

# ARTICLE

## Causation and the Discretionary Function Exception to the Federal Tort Claims Act

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### TABLE OF CONTENTS

INTRODUCTION . . . . .	694
I. STATUTORY BACKGROUND OF THE DISCRETIONARY FUNCTION EXCEPTION . . . . .	699
II. SUPREME COURT INTERPRETATION OF THE DISCRETIONARY FUNCTION EXCEPTION . . . . .	702
A. <i>The Supreme Court's Two-Step Test for Determining         Whether Government Conduct Constitutes the Exercise         of a Discretionary Function</i> . . . . .	703
1. Breadth of the Two-Step Test . . . . .	707
2. Government Conduct Not Protected by the Two-Step Test . . . . .	710
3. The Court's "Disaggregative" Approach to Applying the Two-Step Test in Cases Involving a Course of Government Conduct . . . . .	712

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<i>B. Implications of the Supreme Court's Decisions for the "Based Upon" Issue . . . . .</i>	715
1. Practical Implications . . . . .	715
2. Doctrinal Implications . . . . .	717
III. <i>FISHER BROTHERS SALES, INC. V. UNITED STATES . . . . .</i>	722
<i>A. Factual and Procedural History . . . . .</i>	722
<i>B. Analysis of the Approaches in Fisher Brothers to Resolving the "Based Upon" Issue . . . . .</i>	727
1. The Approach of the <i>Fisher Brothers</i> Dissent . . . . .	727
<i>a. The Dissent's Reliance on Berkovitz . . . . .</i>	727
<i>b. The Dissent's Reliance on Plaintiffs' Proximate Cause Allegations . . . . .</i>	729
2. The Approach of the <i>Fisher Brothers</i> Majority . . . . .	731
<i>a. The Majority's "Immediate Cause" Standard . . . . .</i>	732
<i>b. The Majority's Understanding of the Purpose of the Discretionary Function Exception . . . . .</i>	735
i. Whether the Exception Prevents Only the "Judgmental" Judicial Scrutiny That Occurs in a Direct Challenge to the Exercise of a Discretionary Function . . . . .	735
ii. Whether the Exception Also Prevents the "Nonjudgmental" Judicial Scrutiny That Occurs in a <i>Fisher Brothers</i> -Type Action . . . . .	737
(A) <i>The Risk of Large Money Judgments . . . . .</i>	738
(B) <i>The Diversion of Time and Energy of Discretionary Decisionmakers . . . . .</i>	741
(C) <i>The Effect on Executive Branch Policymaking . . . . .</i>	742
(1) Avoidance of Personal Involvement in FTCA Litigation . . . . .	743
(2) Avoidance of Large Money Judgments Against the Government . . . . .	746
3. A Common Sense Evaluation of the Majority's Conclusion . . . . .	747

IV. A PROPOSED APPROACH FOR RESOLVING THE  
 “BASED UPON” ISSUE . . . . . 748

A. *Description of the Proposed “Influence” Standard* . . . . . 748

1. Overview of the Influence Standard . . . . . 749

2. Specific Features of the Influence Standard . . . . . 750

    a. *Timing of “Protected Conduct”* . . . . . 750

    b. *Unimportance of Ability to Prove Influence* . . . . . 752

    c. *Settings in Which the Influence Standard Applies* . . . . . 753

    d. *Nonexclusivity of the Influence Standard* . . . . . 753

B. *Application of the Influence Standard* . . . . . 756

1. FTCA Claims Ostensibly Based Upon the Data Underlying the Exercise of a Discretionary Function . . . . . 757

    a. *Johnson v. United States Department of Interior* . . . . . 757

    b. *Patterson v. United States* . . . . . 758

    c. *In re Glacier Bay* . . . . . 759

    d. *Appley Brothers v. United States* . . . . . 762

2. FTCA Claims Ostensibly Based Upon Procedural Violations Accompanying the Exercise of a Discretionary Function . . . . . 764

    a. *Jayvee Brand, Inc. v. United States* . . . . . 765

    b. *Myers & Myers, Inc. v. United States Postal Service* . . . . . 768

3. FTCA Claims Ostensibly Based Upon the Wrongful and Unprotected Implementation of a Protected Policy Decision: *Autery v. United States* . . . . . 771

4. FTCA Claims Based Upon Criminal Law Enforcement Activities . . . . . 773

    a. *Gray v. Bell* . . . . . 774

    b. *Payton v. United States* . . . . . 776

C. *The Impact of the Influence Standard on Current Law* . . . . . 782

CONCLUSION . . . . . 783

## INTRODUCTION

The United States government has avoided tort liability for exposing people to radiation, asbestos, Agent Orange, and blood contaminated by the human immunodeficiency virus (HIV).<sup>1</sup> In

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<sup>1</sup> See, e.g., *Prescott v. United States*, 973 F.2d 696, 702-04 (9th Cir. 1992) (stating that government bears burden of proving that claim by radiation victims under Federal Tort Claims Act (FICA) was barred by discretionary function exception); *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 992-99 (9th Cir. 1987) (holding that discretionary function exception barred recovery under FTCA for victims of radiation from Hiroshima bombing and atmospheric testing of nuclear weapons); *Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987) (holding that discretionary function exception precluded government liability for injuries resulting from radioactive fallout of atom bomb testing); see also Robert F. Blomquist, *American Toxic Tort Law: An Historical Background, 1979-1987*, 10 PACE ENVTL. L. REV. 85, 113-19 (1992) (discussing district court's holding in *Allen*); Grover Glenn Hankins, *The Federal Tort Claims Act: A Smooth Stone for the Sling*, 31 GONZ. L. REV. 27, 41-53 (1995-96) (discussing application of FTCA's discretionary function exception to radiation claims); Nestor M. Davidson, Note, *Constitutional Mass Torts: Sovereign Immunity and the Human Radiation Experiments*, 96 COLUM. L. REV. 1203, 1221-22 (1996) (same).

See, e.g., *Lively v. United States*, 870 F.2d 296, 297-98 (5th Cir. 1989) (holding that discretionary function exception barred recovery by longshoreman exposed to asbestos); *Gordon v. Lykes Bros. Steamship Co.*, 835 F.2d 96, 96-97 (5th Cir. 1988) (holding that discretionary function exception barred claim by merchant seaman exposed to asbestos); *Smith v. Johns-Manville Corp.*, 795 F.2d 301, 304 (3d Cir. 1986) (holding that General Service Administration's decision to sell asbestos "as is" fell within discretionary function exception and barred claims for injuries); *Shuman v. United States*, 765 F.2d 283, 290 (1st Cir. 1985) (holding that decisions by government concerning whether and when to warn of hazards of working with asbestos constituted discretionary function); see also Gideon Mark, Comment, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 898 n.160 (1983) (noting that claims against United States for asbestos injuries have been unsuccessful because of discretionary function exception); cf. *Sea-Land Serv., Inc. v. United States*, 919 F.2d 888, 889 (3d Cir. 1990) (holding that contribution claim by government contractor under Suits in Admiralty Act for asbestos liability was barred by discretionary function exception); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 33 (2d Cir. 1989) (holding that discretionary function exception limited claims under Suits in Admiralty Act for exposure to asbestos). But cf. *Dube v. Pittsburgh Corning*, 870 F.2d 790, 796-800 (1st Cir. 1989) (finding that discretionary function exception did not bar certain asbestos claims under FTCA).

See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194, 199-201 (2d Cir. 1987) (stating that discretionary function exception and *Feres* doctrine precluded Agent Orange claims); see also 38 U.S.C. § 1116 (1994) (authorizing government disability payments for some Agent Orange claims); William J. Blechman, Comment, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?*, 36 U. MIAMI L. REV. 489, 494-526 (1982) (discussing government contractor defense to tort claims and its relation to sovereign immunity and discretionary authority); Blomquist, *supra*, at 111-12 (discussing *Feres* doctrine and discretionary function exception as applied to Agent Orange cases).

See *C.R.S. by D.B.S. v. United States*, 11 F.3d 791, 802 (8th Cir. 1993) (holding that military's decisions regarding screening blood for HIV and notifying those at risk of infection were exercise of discretionary function); Linda M. Dorney, Comment, *Culpable Conduct*

each of these settings, among others, the government has successfully relied on the “discretionary function exception” to the Federal Tort Claims Act (FTCA).<sup>2</sup> This Article discusses causation, an issue that arises in many FTCA actions in which the government invokes the exception. This issue, however, has received almost no attention from the courts or commentators.

The causation issue may arise whenever an FTCA plaintiff’s injuries stem, not from the *single act* of a government employee, but from a *course* of government conduct. In many such cases, one cannot pinpoint a single cause of the injuries. In some of these cases, the plaintiff can plausibly argue that the injuries were caused by conduct that is *not* protected by the discretionary function exception, while the government can just as plausibly argue that the injuries were caused by conduct that *is* protected by the exception. If the plaintiff’s argument prevails, she may recover by showing that the injurious governmental conduct was tortious under the law of the state where the injuries occurred. If the government’s argument prevails, the plaintiff’s claim is barred by sovereign immunity. Thus, the question of what “really” caused the plaintiff’s injuries for purposes of applying the

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*with Impunity: The Blood Industry and the FDA’s Responsibility for the Spread of AIDS Through Blood Products*, 3 J. PHARMACY & L. 129, 162-63 (1994) (discussing government’s arguments and court decisions finding that failure to regulate blood is discretionary function).

For a general discussion of the role of the discretionary function exception in protecting the government from tort liability for catastrophic accidents, see ALBERT J. ROSENTHAL ET AL., *CATASTROPHIC ACCIDENTS IN GOVERNMENT PROGRAMS* 39-41 (1963); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 871 (1991) (discretionary function exception “limit[s] the federal government’s exposure by perhaps billions of dollars a year”).

<sup>2</sup> The FTCA is codified at 28 U.S.C. §§ 1346(b), 2671-80 (1994). The discretionary function exception is codified at § 2680(a), in the italicized language below:

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) *Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.*

28 U.S.C. § 2680 (emphasis added).

discretionary function exception is a potentially dispositive threshold issue in many FTCA cases.

This Article finds the answer to the causation question in statutory language that has been largely ignored. The discretionary function exception preserves federal sovereign immunity from tort claims that are “based upon” a government official’s exercise of, or failure to exercise, “a discretionary function.”<sup>3</sup> To decide whether the exception preserves sovereign immunity from a particular tort claim, a court must determine: (1) what government conduct the claim is “based upon”; and (2) whether that government conduct constitutes the exercise of a “discretionary function.” Many courts and commentators have addressed the second issue by exploring the meaning of the statutory term “discretionary function.”<sup>4</sup> In contrast, no court until

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<sup>3</sup> *Id.* § 2680(a).

