelevant whether the government employee actually balanced economic, social, and political concerns in reaching a decision. The court then for the first time used the precise language eventually employed by Justice White in *Gaubert*: “Thus, the relevant question is not whether an explicit balancing is proved, but whether the decision is *susceptible to policy analysis*.”⁴³ The outcome of the case followed directly from this premise. Referring to the decision by the EPA’s on-scene coordinator of when to schedule the neutralization of a volatile chemical tank venting into the atmosphere, the court argued:

In this context, *one would expect* the scheduling decision to reflect not only the available resources and the other hazards to be neutralized on the site, but most importantly, a balancing of the risks of proceeding with the neutralization on the day chosen against the risks of further delay.⁴⁴

41 See Bagby & Gittings, *supra* note 13, at 255; Martin, *supra* note 14, at 255, 261.

42 837 F.2d 116 (3d Cir.), *cert. denied*, 487 U.S. 1235 (1988). The Third Circuit had actually employed susceptibility analysis even before *Myslakowski* in *Smith v. Johns-Manville Corp.*, 795 F.2d 301 (3rd Cir. 1986), but it offered no explanation whatsoever: “The test is not whether the government actually considered each possible alternative in the universe of options, but whether the conduct was of the type associated with the exercise of official discretion.” *Id.* at 308-09. Thus, the General Service Administration’s decision to sell surplus asbestos without warnings or warranties was protected under the discretionary function exception, even though the government produced no evidence showing that the GSA considered the health risks of asbestos in formulating its plan of sale.

43 *U.S. Fidelity & Guaranty*, 837 F.2d at 121 (emphasis added).

44 *Id.* at 122 (emphasis added).

Since "one would expect" the policy balancing to have taken place, the court felt no need to look at what the EPA coordinator actually did.⁴⁵

Finally, in 1989, the Ninth Circuit followed *Atmospheric Testing* in perhaps the most influential pre-*Gaubert* susceptibility case, *Kennewick Irrigation District v. United States*.⁴⁶ The plaintiffs there sought recovery for property damage and personal injuries arising out of two breaks in the Irrigation District's main irrigation canal, which had been designed and constructed in the mid-1950s by the United States Bureau of Reclamation. The magistrate found the discretionary function exception inapplicable because the decision concerning lining of the canal and other aspects of design and construction challenged by the plaintiffs were simply engineering decisions, not policy decisions. The Bureau's failure to use recognized and accepted engineering standards was simply negligence in the exercise of a common engineering function. The Ninth Circuit, however, observed that the design decisions were discretionary functions because the Bureau officials had to consider construction costs and the water users' ability to pay those costs. Even though the Bureau had failed to prove that it actually considered budgetary factors in deciding not to line the main canal, the Ninth Circuit quoted the "susceptible to policy analysis" catchphrase and cited *U.S. Fidelity and Guaranty, Myslakowski*, and their progeny for the proposition that the discretionary function exception applies even in the absence of a conscious policy decision. The court quoted *At-*

45 The Third Circuit followed *U.S. Fidelity & Guaranty* two years later in *Sea-Land Service Inc. v. United States*, 919 F.2d 888 (3d Cir. 1990). This latter case arose from the decedent's service from 1943 to 1948 on United States ships that were built with asbestos. The case was brought under the Suits in Admiralty Act, 46 U.S.C. § 741 et seq. (1994), which the court concluded contains a discretionary function exception. Using the "susceptible to policy analysis" language from *U.S. Fidelity & Guaranty*, the court observed: "[W]e need not examine the record for evidence of a conscious policy decision regarding the use of asbestos in ship construction." 919 F.2d at 892. The court then observed that the matter was susceptible to policy analysis whether or not the government official failed to weigh the relevant factors. Citing *Myslakowski*, the court raised the same red herring invoked earlier by the Sixth Circuit: "[I]f the negligent failure of a government policy-maker to consider all relevant aspects of a matter was not within the exception, the discretionary function exception would be illusory." *Id.* The court reasoned that since there was a desperate need during World War II to produce ships as quickly as possible, the choice of materials necessary to accomplish that goal was certainly amenable to policy analysis. Even the use of ships with asbestos after the war presented significant questions of resource allocation that were also susceptible to policy analysis. Finally, the government's failure to warn both during and after the war of the health effects of asbestos was also susceptible to policy analysis and was a choice similar to the use of asbestos in the first place.

46 880 F.2d 1018 (9th Cir. 1989).

ospheric Testing at length concerning the problems in ascertaining what constitutes a "decision," but it engaged in no deeper analysis than it had provided in the earlier case.

C. *Alternative Views*

Gaubert's presumption and its susceptibility test had no origins in Supreme Court discretionary function jurisprudence and tenuous origins in circuit court jurisprudence. Moreover, they seemed to run counter to the plain meaning of the *Varig* and *Berkovitz* texts. *Varig* emphasized the Congressional intent to immunize "decisions grounded in social, economic, and political policy . . ." ⁴⁷ Nowhere did the *Varig* Court speak of the immunization of decisions potentially grounded or conceivably grounded in policy considerations. *Berkovitz* asserted that "application of the discretionary function exception . . . hinges on whether the agency officials . . . permissibly exercised policy choice" ⁴⁸ and that the discretionary function exception protects "only governmental actions and decisions based on considerations of public policy." ⁴⁹ The language of these cases implies that protected decisions are only those decisions actually based on policy consideration, not those susceptible to policy analysis.

Gaubert's presumption and "susceptibility" test are even more surprising given that many circuit courts applying the discretionary function exception in the days before *Gaubert* looked for evidence in the record of whether or not the government agent considered policy factors. For example, in the Second Circuit case of *Andrulonis v. United States*, ⁵⁰ a bacteriologist contracted rabies while performing a laboratory experiment. Dr. George Baer, a federal government scientist, had furnished the rabies viral strain used in the experiment and had also supervised the experiment. The district court held the government liable for Mr. Andrulonis's injuries because Dr. Baer had a "duty to warn about the obviously dangerous conditions he should have noticed in the laboratory when the rabies virus he had supplied was being used." ⁵¹ The Second Circuit noted that the government's initial decision to encourage rabies research and commence the study at issue implicated policy considerations and, therefore, deserved discre-

47 *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

48 *Berkovitz v. United States*, 486 U.S. 531, 545 (1988).

49 *Id.* at 537.

50 924 F.2d 1210 (2d Cir. 1991), *vacated*, 502 U.S. 801 (1991), *previous decision reinstated*, 952 F.2d 652 (2d Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992).

51 *Andrulonis*, 952 F.2d at 653.

tionary immunity. The court went on to conclude, however, that no policy factors actually influenced Baer's failure to warn:

The same is not true, however, with Dr. Baer's alleged failure to warn of the extreme dangers presented by the particular circumstances of the March 29th experiment which Dr. Baer failed to interrupt. The situation did not lend itself to policy balancing, nor is there any indication that Dr. Baer considered the policy implications or the pros and cons of allowing the experiment to proceed.⁵²

In spite of *Atmospheric Testing*, the Ninth Circuit also frequently "declined to affirm a dismissal of an action on the basis of a discretionary function issue when the evidentiary record was insufficient to entitle the government to summary judgment on the question of whether the alleged acts of negligence resulted from choices grounded in social, economic, or political policy."⁵³ The First Circuit, in certain circumstances, explicitly conditioned the applicability of the discretionary function exception upon the government's presenting evidence of an actual policy decision. For example, in *Dube v. Pittsburgh Corning*,⁵⁴ the court held that the Navy's failure to warn bystanders of the risks associated with exposure to asbestos was not protected by the discretionary function exception largely because the Navy never made an actual decision to forgo protecting or warning such bystanders. The fact that the Navy could have considered and re-

52 *Andrulonis*, 924 F.2d at 1219.

53 *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). In *Seyler v. United States*, the plaintiff alleged that the Bureau of Indian Affairs negligently failed to maintain one of its roads in a safe condition by failing to erect speed limit signs on the road. *Seyler v. United States*, 832 F.2d 120, 122 (9th Cir. 1987). The Ninth Circuit said: "We can find nothing in the record to suggest that the BIA's failure to provide signs resulted from a decision 'grounded in social, economic, or political policy.'" *Id.* at 123 (citation omitted); see also *Routh v. United States*, 941 F.2d 853, 856 (9th Cir. 1991) ("The government's position, carried to its logical extreme, would allow the undercutting of a policy decision to require a safe workplace by purely economic considerations not supported in the record."); *Arizona Maintenance Co. v. United States*, 864 F.2d 1497, 1504-05 (9th Cir. 1989) (requiring particularized and fact-specific inquiry into whether government agent's acts or omissions flowed from choice based on social, political, and economic policy factors); *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195 (9th Cir. 1987) (declining to hold that Park Service's decision to maintain pass in safe condition was decision grounded in social, political, or economic policy because of insufficient evidence in record of clear link between Park Service road policies and condition of pass). Interestingly, in a footnote in a case decided after *Gaubert*, but without citing *Gaubert* for the proposition, the Ninth Circuit asserted that "[t]he government, of course, need not necessarily prove that a government employee actually balanced economic, social, and political concerns in reaching his or her decision." *Prescott*, 973 F.2d at 703 n.5.

54 870 F.2d 790 (1st Cir. 1989).

jected a policy of warning or protecting bystanders did not bring its failure to warn within the discretionary function exception.⁵⁵

Justice White's opinion in *Gaubert* was not unanimous; Justice Scalia concurred in the result, but for different reasons. Instead of immunizing all decisions that are susceptible to policy considerations, Scalia advocated limiting the discretionary function exception to decisions that are susceptible to policy considerations and "made by an officer whose official responsibilities include assessment of those considerations."⁵⁶ Ordinarily, operational level employees are not responsible for making policy decisions, and they should not be immunized when they do so. Looking back at *Dalehite*, a case that involved a devastating fertilizer explosion in Texas, Scalia observed:

The dock foreman's decision to store bags of fertilizer in a highly compact fashion is not protected by this exception, because, even if he carefully calculated considerations of cost to the government versus safety, it was not his responsibility to ponder such things; the Secretary of Agriculture's decision to the same effect is protected, because weighing those considerations is his task.⁵⁷

Scalia also observed that the existence of policy authority provided some comfort that the decision itself was one that ought to be informed by policy considerations. In the case at hand, Scalia found it impossible to determine whether each specific action of the regulators qualified for discretionary immunity. He was convinced, however, that the decision whether or not to take over a bank was a protected one, and the actions of the regulators were protected because they merely established the conditions under which the FHLBB would or would not take over the bank.

55 *Id.* at 796-800. "When the government is operating in a capacity . . . highly analogous to private industry, we doubt that the 'susceptible of discretion' analysis can protect an official's negligent failure to act without an affirmative exercise of policy judgment . . ." *Id.* at 799; see also *Collazo v. United States*, 850 F.2d 1, 3 (1st Cir. 1988) ("But nothing in the record so far suggests that the VA Hospital's decisions were made on other than medical grounds.").

56 *United States v. Gaubert*, 499 U.S. 315, 335 (1991) (Scalia, J., concurring). Scalia recognized that his test, by looking not only at the decision but also at the officer who made it, once again made relevant the planning versus operational distinction of prior case law. Although this distinction was pronounced dead by the majority opinion in *Gaubert*, some state courts still employ it. See, e.g., *Brown & Anjier*, *supra* note 14, at 1499; Amye Tankersley, *Tennessee's Adoption of the Planning-Operational Test for Determining Discretionary Function Immunity Under the Governmental Tort Liability Act*, 60 TENN. L. REV. 633 (1993). At least one commentator advocates resuscitation of the distinction. See Osborne M. Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act: Time for Reconsideration*, 42 OKLA. L. REV. 459 (1989).

57 *Gaubert*, 315 U.S. at 335 (Scalia, J., concurring).

In sum, the Supreme Court adopted susceptibility analysis with none of the jurisprudential underpinnings that usually support a significant shift in the law. The parties to the *Gaubert* litigation did not argue for or against the proposition that the discretionary function exception protects every government decision that is susceptible to policy analysis. The parties did not brief the Court as to what factors the thrift regulators actually considered. Earlier case law barely mentioned the "susceptible to policy analysis" language and superficially analyzed the concept. Most unfortunately, given the strong alternative views, the Supreme Court in *Gaubert* offered no justification for its unexpected leap in the direction of a more capacious sovereign immunity.

D. *The New Test Applied*

Not surprisingly, Justice White's two "clarifications" of the second prong of the *Berkovitz* test made rejection of Thomas Gaubert's claim easy. In 1982 the FHLBB had adopted a "formal statement of policy regarding the Bank Board's use of supervisory actions," which stated, among other things, that it was the agency's goal to "minimize, and where possible, to prevent losses occasioned by violations or unsafe or unsound practices by taking prompt and effective supervisory action" The existence of this policy guidance triggered White's new presumption:

The FHLBB Resolution quoted above, coupled with the relevant statutory provisions, established governmental policy which is presumed to have been furthered when the regulators exercised their discretion to choose from various courses of action in supervising IASA.⁵⁸

Having employed the presumption tool, White scarcely needed to rely on his new susceptibility standard. He believed that the Court of Appeals had already determined the actual policy basis of the regulators' conduct: "[T]hese day-to-day 'operational' decisions were undertaken for policy reasons of primary concern to the regulatory agencies."⁵⁹ In his discussion, however, White disposed of Gaubert's contentions with comments directed to the hypothetical policy nature of the regulators' conduct. With no evidentiary support, White asserted that conversion to a federal charter and intervention with the state agency "were directly related to public policy considerations regarding federal oversight of the thrift industry," as were advising the

58 *Id.* at 332.

59 *Id.*

hiring of a financial consultant, advising when to place IASA subsidiaries into bankruptcy, intervening on IASA's behalf with Texas officials, advising on litigation policy and mediating salary disputes.⁶⁰ White concluded: "[T]here are no allegations that the regulators gave anything other than the kind of advice that was within the purview of the policies behind the statutes."⁶¹ In short, "susceptibility" analysis permitted White to base the Court's decision not on what the regulators actually said and wrote about the reasons behind their actions but on a superficial and general discussion about the nature of their conduct.

III. THE DISCRETIONARY FUNCTION EXCEPTION SINCE *GAUBERT*

One might have predicted after *Gaubert* that the new presumption and the shift of emphasis from actual to hypothetical policy considerations would significantly increase the proportion of government defendants able to satisfy the second prong of the *Berkovitz* test and obtain discretionary function immunity. The cases bear this out.⁶² Nearly three years passed between the Supreme Court's decisions in *Berkovitz*—June of 1988—and *Gaubert*—March of 1991. A comparative analysis of (1) discretionary function exception cases decided during the period between *Berkovitz* and *Gaubert* and (2) discretionary function cases decided in the three years following *Gaubert* illustrates the difference.⁶³ In the period between *Berkovitz* and *Gaubert*, ninety-one relevant cases emerged. In thirty-nine of those cases, the plaintiff pre-

60 *Id.* at 332-33.

61 *Id.* at 337 (citations omitted).

62 The post-*Gaubert* case law disproves the prediction of one commentator that *Gaubert*'s susceptibility analysis "provides fertile ground for litigants seeking recovery in tort against the United States." Medora Marisseau, *Seeing Through the Fallout: Radiation and the Discretionary Function Exception*, 22 ENVTL. L. 1509, 1520-21 (1992). The post-*Gaubert* case law also suggests that another recent commentator's survey of discretionary function exception case law underestimates the importance of *Gaubert*. See Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365, 372-73, 377-79 (1995).

63 In order to identify true discretionary function exception cases, we searched the Westlaw ALLFEDS database (which includes federal district court, circuit court, and Supreme Court cases) during these two time periods for cases in which the phrase "discretionary function exception" appeared either in the case syllabus or in a headnote. We excluded a few cases from this sampling because they contained no holding on a federal discretionary function issue.

Our survey does not examine discretionary function exception cases after March of 1994. We expect that this more recent case law is less revealing of the true effects of *Gaubert*: recent case law would likely reflect the impact of *Gaubert* on the types of cases that plaintiffs' counsel choose to bring into the courts.

vailed on at least one discretionary function claim, for a plaintiff success ratio of forty-three percent. We found ninety-five relevant cases in the three years following *Gaubert*. In only twenty-two of those cases did the plaintiff prevail on at least one discretionary function claim, for a plaintiff success ratio of twenty-three percent.⁶⁴ Moreover, the twenty-three percent plaintiff success ratio in the three years following *Gaubert* understates the impact of susceptibility analysis. The plaintiff prevailed on twenty-six separate claims in the twenty-two cases containing at least one plaintiff discretionary function victory. In thirteen of these claims, the government lost at the first stage of the *Berkovitz* test; *i.e.*, the court found that the government actor deserved no immunity because he violated a mandatory directive—a statute, regulation, agency policy, or contract.⁶⁵ The plaintiff in four more of the twenty-

64 Most of the courts in the cases we reviewed applied the discretionary function exception on a claim-by-claim basis. Compiling the statistics on a claim-by-claim basis reveals a similar pattern. In the *Berkovitz* to *Gaubert* period, the 91 cases comprised at least 123 different discretionary function claims. The plaintiff won 40 of those claims, for a plaintiff success ratio of 33%. The 95 discretionary function exception cases decided in the three years following *Gaubert* involved at least 136 separate claims. The plaintiff prevailed on 26 of those claims, for a plaintiff success ratio of 19%. We have compiled our statistics on a case-by-case basis rather than a claim-by-claim basis for two reasons. First, counting the number of separate discretionary function claims in a case is a difficult task, as courts did not always distinguish closely related claims. Second, it seemed to us that a party's victory on several, closely related discretionary function claims ought not to be evaluated the same as that party's victory on unrelated discretionary function claims in several different cases.

65 *Fisher Bros. Sales Inc. v. United States*, 17 F.3d 647, *withdrawn*, 1994 WL 54992 (3d Cir. 1994), *reh'g en banc granted and judgment vacated*, Apr. 25, 1994 (violation by FDA laboratory technicians of FDA Regulatory Procedures Manual in testing potentially contaminated grapes); *Appley Bros. v. United States*, 7 F.3d 720 (8th Cir. 1993) (violation by Department of Agriculture grain inspectors of Grain Warehouse Examiner's Handbook provisions requiring check of compliance with previous citation); *In re Sabin*, 984 F.2d 124 (4th Cir. 1993) (violation by Department of Biological Services of standards regarding testing of polio vaccine); *Tinkler v. United States*, 982 F.2d 1456 (10th Cir. 1992) (violation by FAA of provisions of its Flight Services Manual regarding weather reports); *Johnson v. Sawyer*, 980 F.2d 1490 (5th Cir. 1992) (violation by IRS agents of taxpayer privacy statute in issuing press release regarding taxpayer's guilty plea); *Phillips v. United States*, 956 F.2d 1071 (11th Cir. 1992) (violation by Army Corps of Engineers of Corps' Safety Manual in permitting contractor to anchor scaffold improperly); *Sumner v. United States*, 794 F. Supp. 1358 (M.D. Tenn. 1992) (violation by Army of internal regulations regarding warning public of areas used for target practice); *Autery v. United States*, 786 F. Supp. 944 (S.D. Ala. 1992) (National Park Service directive left park officials no discretion concerning removal of dangerous tree near roadway); *Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687 (E.D. Cal. 1991) (violation by Defense Property Disposal Service of policies and procedures in selling hazardous materials without alerting buyer of special handling requirements); *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427 (D.D.C.

six successful claims prevailed because the court, in apparent disregard of *Gaubert*, either required the government to produce specific evidence of policy consideration or found the government's evidence of policy consideration unpersuasive.⁶⁶ Eight of the remaining nine claims challenged low-level, mundane decisions bordering on the ministerial: designing a metal grate;⁶⁷ failing to maintain a bridge fender system;⁶⁸ failing to inform overseas government employees about their health benefits, to transmit a crucial health-related message, and to conduct a test for meningitis;⁶⁹ providing advice to mine operators on where to wire in safety lights;⁷⁰ releasing a para-

1991) (violation by State Department of federal regulations regarding medical care for employees overseas); *Musick v. United States*, 768 F. Supp. 183 (W.D. Va. 1991) (violation by Air Force pilot of mandatory squadron policy regarding minimum flying altitude); *Woodman v. United States*, 764 F. Supp. 1455 (M.D. Fla. 1991) (violation by Navy of contracts prohibiting disposal of acids and flammable liquids in dumpsters); *Rowell v. United States*, 1991 WL 120361 (S.D.N.Y. June 21, 1991) (violation by Army of contract requiring that it ensure contractors' compliance with applicable safety regulations).

66 *Prescott v. United States*, 973 F.2d 696, 702-03 (9th Cir. 1992) (rejecting government's claim that "everything the government does in carrying out the nuclear testing program falls within the discretionary function exception," citing previous cases that "mention the particularized and fact specific inquiry applicable to FTCA cases raising the discretionary function exception issue," and requiring the United States to prove "that each and every one of the alleged acts of negligence (1) involved an element of judgment and (2) that judgment was grounded in social, economic or political policy."); see also *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 740 (E.D. Cal. 1993) (citing the "particularized and fact specific inquiry" requirement of *Prescott*, and denying government's motion for summary judgment because "it provid[ed] no evidence that the [decisions causing flooding] involve an element of judgment, which was grounded in social, economic or political policy"); *Marin v. United States*, 814 F. Supp. 1468, 1483-84 (E.D. Wash. 1992) (rejecting government's argument that failure to warn victim threatened by informant was trade off between greater safety and greater enforcement effectiveness because of actual evidence to contrary); *Patel v. United States*, 806 F. Supp. 873, 878 (N.D. Cal. 1992) (rejecting government's argument that search warrant tactics furthered policy of strengthening evidentiary basis for narcotics cases because decision to use flammable tear gas projectiles resulted in total destruction of all evidence at scene).

67 *Sexton v. United States*, 797 F. Supp. 1292 (E.D.N.C. 1991).

68 *Arkansas River Co. v. CSX Transp.*, 780 F. Supp. 1138 (W.D. Ky. 1991).

69 *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427 (D.D.C. 1991).

70 *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992). Even this patently objective, nonpolicy decision was nearly caught in the *Gaubert* policy-making presumption. The district court had found that the inspector's advice on where to wire the lights was protected by the discretionary function exception because the inspector had discretion, and it must be presumed therefrom that the inspector's acts were grounded in the policies of the Mine Safety and Health Act. *Ayala v. United States*, 771 F. Supp. 1097, 1107 (D. Colo. 1991).

noid schizophrenic Vietnam veteran from a VA medical center;⁷¹ and selling hazardous materials in damaged containers.⁷²

The remaining plaintiff victory in our three-year post-*Gaubert* sample, *Redland Soccer Club v. Department of the Army*,⁷³ contains an unusually sophisticated application of *Berkovitz* and *Gaubert*. *Redland Soccer Club* addressed the disposal of hazardous waste by an Army depot. The Army contended that waste disposal decisions were "dominated by considerations of affordability, efficiency and safety," and thereby qualified for discretionary function immunity.⁷⁴ The court, however, construed policy to include only "policy in more direct furtherance of the agency or department's congressionally delegated mission"—not matters concerning the internal affairs of an agency. The court then concluded that waste disposal had nothing to do with the Army's mission: "Here, the Army, acting as would any large corporation, made certain decisions regarding disposal of waste. Only in the most tangential way could it be said that these decisions were in furtherance of the Army's mandate."⁷⁵

The government prevailed on the rest of the post-*Gaubert* claims in our sample, including a myriad of issues one would think the courts were well-equipped to handle, such as the design of guardrails on a bridge,⁷⁶ failure to install ground wires on power lines,⁷⁷ burying

71 *Mayer v. United States*, 774 F. Supp. 1114 (N.D. Ill. 1991). The court noted a split of authority even as to this kind of exercise of professional judgment and decided to follow a pre-*Gaubert* case, *Collazo v. United States*, 850 F.2d 1 (1st Cir. 1988). The court did not cite *Gaubert* and implicitly contradicted the holding of *Gaubert* by requiring the government to prove actual, as opposed to hypothetical, policy considerations: "Thus the decision to release a patient will be deemed an inherently medical one *unless proved otherwise*." *Mayer*, 774 F. Supp. at 1118 (emphasis added).

72 *Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687 (E.D. Cal. 1991).

73 835 F. Supp. 803 (M.D. Pa. 1993).

74 *Id.* at 808.

75 *Id.* at 809.

76 *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993). The Fourth Circuit left no doubt as to how it would interpret *Gaubert*:

Finally, we note one further point with respect to the application of the second element of the foregoing analysis that we believe *Gaubert* clarified. Rather than requiring a fact-based inquiry into the circumstances surrounding the government actor's exercise of a particular discretionary function, we are of opinion that a reviewing court in the usual case is to look to the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one which we would expect inherently to be grounded in considerations of policy Thus, our inquiry here must focus on the inherent, objective nature of the challenged decision; we find largely irrelevant the presence or absence of evidence that involved government

waste so as to create a "hazardous mess,"⁷⁸ imposition of extensive property damage during a hazardous waste cleanup,⁷⁹ surveillance of a kidnapping victim,⁸⁰ failure to consider airborne contamination during the cleanup of an arsenal,⁸¹ equipping of Army lawyers with law books,⁸² provision of food and water for wild horses and burros near an unfenced highway,⁸³ execution of an arrest warrant on the wrong person,⁸⁴ investigation and protection of a threatened prison inmate,⁸⁵ and acceptance for mailing of an improperly-bound package.⁸⁶

*C.R.S. v. United States*⁸⁷ provides a stark example of how the discretionary function exception now works. C.R.S. died from AIDS at age five. Her father, D.B.S., had graduated from a small-town Minnesota high school and had immediately entered the National Guard. Sent to Fort Benning, Georgia, for basic training in the summer of 1983, an intestinal abnormality brought him to Martin Army Commu-

agents which did or did not engage in a deliberative process before exercising their judgment.

Id. at 720-21; *see also* *Baum v. United States*, 765 F. Supp. 268 (D. Md. 1991).

⁷⁷ *Richardson v. United States*, 943 F.2d 1107 (9th Cir. 1991).