<sup>4</sup> *See, e.g.,* Payton v. United States, 679 F.2d 475, 479 (5th Cir. 1982) (en banc) (indicating that courts have struggled with meaning of term “discretionary function” since soon after FTCA’s enactment); Irvin M. Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 GEO. L.J. 1, 40-45 (1946) (discussing exceptions to FTCA and their scope); *see generally* John W. Bagby & Gary L. Gittings, *The Elusive Discretionary Function Exception from Government Tort Liability: The Narrowing Scope of Federal Liability*, 30 AM. BUS. L.J. 223 (1992) (devising and applying mode of analysis for determining when to use discretionary function exception); Ronald A. Cass, *The Discretionary Function Exception to the Federal Tort Claims Act*, in 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 1503 (1987) [hereinafter ACUS REPORT] (discussing need to clarify discretionary function exception, but noting such clarification is unlikely to occur); David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291, 294-303 (1988-89) (detailing application of discretionary function exception in three leading cases); 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 (1993) (summarizing objectives of tort law and examining how courts pursue those objectives when deciding applicability of discretionary function exception); Krent, *supra* note 1, at 875-84 (examining development of discretionary function); Daniel E. Matthews, *Federal Tort Claims Act — The Proper Scope of the Discretionary Function Exception*, 6 AM. U. L. REV. 22 (1957) (discussing background and case law surrounding discretionary function exception and concluding more precise definition of term is needed); Cornelius J. Peck, *The Federal Tort Claims Act — A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956) (discussing considerable amount of litigation and confusion arising from discretionary function exception and suggesting proper construction); John M. Rogers, *A Fresh Look at Agency “Discretion”*, 57 TUL. L. REV. 776, 804-22 (1983) (discussing meaning of “discretion” in discretionary function exception); Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 MAINE L. REV. 365 (1995) (assessing discretionary function exception); Note, *The Discretionary Function Exception of the Federal Tort Claims Act*, 66 HARV. L. REV. 488 (1953) (discussing scope, meaning, and application of discretionary function exception).

recently,<sup>5</sup> and no recent commentator,<sup>6</sup> has examined the antecedent question of how to identify what government conduct a tort claim is “based upon” within the meaning of the statute. Rather, courts have simply assumed that an FTCA plaintiff’s claim is based upon the government conduct that the plaintiff alleges was wrongful and proximately caused the plaintiff’s injuries. This Article argues that such an assumption is not always warranted.<sup>7</sup>

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<sup>5</sup> See *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279 (3d Cir. 1995) (en banc) (holding discretionary function exception precluded claims based on FDA policy decisions by focusing on meaning of “based upon”).

<sup>6</sup> One scholar briefly addressed the statutory term “based upon” in a 1956 article arguing for an interpretation of the exception, the thrust of which the Supreme Court later rejected. See Peck, *supra* note 4, at 225-26, 228-29 (discussing meaning of “based upon” language); Rogers, *supra* note 4, at 821-22 (discussing Professor Peck’s article); *infra* notes 100, 112 (analyzing Professor Peck’s approach to proximate causation).

<sup>7</sup> In general, a plaintiff may recover damages in tort only if she shows that the defendant’s wrongful conduct “proximately caused” the injuries for which damages are sought. As Justice O’Connor recently explained the concept in relation to the Endangered Species Act:

Proximate causation is not a concept susceptible of precise definition. It is easy enough, of course, to identify the extremes. The farmer whose fertilizer is lifted by tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby. At the same time, the landowner who drains a pond on his property, killing endangered fish in the process, would likely satisfy any formulation of the principle. We have . . . said that proximate causation normally eliminates the bizarre, and have noted its functionally equivalent alternative characterizations in terms of foreseeability and duty. Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences.

*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2420 (1995) (O’Connor, J., concurring) (internal quotation marks and citations omitted). See generally W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 42, at 272-80 (5th ed. 1984) (discussing proximate cause and various proposed standards of causation); Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 713-14 (1982) (discussing concept of causation in tort law). Several scholars of law and economics have developed a “probabilistic” conception of causation. See, e.g., Guido Calabresi, *Concerning Cause and the Law of Torts*, 43 U. CHI. L. REV. 69, 71-72 (1975) (distinguishing concepts of cause, causal link, “but for” cause, and proximate cause); William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 111-15 (1983); Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463, 466-70 (1980); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 564-66 (1988). Under that conception, Event 1 “causes” Event 2 if Event 1 increases the probability that Event 2 will occur, compared to the probability that

The first and only decision to address the statutory phrase “based upon” is the Third Circuit’s en banc decision in *Fisher Brothers Sales, Inc. v. United States*.<sup>8</sup> *Fisher Brothers* held that tort claims concerning a governmental ban on Chilean grapes were “based upon” a discretionary decision by the Commissioner of the Food and Drug Administration, and were not “based upon” the allegedly negligent laboratory testing of grapes that preceded the Commissioner’s decision. This Article explains that the holding in *Fisher Brothers* was correct, but that the court’s analysis was not.<sup>9</sup> The court correctly held that the plaintiffs’ claims were barred because their resolution would have required the kind of judicial scrutiny of executive-branch decisionmaking that the discretionary function exception was intended to prevent. The *Fisher Brothers* court used the wrong standard, however, for identifying claims that require such scrutiny. This Article’s proposed approach would treat an FTCA claim as based upon conduct that is protected by the exception — even if the plaintiff alleges that his injuries were proximately caused by wrongful, unprotected conduct — if the plaintiff must prove that the allegedly wrongful, unprotected conduct *influenced* the manner in which a discretionary function was exercised.<sup>10</sup> This “influence” test applies in all of the factual settings in which the “based upon” issue arises.<sup>11</sup> It prevents FTCA plaintiffs from avoiding the

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Event 2 would have occurred in the absence of Event 1. See, e.g., Shavell, *supra*, at 468. Thus, a departure from the required standard of care “causes” an injury when the departure increases the probability that the injury will occur beyond the probability that it would have occurred in the absence of the departure. The departure “proximately” causes the injury when the increase in probability is large enough to offset administrative costs of determining whether a departure has occurred. See, e.g., *id.* at 502-03 (explaining instrumentalist approach to causation); Sykes, *supra*, at 572 (analyzing application of probabilistic view of causation to enterprise liability example).

<sup>8</sup> 46 F.3d 279 (3d Cir. 1995) (en banc) (holding that plaintiff’s claim was not based upon defendant’s conduct), *cert. denied*, 116 S. Ct. 49 (1995). See also *Payton*, 679 F.2d at 486 (Tjoflat, J., concurring in part and dissenting in part) (stating that there is no known case which addresses whether Congress intended discretionary function exception to permit plaintiffs to route FTCA claims through palpably discretionary act to antecedent act, in order to maintain action otherwise barred by exception). The facts and procedural history of *Fisher Brothers* are described in detail below. See *infra* notes 114-30 and accompanying text.

<sup>9</sup> See *infra* notes 176-221 and accompanying text (arguing that *Fisher Brothers* majority reached correct result through improper approach).

<sup>10</sup> See *infra* notes 222-44 and accompanying text (discussing application of “influence” standard to “based upon” issue).

<sup>11</sup> See *infra* notes 244-393 and accompanying text (explaining broad applicability of

discretionary function exception by mere artful pleading and thereby protects executive-branch discretionary decisionmaking from the skewing effects of tort litigation.

This Article proceeds in four parts. Part I explains the statutory background of the discretionary function exception.<sup>12</sup> Part II analyzes the Supreme Court's interpretation of the exception.<sup>13</sup> Part III evaluates the approaches to resolving the "based upon" issue taken by the en banc majority and by the en banc dissent in *Fisher Brothers*.<sup>14</sup> Part IV proposes a new approach — the application of an "influence" standard — which is derived from the reasoning of, but distinct from the approach taken by, the *Fisher Brothers* majority.<sup>15</sup> Part IV then explains how the influence standard would apply to cases decided by federal courts of appeals in which the "based upon" issue has arisen but has not been addressed.<sup>16</sup>

## I. STATUTORY BACKGROUND OF THE DISCRETIONARY FUNCTION EXCEPTION

Despite criticism, it still is the law that the federal government enjoys sovereign immunity from lawsuits unless Congress has waived that immunity by statute.<sup>17</sup> One of the major statutes in

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influence standard).

<sup>12</sup> See *infra* notes 17-26 and accompanying text (discussing how "based upon" issue relates to FTCA's waiver of sovereign immunity).

<sup>13</sup> See *infra* notes 27-112 and accompanying text (discussing Supreme Court cases construing discretionary function exception).

<sup>14</sup> See *infra* notes 113-221 and accompanying text (comparing majority and dissent approaches in *Fisher Brothers*).

<sup>15</sup> See *infra* notes 222-43 and accompanying text (proposing influence standard for resolving "based upon" issue).

<sup>16</sup> See *infra* notes 244-395 and accompanying text (explaining how influence standard would apply to cases decided by federal courts of appeals).

<sup>17</sup> See, e.g., *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (stating that Congress must unequivocally express intent to waive sovereign immunity for such waiver to be effective). For criticism of sovereign immunity, see, e.g., Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public-Lands Cases*, 68 MICH. L. REV. 867, 867 n.1 (1970) (noting prevalent criticism of sovereign immunity doctrine); John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1126 (1993) (same); see also Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 343-46, 350 (1995) (arguing that Supreme Court has authority to abrogate federal sovereign immunity from private actions for constitutional violations). For an encyclopedic review and criticism of the history of governmental immunity from tort claims in the United States and Great Britain, see Professor Edwin Borchard's eight-part series:

which Congress has done so — and the subject of this Article — is the Federal Tort Claims Act.<sup>18</sup> The FTCA waives federal sovereign immunity from liability in money damages for certain torts of federal employees.<sup>19</sup>

The FTCA promises much but delivers little in the way of relief from sovereign immunity. The promise is set forth in the FTCA's general waiver provision. It exposes the government to liability

for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.<sup>20</sup>

That apparently broad exposure to tort liability is limited considerably by a list of FTCA exceptions that preserve sovereign immunity from certain types of tort claims.<sup>21</sup> Most of the exceptions are fairly clear and narrow.<sup>22</sup> The most important excep-

*Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-1925); *Governmental Responsibility in Tort* (pts. 4-6), 36 YALE L.J. 1, 757, 1039 (1926-1927); *Theories of Governmental Responsibility in Tort* (pts. 7-8), 28 COLUM. L. REV. 577, 734 (1928).

<sup>18</sup> 28 U.S.C. §§ 1346(b), 2671-80 (1994). See generally *United States v. Spelar*, 338 U.S. 217, 219-21 & nn.6-9 (1949) (tracing history of FTCA).

<sup>19</sup> See §§ 1346(b), 2674. There are other federal statutes, in addition to the FTCA, that waive federal sovereign immunity from certain tort claims. See, e.g., 46 U.S.C. app. §§ 741-52 (1994) (waiving immunity under Suits in Admiralty Act); *id.* §§ 781-90 (waiving immunity under Public Vessels Act); see also *FDIC v. Meyer*, 510 U.S. 471, 483 (1994) (finding that agency's "sue-and-be-sued" clause waived sovereign immunity from constitutional-tort claim). However, the FTCA is the major such statute. Still other federal statutes waive federal sovereign immunity from types of claims other than tort claims. The major examples of the latter are the Tucker Act, 28 U.S.C. § 1346(a), which waives sovereign immunity from claims for money damages based on a government contract, a statute, or the Constitution; and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1994), which waives sovereign immunity from claims for declaratory or injunctive relief related to certain agency actions. See also Borchard (pt. 1), *supra* note 17, at 32-34 (describing earlier statutory waivers of federal sovereign immunity).

<sup>20</sup> § 1346(b); see also § 2674.

<sup>21</sup> See § 2680(a)-(n). A tort claim against the government may be barred by sovereign immunity even if it does not fall within one of the express exceptions to the FTCA. See *Feres v. United States*, 340 U.S. 135, 146 (1950). For example, the Supreme Court has held that the FTCA implicitly preserves sovereign immunity from tort claims by members of the military for injuries "incident to" military service. See *id.* The Court has also held that a tort claim may be barred by the Flood Control Act, which predated the FTCA. See *United States v. James*, 478 U.S. 597, 604-12 (1986).

<sup>22</sup> One exception, for example, preserves immunity from claims "arising out of the loss,

tion, though, is unclear and broad.<sup>23</sup> Known as the “discretionary function exception,” it preserves immunity from “[a]ny 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 involved be abused.”<sup>24</sup>

The text of the discretionary function exception requires a court to ask at least two distinct questions.<sup>25</sup> First, a court must

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miscarriage, or negligent transmission of letters or postal matter.” See § 2680(b). The other exceptions preserve sovereign immunity from such claims as those arising out of the collection or assessment of taxes or customs duties, see § 2680(c), activities related to national defense, see § 2680(e), the imposition of quarantines, see § 2680(f), and most intentional torts, such as assault and battery, see § 2680(h).