⁷⁸ *United States v. Skipper*, 781 F. Supp. 1106, 1115 (E.D.N.C. 1991). Without analysis, and with great misgivings, the court stated: "Further, the administrative decisions involving the cleanup and disposal of hazardous waste are grounded in environmental, economic and social considerations, and are just the sort of decisions the exception was designed to protect." *Id.* at 1114. Although compelled by the case law to decide for the government, the court in *Skipper* found it "inconceivable that the Government would be able to shield itself from liability for improper burial of hazardous waste." *Id.* at 1115.

⁷⁹ *United States v. Amtreco, Inc.*, 790 F. Supp. 1576, 1581 (M.D. Ga. 1992).

⁸⁰ *Flax v. United States*, 791 F. Supp. 1035 (D.N.J. 1992); *see also* *Flax v. United States*, 847 F. Supp. 1183 (D.N.J. 1994).

⁸¹ *Daigle v. United States*, 972 F.2d 1527 (10th Cir. 1992). The court concluded: "The [EPA] administrator *must* balance overall priorities—in this case the need for a prompt cleanup and the mandate of safety—with the realities of finite resources and funding considerations." *Id.* at 1541 (emphasis added).

⁸² *Knisley v. United States*, 817 F. Supp. 680, 694 (S.D. Ohio 1993).

⁸³ *Pearson v. United States*, 9 F.3d 1553 (9th Cir. 1993).

⁸⁴ *Mesa v. United States*, 837 F. Supp. 1210, 1213 (S.D. Fla. 1993) ("We hold as a matter of law that the function of determining when and how to execute an arrest warrant is quintessentially a discretionary function, involving choices and judgments that are grounded in policy considerations.").

⁸⁵ *Barrett v. United States*, 845 F. Supp. 774, 782 (D. Kan. 1994) ("[T]he prison regulations and the statutes with which they conform are grounded in social, political and economic policy, and, thus, decisions made in accordance with these regulations are protected by the discretionary function exception.").

⁸⁶ *Robinson v. United States*, 849 F. Supp. 799, 805 (S.D. Ga. 1994).

⁸⁷ 11 F.3d 791 (8th Cir. 1993). The following factual summary is drawn from the opinion and the Appellants' Brief and Addendum.

nity Hospital. During a week of treatments and surgery, D.B.S. received nine units of Army blood. He recovered, finished his training, returned to his hometown, and married his high school sweetheart. Their first two children were healthy boys. C.R.S., their third child, was born in June 1987, and she was never healthy. Following a series of perplexing illnesses, doctors conducted an HIV test in January 1989, and C.R.S. tested positive. Both her father and mother tested positive shortly thereafter. The Army was ultimately forced to identify and obtain HIV test results from the nine men who had donated the blood received by D.B.S. in 1983. The ninth donor was HIV positive.

The plaintiffs' principal negligence claim challenged the procedures employed by the Army in the summer of 1983 to screen blood supplies for the AIDS virus. Military blood policy was coordinated by the Military Blood Program Office (MBPO) in the Pentagon. In April of 1983, the MBPO received notice of the American Association of Blood Banks' recommended screening procedures for civilian blood supplies. Since at that time there was no laboratory test for identifying the AIDS virus, those procedures relied on voluntary self-deferral by high risk donors. Potential donors were informed at the blood bank that certain high risk groups, principally homosexual and bisexual men and intravenous drug users, should not donate blood. The MBPO promulgated these self-deferral procedures for all military blood banks. It did not consider how effective the civilian procedures would be in the military setting, where military units frequently donated blood as a group and where homosexual men and drugs users who identified themselves were in danger of court martial or discharge. Moreover, the MBPO made no effort to ascertain whether the procedures had any effectiveness whatsoever. Not surprisingly, given the implausible image of a G.I. in an olive T-shirt reading the AIDS advisory card and stepping out of the blood line, none of the military personnel deposed by plaintiffs' counsel could recall a single soldier who had self-deferred. The plaintiffs contended that the obvious ineffectiveness of civilian screening procedures in the military made it incumbent upon the military to take proactive steps in order to ensure the safety of its blood supply—principally the use of a "surrogate test" for the AIDS virus, such as the test for the core antigen of the hepatitis B virus. Experts testified that while the hepatitis B core antigen test was over-inclusive, it would have eliminated most of the blood contaminated with the AIDS virus.

The MBPO had not given any consideration whatsoever to whether the civilian procedures would be effective in the military. Indeed, the MBPO director testified that he did not even know that a surrogate test existed. Nevertheless, the district court granted the gov-

ernment summary judgment based on the discretionary function exception,⁸⁸ and the Eighth Circuit affirmed. The Eighth Circuit cited *Gaubert*, *Sealand*, and *Kennewick* and invoked the catchphrase "susceptibility to policy analysis." The court ruled that devising blood screening procedures "*implicates* a host of complex policy issues, ranging from the need to keep costs in check given the budget constraints under which government operates to the need to ensure that the blood supply is safe and plentiful."⁸⁹ The court concluded that the decision was "the type of policy-bound decision" that Congress intended to protect.⁹⁰ Whether or not the Army actually considered these complex policy factors was immaterial under *Gaubert*, said the court, because the Army "*could have considered* a wide range of policy factors in making its decision."⁹¹ Thus a group of wronged plaintiffs was deprived of its day in court because the Army, although it apparently made a careless mistake, theoretically could have relied upon policy considerations when making its decision.⁹²

One of the plaintiffs' claims in *C.R.S.* was that the Army failed to warn those individuals who had received Army blood transfusions before a reliable HIV test was available that they were at risk for passing the virus on to their family members.⁹³ The Army had never thought about giving such a warning, but the court concluded that any decision about warning should be immune because it "*implicates* the competing concerns of safety and cost."⁹⁴ The handling of this and other "failure to warn" cases since *Gaubert* provides telling examples of the impact of that decision. Prior to *Gaubert*, failure to warn claims had frequently provided plaintiffs a way around the discretionary function exception. It may be a policy decision of the government not to eliminate a safety hazard, or even unavoidably to create one; much less often is it a policy decision to fail to let the public know about the hazard. In our pre-*Gaubert* sampling of ninety-one discretionary function cases, plaintiffs raised failure to warn claims in fifteen

88 *C.R.S. v. United States*, 820 F. Supp. 449, 458 (D. Minn. 1993).

89 *C.R.S.*, 11 F.3d at 797 (emphasis added).

90 *Id.*

91 *Id.* at 798 (emphasis added).

92 The use of susceptibility analysis is particularly hard to justify when the government is acting as a proprietor rather than as a regulator. Even though the government as landlord, employer, health care provider, or auto fleet manager could conceivably make decisions based on large questions of public policy, it usually tries to get the most value for the least expenditure—as would any private actor. Little is to be gained by wrapping this kind of government conduct in the cloak of susceptibility analysis.

93 *C.R.S.*, 11 F.3d at 801.

94 *Id.* (emphasis added).

of them. The plaintiffs were successful in seven, for a plaintiff success ratio of forty-seven percent. This type of liability has virtually disappeared in the wake of *Gaubert*. Plaintiffs brought failure to warn claims in twenty-four of the ninety-five cases in our second sample. Plaintiffs were successful only three times, for a thirteen percent plaintiff success ratio. Furthermore, plaintiffs won two of these three victories because the government had violated a mandatory regulation and the court consequently had no opportunity to apply susceptibility analysis.⁹⁵ In the third case, the court disregarded susceptibility analysis and critically evaluated the actual evidence supplied by the government regarding policy considerations.⁹⁶

By contrast, in ruling for the government in most post-*Gaubert* failure to warn cases, courts have made plain the new focus on hypothetical policy considerations:

The lack of record evidence describing an analysis of public policy factors in the [National Park Service] decision not to post warnings [of the unstable condition of the sandstone rock in the vicinity of Indian petroglyphs in Dinosaur National Monument] is immaterial.⁹⁷

This choice [not to warn a district attorney of threat by federal probationer] implicated policy concerns. . . . An analysis of these concerns would likely include consideration of budgetary constraints as well as time and personnel limitations. It is not necessary for the government to prove a conscious decision based on a policy analysis.⁹⁸

As to the argument that there is no evidence that the National Park Service exercised its discretion in this case, it is not necessary for the court to conclude that the National Park Service actually considered whether to post a sign warning of pedestrian users in order to find that the discretionary function exception applies.⁹⁹

95 *Sumner v. United States*, 794 F. Supp. 1358 (M.D. Tenn. 1992) (finding violation of Army regulations requiring warnings of ammunition impact areas); *Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687 (E.D. Cal. 1991) (finding violation of Defense Property Disposal Service policies and procedures in selling hazardous materials without alerting buyer of special handling requirements).

96 *Marin v. United States*, 814 F. Supp. 1468 (E.D. Wash. 1992). The court specifically determined that the government's argument regarding the need for secrecy was not established by the facts of the case or the law. The court was "satisfied that the failure to warn in this case was not due to a trade-off between greater safety and greater informant effectiveness." *Id.* at 1483.

97 *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993).

98 *Weissich v. United States*, 4 F.3d 810, 813 (9th Cir. 1993).

99 *Alderman v. United States*, 825 F. Supp. 742, 745 (W.D. Va. 1993).

The question of whether the discretionary function exception applies [to the failure to warn about or close winter trails] does not depend on whether federal employees actually took policy considerations into account.¹⁰⁰

After *Gaubert*, courts disposed of the vast majority of failure to warn cases with susceptibility analysis.¹⁰¹

Gaubert has not only affected which cases the government wins; it has also affected how the government wins them. Since *Gaubert* permits government lawyers to invoke discretionary function immunity with presentation of hypothetical policy considerations rather than requiring evidence of actual policy considerations, one might expect more cases in the wake of *Gaubert* to be disposed of before proceeding to trial. The case law once again bears out this expectation in conclusive fashion.¹⁰² Fifty-one of the eighty-nine separate cases in our pre-*Gaubert* sample went to trial. Twenty-one of the eighty-eight separate cases in the post-*Gaubert* sample went to trial. Hypothesizing about what government decisionmakers might have done has largely replaced the presentation of evidence about what they actually did. While the reduction of procedural costs, such as trials, is a welcome incidental benefit of any rule of law, in the case of discretionary function analysis that benefit comes at the expense of permitting a wide range of injury-producing and possibly negligent state action to escape meaningful judicial scrutiny.

100 Childers v. United States, 841 F. Supp. 1001, 1013 (D. Mont. 1993).

101 The remainder of the 24 failure to warn cases in our post-*Gaubert* sampling are Pearson v. United States, Nos. 92-15868, 92-15874, 1993 U.S. App. LEXIS 28727, at *4 (9th Cir. Oct. 28, 1993); Shively v. United States, No. 92-16354, 1993 U.S. App. LEXIS 21094, at *4 (9th Cir. Aug. 18, 1993); Layton v. United States, 984 F.2d 1496, 1504 (8th Cir. 1993); Daigle v. Shell Oil Co., 972 F.2d 1527, 1537-38 (10th Cir. 1992); Johnson v. United States Dep't of Interior, 949 F.2d 332, 338 (10th Cir. 1991); Lockett v. United States, 938 F.2d 630, 638 (6th Cir. 1991); Bergquist v. National Weather Serv., 849 F. Supp. 1221, 1228 (N.D. Ill. 1994); Valdez v. United States, 837 F. Supp. 1065, 1067-68 (E.D. Cal. 1993); Koch v. United States, 814 F. Supp. 1221, 1231 (M.D. Pa. 1993); Lesoeur v. United States, 858 F. Supp. 974, 978 (D. Ariz. 1992), *aff'd*, 21 F.3d 965, 970 (9th Cir. 1994); Mellott v. United States, 808 F. Supp. 746, 750 (D. Mont. 1992); Fahl v. United States, 792 F. Supp. 80, 83 (D. Ariz. 1992); Hale House Ctr., Inc. v. FDIC, 788 F. Supp. 1309, 1313 (S.D.N.Y. 1992); Richardson v. United States, 776 F. Supp. 1373, 1380 (W.D. Ark. 1991); and the two *C.R.S.* decisions.

102 The number of cases in our two samples is slightly reduced from the number of cases used in the overall plaintiff success ratio analysis set forth earlier in Part III. Our samples include a few cases decided initially by a trial court and then subsequently by an appellate court. We counted such cases twice for purposes of computing the plaintiff success ratio because two distinct courts were analyzing the claims. We counted such cases only once in the "incidence of trial" analysis above, for obvious reasons.

IV. REAL POLICY DECISIONS: A BETTER TEST FOR DISCRETIONARY FUNCTION IMMUNITY

So far we have demonstrated that the *Gaubert* test for discretionary function immunity has significantly narrowed government tort liability and that the justification for this restricted liability has not been adequately articulated by the Supreme Court or by any other court. Reflection upon the economic bases of tort law and the theoretical foundations of sovereign immunity suggests that the *Gaubert* "susceptibility" standard is inappropriate.¹⁰³ The government should be immune, we have concluded, only when it can produce evidence that an official whose responsibilities included the weighing of social, economic, or political policy factors actually relied on a true policy factor in making the challenged decision. Part IV.A provides a constitutional argument by analogy for holding the government liable for its torts. Part IV.B explains the underlying rationales for our fault-based tort system and for sovereign immunity, in light of which the discretionary function exception must be crafted. Part IV.C briefly explores the possibility of holding the government strictly liable for its torts. Part IV.D sets forth what we believe to be the proper judicial test for applying the discretionary function exception to government action.

A. *Lifeboats and Bureaucrats: The Takings Analogy*

Our society has long since rejected the notion that the raw power of government and its elemental need to survive justify unfettered depredations of citizens by the state. It is true, of course, that our society occasionally sanctions the maximization of social welfare by imposing unrequited suffering on certain individuals. When there are simply not enough resources to satisfy the basic needs of everyone, for example, a social group might rationally decide to add to the resources available to the many by inflicting uncompensated harm on the few. The strongest survivors in a lifeboat may, with at least some moral justification, decide to eat the weakest.¹⁰⁴ Nevertheless, most of

103 *But see* William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 52-57 (1993).

104 The famous case of *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884) addressed the moral dilemma faced by those in such a desperate situation. Although the court sentenced Dudley and Stephens to death for killing and eating one of their young shipmates, the Crown commuted the sentence to six months' imprisonment. Perhaps Queen Victoria was touched by Chief Justice Coleridge's admission: "We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy." *Id.* at 288. For an extensive discussion of the *Dudley & Stephens* case, see A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984).

us would deem such deliberate exploitation of individuals by the group "fair" only if the group faced an extreme level of scarcity.

America's rejection of unvarnished lifeboat cannibalism is enshrined in the Fifth Amendment to the United States Constitution, which prohibits the federal government from taking the private property of a citizen without paying just compensation.¹⁰⁵ Over the years the Supreme Court has expanded the definition of taking private property to include any government action that causes significant physical damage to a citizen's property or severely impairs a citizen's use and enjoyment of her property. This includes some regulatory takings, particularly if a physical "invasion" of property is compelled or if the regulation denies all economically beneficial or productive use of the property.¹⁰⁶

Our founding fathers' visceral rejection of untrammelled government appropriation of private property is supported by economic theory. Judge Posner has explained that just compensation is necessary to prevent the government from abusing the power of eminent domain in inefficient ways.¹⁰⁷ Without the Takings Clause, government would have an incentive

The tactic of Dudley & Stephens is aesthetically (and arguably morally) less palatable than, but economically indistinguishable from, situations where the victims are selected by some random process—an "accident"—rather than deliberately singled out.

105 U.S. CONST. amend. V.

106 See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1013 (1992); *Nolan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Loretto v. Telepromptor Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 123-24 (1978); *United States v. Causby*, 328 U.S. 256, 265-66 (1946); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 401 (1922); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 179-80 (1871).

107 RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 50 (3d ed. 1986). There are other rationales for the takings clause. Professor Michelman has suggested that failure to compensate adversely affected property owners would demoralize them and cause people to underinvest in property development. Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). Professors Blume and Rubinfeld have argued that just compensation is necessary because of human risk aversion. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984). Posner doubts both of these rationales because of the existence of well developed insurance markets. If eminent domain insurance were available and the government decreed that it would no longer pay compensation to the victims of eminent domain, people would neither fear eminent domain nor become demoralized if they were the subjects of eminent domain. POSNER, *supra*, at 50.

to substitute land for other inputs that were socially cheaper but more costly to the government. Suppose the government has a choice between putting up a tall but narrow building on a small lot and a short but wide building on a large one. The market value of the small lot is \$1 million, and of the large lot \$3 million. The tall narrow building would cost \$10 million to build and the short wide one, \$9 million. Obviously, the cheaper alternative from the standpoint of society as a whole is to build the tall building on the small lot (total cost: \$11 million), rather than the short building on the large lot (\$12 million). But if the land is free to the government, it will build the short building on the large lot, for then the net cost to it will be \$1 million less.¹⁰⁸

Posner also supplies some efficiency reasons for the Court's refusal to compensate most regulatory takings. First, general governmental regulations that affect property values affect the property values of many people—sometimes the property values of tens of millions of people. The administrative task of compensating all those harmed and negatively compensating (taxing) all those helped by the regulation would be nightmarish. Second, regulations that affect interactive land uses (zoning ordinances, for example), often should be construed as preventing one land owner (e.g., an industrialist) from harming another land owner (e.g., a resident), rather than as the state taking property from one citizen for the public weal.¹⁰⁹

If government agents intentionally destroy or seize a citizen's property, a "taking" requiring just compensation has unquestionably occurred.¹¹⁰ The Supreme Court has indicated, however, that if government agents *negligently* destroy or take a person's property, this is not a compensable taking.¹¹¹ Although the textual and historical ar-

108 POSNER, *supra* note 107, at 51.

109 *Id.* at 52-53.

110 *Hudson v. Palmer*, 468 U.S. 517 (1984). The following analysis in the text ignores the distinction between "harmful externalities" and the "taking of things." See Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 719-23, 771-73 (1996). It is not our task to determine the proper remedy for government encroachments (the context in which such distinction is germane), only to determine when citizens deserve a remedy.

111 See *Daniels v. Williams*, 474 U.S. 327, 333 (1986) ("[I]njuries inflicted by governmental negligence are not addressed by the United States Constitution . . ."). If the language in *Daniels* is interpreted literally, it seems to imply that:

an individual [has] no constitutional right to just compensation when agents of the state negligently destroyed his property, regardless of the extent of loss or the nature of the state activity. For example, assume that a state employee negligently drove a truck filled with flammable liquids off the highway and crashed into a house, destroying the house and all persons therein. Could any surviving members of the family that owned the house be denied

guments for this distinction are strong,¹¹² the philosophical reason for the distinction is not clear. The economic rationale for takings law is not limited to intentional acts.

The economic explanation for the Takings Clause applies equally well in the context of torts. The cost distinction between the short building and the tall building in Posner's example above might not be the price of their lots but their accident costs, say, because the sprawling short building will require dangerous electric carts that run into people rather than the safer elevators of the tall building. In such a scenario, if the government does not have to internalize accident costs, it will rationally choose the alternative that is more expensive from the standpoint of society as a whole. Without the Takings Clause, the land costs of government projects would be borne by identifiable landowners. Without government liability in tort, the accident costs of government projects will be borne by unidentifiable project participants and bystanders. These accident costs are just as much a predictable social cost of many government projects as are land prices and ought to exert just as much influence on project design.

Moreover, the administrative limitations on providing compensation to the victims of regulatory takings do not apply to the victims of governmental torts. Compensating the victims of governmental torts is not an administrative nightmare; most government torts affect only a single plaintiff or an identifiable set of plaintiffs. Moreover, government agents who commit torts are usually not articulating the relative rights of various groups of citizens; such torts, if the losses are allowed to lie where they fall, are pure examples of the kind of state behavior prohibited by the spirit of the Takings Clause.

The victims of accidental "takings" may have an even stronger moral and political right to compensation than do victims of deliberate takings. Victims of intentional government takings have been deliberately selected by an appropriate legislative or executive body that

all compensation for the loss of their property and the lives of their family members due to a state sovereign immunity law? Literal application of the statement in *Daniels* would mean that a state doctrine of sovereign immunity could totally defeat any claim for just compensation in such a case.

JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 443 (4th ed. 1991). Nowak and Rotunda suggest that courts use a case-by-case approach to determine "whether the negligence of government employees had so unfairly shifted social costs (such as the cost for the societal benefit from the state agency that employed the truck driver) to an individual or a limited group of individuals (the property owners and family members in our hypothetical) that the unintended harm to the individual or group of individuals constituted a taking for which just compensation was required." *Id.*

¹¹² See *Daniels*, 474 U.S. at 331-33.

is accountable to the people for its decision; victims of accidental takings have been selected only by negligence and chance. Victims of deliberate takings are harmed in order to promote the common good directly; victims of accidental takings are often harmed simply because of the carelessness of a government agent and thus only indirectly to promote the common good.

The spirit and economic purpose of the Takings Clause, then, demand that citizens be compensated for harm caused by government torts. The Takings Clause is not the only relevant consideration, however, in assessing the wisdom and justice of exposing the government to tort liability. The next Part discusses some of the countervailing considerations.

B. Highway Curves and Bureaucrats: Why Shield Government?

Tort law has the laudable economic purpose of allocating accident costs so as to create incentives for actors to set activity levels and precaution levels optimally. In the words of Judge Calabresi: "[T]he principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents."¹¹³ If an activity subjected only its participants to a risk of injury, rational participants would balance the utility of the activity, the cost of precautions, and the likelihood and severity of accidents and would take the optimal precautions. Free market principles counsel that if the price of activities reflects the accident costs they generate, each individual will be able to choose for himself whether an activity is worth the concomitant accident costs. Many activities create risks for non-participants, however; consequently, the participants will not always take the socially optimal precautions to prevent harm. When activities do not incorporate the accident costs they create, actors will "choose more accident prone activities than they would if the prices of these activities made them pay for these accident costs, resulting in more accident costs than we want."¹¹⁴ Tort law exists in order to force actors to internalize the costs of their actions.

113 GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26 (1970). Professor Kratzke puts it this way: "Tort law searches for the combination of greatest precautions whose marginal cost is less than the marginal reduction in expected accident costs." Kratzke, *supra* note 103, at 5 & nn.14-19; *see also* Goldman, *supra* note 6, at 856; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

114 CALABRESI, *supra* note 113, at 70. Calabresi also thinks that sometimes specific deterrence—i.e., collectively imposed penalties or subsidies or prohibitions of certain activities—is necessary to reduce the sum of accident costs and their avoidance. *Id.* at 95-96.

There is no theoretical reason why government should not feel the beneficent pressure of tort law to set its activities and precautions at optimum levels,¹¹⁵ but there are several practical reasons for treating the government as a special case.¹¹⁶ The first of these is that judges are unable to analyze certain types of governmental decision making with the negligence calculus at the center of our fault-based tort system. The economic principle behind the negligence standard is well-summarized by the formula of Judge Learned Hand. Hand explained that a potential injurer is negligent if and only if the cost of taking precautions is less than the product of the probability of loss and the magnitude of loss.¹¹⁷ The negligence standard, construed properly in its marginal formulation, obliges a defendant to invest in precautions only to the point where another dollar spent on precautions would yield less than a dollar's worth of additional safety.¹¹⁸ Moreover, a defendant should not be found negligently liable if the plaintiff could have prevented the accident more cheaply than the defendant.¹¹⁹

The policy-making function of government makes ascertaining negligence in this usual fashion impossible. Judge Hand's neat equation breaks down when the potential injurer is a government agent

115 See Goldman, *supra* note 6, at 856-58; Krent, *supra* note 6, at 872, 884-85.

116 The history of government liability is also full of outdated justifications for protecting the sovereign. In the following discussion in the text, we disregard most of the hoary roots of sovereign immunity, which are either rotten or at least inapplicable to twentieth-century America. Among these are: (1) the indignity of subjecting the government to suit, see *In re Ayers*, 123 U.S. 443, 505 (1887); (2) the theory that there is no legal right against a lawmaker, see *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.); (3) the need to protect the public treasury, see Goldman, *supra* note 6, at 854-56; (4) the flood of frivolous litigation against the government that could overwhelm the federal courts, see Roger C. Cramton, *Non-Statutory Review of Federal Administrative Action*, 68 MICH. L. REV. 389, 427-28 (1970) (rebutting argument by pointing out that frivolous suits against government have defects other than that they are against government and that empirically, no flood has occurred in past as sovereign immunity has been repealed piecemeal); James Samuel Sable, Note, *Sovereign Immunity: A Battleground of Competing Considerations*, 12 SW. U. L. REV. 457, 467-68 (1981) (same); (5) the metaphysical theory that the king can do no wrong, see Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1060 (1946).

117 See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Kratzke points out that although this formula may appear to require a degree of precision that can never be attained, the formula does not require absolute measurement of costs, but rather the comparison of costs and benefits. Where one or another of the variables is very high or very low, a court can say with some certainty whether conduct was unreasonable. Kratzke, *supra* note 103, at 6.

118 POSNER, *supra* note 107, at 148-49.

119 *Id.* at 154.

charged by law to consider more than safety, financial cost, and other objective elements. In such a circumstance, one of Hand's three variables—the cost of taking precautions, which may include forbearing from the activity—cannot be quantified. For example, in spite of posted warnings, a particular tight highway curve may regularly cost one human life per year. Reasonable people applying Hand's formula probably could come to some general agreement about whether the government is negligent for its failure to straighten the curve as long as the costs of the precaution—land, concrete, and labor—could be measured.¹²⁰ But if straightening the curve would require destroying a pristine wetland, a historic church, or a unique artillery range, any effort to determine fault would be futile. Fault cannot be assessed where an unquantifiable policy variable is involved.¹²¹

This analysis indicates that the basic *Berkovitz* test for immunity has a sound economic basis—discretionary decisions involving unquantifiable policy variables should be immune. Note, however, that by bestowing tort immunity the legal system is not blessing the bureaucrat's choice, say, to leave a dangerous highway curve intact. Most people might perceive little worth in the swamp or the church behind the curve. By immunizing the decision the courts are simply throwing up their hands and acknowledging their institutional inability to evaluate the government's choice. Discretionary function immunity is a second-best option to which our fault-based tort system resorts because courts lack the information necessary to allocate efficiently the externalities of some government behavior.