<sup>23</sup> See H.R. REP. NO. 79-1287 at 5-6 (1945) (referring to discretionary function exception as “highly important”); S. REP. NO. 77-1196 at 7 (1942) (same); H.R. REP. NO. 77-2245 at 10 (1942) (same); ACUS REPORT, *supra* note 4, at 1504 (1987) (stating that discretionary function exception “has critical importance for the scope of government exposure to liability”); RICHARD H. FALLON JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1031 (4th ed. 1996) [hereinafter HART & WECHSLER] (stating that discretionary function exception is “most important” exception and “has caused difficulty from the outset”); Peck, *supra* note 4, at 208 (noting that, a decade after enactment, discretionary function exception “appears to have given rise to considerable confusion and litigation”).

<sup>24</sup> 28 U.S.C. § 2680(a). The discretionary function exception has remained unchanged since it was enacted as part of the FTCA in 1946. An identical provision was included in earlier, unenacted bills that would have waived federal sovereign immunity from tort claims. See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 809 (1984) (tracing language of discretionary function exception to bills introduced in 1942).

<sup>25</sup> Because both questions required by the text of the discretionary function exception relate to the scope of the FTCA’s waiver of sovereign immunity, they are questions of federal, not state, law. Cf. *Kosak v. United States*, 465 U.S. 848, 851-52 (1984) (holding that federal law governs question of whether plaintiff’s claim “ar[ose] in respect of . . . the detention of any goods or merchandize by an officer of customs” for purposes of § 2680(c)). The applicability of the discretionary function exception is a jurisdictional issue; if the exception applies to a tort claim, the claim is barred by sovereign immunity, as a result of which a court lacks subject-matter jurisdiction over the claim. See, e.g., *In re Glacier Bay*, 71 F.3d 1447, 1450 (9th Cir. 1995). The exception also partakes, however, of an affirmative defense, and accordingly, the courts of appeals that have addressed the issue have held that the government bears the burden of proving the applicability of the exception. See *Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996); *Carlyle v. United States Dep’t of the Army*, 674 F.2d 554, 556 (6th Cir. 1982); *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952); see also *Blessing v. United States*, 447 F. Supp. 1160, 1167 n.6 (E.D. Pa. 1978) (discussing dispute among courts over burden of proof); Peck, *supra* note 4, at 225 & n.66 (stating that burden of proof is properly on government). But cf. *Rothrock v. United States*, 62 F.3d 196, 198 n.1 (7th Cir. 1995) (suggesting that issue is open in Seventh Circuit);

ask upon what government conduct the claim is based. Second, the court must ask whether that conduct constitutes the exercise of a "discretionary function."<sup>26</sup>

## II. SUPREME COURT INTERPRETATION OF THE DISCRETIONARY FUNCTION EXCEPTION

The Supreme Court has addressed the discretionary function exception to the FTCA many times since the FTCA's enactment in 1946.<sup>27</sup> None of the Court's decisions, however, have discussed how to determine what government conduct a tort claim is based upon for purposes of the exception.<sup>28</sup> Instead, the parties and the Court have simply assumed that the claim was based upon the government conduct that the plaintiff alleged was wrongful and proximately caused the plaintiff's injuries.<sup>29</sup> Pro-

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*Autery v. United States*, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993) (stating that issue is open in Eleventh Circuit); *Kiehn v. United States*, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993) (suggesting that issue is open in Tenth Circuit). Regardless of this hybrid nature, the applicability of the exception is always decided by the court, even to the extent its applicability depends on resolution of disputed facts, because FTCA actions are tried exclusively by federal courts sitting without juries. See 28 U.S.C. § 2402.

<sup>26</sup> For brevity, this Article generally will use "exercise" to encompass the exercise or performance of, as well as the failure to exercise or perform, a discretionary function.

<sup>27</sup> See *United States v. Gaubert*, 499 U.S. 315, 322-26 (1991) (discussing discretionary function exception to FTCA); *Berkovitz v. United States*, 486 U.S. 531, 535-39 (1988) (same); *Varig Airlines*, 467 U.S. at 807-20 (same); *Rayonier, Inc. v. United States*, 352 U.S. 315, 315-21 (1957) (same); *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (same); *United States v. Union Trust Co.*, 350 U.S. 907 (1955) (per curiam) (same); *Dalehite v. United States*, 346 U.S. 15, 17-45 (1953) (same); see also *Indian Towing Co. v. United States*, 350 U.S. 61, 61-76 (1955) (described in *Berkovitz*, 486 U.S. at 538 n.3, as a decision "illuminat[ing] the appropriate scope" of exception); cf. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-13 (1988) (discussing discretionary function exception in government-contractor tort defense case).

<sup>28</sup> The Court has, however, addressed the meaning of the term "based upon" as it is used in a different statute: the Foreign Sovereign Immunities Act of 1976. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-58 (1993). The implications of *Nelson* for the "based upon" issue that arises under the discretionary function exception to the FTCA are discussed *infra* at note 112.

<sup>29</sup> See *Gaubert*, 499 U.S. at 322-25 (determining whether "challenged conduct" constituted exercise of discretionary function); *id.* at 327-28, 332 (describing seven instances of negligent government conduct by bank regulators alleged in complaint and determining that "each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield"); *Berkovitz*, 486 U.S. at 540, 542-48 (determining whether each of plaintiffs' "specific allegations of agency wrongdoing" constituted exercise of discretionary function); *Varig Airlines*, 467 U.S. at 814, 819-20 (determining whether each allegedly negligent action constituted exercise of discretionary func-

ceeding on that assumption, the Court has focused exclusively on whether the allegedly wrongful and injurious conduct constituted the exercise of a “discretionary function.”

Although the Court has not directly addressed the “based upon” issue, its precedent illuminates the issue in two ways. First, in developing a test for identifying a “discretionary function,” the Court has relied on the purpose and history of the exception.<sup>30</sup> The Court’s understanding of that purpose and history should also inform the resolution of the “based upon” issue. Second, several of the Court’s decisions addressing the exception involved injuries arising from a course of government conduct.<sup>31</sup> Any proposed resolution of the “based upon” issue must be consistent with those decisions if the lower federal courts are to apply it.

A. *The Supreme Court’s Two-Step Test for Determining Whether Government Conduct Constitutes the Exercise of a Discretionary Function*

The Court has often stated that the purpose of the discretionary function exception is to prevent the courts in FTCA actions from “second guessing” public policy decisions by executive-branch officials.<sup>32</sup> That purpose is said primarily to reflect: (1) separation-of-powers concerns and, relatedly, (2) the incompetence of courts, compared to executive-branch officials, to decide matters of public policy.<sup>33</sup> In keeping with this purpose,

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<sup>30</sup> See *Berkovitz*, 486 U.S. at 537; *Varig Airlines*, 467 U.S. at 808; *Dalehite*, 346 U.S. at 32-34; see also *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983) (stating that “reservation of governmental immunity embodied in the [discretionary function] exemption should be bounded by its justifying purpose”).

<sup>31</sup> See *infra* notes 79-93 and accompanying text (discussing *Berkovitz*, *Varig Airlines*, *Dalehite*, and *Gaubert*).

<sup>32</sup> See, e.g., *Gaubert*, 499 U.S. at 323; *Berkovitz*, 486 U.S. at 536-37; *Varig Airlines*, 467 U.S. at 814; see also H.R. REP. NO. 77-2245 at 10 (1942) (discussing discretionary function exception).

<sup>33</sup> See, e.g., *Blessing v. United States*, 447 F. Supp. 1160, 1170-71 (E.D. Pa. 1978) (discussing separation of powers and judicial restraint in tort actions against government); Osborne Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 121-23 (1968) (giving three predominant reasons for continuing to recognize discretionary immunity); cf. *Flast v. Cohen*, 392 U.S. 83, 94-97 (1968) (justiciability doctrine reflects “dual limitations” based on separation of powers and traditional understanding of what matters are “thought to be capable of resolution through the judicial process”); *Gray*,

the Court has adopted a test for identifying a “discretionary function” that protects policy-based decisions from tort liability and leaves non-policy-based decisions unprotected.<sup>34</sup>

The Court applies a two-step test to determine whether the challenged governmental action in a particular case constitutes the exercise of a discretionary function. The first step asks whether the conduct is “discretionary.”<sup>35</sup> An action is “discretionary,” the Court has said, if it involves “choice.”<sup>36</sup> Accordingly, the Court has said that an action is not discretionary if taking or not taking the action violates a mandatory statute, regulation, or other agency prescription. The Court has explained that a government official has no “choice” but to follow such prescriptions.<sup>37</sup> Thus, in *Hatahley v. United States*,<sup>38</sup> for example, the Court held that the exception did not protect the government from liability for impounding horses owned by Native Americans, because the federal range agents violated regulations requiring them to give notice to the owners before impounding the horses.<sup>39</sup>

Government conduct that satisfies the first step must still satisfy the second step to be protected by the discretionary function exception.<sup>40</sup> The second step asks whether the government

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712 F.2d at 511 (general rationale of sovereign immunity is that “courts should not interfere with government operations and policymaking”).

<sup>34</sup> See *infra* notes 35-51 and accompanying text (explaining two-part test).

<sup>35</sup> See *Berkovitz*, 486 U.S. at 536.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* (stating that “discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.”); see generally D. Scott Barash, Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300, 1300-34 (1987) (discussing relevance to exception of statutory and regulatory violations).

<sup>38</sup> 351 U.S. 173 (1956).

<sup>39</sup> See *id.* at 177-78, 181.

<sup>40</sup> The fact that an official’s conduct does not satisfy the Court’s two-step test means that government liability for that conduct is not barred by the discretionary function exception. See *id.* Once the plaintiff overcomes the sovereign immunity bar posed by the exception, he still can recover only by proving that the conduct was “wrongful” under the law of the state in which the conduct occurred. See 28 U.S.C. § 1346(b) (1994) (allocating jurisdiction for claims against United States employee based on wrongful or negligent act or omission). The Court has held that, in making that proof, the plaintiff cannot rely on state law imposing strict liability. See *Laird v. Nelms*, 406 U.S. 797, 801 (1972); *Dalehite v. United States*, 346 U.S. 15, 17-45 (1953). In so holding, the Court relied on the fact that the FTCA waives sovereign immunity from tort liability only for the “wrongful” conduct of

conduct involves the “kind” of discretion that Congress intended the discretionary function exception to protect.<sup>41</sup> Thus, not all discretionary conduct is protected by the exception. This second step is grounded in part upon the statutory text. On its face, the term “discretionary *function*” does not appear designed to protect all discretionary *acts*. “Discretionary function” is a term of art that has been traced to doctrines predating the FTCA, such as those for awarding judicial relief against government officers and municipalities.<sup>42</sup> Under those doctrines, courts could direct officers to carry out “ministerial” but not “discretionary” acts, and could hold municipalities liable when they carried out “proprietary,” but not “discretionary,” functions.<sup>43</sup>

The difficulty, and the subject of the Court’s decisions to date, has concerned precisely what *kind* of discretion the exception protects. The Court has addressed the matter in a general way by holding that the exception protects only discretionary decisions “based on considerations of public policy.”<sup>44</sup> The Court has also explained that public policy considerations

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government agents. *See Laird*, 406 U.S. at 801; *Dalehite*, 346 U.S. at 44-45.

<sup>41</sup> *See Berkovitz*, 486 U.S. at 536 (stating that second step focuses on kind of discretion exercised by government official); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984) (holding that “basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee — whatever her rank — are of the nature and quality that Congress intended to shield from tort liability”).