Besides the problem of judicial incompetence at valuing policy factors, there are several other good reasons why the government should not always be forced to internalize its negative externalities. The second reason, closely related to the first, is that judicial review of agency decision making may violate the higher value of separation of powers. Without a discretionary function exception to governmental tort liability, the judiciary would be able, through tort plaintiffs, to obtain substantive review powers over most governmental endeavors. The discretionary function exception serves to prevent judicial second guessing of the policy choices of the executive and legislative

120 Of course, the magnitude of loss must also be measurable. There are strong reasons to think, however, that such magnitudes are generally measurable. Our society routinely quantifies even the value of a human life. The science of making such quantifications is called hedonics. See generally W. GARY BAKER & MICHAEL K. SECK, DETERMINING ECONOMIC LOSS IN INJURY AND DEATH CASES (2d ed. 1993) (explaining how economists and courts calculate value of human lives and body parts).

121 See Kratzke, *supra* note 103, at 5-7, 11.

branches¹²²—those branches entrusted by the U.S. Constitution with policy-making authority.¹²³

Third, unlike the private sector, administrative and political processes provide alternative checks on the bad conduct of government officials.¹²⁴ Indeed, the federal judiciary plays a significant role in enforcing the procedural fairness and effectiveness of administrative processes through, among other things, judicial review of agency informal rule making and adjudication under an “abuse of discretion” standard,¹²⁵ judicial review of agency formal rule making and adjudication under the “substantial evidence” standard,¹²⁶ the federal Constitutional requirement of adjudicatory due process,¹²⁷ and federal statutory hearing rights.¹²⁸ The political checks include the multifarious pressures brought to bear by executive and legislative supervisors and public opinion on agency action. Where these administrative and political forces constrain government action, the deterrent threat of a tort suit may be superfluous.¹²⁹ Of course, this uniqueness should not

122 See PETER SCHUCK, *SUING GOVERNMENT* 114 (1983); *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984) (“This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”); Goldman, *supra* note 6, at 852-53; cf. Osborne M. Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO L.J. 81, 122 (1968) (contending that judges do not have necessary resources or expertise to make policy).

123 See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Abbott Lab. v. Gardner*, 387 U.S. 136, 141 (1967); THE FEDERALIST No. 78 (Alexander Hamilton); ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

124 Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1540 (1992).

125 See 5 U.S.C. § 553 (1994) (detailing requirements of informal rule making); *id.* § 706 (1994) (prescribing abuse of discretion standard of review for informal agency decisions); see also *Motor Vehicle Mfr. Ass’n of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983); *Automotive Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

126 See 5 U.S.C. §§ 556-57 (1994) (detailing requirements of formal rule making); *id.* § 706 (1994) (prescribing substantial evidence standard of review for formal agency decisions); see also *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963).

127 See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

128 See, e.g., *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973).

129 Krent, *supra* note 6, at 873-74, 889-94. Krent suggests imposition of a “deliberation” requirement for applicability of the discretionary function exception. *Id.* at 906. We believe that such a requirement too greatly restricts agency flexibility. Many desirable agency decisions are not the product of sustained debate within the agency; they are the result of a single individual’s reflection and considered judgment. Moreover,

be overstated. Many private entities make important decisions, such as product design by a manufacturer of consumer goods, only after a lengthy internal review process, and they are frequently quite sensitive to public opinion and pressures other than potential legal liability. Conversely, many tortious government actions are taken without significant amounts of deliberation and are accomplished by employees in the depths of bureaucracies whom one would not expect to be particularly politically sensitive.¹³⁰ These possibilities notwithstanding, the layers of administrative and political review behind most government decision making cannot be discounted when contemplating the proper scope of discretionary function immunity.

A fourth justification for sovereign immunity is that forcing the government to internalize its costs of operation might over-deter governmental action because the government does not enjoy the benefits of its non-negligent conduct.¹³¹ The possibility that excessive liability might chill decisive governmental action is a theme that runs through

all deliberated agency decisions should not obtain immunity. An agency might undertake professional deliberation rather than policy deliberation; and professional deliberation might reach an objectively "wrong" outcome. See *infra* Part IV.D.3.

130 For example, in *C.R.S. v. United States*, 11 F.3d 791 (8th Cir. 1993), the inadequate civilian blood screening procedures that permitted D.B.S. to be infected with the AIDS virus were mechanically promulgated, without administrative review, by a non-political career Navy officer in the Pentagon.

Many torts of the federal government are the result of "non-decisions," the failure of agency employees to address a particular danger, and thus are matters which slipped through the administrative process entirely. The First Circuit in *Dube v. Pittsburgh Corning* understood this point: "Without an actual decision to forgo protecting or warning domestic bystanders, it is difficult to determine whether even the Navy would consider such a decision a permissible or impermissible exercise of policy judgment." *Dube v. Pittsburgh Corning*, 870 F.2d 790, 799-800 (1st Cir. 1989).

131 Of course, individuals or groups of individuals commit the torts for which the government is held liable, and under current law, tort suits against employees of the United States who are acting within the scope of their employment are deemed to be suits against the United States. See 28 U.S.C. § 2679 (1994). If the government passes on the costs of tort liability to the individual tortfeasors (whether financially or in some other fashion), government agents will certainly not make decisions vigorously. Government officials, because of the special nature of the public sector, are excessively risk-averse if faced with potential punishment for their torts. Government officials interact with the public frequently, often serve conflicting and ambiguous goals, often have a duty to act, often suffer the risk of misinterpreting the directives of their superiors, and often face administrative constraints on their decision making. They will consequently behave risk-aversely. Public officials are capable of shifting costs to the public in this manner without detection because many official decisions are unavoidably discretionary and of low visibility. See SCHUCK, *supra* note 122, at 68-71; see also Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 566-76, 602-06 (1986).

the cases and commentary on government immunity.¹³² A private company may release a risky new product, knowing that it is likely to generate numerous liability claims, because the profit potential makes it worthwhile; costs and benefits are quantified in the same medium. Since the government's reward for effective conduct is not monetary, the use of monetary disincentives, like the threat of tort judgments, may prove to be too effective.¹³³

Any revisions to the discretionary function exception to the FTCA, such as we propose in Part IV.D below, must grapple with these justifications for sovereign immunity.

C. *Strict Liability and the State: Government Without Immunity*

As demonstrated in the preceding Part, the unique policy-making aspect of governmental conduct counsels against governmental liability in tort only because of the practical limitation in administering a particular kind of tort regime; i.e., one based upon fault. To underscore the point that the policy-making nature of government is merely a practical and not a theoretical ground for supporting sovereign tort immunity, we pause in this Part to discuss strict liability and to illustrate the adventitious nature of sovereign immunity.

The possibility of holding the government strictly liable in tort is not farfetched for any theoretical reasons. Fault did not become the predominant basis for liability in our tort system until the nineteenth

132 See, e.g., Goldman, *supra* note 6, at 853-54; Krent, *supra* note 6, at 872, n.6; see also Jerry Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8 (1978).

133 Government agencies are not like private firms in an important respect: "As a non-profit maximizing actor, the government does not respond as directly to monetary signals." Krent, *supra* note 124, at 1539.

One might argue that an additional reason to preserve some form of sovereign immunity is that because damage awards against the government are usually not taken out of the guilty agency's budget, particular agencies do not pay for the costs of the torts they commit, even where sovereign immunity has been abrogated. See 31 U.S.C. § 1304 (1994) (stating that Congress appropriates whatever amounts are necessary to pay final judgments against the United States resulting from suits under FTCA). Consequently, even in a world without sovereign immunity, agencies would have little direct financial incentive to behave with reasonable care. Of course, this problem in the incentive system can be resolved by simply forcing agencies to pay the price of their torts. But see SCHUCK, *supra* note 122, at 104-07 (arguing that even if agencies had to pay for their torts, since budgets for agencies are not set through rational processes—but rather through political influence or log rolling—an agency's budget might be continually restored, even in face of extensive tort payments). Even without this sort of legal reform, however, paying tort judgments, particularly repeated tort judgments, must have some impact on government conduct, even if agencies do not directly lose funds in proportion to the extent of their misbehavior.

century, and its dominance has waned throughout the course of the twentieth century.¹³⁴ Our predominantly fault-based tort system contains significant strict liability exceptions, such as workers' compensation, ultrahazardous activities, and products liability.¹³⁵ Several commentators have cogently argued that our fault-based tort regime ought to be, in large part, replaced by strict liability.¹³⁶

Commentators and judges have frequently recognized the logic of shifting the costs of injuries resulting from government activities to the public at large: the burden on each taxpayer would be relatively slight, the public benefits from the government's activities, government budgets ought to account for accident costs, and government programs ought to have a financial incentive to take adequate precautions.¹³⁷

Professor Fletcher offered a fairness argument for strict liability that may also be applicable to government conduct. He argued that it is fair to make people strictly liable for harm they cause when they are imposing unusual or nonreciprocal risks on others. Some unusual activities

represent threats of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares If the defendant creates a risk that exceeds those to which he is reciprocally subject, it seems fair to hold him liable for the results of his aberrant indulgence.¹³⁸

134 See Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

135 See RESTATEMENT (SECOND) OF TORTS §§ 519-524A (1965) (ultrahazardous activities); *id.* at §§ 388-408 (products liability); PROSSER & KEETON, *THE LAW OF TORTS* 545-68 (1984) (ultrahazardous activities); *id.* at 690-724 (products liability); *id.* at 565-80 (workers' compensation); DANIEL B. DOBBS, *TORTS AND COMPENSATION* 740-92 (1985) (workers' compensation).

136 See, e.g., CALABRESI, *supra* note 113; Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

137 See *Rayonier, Inc. v. United States*, 352 U.S. 315, 319-20 (1957) (stating explicitly the advantages of shifting losses to public as whole because public enjoys benefits of government services); *Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987) (McKay, J. concurring) (indicating collective citizenry, not isolated individual should bear economic burden); Goldman, *supra* note 6, at 857 ("Shifting the costs of such injuries to the public as a whole creates a relatively slight burden to each taxpayer, and forces all those benefitting from the injury-causing activity to pay a portion of the damages caused."); William P. Kratzke, *The Convergence of the Discretionary Function Exception to the Federal Tort Claims Act With Limitations of Liability in Common Law Negligence*, 60 ST. JOHN'S L. REV. 221, 280 (1986).

138 George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547-48 (1972).

Fletcher's rationale seems to explain many of the pockets of strict liability in our tort system: ultrahazardous activity, wild animals, ground damage caused by airplanes. It would appear equally applicable to the many government activities which create unusual risks—for example, nuclear weapons production and testing, high speed pursuits, taking over troubled S&Ls, and training soldiers.

Strict liability can be more effective than a negligence standard for promoting the macro-efficiency of an economic system. Strictly liable defendants pay for all the damage their activity causes, regardless of the availability of cheap precautionary measures. Strict liability thus provides defendants with an incentive to relocate, redesign, reduce, or abandon very dangerous activities—an incentive that is absent in a negligence system.¹³⁹ Strict liability is not always superior to the negligence standard from a macro-efficiency perspective, however, because “changes in activity level by victims are also a method of accident avoidance, and one that is encouraged by negligence liability but discouraged by strict liability.”¹⁴⁰ Hence, strict liability makes sense in those areas of human endeavor where activity-level reductions by potential injurers are more efficient accident prevention mechanisms than are activity-level reductions by potential victims.¹⁴¹

Many government activities are highly discretionary and often subject to numerous alternatives—e.g., the government could build canals rather than railroads, it could properly dispose of rather than dumping or selling hazardous wastes,¹⁴² it could use civilian blood banks or civilian lawyers rather than supplying its own to military personnel,¹⁴³ and it could prune its own trees rather than hiring contrac-

139 Steven Shavell, *Strict Liability vs. Negligence*, 9 J. LEGAL STUD. 1 (1980); POSNER, *supra* note 107, at 161. Posner provides a good example of how strict liability can contribute to macroefficiency: “Suppose railroads and canals are good substitutes in transportation, but railroads inflict many accidents that cannot be avoided by being careful and canals none. Were it not for these accident costs, railroads would be 10 percent cheaper than canals, but when these accident costs are figured in, railroads are actually 5 percent more costly. Under a rule of negligence liability, railroads will displace canals even though they are the socially more costly method of transportation.” *Id.*

140 POSNER, *supra* note 107, at 162.

141 *Id.* at 163.

142 See *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992); *Redland Soccer Club v. United States*, 835 F. Supp. 803 (M.D. Penn. 1993), *aff'd in part, rev'd in part*, 55 F.3d 827 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996); *Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687 (E.D. Cal. 1991).

143 See *C.R.S. v. United States*, 11 F.3d 791 (8th Cir. 1993); *Knisley v. United States*, 817 F. Supp. 680 (S.D. Ohio 1993).

tors of dubious expertise.¹⁴⁴ Moreover, for many kinds of government activity, there is little that potential victims can do to reduce the risk of harm, as both Thomas Gaubert and C.R.S. could attest.¹⁴⁵ Accordingly, it may be particularly appropriate to create the proper incentive for government to choose its activities and activity levels in a manner that accounts for accident costs.

The theoretical applicability of strict tort liability to government conduct underscores the proper and limited role of the discretionary function exception. A strict liability tort system has no need for such an exception, because it would not require judicial evaluation of the costs and benefits of government conduct. Discretionary function immunity is only needed because the predominant element of our tort system—negligence—requires the assessment of fault, and because that assessment in turn depends on information that is unobtainable in the context of policy decisions.