<sup>42</sup> *See Dalehite*, 346 U.S. at 27 & n.16 (quoting statement by Justice Department official during congressional committee hearing that discretionary function exception expressed common law limit on judicial review that courts probably would have inferred even in absence of express provision); *id.* at 34 & n.30 (referring to “substantial historical ancestry” of distinction between executive officials’ discretionary acts and those compelled by “positive rules of law”); *see also* Gottlieb, *supra* note 4, at 44 (delineating difference between clerical or ministerial functions and discretionary functions in determining whether mandamus will lie against government official); Krent, *supra* note 1, at 876 & n.22 (discussing historical antecedents of discretionary function exception). *But cf.* Rogers, *supra* note 4, at 805-06 (arguing that exception should not be interpreted strictly in accordance with mandamus principles).

<sup>43</sup> *See* CHESTER JAMES ANTIEAU & MILO MECHAM, *TORT LIABILITY OF GOVERNMENT OFFICERS AND EMPLOYEES* §§ 2.4-2.9, at 24-32 (1990) (discussing distinction between “discretionary” and “ministerial” functions for purposes of official immunity); WILLIAM B. WRIGHT, *THE FEDERAL TORT CLAIMS ACT* 11 & n.1 (1957) (claiming that governmental immunity for proprietary functions is defense native to municipal law); Krent, *supra* note 1, at 876 n.22 (providing examples of ministerial, discretionary, and proprietary functions); Rogers, *supra* note 4, at 780-87 (discussing mandamus).

<sup>44</sup> *See Berkovitz*, 486 U.S. at 537.

include social, economic, and political considerations.<sup>45</sup> Furthermore, the Court has distinguished public policy considerations from scientific, mathematical, and other “objective” criteria.<sup>46</sup> Despite this guidance, the second step of the Court’s two-step test continues to generate confusion.<sup>47</sup>

The distinction between the kind of discretionary conduct that the exception protects and the kind that it does not is illustrated by *Indian Towing Co. v. United States*.<sup>48</sup> In *Indian Towing*, a tugboat owner whose boat ran aground sued the United States under the FTCA. The owner claimed that the grounding occurred because the government had failed to keep a nearby lighthouse in working order.<sup>49</sup> The Court found that the government’s decision to erect the lighthouse in the first place involved protected discretion, but its maintenance of the lighthouse did not.<sup>50</sup> As Justice Scalia explained in a later case, it is doubtful that the decision to keep the lighthouse working was susceptible to public policy considerations or, for that matter, that the officials responsible for its maintenance even had authority to consider public policy.<sup>51</sup>

For convenience, the phrase “protected conduct” will be used to refer to conduct that constitutes the exercise of a discretionary function under the Court’s two-step test; the phrase “unprotected conduct” will be used to refer to conduct that does not satisfy the Court’s two-step test. It is important to keep in mind that conduct may be unprotected *either* because it does not involve any discretion — an official’s actions are dictated by statute, regulation, or other prescription — *or* because, although

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<sup>45</sup> See *id.*; *Varig Airlines*, 467 U.S. at 820.

<sup>46</sup> See *Gaubert*, 499 U.S. at 331; *Berkovitz*, 486 U.S. at 545; see also, e.g., *In re Glacier Bay*, 71 F.3d 1447, 1452 (9th Cir. 1995) (concluding that certain activities connected to conducting hydrographic surveys were not protected by exception because they involved discretion of a purely scientific nature). *But cf.* *Fishback & Killefer*, *supra* note 4, at 325-26 (arguing that scientific and technical decisions implicate protected discretion).

<sup>47</sup> See, e.g., RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 1005 (2d ed. 1994) (noting that “[a]ll of the tests for discretionary functions . . . present difficult line-drawing problems. Inconsistent decisions, thus, are common.”).

<sup>48</sup> 350 U.S. 61 (1955).

<sup>49</sup> See *id.* at 62.

<sup>50</sup> See *Berkovitz*, 486 U.S. at 538 n.3 (discussing *Indian Towing*); *Indian Towing*, 350 U.S. at 69.

<sup>51</sup> See *Gaubert*, 499 U.S. at 336 (Scalia, J., concurring).

the action involves discretion, it does not involve the kind of discretion — consideration of public policy — that the exception was designed to protect.

### 1. Breadth of the Two-Step Test

Given the manner in which the Court has applied the two-step test for identifying a discretionary function, the exception cloaks the government with much of the sovereign immunity protection that the FTCA's general waiver provision purports to strip away. It is usually easy for government conduct to satisfy the first step of the Court's two-part test, which asks whether the challenged conduct involved "choice." Few actions by government employees are specifically mandated by a statute, regulation, or agency policy.<sup>52</sup> Instead, most government employees have discretion in most matters, either because their actions simply are not covered by any statute or agency directive, or because the pertinent statutes and directives confer discretion on them. Indeed, assume that no statute covers the conduct of a particular agency's official. The agency then has an incentive, when drafting regulations, to be liberal in granting discretion to that official if it wishes to take advantage of the discretionary function exception.<sup>53</sup>

Likewise, it is often easy for government conduct to satisfy the second step of the Court's two-part test, which asks whether the challenged conduct was susceptible to public policy considerations. The Court has made clear that protected policymaking includes the balancing of safety concerns against budgetary or

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<sup>52</sup> See *Gray v. Bell*, 712 F.2d 490, 508 & n.54 (D.C. Cir. 1983) (finding that virtually all administration decisions involve discretion); *Blessing v. United States*, 447 F. Supp. 1160, 1174 n.21 (E.D. Pa. 1978) (same); *Ham v. Los Angeles County*, 189 P. 462, 468 (Cal. 1920) (quoted in ANTIEAU & MECHAM, *supra* note 43, at 27); see also PETER SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 66 (1983) (arguing that "[s]treet-level officials . . . are actually awash in discretion").

<sup>53</sup> See *Bagby & Gittings*, *supra* note 4, at 238 (describing incentive created by discretionary function exception for upper-level regulators to delegate minor policy making authority); *Krent*, *supra* note 1, at 892 (arguing that *Berkovitz* Court's interpretation of exception creates perverse incentive for agencies to allow government officials to exercise unguided discretion); Donald Zillman, *Congress, Courts, and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act*, 1989 UTAH L. REV. 687, 738 (noting that exception encourages government agencies to include public policy discussion in all memoranda to avoid litigation).

other feasibility concerns.<sup>54</sup> Such balancing underlies many government decisions — just as it does many private decisions — that become the subject of tort suits.<sup>55</sup> In the typical tort case, the plaintiff argues that the defendant took inadequate precautions against the alleged injuries; the defendant responds that it took all cost-justified precautions.<sup>56</sup> The parties to FTCA actions often make similar arguments, thus framing the issue in a way that supports the conclusion that the challenged government conduct involved protected discretion.<sup>57</sup>

In its most recent decision construing the discretionary function exception, *United States v. Gaubert*,<sup>58</sup> the Court made it even easier for the government to satisfy the second part of the two-part test.<sup>59</sup> In *Gaubert*, the Court held that the exception barred FTCA claims related to government oversight of a savings and loan association.<sup>60</sup> In so holding, the Court stated that there is a “strong presumption” that a government employee

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<sup>54</sup> See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 819-20 (1984) (noting that government decisions regarding extent of safety regulation entail balancing safety objectives “against such practical considerations as staffing and funding”); *Dalehite v. United States*, 346 U.S. 15, 40-41 (1953) (finding that exception protected government decisions that involved balancing considerations related to program feasibility, such as production costs); *Richardson v. United States*, 943 F.2d 1107, 1111-12 (9th Cir. 1991) (finding that exception barred claim challenging government conduct based on balancing safety and cost concerns). *But see Dalehite*, 346 U.S. at 58 (Jackson, J., dissenting) (arguing that not all decisions that balance care and cost deserve immunity).

<sup>55</sup> *But see ARA Leisure Servs. v. United States*, 831 F.2d 193, 196 (9th Cir. 1987) (stating that exception did not protect government’s failure to maintain road in national park merely because that failure reflected budget constraints: “[b]udgetary constraints underlie virtually all governmental activity”).

<sup>56</sup> This line of argument about relative “fault” reflects Judge Learned Hand’s formula for determining negligence. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (outlining three components to determine negligence); see also RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 164-67 (4th ed. 1992) (describing economics behind Judge Hand’s formula).

<sup>57</sup> See ACUS REPORT, *supra* note 4, at 1517 (claiming that “resource allocation issues inevitably are drawn into issue in tort litigation”). The Court has been criticized for indicating that the discretionary function exception protects any decision in which budgetary constraints could be considered. See, e.g., *Domme v. United States*, 61 F.3d 787, 793-96 (10th Cir. 1995) (Henry, J., concurring) (arguing that insufficient government resources, without more, does not always implicate discretionary function exception); *Bagby & Gittings*, *supra* note 4, at 252 (same).

<sup>58</sup> 499 U.S. 315 (1991).

<sup>59</sup> See *id.* at 324-25; see also Zillman, *supra* note 4, at 384 (stating that *Gaubert* makes it easier for government to use discretionary function exception).

<sup>60</sup> See *Gaubert*, 499 U.S. at 319-20, 327-34.

exercises *protected* discretion when she acts under a regulation or other agency guideline that expressly or by implication affords the employee *any* kind of discretion.<sup>61</sup> The Court appeared to reason that the regulatory decision to grant discretion to an official inherently involves public policy considerations. Therefore, the Court determined, courts should presume that the official's exercise of that discretion partakes of the same public policy considerations.<sup>62</sup> In addition, the Court in *Gaubert* emphasized that the relevant question is not the subjective one of whether the government actor actually considered matters of public policy when she made the challenged decision; rather, the question is the objective one of whether the decision was "susceptible to" public policy analysis.<sup>63</sup> Thus, under *Gaubert*, a decision is susceptible to public policy analysis if the

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<sup>61</sup> See *id.* at 324.

<sup>62</sup> See *id.*

<sup>63</sup> See *id.* at 325. Commentators both before and after *Gaubert* have argued that the exception should apply only if the government proves that public policy was actually considered. See Bagby & Gittings, *supra* note 4, at 254-55 (arguing that government must prove policy consideration took place); Krent, *supra* note 1, at 884-907 (arguing that exception should apply only when challenged official action is result of deliberative process that includes policy considerations); Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1550 (1992) (same); Peck, *supra* note 4, at 222, 225-26 (same). Professors Bagby and Gittings recognize, however, that such proof is "generally not a federal court requirement." Bagby & Gittings, *supra* note 4, at 254. They also appear to recognize that such a requirement would, as a practical matter, impose significant procedural and documentation obligations on officials who exercise discretionary functions. See *id.* at 261, 264-65; see also Peck, *supra* note 4, at 226. It is doubtful, in light of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523-25 (1978), that federal courts may put such procedural obligations on federal agencies.

Professor Peck cited the statutory term "based upon" to argue that the exception protected not only (1) conduct that, the government proved, was actually grounded in public policy considerations but also (2) conduct that, though not itself grounded in policy, was specifically directed or necessarily contemplated by an official who had exercised a discretionary function. See Peck, *supra* note 4, at 228-29. *Gaubert* plainly rejects Professor Peck's view that the government is required to prove that public policy was actually considered. See *Gaubert*, 499 U.S. at 325. *Gaubert* does not, however, undermine Professor Peck's contention that a claim is based upon the exercise of a discretionary function if the plaintiff challenges as wrongful an action that, though not itself discretionary, was specifically directed by an official exercising a discretionary function. See *id.* at 324. That contention, moreover, finds support in the language of the exception, discussed *infra* note 100, although it is in some tension with *Nelson*, as discussed *infra* note 112. While this Article focuses on a different situation from that upon which Professor Peck focused, I essentially endorse his contention. See *infra* note 100 and text accompanying notes 237-38.

decisionmaker has authority to, and reasonably could, consider public policy when taking the action upon which the tort claim is based.<sup>64</sup>

## 2. Government Conduct Not Protected by the Two-Step Test

While adopting a broad interpretation of the discretionary function exception, the Court has made it clear that the exception does not immunize all government conduct from tort liability.<sup>65</sup> The Supreme Court discussed what constitutes unprotected conduct at greatest length in *Berkovitz v. United States*.<sup>66</sup> In that case, a child contracted polio from a polio vaccination. The parents and the child sued the United States under the FTCA.<sup>67</sup> They contended that the government: (1) should not have issued a license to the manufacturer of the vaccine that caused the child's polio; and (2) should not have approved for public release the particular lot of that manufacturer's vaccine from which the child's vaccination had come.<sup>68</sup> The government contended that the plaintiffs' claims were barred by the discretionary function exception.<sup>69</sup> The Court held that some of the plaintiffs' theories of tort liability were barred by the exception, some were not, and some might or might not be.<sup>70</sup>

The *Berkovitz* Court held that the exception would bar a challenge to the regulatory criteria for approving the lots of polio vaccine for public release.<sup>71</sup> To understand that holding, suppose that one of the regulatory criteria called for a certain laboratory test to be performed on only one out of every five lots,

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<sup>64</sup> See *Gaubert*, 499 U.S. at 335-36 (Scalia, J., concurring) (observing that decision cannot be "susceptible" to policy analysis unless responsible decisionmaker has policymaking authority).