D. Negligence and Nitpicking: How Far Should Courts Go?

Our discussion so far has indicated that while there is no theoretical justification for extensive government immunity (and that, in fact, strict liability for government activity has much to recommend it), nevertheless, there are also good reasons to maintain a carefully crafted discretionary function exception to governmental liability in tort. In this Part, we articulate the proper boundaries for such an exception. Discretionary function immunity ought to be reserved for (1) actual decisions (2) made by government officials possessing authority to direct policy (3) in consideration of legitimate policy factors.

144 See *Layton v. United States*, 984 F.2d 1496 (8th Cir. 1993).

145 A chief advantage of strict liability is that it shifts the costs of injuries to the injury-producing activity, without requiring a procedural mechanism for ascertaining fault. Difficult fault questions, however, are replaced by difficult causation questions. For example, does the government's military decision to move the American fleet out of the South Pacific make it liable in tort to the American businessman whose Philippines' operation is wiped out by a subsequent Japanese invasion? On the other hand, the argument of many against strict governmental liability—that it would bankrupt the country—is not as big a problem as it may seem. As with workers' compensation, it might be appropriate to impose statutory damages schedules in exchange for lifting plaintiffs' burden of establishing fault. In effect, this is how the government treats its servicemen—ordinarily they cannot sue, but they and their families are entitled to Veterans' Administration benefits. See 38 U.S.C. §§ 1101-1163, 1701-1764 (1994); see also *Feres v. United States*, 340 U.S. 135, 146 (1950) (holding that FTCA does not waive United States' sovereign immunity "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.").

1. Actual Policy Decisions

Although the federal courts do not generally require that a government decisionmaker make an actual policy decision in order to obtain discretionary function immunity,¹⁴⁶ they should impose such a requirement. If the relevant government official attests that a policy factor influenced his decision to keep a dangerous highway curve, we know that at least one knowledgeable person believed that the church or the swamp behind the curve justified the continued deaths caused by the curve. Since at least one knowledgeable person perceived relevant non-objective policy factors, there is some warrant for the court's refusal to look further. The *Gaubert* susceptibility test, however, permits the government to obtain immunity on the ground that the decisionmaker *could* have considered whether the church or the swamp justified the continued deaths, whether or not the decisionmaker actually did so. The susceptibility test rests on the presumption that *any* potential policy factor, no matter how trivial, outweighs *any* accident costs, no matter how horrible, without even the assurance that a single person actually balanced the equities in the case at hand. Indeed, if the decisionmaker himself did not actually consider the policy factors in his own area of specialization, those policy factors are unlikely to have been of much significance.¹⁴⁷ Since policy factors have some hypothetical relevance to so many government decisions, particularly if budgetary constraints are deemed a policy factor, granting immunity for hypothetical policy considerations is more akin to lifeboat cannibalism than a reasoned attempt to preserve legitimate policy making.¹⁴⁸ The requirement that immunity be reserved for decisions that

146 See *United States v. Gaubert*, 499 U.S. 315, 325 (1991); David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Torts Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291, 299-300 (1988-89); Donald N. Zillman, *Congress, Courts, and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 730-31.

147 Of course, the *Gaubert* test has procedural as well as substantive ramifications. It permits the government to prevail without submitting evidence of an actual policy decision. Thus, in at least some of the many decisions dismissing plaintiffs' causes of action because of hypothetical policy factors, the decisionmaker may indeed have engaged in policy balancing. It is more likely, however, that if the government had such evidence, it would produce it.

148 Several other commentators have recognized the value of imposing an actual policy choice requirement on government agents seeking to obtain discretionary function immunity. None of these commentators attempt to explain or provide justification for the requirement though. See Bagby & Gittings, *supra* note 13, at 254-55; Marisseau, *supra* note 62, at 1521-22, 1537-38. Bagby and Gittings make a "consciously considered decision weighing or balancing competing policy factors" one of the elements of their two-phase inquiry. Bagby & Gittings, *supra* note 13, at 253. Bagby and

actually relied on policy factors would protect real policy making rather than blithely assuming a dispositive importance for policy-making potential.¹⁴⁹

The most cogent non-economic rationales for sovereign immunity, set forth in Part IV.B above, reinforce the argument for imposing an "actual decision" requirement. The "separation of powers" rationale for sovereign immunity requires the preservation of the independence and vitality of the executive and legislative branches of government. The coordinate branches have an undeniable interest in protecting their actual policy decisions; however, this interest is comparatively slight for decisions that did not involve actual policy making. Protecting the autonomy of the three spheres of government does not entail forbidding the judiciary from holding the other branches responsible for negligent conduct unrelated to any actual policy decision. Judicial review of agency decisions that do not involve actual consideration of policy factors enforces a desirable economic rationality on legislative and executive decision making. In such cir-

Gittings also recognize that the discretionary function exception should protect a failure to act only where the course of inaction occurred as a result of a conscious balancing of risks and benefits. They do not lay out their preference for conscious deliberation in detail, however, except to say that, "quick, ill-conceived judgments that at best poorly evaluate broad governmental policy matters should not be immune." *Id.* at 255.

The consciously considered decision of Bagby and Gittings is a very different animal from the actual policy decision we would require. Bagby and Gittings require agency decisionmakers to conduct a "careful evaluation of alternatives." They contend that "quick, ill-conceived judgments" that poorly evaluate relevant policy factors should not be immune, and that agencies must "fully consider and document ad hoc decisions." *Id.* They analogize the "hard look" standard under the APA to their proposed "considered decision" standard for the discretionary function exception. *Id.* at 264-65 (citing *Pacific States Box & Casket Co. v. White*, 296 U.S. 176 (1935); *Portland Cement Ass'n v. Train*, 513 F.2d 506 (D.C. Cir. 1975); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). Our approach is much simpler and does not ask judges to make difficult distinctions between careful and non-careful evaluation, ill-conceived and well-conceived judgments, and full and partial consideration of policy factors.

149 Professor Krent's "process approach" to the discretionary function exception requires that the government action result from agency deliberation in order to obtain immunity. Krent, *supra* note 6, at 906. We believe that Krent's approach places too high of a burden on the government. If government agents were forbidden from acting in the absence of full agency deliberation, government agencies would be hamstrung in their efforts to carry out their missions wisely and expeditiously. We recognize that our approach also places a burden on government actors to document the rationales for their choices, but we believe that the increased burden is worth bearing for the reasons set forth in this Part of the Article. *But see* Zillman, *supra* note 62, at 387-88.

cumstances, there is no second guessing of agency choices because there was no first guessing.¹⁵⁰ The “administrative and political checks” rationale for sovereign immunity also strengthens the argument for requiring an actual decision. What makes the deliberative processes of government truly different from those of private actors is that they involve the careful hammering out of *public policy*, and lack of evidence in the record of actual consideration of policy variables makes it unlikely that this unique process occurred. The “chill government decision making” rationale for sovereign immunity also poses no obstacle to this requirement. The only government decisions that an actual decision requirement will deter are “nondecisions” and poorly made technical judgments.

The federal court system is not the only source of discretionary function law. Every state has some variety of discretionary function exception. State court judges have struggled as hard as their federal brethren to strike the right balance between plaintiffs and policymakers. Many state courts have not accepted the minimalist *Gaubert* approach; they have conditioned the applicability of discretionary function immunity upon the government’s demonstrating that it actually considered policy factors in making its decision. Although some states have rejected this idea,¹⁵¹ most state courts that have expressly analyzed the issue have required the government to show that its agent actually balanced public policy concerns. The states that have imposed such a requirement include California,¹⁵² Washington,¹⁵³

150 The First Circuit in *Dube* understood that “where there is no policy judgment, courts would be ‘second guessing’ by implying one.” *Dube v. Pittsburgh Corning*, 870 F.2d 790, 800 (1st Cir. 1989).

151 See, e.g., *Industrial Indem. Co. v. Alaska*, 669 P.2d 561, 566 (Alaska 1983).

152 *Johnson v. State*, 447 P.2d 352, 361 n.8 (Cal. 1968). A host of other California cases rely on this point of law. See, e.g., *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 723-24 (E.D. Calif. 1993); *Ramos v. County of Madera*, 484 P.2d 93, 98 (Cal. 1971); *Ebarb v. County of Stanislaus*, 246 Cal. Rptr. 845, 851 (Ct. App. 1988); *Holman v. State*, 124 Cal. Rptr. 773, 785-86 (Ct. App. 1975); *Elton v. County of Orange*, 84 Cal. Rptr. 27, 31 (Ct. App. 1970).

153 *King v. City of Seattle*, 525 P.2d 228, 233 (Wash. 1974).

Utah,¹⁵⁴ New Jersey,¹⁵⁵ Indiana,¹⁵⁶ Minnesota,¹⁵⁷ Oregon,¹⁵⁸ Delaware,¹⁵⁹ Montana,¹⁶⁰ Louisiana,¹⁶¹ and Hawaii.¹⁶²

The seminal state case is *Johnson v. State*. In *Johnson*, a foster parent sued the state of California for personal injuries she suffered when a child whom the state Youth Authority placed in her home assaulted her. Ms. Johnson claimed that the state parole officer failed to warn her of the latent but foreseeable danger of accepting the child into her home and that the failure led to her injuries. The Supreme Court of California determined that the state could not avail itself of discretionary immunity because the parole officer's decision not to warn the plaintiff had not been an exercise of a discretionary function. In reaching its conclusion, the *Johnson* court made two significant points: (1) the goal of discretionary function immunity is to ensure "judicial abstention in areas in which the responsibility for basic policy decisions has been committed to coordinate branches of government. Any wider judicial review, we believe, would place the court in the unseemly position of determining the propriety of decisions expressly entrusted to a coordinate branch of government";¹⁶³ and (2) "to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision."¹⁶⁴ A host of other states have followed *Johnson's* lead, and the federal judiciary ought to do likewise.

154 *Little v. Utah State Div. of Family Servs.*, 667 P.2d 49, 51 (Utah 1983).

155 *Kolitch v. Lindedahl*, 497 A.2d 183, 197 (N.J. 1985); *Costa v. Josey*, 415 A.2d 337, 342 (N.J. 1980); *Pacifico v. Froggatt*, 591 A.2d 1387, 1389 (N.J. Super. Ct. Law Div. 1991).

156 *Greathouse v. Armstrong*, 616 N.E.2d 364, 367 (Ind. 1993); *Peavler v. Board of Comm'rs*, 528 N.E.2d 40, 46 (Ind. 1988).

157 *Nusbaum v. County of Blue Earth*, 422 N.W.2d 713, 722 (Minn. 1988); *Schaefer v. State*, 444 N.W.2d 876, 879-81 (Minn. Ct. App. 1989).

158 *Little v. Wimmer*, 739 P.2d 564, 568-69 (Or. 1987); *Bradford v. Davis*, 626 P.2d 1376, 1382 (Or. 1981); *Stevenson v. State*, 619 P.2d 247, 254 (Or. 1980).

159 *Biloon's Elec. Serv., Inc. v. City of Wilmington*, 401 A.2d 636, 641 (Del. Super. Ct. 1979), *aff'd*, 417 A.2d 371 (Del. 1980).

160 *State Div. of Workers' Compensation v. Blaylock*, 805 P.2d 1272, 1277-78 (Mont. 1990) (discussing common law "quasi-judicial" immunity by analogizing same to discretionary function immunity under FTCA).

161 *Fowler v. Roberts*, 556 So. 2d 1, 13-16 (La. 1989).

162 *Breed v. Shaner*, 562 P.2d 436, 442 (Haw. 1977).

163 *Johnson v. State*, 447 P.2d 352, 360 (Cal. 1968).

164 *Johnson*, 447 P.2d at 361 n.8. Some commentators have argued that *Johnson's* requirement that a government decision be accompanied by a conscious balancing of policy factors stems from the particular phrasing of the California Code's discretion-

2. Policy-Making Authority

If courts are to leave untouched what could be blatant blunders based on a decisionmaker's declaration that she relied on a policy factor in reaching her conclusion, the decisionmaker should be an official whose responsibilities include taking such matters into account.¹⁶⁵ Bear in mind, as discussed in Part IV.B above, that discretionary function immunity is not predicated on the assumption that policy variables automatically outweigh any objective considerations that indicate government negligence. Rather, discretionary function immunity is an acknowledgment that courts lack the political authority and expertise to evaluate decisions based on policy variables. Courts should have no duty, therefore, to abstain from reviewing the choices of a government employee without authorization or special expertise for making policy decisions.

All government employees do not have and should not have authority to disregard objective considerations that dictate one course of action because of vague policy considerations that suggest something

ary function exception. *See, e.g.*, *Harrison v. Escambia County School Board*, 419 So.2d 640, 649 n.13 (Fla. Dist. Ct. App. 1982). California Gov't Code § 820.2 (West 1995) provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Although § 820.2 expressly immunizes only the employee, § 815.2(b) states that if the employee is immune, so too is the state or county. This text is different from that of the Federal Tort Claims Act (FTCA), which holds, in part, that the government is not liable for any claim "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 be abused." 28 U.S.C. § 2680(a) (1994). Nevertheless, there are excellent reasons to suppose that the outcome in *Johnson* was not driven by the court's semantic formalism. First, although the two statutes use distinct language, the distinction seems to be without a difference. What could be the real difference between "an act or omission that is the result of the exercise of discretion" and "the exercise or performance or the failure to exercise or perform a discretionary function"? Second, the *Johnson* court, throughout its opinion, analogized California's discretionary immunity law to the FTCA; in the very footnote in which the court imposed the "conscious policy decision" requirement, it cited for support two articles on the FTCA's discretionary function exception. Third, many of the other courts that borrowed *Johnson*'s reasoning in order to graft such a requirement onto their state's immunity statutes were construing statutes that more closely resemble (or exactly resemble) the FTCA than the California Code. Oregon and Utah are good examples. OR. REV. STAT. § 30.265(3)(c) (1988 & Supp. 1996); UTAH CODE ANN. § 63-30-10 (1993 & Supp. 1996).