<sup>65</sup> As described above, the government's Achilles heel is the area in which government officials violate statutory or regulatory prescriptions or exercise discretion based on technical, professional, or other "objective" criteria. See *supra* text accompanying notes 35-51.

<sup>66</sup> 486 U.S. 531, 535-39 (1986). See also *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (illustrating the distinction between protected and unprotected discretion).

<sup>67</sup> See *Berkovitz*, 486 U.S. at 533.

<sup>68</sup> See *id.* at 539-40.

<sup>69</sup> See *id.* at 533.

<sup>70</sup> See *id.* at 540-48.

<sup>71</sup> See *id.* at 546 (holding that discretionary function exception bars claims challenging government's policy in regulating release of vaccine lots).

rather than every single lot. Suppose further that, because of that criterion, the injurious lot was not tested; it did not happen to be the fifth lot under the prescribed counting method. The discretionary function exception would bar a claim that the government was negligent in failing to test every single lot. Underlying that result is the conclusion that the challenged criterion was susceptible to policy analysis; for example, the government could have devised it by balancing the benefits against the costs of testing every lot.<sup>72</sup>

The *Berkovitz* Court further held, however, that the exception would *not* bar a claim that the objective testing criteria had been misapplied.<sup>73</sup> To refer again to the hypothetical criterion described above, suppose the injurious lot of vaccine should have been subjected to a certain lab test — because it was the fifth lot under the prescribed counting method — but that, by oversight, it was not tested. The exception would not bar a claim based on that violation of the testing procedures. By entertaining this type of claim, a court would not be second-guessing any policy decision; on the contrary, it would be enforcing the antecedent policy decision to test every fifth lot.<sup>74</sup>

The *Berkovitz* Court was unable to determine whether the exception also barred a challenge to the manner in which the government applied its criteria for licensing manufacturers to produce polio vaccine.<sup>75</sup> Whether that challenge was barred depended on the nature of the licensing criteria, which was not clear from the record. If applying the licensing criteria “involve[d] the application of objective scientific standards,” the Court held, the decision to license the manufacturer would not be protected by the discretionary function exception.<sup>76</sup> On the

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<sup>72</sup> See *id.* (explaining that discretionary function exception protects independent policy judgments of government officials).

<sup>73</sup> See *id.* at 546-47 (explaining that discretionary function exception does not bar claim that government knowingly released lot of vaccine that did not comply with mandatory safety standard).

<sup>74</sup> See *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1026-27 (9th Cir. 1989) (stating that if exception were construed to insulate violations of mandatory standards that had been adopted in exercise of discretionary function, such construction would undermine prior exercise of discretionary function).

<sup>75</sup> See *Berkovitz*, 486 U.S. at 544-45 (remanding to district court because parties inadequately addressed issue).

<sup>76</sup> See *id.* at 545.

other hand, that decision would be protected if applying the criteria “incorporate[d] considerable ‘policy judgment.’”<sup>77</sup> The Court accordingly remanded the case for further proceedings on the claim that the government was negligent in licensing the manufacturer of the injurious vaccine.<sup>78</sup>

### 3. The Court’s “Disaggregative” Approach to Applying the Two-Step Test in Cases Involving a Course of Government Conduct

In addition to illustrating the kind of conduct that is protected by the discretionary function exception, *Berkovitz* illustrates how the Court applies the exception to claims arising from a course of governmental conduct. Under that approach, the Court applies its two-step test for identifying whether conduct is protected, not to the course of conduct *as a whole*, but to the specific components of the course of conduct that, the plaintiff alleges, were wrongful and proximately caused the plaintiff’s injuries. The injurious government conduct in *Berkovitz* had at least four components: (1) the development of criteria for licensing the manufacturers of polio vaccines; (2) the application of those licensing criteria to individual manufacturers; (3) the development of criteria for the public release of individual lots of vaccine by a licensed manufacturer; and (4) the application of those criteria to lots of vaccine. As described above, the Court applied its two-part test to each allegedly negligent component.<sup>79</sup> This approach may be described as “disaggregative.”<sup>80</sup>

The Court has not always so interpreted the discretionary function exception. The disaggregative approach of the *Berkovitz*

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<sup>77</sup> *See id.*

<sup>78</sup> *See id.* at 548.

<sup>79</sup> *See id.* at 540, 542-48 (determining whether each of plaintiffs’ specific allegations of agency wrongdoing constituted exercise of discretionary function); *see also supra* notes 66-78 and accompanying text (explaining application of two-part test in *Berkovitz*).

<sup>80</sup> *See* Krent, *supra* note 1, at 890 n.87 (stating that “[t]he difficulty of disaggregating the officials’ tasks for purposes of the Court’s inquiry [in *Berkovitz*] is troubling”); *cf.* ACUS REPORT, *supra* note 4, at 1543 (finding that “[v]irtually any bureaucratic exercise of regulatory authority can be disaggregated into component parts such that one part arguably falls outside the ambit of a narrow regulatory conduct exception, no matter how that more limited exception is defined”).

Court differs from the approach used in *Dalehite v. United States*,<sup>81</sup> the earliest Supreme Court decision construing the discretionary function exception. *Dalehite* involved the near-total destruction of Texas City, Texas, by explosions of government-produced, fertilizer-grade ammonium nitrate.<sup>82</sup> The government was producing the fertilizer for shipment to European countries ravaged by World War II.<sup>83</sup> By a four-to-three vote, the Court held that all of the tort claims arising from the explosions were barred.<sup>84</sup> In so holding, the Court focused on the discretionary nature of the course of government conduct *as a whole*, rather than on specific components of that course of conduct.<sup>85</sup> In explaining the exception, the Court stated:

Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.<sup>86</sup>

This passage suggests that the exception protects a subordinate who carries out a government operation that was developed on the basis of public policy, even if the subordinate's actions are negligent and are not, themselves, susceptible to public-policy considerations.<sup>87</sup> That suggestion is confirmed by the Court's conclusion that *all* of the claims were barred, even though the plaintiff "claimed negligence, substantially on the part of the

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<sup>81</sup> 346 U.S. 15 (1953).

<sup>82</sup> *See id.* at 22-23.

<sup>83</sup> *See id.* at 19-20.

<sup>84</sup> *See id.* at 32-45.

<sup>85</sup> *See id.* at 30-36 (discussing rationale for Court's holding); *see also* Bagby & Gittings, *supra* note 4, at 228 (discussing *Dalehite* as protecting negligent implementation of policy-based decisions); Peck, *supra* note 4, at 215-16 (discussing how Court's analysis focused on whole, rather than specific components).

<sup>86</sup> *See Dalehite*, 346 U.S. at 36.

<sup>87</sup> *See* Bagby & Gittings, *supra* note 4, at 228 (construing *Dalehite* to protect negligent implementation of policy-based decisions and criticizing that approach); Fishback & Killefer, *supra* note 4, at 325 (reading *Dalehite* to protect negligent implementation of policy-based decisions and endorsing that approach); Matthews, *supra* note 4, at 28-30, 34 (stating that some lower courts construe *Dalehite* to protect negligent implementation of policy-based decisions).

entire body of federal officials and employees involved” in the course of conduct.<sup>88</sup> That conclusion appears to reflect a judgment that the government’s actions were discretionary, when viewed in the *aggregate*, rather than a judgment that each instance of negligent conduct was discretionary.<sup>89</sup>

The Court has never expressly forewarned the “aggregative” approach suggested in *Dalehite* in favor of the disaggregative approach used in *Berkovitz*. Indeed, there is language in a post-*Dalehite*, pre-*Berkovitz* case — namely, *United States v. Varig Airlines* — suggesting that the exception protects the negligent implementation of programs based on protected discretion, even if the negligent conduct itself did not involve protected discretion.<sup>90</sup> Furthermore, the Court in *Gaubert*, a post-*Berkovitz* case, held that the exception protected some components of a course of government conduct that, as Justice Scalia observed in his concurrence, did not seem to satisfy the two-part test if viewed in isolation from the course of conduct of which they were a part.<sup>91</sup> Nonetheless, the majority in *Gaubert* purported to apply

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<sup>88</sup> See *Dalehite*, 346 U.S. at 18. The *Dalehite* dissent argued that

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

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

<sup>89</sup> The Court in *Dalehite*, however, neither expressly embraced an aggregative approach nor expressly rejected a disaggregative approach. Despite the language quoted in the text *supra* accompanying note 86, and other indications that the Court took an aggregative approach, the Court purported to examine the discretionary nature of each allegedly negligent government act, an examination that would be consistent with a disaggregative approach. See *Dalehite*, 346 U.S. at 23-24 (describing instances of conduct found negligent by district court); *id.* at 38-44 (discussing discretionary nature of each instance of allegedly negligent conduct). Even so, the *Dalehite* Court’s conclusion that each allegedly negligent act involved protected discretion was unconvincing; that, coupled with other indicia of an aggregative approach, renders *Dalehite* ultimately ambiguous. It is perhaps that ambiguity that caused the Court’s later decisions construing the exception “not [to] follow[] a straight line,” *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 811 (1984).

<sup>90</sup> See *Varig Airlines*, 467 U.S. at 820 (concluding that because Federal Aviation Administration (FAA) exercised protected discretion in developing “spot-check” program of inspecting airplanes, acts of FAA employees in executing spot-check program in accordance with agency directives were protected).

<sup>91</sup> See *United States v. Gaubert*, 499 U.S. 315, 334 (1991) (Scalia, J., concurring) (expressing doubt that individualized analysis necessarily leads to conclusion that discretionary

its two-part test to each “challenged action[.]” — each act that was alleged to have been wrongful and to have proximately caused the plaintiffs’ injuries — and expressly held that each such action satisfied that test.<sup>92</sup> The lower federal courts have accordingly understood the Court’s precedent to require this disaggregative approach.<sup>93</sup>

### *B. Implications of the Supreme Court’s Decisions for the “Based Upon” Issue*

The Supreme Court’s decisions have practical and doctrinal implications for the “based upon” issue. As a practical matter, the “based upon” issue has become important because of the Court’s disaggregative approach to applying its two-step test. As a doctrinal matter, the Court’s decisions indicate that courts need not invariably assume that an FTCA action is exclusively based upon the conduct that the plaintiff alleges was wrongful and proximately caused the injuries.

#### 1. Practical Implications

When a government official triggers the FTCA’s broad waiver provision by wrongfully causing injury “while acting within the scope of his office or employment,”<sup>94</sup> the official seldom acts

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function exception bars claims before Court); *infra* notes 106-11, 239-43 and accompanying text (describing Justice Scalia’s concurrence and its relation to approach proposed here).