¹⁶⁵ *See* Goldman, *supra* note 6, at 859-60; Bagby & Gittings, *supra* note 13, at 230-32; Marisseau, *supra* note 62, at 1528.

different.¹⁶⁶ If neither statute nor regulation nor agency policy or practice grants an official the authority to make policy, then there is no reason to think that the official is better at assigning a value to the policy factor than a court would be: (1) neither Congress nor the agency's chiefs thought that the official was well positioned to make such a decision; (2) the official does not likely possess the requisite experience in making policy decisions; and (3) the official does not regularly receive the social, political, and economic data to make the decision wisely.¹⁶⁷ Justice Scalia was correct in observing that the old planning/operational distinction eliminated much of this problem. He was also correct, we believe, in advocating that immunity be reserved for policy decisions made by "an officer whose official responsibilities include assessment of [social, economic or political policy] considerations."¹⁶⁸

In addition, what constitutes permissible policy considerations for a particular official ought to be limited by the scope of the official's

166 Cf. D. Scott Barash, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300 (1987) (arguing that negligent execution of mandatory regulations should not receive discretionary function immunity); *Berkovitz v. United States*, 486 U.S. 531, 545 (1988) (same).

167 For example, in *Ayala v. United States*, 771 F. Supp. 1097 (D.D.C. 1991), an electrical inspector of the Mine Safety and Health Administration gave incorrect technical assistance to a mining company about where to wire in add-on lights to a coal mining machine. Fifteen men died in the resulting explosion of methane and coal dust. The district court applied the discretionary function exception based upon the presumption that the decision was made in furtherance of Federal Mine Safety and Health Act regulations promulgated to protect the health and safety of the miners. Aside from the fact that there was no evidence in the record that such factors made any difference at all in the inspector's decision, it would appear highly unlikely that anyone in the Mine Safety and Health Administration would have given authority to a technical inspector to disregard objective technical factors in favor of lofty policy considerations when addressing an electrical question. The Tenth Circuit reversed the trial court's decision on the grounds that such a technical decision was not susceptible to policy analysis. *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992); see also *Doolin v. United States*, No. 93-2377, 1994 WL 233829 (N.D. Ill. May 23, 1994) (immunity granted to HUD realty specialist who never visited property in order to monitor independent contractor boarding up windows); *Robinson v. United States*, 849 F. Supp. 799 (S.D. Ga. 1994) (immunity granted to decision of postal employee who accepted package tied with string in violation of post office rules; package ultimately turned out to be fatal letter bomb); *Mesa v. United States*, 837 F. Supp. 1210 (S.D. Fla. 1993) (immunity granted to DEA agents who executed arrest warrant on wrong person); *Flax v. United States*, 791 F. Supp. 1035 (D.N.J. 1992) (immunity granted to decisions made by FBI agents who allegedly conducted surveillance of kidnapping victim negligently, resulting in death of victim).

168 *United States v. Gaubert*, 499 U.S. 315, 335 (1991) (Scalia, J., concurring).

delegated policy-making authority.¹⁶⁹ An agency's grant of policy authority to an official is unlikely to be completely open-ended. Most grants of policy authority restrict the grantee's policy discretion to some extent. If the delegations of policy authority are thoughtful, officials making different kinds of decisions ought to be permitted to consider different kinds of policy factors. It would be only logical for courts to limit an official's claim that he relied on nonreviewable policy factors in making a decision to those factors he is expressly authorized to consider. This second limitation on the scope of policy factors flows directly from the requirement of policy authority itself—if an official has no express policy authority, none of his decisions are immune; if he had express policy authority, immunity is limited to the policy factors expressly reserved to his judgment. Although this limitation has a theoretical neatness, in reality the chain of delegation of policy-making authority will not always be crystal clear. To the extent that agency delegations of authority are unclear, however, this kind of restriction on immunity will encourage agencies to clarify their delegations of authority.

Scrutinizing the authority of the government decisionmaker will also ensure that her decision was based on the policies underlying her agency's mission. No agency official should receive immunity for relying on policy factors outside the scope of the regulatory regime in which she operates.¹⁷⁰ For example, in *C.R.S.*, the MBPO should not have been able to immunize its negligent blood screening decision by citing the privacy interests of soldiers to avoid interrogation as to their sexual conduct and drug habits. That moral proposition, no matter how weighty, has nothing to do with the MBPO's mission. For another example, if the SEC negligently denies registration to a corporation's securities, the careless SEC official should not be able to obtain

169 In a sense, this limitation flows directly from the Supreme Court's *Berkovitz* decision: "[A]pplication of the discretionary function exception . . . hinges on whether the agency officials . . . *permissibly* exercise policy choice." *Berkovitz*, 486 U.S. at 545 (emphasis added).

170 See *Kratzke*, *supra* note 103, at 21; *Gaubert*, 499 U.S. at 324-25 ("For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in *the policy of the regulatory regime.*" (emphasis added)); *cf. id.* at 324 ("On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration *of the same policies which led to the promulgation of the regulations.*" (emphasis added)); *id.* ("[I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance *of the policies which led to the promulgation of the regulations.*" (emphasis added)).

immunity by stating that he feared the corporation would use the new capital to build pernicious products. While this fear stems from a real social policy consideration, the SEC does not have as one of its goals preventing corporations from producing harmful goods.

Another advantage of the policy-making authority requirement is that it rationalizes the first prong of the *Berkovitz/Gaubert* test. The first prong, as presently applied, adds little to basic negligence analysis anyway, since whether or not an official acted in accord with or contrary to mandatory statutes or regulations will probably be nearly conclusive in establishing negligence after the immunity hurdle is cleared. Addressing this issue at the immunity stage creates an unnecessary redundancy. Courts should not merely ask whether the official had choice; rather, courts ought to ask whether the official had the authority to make the kind of choices that warrant immunity. Asking about compliance with statutes or mandatory regulations is not even necessary if the more important question of policy-making authority is analyzed. If an official acted contrary to statute or regulations, he certainly lacked policy authority to make the challenged decision. Immunity will not apply and the negligence analysis will proceed.

A requirement that the government decisionmaker have authority to engage in policy making before the discretionary function exception is applied has a sound jurisprudential basis. *United States v. Varig Airlines* provides a nice example. In ruling that the FAA "spot check" program was immune from a tort lawsuit, the *Varig Airlines* Court specifically noted:

The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources.¹⁷¹

Some commentators also support a policy-making authority requirement for the applicability of discretionary function immunity.¹⁷² Fed-

171 *United States v. Varig Airlines*, 467 U.S. 797, 820 (1984); *see also* *Berkovitz v. United States*, 486 U.S. 531, 540-44 (1988); *Hatahley v. United States*, 351 U.S. 1973, 1981 (1956); *Prescott v. United States*, 959 F.2d 793, 795-96 (9th Cir. 1992); *Roberts v. United States*, 887 F.2d 899, 901 (9th Cir. 1989); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196-97 (D.C. Cir. 1986); *Jayvee Brand v. United States*, 721 F.2d 385, 389 (D.C. Cir. 1983); *Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978); *Griffin v. United States*, 500 F.2d 1059, 1068-69 (3d Cir. 1974).

172 Bagby and Gittings propose that "a reviewing court must determine that legislative authority is delegated to the agency to exercise public policy discretion." They point out that an actual record of delegation of policy-making authority to lower level

eral case law, however, does not at this time make policy-making authority a prerequisite for immunity.¹⁷³

A policy-making authority requirement also corresponds well with the main non-economic rationales for sovereign immunity.¹⁷⁴ Separation of powers requires that the prerogative of the non-judicial branches of government to craft and implement public policy not be unduly restricted. If an agency employee lacks policy-making authority, however, judicial review of his potentially negligent decisions will not much threaten the agency's policy-making franchise. Nothing about the separation of powers requires that every government official be allowed to cast economic rationality aside in the pursuit of policy goals. Indeed, judicial review of decisions made by officials without explicit policy-making authority will foster the separation of powers by providing agencies with an incentive to delegate policy authority carefully—to those officials the agency truly desires to be free from the demands of the negligence calculus. Moreover, policy decisions made by non-authorized government officials are precisely the kinds of decisions that slip through the cracks in the administrative and political review processes; and, conversely, possession of policy-making authority by the relevant decisionmaker implies that the decisionmaker was within the established chain of delegated policy-making authority and was well positioned and well qualified to make the choice he made. Lastly, the only sort of government conduct that this requirement would chill is policy making by government employees who are not authorized to do so.

3. True Policy Factors

A third requirement of a properly formulated discretionary function immunity, nearly implicit in the two previous requirements (that

employees is necessary to prevent what they call a "false policy" problem, i.e., boilerplate delegations of minor policy-making authority and the peppering of internal memoranda with policy wording to bring activities within the protected zone. Bagby & Gittings, *supra* note 13, at 230.

Goldman also advocates an authorization inquiry. He observes that the person implementing the vaccination approval program of *Berkovitz* was not authorized to make policy determinations as to whether those procedures were the most cost efficient or safe methods possible. Goldman observes that authorization is another way of checking to see that the first test in *Berkovitz* is met. Goldman, *supra* note 6, at 859-60.

¹⁷³ Courts in discretionary function exception cases have frequently examined the relevant official's policy-making authority. See, e.g., *Begay v. United States*, 768 F.2d 1059, 1065 (9th Cir. 1985); *McMichael v. United States*, 751 F.2d 303, 307 (8th Cir. 1985).

¹⁷⁴ See *supra* Part IV.A.

the decisionmaker actually considered policy factors and that the decisionmaker had authority to act in accordance with such factors), is that immunity be reserved for decisions involving genuine policy variables. Although the jurisprudence of what constitutes a true policy factor is imprecise, the economic test for true policy factors is clear, although difficult to implement. Policy factors exist when the "cost of precaution" element in the Learned Hand negligence formula cannot be computed because reasonable people widely disagree about the costs and benefits of certain governmental activities—for example, how important is preserving the environment, strengthening national defense or protecting civil rights?

Many post-*Gaubert* courts have based discretionary function immunity on the consideration or hypothetical consideration of "policy" factors that do not meet this simple economic test. Courts have regularly mistaken facts that could be easily plugged into the Learned Hand negligence formula for policy factors. In *C.R.S.*, for example, the court immunized the government from the plaintiffs' failure-to-warn claim because:

[t]he government could have balanced the fact that identifying all those in D.B.S.' position might have lowered the risks of transmission against the possibility that public awareness of AIDS and warnings from other sources might have obviated the need for notification from the Army, the fact that the risk of infection was statistically slight, the risk that military morale could be affected, and the judgment that scarce resources could be better allocated elsewhere.¹⁷⁵

These factors identified by the court are simply not unquantifiable value judgments. The "public awareness of AIDS and warnings from other sources" are precisely the kind of facts (not value judgments) that reduce the "accident cost" element in the Hand negligence formula. The statistical "risk of infection" is another mathematical fact. As for "military morale," what might affect morale and by how much may call for some expert analysis, but so do many of the technical issues routinely addressed by courts. How to categorize "scarce resources" is a closer question, but this Part will show that courts should not consider scarce resources to be a genuine policy factor.

Minimal scrutiny of other discretionary function decisions reveals a similar lack of fidelity to the economic definition of a policy variable. For example, in a claim against the Army for failure to properly train, supervise, and equip an Army legal assistance officer, the court con-

175 *C.R.S. v. United States*, 11 F.3d 791, 801 (8th Cir. 1993).

cluded, “[c]ertainly the decision whether particular law books ought to be provided is a discretionary one, calling for a judgment much like the judgment found protected in *Gaubert*.”¹⁷⁶ Another court held that the EPA’s decision to stockpile hazardous waste on the plaintiff’s property was protected by the discretionary function exception because the factors influencing the EPA’s decision included:

- (1) the existence of prior contamination at the site, i.e., if the stockpile were placed on already-contaminated land, then there would be less net contamination;
- (2) the lack of accessibility to schools and residences;
- (3) the distance from operations at [the contaminated site];
- (4) the accessibility of vehicles involved in transportation and disposal;
- (5) the distance from streams and waterways;
- and (6) the need to control migration of the dirt after stockpiling.¹⁷⁷

In dismissing a claim against the Forest Service for selecting contractors who were unable to perform tree culling work safely, the Eighth Circuit concluded that the selection of contractors “is grounded in policy since the contracting officer considers bidders’ expertise, their safety records, and the amount of their bids in making the selection.”¹⁷⁸ The Ninth Circuit found that the Forest Service’s decision to leave grazing lands adjacent to a highway unfenced was made after

176 *Knisley v. United States*, 817 F. Supp. 680, 694 (S.D. Ohio 1993). This decision is particularly ironic because, just prior to finding the claim barred by the discretionary function exception and thus, in essence, challenging conduct that courts are not equipped to evaluate, the court evaluated the substance of the claim at length and concluded that the plaintiff had failed to establish the standard of care from which the Army deviated. The same irony is found in *Barrett v. United States*, 845 F. Supp. 774 (D. Kan. 1994), which considered a claim that the failure to investigate threats against an inmate by prison Muslims resulted in his death. The court decided that, “[b]alancing the concerns of inmate security with the right of a prisoner to circulate and socialize with some degree of freedom within the general population of a prison is a matter that, without doubt, involves many policy considerations.” *Id.* at 782. Not only does the management of an inmate population appear to involve primarily professional judgments rather than policy considerations, but just prior to reaching its conclusion the court made extensive findings of fact regarding the merits of the claim and concluded that failure to investigate or to segregate the victim was not the proximate cause of his death.