<sup>92</sup> See *Gaubert*, 499 U.S. at 327, 332-33 (describing seven alleged instances of negligent government conduct by bank regulators and determining that each regulatory action involved policy judgment that discretionary function exception was designed to shield); see also *Berkovitz v. United States*, 486 U.S. 531, 540, 542-48 (1986) (determining whether each of plaintiffs’ specific allegations of agency wrongdoing constituted exercise of discretionary function); *Varig Airlines*, 467 U.S. at 819-20 (describing instances of negligent conduct alleged in complaint and determining that each instance satisfied two-part test).

<sup>93</sup> See, e.g., *In re Glacier Bay*, 71 F.3d 1447, 1451 (9th Cir. 1995) (stating that *Berkovitz* requires courts to “examine separately” each claimed negligent act); *Johnson v. United States Dep’t of Interior*, 949 F.2d 332, 336 (10th Cir. 1991) (analyzing each challenged action to determine whether claims were barred by exception); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1025 (9th Cir. 1989) (same); *Pooler v. United States*, 787 F.2d 868, 870-71 (3d Cir. 1986) (same). *But cf.* *Autrey v. United States*, 992 F.2d 1523, 1527-28 (11th Cir. 1993) (considering nature of government conduct as a whole rather than each decision made by government); *infra* notes 328-41 and accompanying text (discussing *Autrey*).

<sup>94</sup> 28 U.S.C. § 2680(a) (1994).

alone. Instead, the official is almost always acting within the broad confines of some policy or program conceived and implemented by other, higher-level officials.<sup>95</sup> Moreover, especially when the official is not a "street-level"<sup>96</sup> official, her wrongful conduct may lead to injury only because it sets in motion conduct by other officials. It is therefore often possible for the injured party to allege in good faith that any one of many actors and actions caused the injuries.

For example, suppose a poorly trained government lab technician provides defective data on the basis of which another official, who arguably should have noticed the defect, licenses a nuclear reactor in an earthquake-prone area. Fault for any resulting injury might properly be laid at the door of the official who designed or administered the training program for the technician, the technician herself, or the licensing official. The multiplicity of potentially culpable actors explains why, after a government disaster, one often hears that there is "plenty of blame to go around."

The Court's disaggregative approach to applying the two-step test encourages FTCA plaintiffs to slice the injurious course of government conduct into as many pieces as possible and to spread the blame over as many of them as possible. At the start of a lawsuit, the plaintiff cannot know the identity and role of all of the potentially culpable officials. Nor can the plaintiff identify with certainty all statutory and regulatory material that might trigger, or defeat, a government defense under the discretionary function exception. To defeat the defense, the plaintiff usually should aim to fix ultimate blame as low in the bureaucracy as possible, where most officials apply objective criteria and lack policymaking authority.<sup>97</sup> By virtue of that position, however, the targeted official will work under multiple layers of supervision, consisting of officials who may have had some role in affirmatively causing or failing to prevent the injury. The government should aim to kick the blame as far upstairs as possible,

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<sup>95</sup> *But see supra* notes 53-64 and accompanying text (noting that applicable policy or program often does not specifically either mandate or prohibit the wrongful conduct).

<sup>96</sup> *See* SCHUCK, *supra* note 52, at 66 (discussing discretion of street-level officials).

<sup>97</sup> *See, e.g.,* Rogers, *supra* note 4, at 778 (noting that low-level officials' duties often involve following detailed regulations and thus do not involve policymaking discretion).

where the policymakers dwell. If the plaintiff and the government each finds, respectively, an official whose conduct is not protected and an official whose conduct is protected, the court must decide which conduct the claim is based upon.

## 2. Doctrinal Implications

*Berkovitz* strongly suggests that an FTCA claim is not necessarily based upon protected conduct merely because such conduct lay at the beginning of the causal chain leading to injury. The *Berkovitz* Court recognized that the government's decision concerning which tests to perform on polio vaccines was a discretionary function.<sup>98</sup> But the Court ultimately held that the plaintiffs could recover if an FDA scientist failed to perform a required test on the injurious lot of polio vaccine.<sup>99</sup> Thus, protected conduct (the establishment of testing protocols) preceded the unprotected conduct (the carrying out of the protocols) in the chain of events leading to injury. Indeed, the outcome of the decision establishing testing protocols was a "but for" cause of the injuries; negligent testing would not have occurred but for the decision to test at all. *Berkovitz* thus makes clear that, even though the decision establishing testing protocols was protected conduct that "caused" the negligent testing to occur, the plaintiffs could "base" their claim on the subsequent, negligent testing. That claim was not, *Berkovitz* suggests, based upon the antecedent decision to conduct the testing.<sup>100</sup>

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<sup>98</sup> See *Berkovitz v. United States*, 486 U.S. 531, 546-47 (1986) (discussing Court's finding that regulation of polio vaccine was discretionary function).

<sup>99</sup> See *id.* at 546-48 (failure to perform required test is not permissible exercise of policy discretion).

<sup>100</sup> See *id.* (holding that it was improper to dismiss claim regarding application of safety standards for vaccine release because plaintiffs might show that such application did not involve protected discretion). The text of 28 U.S.C. § 2680(a) — specifically, the clause preceding the clause that sets forth the discretionary function exception — reinforces the suggestion in *Berkovitz* that unprotected, negligent conduct should not be regarded as based upon prior, protected conduct merely because it implements the prior, protected conduct. See *supra* note 2 (quoting text of 28 U.S.C. § 2680(a)). The discretionary function exception is set forth in the second clause of § 2680(a). The first clause bars "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." § 2680(a). The negative implication of the first clause is that the exception does *not* bar a claim that an official has *failed* to exercise due care in the execution of a statute or

*Berkovitz* also suggests that a claim is not based upon protected conduct merely because a tort award on that claim could affect executive-branch policymaking. If the government were held liable in *Berkovitz* for the negligence of an FDA scientist, the executive branch might well change the way it regulates polio vaccine production. For example, it might deregulate the industry, so that testing was done by the industry, rather than the government. Then the industry, not the government, would be liable for negligent testing. Alternatively, the executive branch might give FDA scientists more discretion over what tests to perform. In that event, *Gaubert* would lead courts to find that the "street-level" scientists themselves exercised protected discretion in performing the tests;<sup>101</sup> their actions would thereby generally be protected by the exception. A decision to deregulate the industry or to give lab officials more discretion would clearly constitute the exercise of a discretionary function. The possibility that such decisions might be made in response to tort liability — a possibility that the government specifically called to the

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regulation. The same implication logically extends to claims based on a lack of due care in the execution of agency prescriptions that are not set forth in a statute or regulation, but that have been formulated through the exercise of a discretionary function (such as rules established through informal agency guidelines and informal or formal adjudications). Thus, in light of the first clause, the exception should not be construed to bar claims based on the negligent implementation of a discretionary function. By the same token, as Professor Peck explained, the first clause implies that a claim *should* be barred if the allegedly wrongful conduct was that of an official who implemented a discretionary function while exercising due care. See Peck, *supra* note 4, at 230-31. Professor Peck argued that such a claim should be regarded as being based upon the antecedent exercise of a discretionary function. See *id.* Professor Rogers endorsed Professor Peck's argument in a later article, see Rogers, *supra* note 4, at 821-22, and so do I. "Due care" would presumably be established, in the first instance, if the allegedly wrongful conduct was specifically directed by the official who exercised the discretionary function. See Peck, *supra* note 4, at 230-31. In the absence of such a specific directive, a court would have to rely on federal common law to determine "due care." See *Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1160-61 (1st Cir. 1987).

<sup>101</sup> See *United States v. Gaubert*, 499 U.S. 315, 324 (1991) (arguing that if employee obeys direction of mandatory regulation, government will be protected because action is in furtherance of regulation's policies).

Court's attention in *Berkovitz*<sup>102</sup> — did not affect the outcome in that case.<sup>103</sup>

*Berkovitz*'s implications for the "based upon" issue run counter to the broader implications of *Dalehite*. *Dalehite* has been criticized as reflecting an overly expansive interpretation of the statutory term "discretionary function."<sup>104</sup> The decision may be better understood, however, as reflecting an expansive interpretation of the statutory term "based upon." So understood, the decision held that all of the claims — even claims involving actions by low-level officials without policymaking authority — were based upon the government's decision to initiate a fertilizer production program in the first place. The *Dalehite* Court suggested a rationale for such an interpretation by emphasizing that all of the allegedly negligent actions occurred in the course of implementing the program.<sup>105</sup> As discussed above, however, that suggestion was superseded by the suggestion in *Berkovitz* that the exception does not protect negligent conduct merely because that conduct implemented an antecedent decision based on public policy.

While *Berkovitz* thus negates the broad implications of *Dalehite* for the "based upon" issue, *Gaubert* tends to confirm *Dalehite*'s narrower implications. Read most narrowly, *Dalehite* implied that a claim ostensibly based upon unprotected conduct might be deemed also to be based upon protected conduct if there is a

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<sup>102</sup> The government argued in *Berkovitz* that the imposition of tort liability for a government scientist's violation of mandatory testing procedures might cause the government either to modify the testing guidelines to afford greater discretion to government scientists or to allow the industry to do the testing. See Brief for Respondents at 27-28, *Berkovitz*, 486 U.S. 531 (discussing consequences on regulatory action if tort remedy is allowed).

<sup>103</sup> Cf. Krent, *supra* note 63, at 1549 (stating that "a finding of liability in *Dalehite* might have chilled the government's willingness to continue shipping aid overseas. A comparable finding in *Varig Airlines* might have deterred the government from inspecting aircraft at all.").

<sup>104</sup> See, e.g., SCHUCK, *supra* note 52, at 114 & n.34 (*Dalehite* "interpret[ed] the exception to immunize routine low-level implementation of high-level policy decisions"); Peck, *supra* note 4, at 215-16 (noting, with disapproval, that *Dalehite* Court took broader position than that urged by government, which had argued that "every act or omission which we claim to be covered by the 'discretionary' exception must involve, in itself and not merely by parentage or affiliation, a discretionary function"); see also 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 27:12, at 67 (2d ed. 1984) (criticizing *Dalehite*'s conclusion that storage and loading of fertilizer involved protected discretion).

<sup>105</sup> See *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953) (holding that initiating programs and activities is discretionary and, therefore, cannot form basis of suit under FTCA).

strong enough connection between the unprotected conduct and the protected conduct. *Gaubert* tends to confirm that implication by holding that the exception applied to some activities that, as Justice Scalia explained in his concurrence, did not themselves appear to involve protected conduct, but were closely related to protected conduct.<sup>106</sup> Justice Scalia cited as an example the majority's holding that the exception barred the claim that bank regulators "acted negligently in selecting consultants to advise the bank."<sup>107</sup> As the concurrence observed, "[i]t remains to be determined whether the choice [of a consultant] is of a policymaking nature."<sup>108</sup> The concurrence nonetheless agreed that the claim based on that conduct was barred by the exception because it was so closely connected with "the decision whether or not to take over [the] bank," which "surely" was protected by the exception.<sup>109</sup> The concurrence explained that all of the regulators' actions were "recommendations" that the bank had to follow to avoid a government takeover.<sup>110</sup> They were therefore tantamount to the setting of conditions under which the government would or would not take over the bank — clearly a discretionary function.<sup>111</sup>

Together, *Berkovitz*, *Dalehite*, and *Gaubert* imply the following for the "based upon" issue: A claim is presumptively based upon the government conduct that the plaintiff alleges was wrongful and proximately caused the injuries. That presumption is not conclusive, however. A claim ostensibly based upon unprotected conduct may also be based upon protected conduct if there is a sufficient connection between the unprotected conduct and the protected conduct. It is not sufficient that the unprotected conduct merely occurred in the course of implementing the policy decision underlying the protected conduct. Nor is it sufficient

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<sup>106</sup> See *Gaubert*, 499 U.S. at 334, 338-39 (Scalia, J., concurring) (concluding that it was speculative whether individual acts of government officials challenged by plaintiffs were susceptible to policy considerations, but that those acts were nonetheless protected by discretionary function exception).