177 *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400, 423 (D.S.C. 1994). Even though every item the court listed is eminently quantifiable, the court concluded that these factors “indisputedly [reveal] that the EPA’s stockpiling of contaminated dirt involved considerations based on public policy . . .” *Id.*

178 *Layton v. United States*, 984 F.2d 1496, 1502 (8th Cir. 1993). The court went on to conclude that the Forest Service’s decision to cut trees on steep slopes rather than girdle them was insulated because Forest Service technicians rely on their experience and judgment in such matters “in order to further the Forest Service’s policy of improving timber quality and in deciding which treatment methods will best serve those goals.” *Id.* The court confused policy making with professional judgment.

balancing social, economic and policy concerns, including that "fencing could pose a safety hazard to snowmobilers in the winter months" and "the danger to motorists driving on the unfenced highway."¹⁷⁹

As noted in Part III above, the second prong of the *Berkovitz* test has nearly disappeared in the wake of *Gaubert*—i.e., if a government actor has any choice whatsoever, the courts will probably deem her immune. This unfortunate occurrence is a result of the combination of *Gaubert* susceptibility analysis and a loose judicial interpretation of "policy" factors. Under susceptibility analysis, a government actor can present to the court all the considerations that hypothetically could have influenced her decisionmaking. For any matter involving real choice, there will undoubtedly be a long list of such considerations, and some of them will sound fairly complex. Courts are frequently overwhelmed by the size and majesty of these lists and tend, as a consequence, to grant immunity. The trend toward increased sovereign immunity in the post-*Gaubert* discretionary function exception case law is a direct consequence of the synergy between *Gaubert's* authorizing courts to confer immunity on decisions susceptible to policy analysis and the courts' failure adequately to address what is and what is not a genuine policy factor.

Although determining what constitutes a true policy factor is not easy, it is certain that government officials should not be able to obtain discretionary function immunity by mere recitation of "budgetary constraints" or "cost considerations." To some extent, budgetary constraints are a factor in almost all government decisionmaking.¹⁸⁰ If cost considerations or budgetary constraints are deemed true economic policy factors, then the discretionary function exception could swallow up governmental liability in tort. Almost every decision to adopt a safety precaution costs money, and every expenditure on safety leaves an agency with less money to pursue its particular policy mission; consequently, almost every safety decision could be deemed an immune decision regarding the agency's budgetary resources.

Although many courts have noted the potentially unsatisfactory results of immunizing governmental decisions that are based on cost considerations alone,¹⁸¹ most courts, without analysis, have treated

179 *Shively v. United States*, No. 92-16354, 1993 WL 312758, at *2 (9th Cir. Aug. 18, 1993). These factors fit nicely into the Hand negligence formula.

180 *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) and Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985).

181 *See, e.g., Routh v. United States*, 941 F.2d 853, 856 (9th Cir. 1991) ("The government's position, carried to its logical extreme, would allow the undercutting of a policy decision to require a safe workplace by purely economic considerations not supported in the record."); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018,

cost considerations as a policy factor. In *C.R.S.*, one of the “social, economic and political policy factors” which insulated the Army’s blood screening procedures from judicial review was “the need to keep costs in check given the budget constraints under which government operates.”¹⁸² Budgetary constraints were even more central to the court’s dismissal of the failure to warn claim.¹⁸³ The Tenth Circuit observed that the EPA must balance “finite resources and funding considerations” against the need for a “prompt cleanup [of a hazardous waste site] and the mandate of safety.”¹⁸⁴ The United States Postal Service, a district judge concluded, needed to consider “safety considerations, costs and efficient use of the USPS’s resources” in determining the extent to which a postal representative would oversee a

1031 (9th Cir. 1989) (mere recitation of budget constraints will not obtain discretionary function protection for the government because “virtually all government actions affect costs since action itself requires resources”); *ARA Leisure Servs.*, 831 F.2d at 195-96 (“Finally, the fact that Park Service maintenance personnel were required to work within a budget does not make their failure to maintain the Thorougfare Pass a discretionary function for purposes of the FTCA. . . . Budgetary constraints underlay virtually all government activity.”); *Smith v. United States*, 375 F.2d 243, 248 (5th Cir. 1967) (“The United States is immune from liability in the present case not because of the mere fact that government officials made choices, but because the choices made affected the political (not merely the monetary) interests of the nation.”). Some courts and at least one commentator have suggested the rule that a decision based solely on budgetary constraints or cost consideration should not be deemed a permissible exercise of policy judgment. See *Kennewick*, 880 F.2d at 1024; *ARA Leisure Servs.*, 831 F.2d at 195; *Marisseau*, *supra* note 62, at 1524-25. Bagby and Gittings also opine, though without any accompanying elucidation, that mere consideration of economic factors should not be sufficient to invoke discretionary immunity. They state: “[c]ourts . . . are criticized for protecting government decisions on the mere showing that cost was a considered factor, given that most government decisions have an economic consequence.” Bagby & Gittings, *supra* note 13, at 252 n.125; see also *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957) (holding that “having a burden on the public treasury” alone should not be sufficient justification for protecting government); Robert D. Thornton, *Federal Tort Claims: A Critique of the Planning Level—Operational Level Test*, 11 U.S.F. L. REV. 170, 195-96 (1976); *infra* Part IV.D.3.

182 *C.R.S.*, 11 F.3d at 797. The Army in *C.R.S.* neither offered any evidence that cost considerations affected its selection of screening procedures nor provided any estimate of the costs of the screening procedures advanced by the plaintiffs. Thus, the claim was dismissed on a purely hypothetical basis.

183 *Id.* at 801. Again, the Army provided the court with no relevant evidence regarding cost.

184 *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1541 (10th Cir. 1992); see also *Johnson v. United States Dep’t of Interior*, 949 F.2d 332, 337 (10th Cir. 1991) (decisions about how to regulate mountain climbing in Grand Teton National Park “involve balancing competing policy considerations pertaining to visitor safety, resource availability, and the appropriate degree of governmental interference in recreational activity.”).

consulting architect's responsibilities.¹⁸⁵ A decision of the Forest Service not to close a forest during a high fire risk was immunized because it rested upon the "vital item of costs."¹⁸⁶ A court decided that the decision of the Office of Surface Mining Regulation not to require installation of blinking lights on standpipes in private strip-mining roads "struck a balance between safety concerns and budgetary constraints, and the efficient allocation of resources."¹⁸⁷ The Eleventh Circuit concluded that in deciding on the method for inspecting potentially hazardous trees along roadways, the National Park Service had to "determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available."¹⁸⁸ The Eighth Circuit observed that the decision of the Forest Service about whether or not to issue warnings about the particular dangers involved in felling gum and beech trees "is susceptible to policy analysis, since it involves balancing safety against cost: the more effort the Forest Service expended to discover dangers and to warn contractors of them, the greater the safety benefit but also the greater the cost to the government."¹⁸⁹

The courts' acceptance of budgetary constraints as a "policy" factor is understandable. An agency's budget has the feel of a large and complex issue that would be miserable for a judge to attempt to un-

185 *Brown v. United States*, No. 92-CV-828, 1994 WL 319015, at *14 (W.D.N.Y. June 8, 1994).

186 *Pope & Talbot, Inc. v. United States Dep't of Agric.*, 782 F. Supp. 1460, 1467 (D. Or. 1991). The court identified the balancing required of the Forest Service to be "the public's need for open forests and the costs entailed with closing the forests against the danger of fire." *Id.* at 1465. As noted in the text above, such precaution costs are the focus of negligence analysis, not immunity.

187 *Koch v. United States*, 814 F. Supp. 1221, 1230 (M.D. Pa. 1993).

188 *Autery v. United States*, 992 F.2d 1523, 1531 (11th Cir. 1993). The extent to which the natural state of the forest should be preserved is a genuine policy variable; the significance of that factor in a roadway inspection program, however, appears questionable. The "limited financial and human resources available" factor is merely the cost element of the Hand formula. It is the "need for other safety programs" that raises the question of competing priorities discussed in the text below. *See also* *Fahl v. United States Dep't of Interior*, 792 F. Supp. 80, 83 (D. Ariz. 1992).

189 *Layton v. United States*, 984 F.2d 1496, 1504 (8th Cir. 1993). This is actually a very nice formulation of the Hand negligence formula. On the continuum set forth by the court, the Forest Service would be negligent until the marginal cost of discovering and warning of additional dangers exceeded the safety benefits. *See also* *Bergquist v. United States Nat'l Weather Serv.*, 849 F. Supp. 1221, 1228 (N.D. Ill. 1994); *Childers v. United States*, 841 F. Supp. 1001, 1016 (D. Mont. 1993); *Knisley v. United States*, 817 F. Supp. 680, 694 (S.D. Ohio 1993); *Webster v. United States*, 823 F. Supp. 1544, 1551 (D. Mont. 1992).

ravel; it evokes images of complicated planning cycles designed to carry out important agency missions that courts have no business supervising. Be that as it may, the Supreme Court has never identified budgetary constraints as a policy factor triggering application of the discretionary function exception. The resources of any organization, whether public or private, are limited. If an agency which engages in accident-producing conduct can obtain immunity by citing limited resources, that agency will inflict accident costs on society regardless of whether or not such costs exceed the costs of preventing such accidents. We do not permit a private organization to defend a negligence action on the grounds of limited resources; nor should we permit a public organization to escape negligence allegations on similar grounds. Discretionary function immunity should only be available for decisions of a uniquely governmental—i.e., policy—nature.

Granted, what the government often means by budgetary constraints is the allocation of scarce resources—spending more money on safety would require the agency to reduce its other activities. Although resource allocation sounds like quintessential policy making, closer analysis reveals that budgeting resources is not the same as crafting policy. Let us return to the highway curve. Suppose that the Highway Department justified leaving in place its dangerously tight curve not on the basis of a nearby church, swamp or artillery range, but rather because of its decision instead to construct an eight-lane expressway across town. In other words, the Highway Department made a difficult resource allocation decision. What the Department has done, however, by skimping on the highway curve in order to build an eight-lane expressway, is to add to the agency's budget by appropriating the damage costs inflicted on the curve's accident victims. The spirit of the Takings Clause condemns this form of state action. Just as the Highway Department cannot bulldoze houses to build the new expressway without paying compensation to the homeowners, so too should the Highway Department not generally be permitted to leave in place a negligently built highway curve that imposes accident costs on unknown citizens without paying compensation to the injured. If it is cheaper for society as a whole to straighten the curve rather than bear the accident costs, tort immunity should not remove the Highway Department's incentive to do so.

This third prerequisite for obtaining discretionary function immunity also respects the valid arguments for sovereign immunity. Separation of powers insists that the judiciary not trammel the legitimate policy-making activities of the other branches. By conditioning any grant of discretionary function immunity on the existence of a true policy decision, the demands of separation of powers are perfectly sat-

isfied—only ministerial and implementational executive and legislative decisions will be reviewable by courts. Moreover, requiring the government to establish that its decisionmaker considered a genuine policy variable in no way renders redundant the administrative and political checks on agency behavior. Administrative and political superiors will be left to fulfill their chief task of policy supervision. Lastly, although granting immunity only to legitimate policy decisions will not chill government policy making, it will, admittedly, chill certain kinds of government non-policy decisionmaking. While this may lead to a lessening of the government's involvement in some fields of activity, those fields of activity will be exactly the areas that private enterprise can most easily enter.¹⁹⁰

CONCLUSION

The *Gaubert* susceptibility test cannot withstand analysis. The economic and other factors that distinguish state actors from private actors almost universally recommend that discretionary function immunity be reserved for actual decisions about true policy factors made by officials with policy-making authority. Such a standard would apply the negligence calculus to government conduct precisely in those cases where the state ought to act like a reasonably careful private citizen. It would provide an incentive for government agents to be more thoughtful in their decisionmaking and to identify situations in which they are deliberately making economically irrational decisions for an appropriate policy purpose. It would encourage the government to be more careful in delegating policy-making authority, giving explicit consideration to which officials should be free from the dictates of economic rationality. It would end the creative writing now required of courts as they conjure up hypothetical policy considerations that never entered into the thinking of government employees, who, in turn, may not have had the authority to act on such considerations in any event.

190 The service areas will be areas not involving social and political policy decisions, i.e., areas that do not involve the provision of public goods. Private firms are more efficient providers of private goods. See RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* ch. 4 (5th ed. 1989).