<sup>107</sup> See *id.* at 337.

<sup>108</sup> *Id.*

<sup>109</sup> See *id.* at 338.

<sup>110</sup> See *id.*

<sup>111</sup> See *id.* at 338-39.

that an award of liability could influence the manner in which the government exercises a discretionary function.

The Court's decisions do not indicate precisely what connection is sufficient for a claim ostensibly based upon unprotected conduct to be based upon protected conduct. And it is worth repeating that the Court has not yet addressed the based upon issue. As discussed in the balance of this Article, however, the based upon issue may arise in a wide variety of factual settings that have been the subject of lower federal court decisions. Moreover, the issue has usually been resolved by the lower courts without careful consideration or consistent results. The issue is therefore one likely to require the Court's attention before long.<sup>112</sup>

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<sup>112</sup> As noted above, *see supra* note 28, the Court has had to address the meaning of the term "based upon" as it is used in the Foreign Sovereign Immunities Act of 1976 (FSIA). *See Saudi Arabia v. Nelson*, 507 U.S. 349, 356-58 (1993). In that case, Mr. Nelson and his wife sued the Saudi Arabian government in a United States federal court, alleging that Saudi police tortured and imprisoned Mr. Nelson for raising safety concerns at the government hospital in Saudi Arabia where he worked. *See id.* at 351-54. The Nelsons relied on the provision of the FSIA that abrogates foreign sovereign immunity from actions "based upon a commercial activity carried on in the United States by the foreign state." *Id.* at 356 (quoting 28 U.S.C. § 1605(a)(2)) (emphasis added). The Nelsons argued that their claim was based upon the recruiting activities that led Mr. Nelson to take the hospital job in Saudi Arabia; those recruiting activities had been carried on in the United States by an agent of the Saudi government. *See id.* at 351-54. The Court rejected the Nelsons' argument, holding that the action was, instead, based upon the torts that later occurred in Saudi Arabia and that did not, the Court further held, constitute "commercial activity." *See id.* at 356-63. The Court concluded: "Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit." *Id.* at 358. In so concluding, the Court relied in part on the context in which the term "based upon" is used in the FSIA. *See id.* at 357-58. Because of the Court's reliance on the statutory context in which the term occurred, *Nelson* does not control the meaning of that term for purposes of the discretionary function exception of the FTCA. Nonetheless, the Court in *Nelson* also relied on the "natural meaning" of the term "based upon"; the Court understood the term to mean "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case" — the "gravamen of the complaint" — and to exclude actions that "preceded" the allegedly wrongful acts. *Id.* (quoting *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985)). To the extent that *Nelson* relied on the "natural meaning" of the term "based upon," it has implications for the meaning of the term as it is used in the discretionary function exception to the FTCA. Specifically, it implies that an FTCA claim is not based upon the exercise of a discretionary function if such exercise "preceded" the allegedly wrongful conduct. *See id.* at 358. As discussed *infra* note 223, that implication does not conflict with the approach proposed here. *Nelson* does, in contrast, cast doubt on the view, first proposed by Professor Peck and endorsed by Professor Rogers and me, that a claim may be based upon the exercise of a discretionary function that occurred *before* the allegedly wrongful conduct. *See supra* note 100 (discussing Professor Peck's interpretation of

## III. FISHER BROTHERS SALES, INC. V. UNITED STATES

## A. Factual and Procedural History

The only decision to date to address the “based upon” language is the Third Circuit’s en banc decision in *Fisher Brothers Sales, Inc. v. United States*.<sup>113</sup> *Fisher Brothers* arose from the “Great Grape Scare of 1989.”<sup>114</sup> The scare began with an anonymous telephone call to the U.S. embassy in Chile. The caller claimed that Chilean grapes bound for the United States had been injected with cyanide. In response to the call, the Food and Drug Administration (FDA) began closely inspecting Chilean grapes coming into the United States. It found some grapes that tested positive for cyanide at an FDA laboratory in Philadelphia, but that later tested negative at an FDA lab in Cincinnati. Faced with these conflicting test results, the Commissioner of the FDA decided to take protective measures. He temporarily banned the importation of Chilean grapes; he had all Chilean grapes that were already in the country taken off the shelves; and he made a public statement reporting the anonymous threats of cyanide contamination.<sup>115</sup> The ban was lifted after a few days because no further cyanide was found.<sup>116</sup> The Chilean economy suffered badly in the meantime, however, partly because other countries, such as Canada, followed suit by imposing their own bans on the grapes.<sup>117</sup>

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the exception).

<sup>113</sup> 46 F.3d 279 (3d Cir. 1994) (en banc), cert. denied, 116 S. Ct. 49 (1995).

<sup>114</sup> See generally HERBERT BURKHOLZ, *THE FDA FOLLIES* 99-106 (1994) (discussing FDA’s response to Great Grape Scare of 1989); Bruce Ingersoll, *Report Shows Hoax May Have Caused Grape Scare of 1989*, WALL ST. J., Dec. 23, 1994, at B5 (discussing effect of anonymous phone call on FDA’s response to Grape Scare).

<sup>115</sup> See *Fisher Bros.*, 46 F.3d at 282-83 (describing facts leading up to Great Grape Scare and FDA’s response).

<sup>116</sup> See generally Marlene Cemons, *Chile, World Bank to Compensate for Fruit Ban Losses*, L.A. TIMES, Mar. 24, 1989, at 4 (business section) (stating that FDA grape ban lasted five days); Marlene Cemons, *U.S. Frees Chile Grapes, Berries, But Other Fruit Held by Markets, Distributors, Must Be Destroyed*, L.A. TIMES, Mar. 18, 1989, at A1 (same); Richard Gibson & Bruce Ingersoll, *Politics and Policy: FDA Seeks Safe Way to Release for Sale Tons of Quarantined Fruit from Chile*, WALL ST. J., Mar. 16, 1989, 1989 WL-WSJ 490265 (quoting statement by FDA official that, after initial evidence of cyanide contamination, no further evidence was found).

<sup>117</sup> See Ingersoll, *supra* note 114, at B5 (reporting that grape ban resulted in \$333 million loss to Chilean economy); *Trade Winds*, FREE CHINA J., Mar. 27, 1989, at 7 (stating that Canada, Japan, and other countries followed United States’s lead on embargo).

Chilean-grape growers, shippers, and importers (collectively "Fisher Brothers") sued the federal government under the FTCA for more than \$210 million in damages.<sup>118</sup> They claimed that they were *not* challenging the Commissioner's decision to withdraw the grapes from the market. Instead, they claimed to be challenging the antecedent FDA laboratory testing of the grapes in Philadelphia.<sup>119</sup> They did not dispute that the Commissioner's decision constituted protected conduct. They contended that the Philadelphia lab testing was not protected, however, because the lab technicians failed to follow mandatory FDA lab procedures.<sup>120</sup> The government moved to dismiss the action on the ground that it was barred by the discretionary function exception. The district court granted the government's motion. It reasoned that the FDA had the discretion to act during the Chilean grape crisis, and that its exercise of that discretion was "grounded in the policy of protecting the public health."<sup>121</sup>

A divided panel of the Third Circuit reversed, holding that the action was not barred by the discretionary function exception.<sup>122</sup> Writing for the panel majority, Judge Roth criticized the district court for analyzing "the conduct of the FDA as a whole."<sup>123</sup> That approach "misapprehend[ed] the precise nature of plaintiffs' claims," which focused on the events in the laboratory.<sup>124</sup> The panel majority considered it "not relevant" whether the Commissioner's decision to withdraw grapes from the market involved protected discretion.<sup>125</sup> In the court's view,

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<sup>118</sup> See *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d at 283; *Petition for Writ of Certiorari* at 17, *Julia Saavedra Balmaceda, Inc. v. United States*, 46 F.3d 279 (3d Cir. 1995) (No. 94-1722) [hereinafter *Balmaceda Pet. App.*].

<sup>119</sup> See *Fisher Bros.*, 46 F.3d at 285-86.

<sup>120</sup> See *id.* at 286 (explaining that claim was based on laboratory procedure and not on FDA Commissioner's decision to embargo grapes).

<sup>121</sup> *Balmaceda v. United States*, 815 F. Supp. 823, 827 (E.D. Pa. 1992).

<sup>122</sup> See *Balmaceda Pet. App.*, *supra* note 118, at 28a-49a (reproducing panel opinion, which is not officially reported).

<sup>123</sup> See *id.* at 37a.

<sup>124</sup> See *id.* at 38a.

<sup>125</sup> See *id.* at 39a.

that decision was relevant only to determine whether the negligent testing of the grapes was the legal cause of the harm to plaintiffs.<sup>126</sup>

Judge Stapleton dissented. He found the Commissioner's decision to be "undeniably a policy one made by an official of the executive branch exercising a discretionary function."<sup>127</sup> He did not believe that the plaintiffs should be able "to escape this indisputable fact by looking behind the injury-causing decision and finding fault with an aspect of the data on which it may have been based."<sup>128</sup>

The en banc Third Circuit, by a seven-to-six vote, reversed the panel and affirmed the dismissal on discretionary function grounds.<sup>129</sup> Judge Stapleton, author of the panel dissent, wrote the opinion for the en banc majority.<sup>130</sup>

For the first time in the case, and apparently for the first time in *any* published opinion by a federal court, the en banc majority's opinion focused on the statutory phrase "based upon." At the outset, the court stated:

We reject [Fisher Brothers'] attempt to circumvent the discretionary function exception, concluding that if the discretionary function exception to the FTCA is to fulfill its clear and important purpose, a claim must be "based upon" the exercise of a discretionary function whenever the immediate cause of the plaintiff's injury is a decision which is susceptible of policy analysis and which is made by an official legally authorized to make it.<sup>131</sup>

Later, the court reiterated that Fisher Brothers' claims were based upon the Commissioner's decision, rather than the antecedent laboratory testing, because the Commissioner's decision was the real cause of Fisher Brothers' injuries. Concluding that "[a]ny other view would defeat the purpose of the discretionary function exception,"<sup>132</sup> the court explained:

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<sup>126</sup> See *id.* at 39a n.3.

<sup>127</sup> *Id.* at 45a (Stapleton, J., dissenting).

<sup>128</sup> *Id.*

<sup>129</sup> See *Fisher Bros.*, 46 F.3d 279, 282 (3d Cir. 1994) (en banc), *cert. denied*, 116 S. Ct. 49 (1995).

<sup>130</sup> See *id.* at 281. Judge Stapleton's majority opinion was joined by Judges Sloviter, Mansmann, Greenberg, Cowen, Nygaard, and Alito. *Id.*

<sup>131</sup> *Id.* at 282.

<sup>132</sup> *Id.* at 286.

In situations like this where the injury complained of is caused by a regulatory policy decision, the fact of the matter is that there is no difference in the quality or quantity of the interference occasioned by judicial second guessing, whether the plaintiff purports to be attacking the data base on which the policy is founded or acknowledges outright that he or she is challenging the policy itself.<sup>133</sup>

If claims could be predicated on negligent data gathering, the court reasoned,

federal courts, of necessity, would be required to examine in detail the decisionmaking process of the policymaker to determine what role the challenged data played in the policymaking . . . . Without such an examination and all of the discovery that would necessarily precede it, a plaintiff in the position of these plaintiffs would be unable to prove a causal link between the alleged negligence and the alleged injury.<sup>134</sup>

Believing that the social cost of permitting such judicial inquiry into policymaking would be prohibitive,<sup>135</sup> the en banc majority identified three components of that cost. First, because policy decisions by federal officials may affect a “potentially staggering” number of people, lawsuits concerning those decisions expose the government to “virtually unlimited” liability.<sup>136</sup> The second component of social cost was imposed by the demands of the litigation on the time and attention of high-level decisionmakers.<sup>137</sup> The third component of social cost arose from “the impact upon policymakers that would result from the fear of virtually unlimited liability and the prospect of virtually interminable litigation.”<sup>138</sup> The majority concluded that “the discretionary function exception was intended to make sure every Commissioner’s judgment will not be skewed by such considerations.”<sup>139</sup>

The en banc dissent did not address the “based upon” issue. Instead, it implicitly assumed that Fisher Brothers’ claims were

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *See id.* at 286-87.

<sup>136</sup> *See id.* at 286.

<sup>137</sup> *See id.* at 286-87.

<sup>138</sup> *Id.* at 287.

<sup>139</sup> *Id.*

based upon the allegedly negligent lab testing.<sup>140</sup> The dissent apparently based this assumption on the complaint's allegation that negligent lab testing was the proximate cause of Fisher Brothers' injuries.<sup>141</sup> Thus, the dissent: (1) equated the "based upon" inquiry to a "proximate cause" inquiry; and (2) treated the plaintiffs' allegation of proximate cause as controlling. Consistent with its implicit determination that the claim was based upon the allegedly negligent lab testing, the dissent focused on whether that testing was a discretionary function.<sup>142</sup> The dissent readily decided that it was not.<sup>143</sup> The dissent observed that "judgment guided purely by scientific or other objective principles does not involve discretion for the purposes of the discretionary function exception."<sup>144</sup> The dissent accepted Fisher Brothers' allegation that such "objective principles" guided the procedures for testing the grapes.<sup>145</sup>

The dissent considered it irrelevant that the testing was both preceded and followed by exercises of discretionary functions: namely, the Commissioner's initial decision to order the testing and his later decision (in light of the test results) to withdraw grapes from the market.<sup>146</sup> As to the Commissioner's decision to order testing, the dissent reasoned that "once the FDA exercised its discretion to test incoming Chilean fruit, it incurred the obligation to use due care in doing so."<sup>147</sup> As to the Commissioner's decision to take the fruit off the market, the discretionary nature of that decision led the dissent to question plaintiffs' ability to prove that the alleged negligence of the lab technicians, rather than the Commissioner's decision, was the proximate cause of their injuries.<sup>148</sup> That factor "had no place,"

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<sup>140</sup> See *id.* at 288, 290 (Roth, J., dissenting) (analyzing whether "negligently performed laboratory work" was discretionary function).

<sup>141</sup> See *id.* at 289 (Roth, J., dissenting) (accepting as true all factual allegations in complaint when considering motion to dismiss).

<sup>142</sup> See *id.* at 289-90 (Roth, J., dissenting) (concluding that laboratory testing was not discretionary function).

<sup>143</sup> See *id.* (holding lab testing not discretionary).

<sup>144</sup> *Id.* at 290 (Roth, J., dissenting).

<sup>145</sup> See *id.* at 289-90 (Roth, J., dissenting) (finding that technicians used objective, scientific standards in testing).

<sup>146</sup> See *id.* at 290-91 (Roth, J., dissenting).

<sup>147</sup> *Id.* at 291 (Roth, J., dissenting).

<sup>148</sup> See *id.* at 291 n.1 (Roth, J., dissenting).

however, in what the dissent regarded as the proper analysis of the discretionary function issue.<sup>149</sup> The dissent was “not persuaded” that the imposition of liability would “have an undesirable effect on policymakers . . . in a position analogous to that of the FDA Commissioner.”<sup>150</sup>

*B. Analysis of the Approaches in Fisher Brothers to  
Resolving the “Based Upon” Issue*

1. The Approach of the *Fisher Brothers* Dissent

As discussed above, the en banc dissent in *Fisher Brothers* implicitly concluded that Fisher Brothers’ claim was based upon negligent lab testing because that is what Fisher Brothers alleged was the proximate cause of its injuries.<sup>151</sup> The dissent’s conclusion relied in part on *Berkovitz*, where the Supreme Court similarly assumed that the claim before it was based upon the conduct that was allegedly wrongful and injurious.<sup>152</sup> As discussed below, however, the dissent’s reliance on *Berkovitz* was unjustified.<sup>153</sup>

The dissent also rested on two propositions: (1) that the court of appeals was bound to accept plaintiffs’ proximate cause allegation; and (2) that a claim is based upon the conduct that proximately caused the injuries.<sup>154</sup> Those propositions are examined below as well.<sup>155</sup>

*a. The Dissent’s Reliance on Berkovitz*

The dissent remarked that the negligent laboratory testing was not protected merely because the Commissioner exercised a discretionary function in ordering the tests in the first place.<sup>156</sup>

<sup>149</sup> See *id.*

<sup>150</sup> *Id.* at 291 (Roth, J., dissenting).

<sup>151</sup> See *id.* at 288-90 (Roth, J., dissenting) (analyzing whether laboratory testing was discretionary function).

<sup>152</sup> See *id.* (interpreting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988), as standing for proposition that court must accept such allegations of complaint as true).

<sup>153</sup> See *infra* Part III.B.1.a (discussing *Fisher Brothers* court’s unjustified reliance on *Berkovitz*).

<sup>154</sup> See *Fisher Bros.*, 46 F.3d at 289, 291 n.1 (Roth, J., dissenting).

<sup>155</sup> See *infra* Part III.B.1.b.

<sup>156</sup> See *Fisher Bros.*, 46 F.3d at 290-91 (Roth, J., dissenting).

That remark was correct but irrelevant.<sup>157</sup> Its correctness is established by *Berkovitz*.<sup>158</sup> As discussed above, *Berkovitz* held that the government was liable for the negligent application of the criteria for releasing polio vaccine, even though the development of those criteria constituted a discretionary function.<sup>159</sup> The dissent's remark was irrelevant, however, because the government did not base its discretionary function argument, and the majority did not base its judgment, on the Commissioner's decision to order the testing of grapes.<sup>160</sup> They relied instead on the Commissioner's decision, *after* the testing, to withdraw the grapes from the market.<sup>161</sup> By focusing on the protected conduct that preceded the allegedly negligent, unprotected lab testing, the dissent ignored the later, protected conduct that intervened between the unprotected conduct and the injuries.

In *Berkovitz*, unlike *Fisher Brothers*, there was no intervening exercise of a discretionary function between the allegedly negligent conduct and the alleged injuries.<sup>162</sup> While the dissent ignored that distinction, the majority considered it a "critical" one.<sup>163</sup> The dissent's disregard is most glaring when it criticizes

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<sup>157</sup> The dissent erred, however, in concluding that the decision to conduct the test created a duty to use due care in testing. *See id.* at 291 (Roth, J., dissenting). That statement fails to distinguish between the issue of whether the testing constituted the exercise of a discretionary function, which is a question of federal law concerning the scope of sovereign immunity; and the quite different issue of whether a private entity in the government's situation would owe a duty of care to plaintiffs, which is a question of state law concerning substantive liability in tort. *See Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 977 (10th Cir. 1994) (holding Good Samaritan doctrine of tort law inapplicable to discretionary function exception).

<sup>158</sup> *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (outlining principles that govern determination of discretionary function exception).

<sup>159</sup> *See supra* notes 98-100 and accompanying text (discussing holding of *Berkovitz*).

<sup>160</sup> *See Fisher Bros.*, 46 F.3d at 286 (holding that plaintiffs' injuries were caused by Commissioner's decisions; therefore, plaintiffs' claims were based upon those decisions).

<sup>161</sup> *See id.* at 286-87 (focusing on potential for tort liability to affect Commissioner's future decisionmaking).

<sup>162</sup> *See Berkovitz*, 486 U.S. at 547-48 (holding discretionary function exception inapplicable because policy did not permit discretionary release of polio vaccine). Plaintiffs in *Berkovitz* alleged that the release of a vaccine lot depended solely on whether it satisfied the laboratory tests; government officials had no discretion either to approve the public release of lots that failed the laboratory tests or to disapprove the public release of lots that passed the tests. *See id.*; *see also Fisher Bros.*, 46 F.3d at 287 (distinguishing *Berkovitz*).

<sup>163</sup> *See Fisher Bros.*, 46 F.3d at 287 (arguing that unlike *Berkovitz*, *Fisher Brothers* involved congressional and FDA authorization for Commissioner to make discretionary decisions regarding quarantine for public health).

the majority's view that the imposition of tort liability could skew policymaking by future FDA Commissioners.<sup>164</sup> The dissent argued that liability would not have consequences "of a different nature or to a greater extent than" that in *Berkovitz*.<sup>165</sup> In support of that argument, the dissent referred solely to the Commissioner's decision to test the grapes.<sup>166</sup> The dissent reasoned that imposing liability in the case before it could have the laudable effect of discouraging future Commissioners from ordering laboratory testing in similar situations unless they were confident that the testing would be performed non-negligently.<sup>167</sup> Implicit in that reasoning is the belief that future Commissioners would want to rely on testing in such situations and would therefore have an incentive to ensure that testing was performed properly. The dissent's reasoning is plausible as far as it goes, but it does not go far enough. The dissent ignores the effect that imposing liability could have on decisionmaking by future Commissioners *after* the receipt of test results. By ignoring that aspect of the case, the dissent avoided the fact that distinguished the case before it from *Berkovitz* and that underlay the majority's decision.

*b. The Dissent's Reliance on Plaintiffs' Proximate Cause Allegations*

The procedural posture of the case did not justify the dissent's view that Fisher Brothers' proximate cause allegation conclusively determined what act its claim was based upon. There are, moreover, affirmative reasons not to treat a plaintiff's proximate cause allegation as controlling the "based upon" issue. That is true even if one assumes that, in barring claims based upon the exercise of a discretionary function, Congress intended to bar claims proximately caused by such an exercise.

On review of an order dismissing a complaint, an appellate court must accept the truth of only the *factual* allegations in the

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<sup>164</sup> See *id.* at 291 (Roth, J., dissenting) (expressing doubt that imposing liability would have the sort of chilling effect on government decisionmaking that discretionary function exception was intended to prevent).

<sup>165</sup> *Id.*

<sup>166</sup> See *id.* at 290 (Roth, J., dissenting).

<sup>167</sup> *Id.* at 291-92 (Roth, J., dissenting).

complaint.<sup>168</sup> The issue of proximate cause is not a question of fact. Rather, it is a mixed question of fact and law;<sup>169</sup> it involves determining whether a set of facts satisfies a legal standard.<sup>170</sup> A court of appeals is not required to accept a plaintiff's legal assertions as to what was the proximate cause of the injuries.<sup>171</sup> The dissent therefore erred by relying on the procedural posture of the case as a basis for deeming the lawsuit to be based upon lab negligence.

Furthermore, if a plaintiff's proximate cause allegation controlled the "based upon" issue, plaintiffs could often avoid the discretionary function exception by artful pleading.<sup>172</sup> The potential for abuse is clear when one recognizes that most policy-based decisions are based in part on information gathered by others. The information may often be incomplete or inaccurate in certain ways. Many plaintiffs, therefore, can argue that injuries resulting from a policy-based decision were based upon faulty information, the gathering of which, because routine, will be unprotected.

The artful pleading problem is not the only reason to reject the dissent's approach. Assume that Congress intended the term "based upon" to mean "proximately caused by." Even if the plaintiff correctly identifies unprotected conduct as *a* proximate cause in his allegations, that does not preclude the possibility

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<sup>168</sup> See, e.g., *United States v. Gaubert*, 499 U.S. 315, 327 (1991) (accepting factual allegations in plaintiff's complaint as true when deciding motion to dismiss).

<sup>169</sup> See, e.g., *Exxon Co., U.S.A. v. Sofec, Inc.*, 116 S. Ct. 1813, 1819 (1996) (holding that issue of proximate cause involves application of law to facts).

<sup>170</sup> See, e.g., *Ornelas v. United States*, 116 S. Ct. 1657, 1662 (1996) (defining mixed question of law and fact as one that involves application of legal standard to facts before court).

<sup>171</sup> See generally *id.* (holding that independent appellate review of probable cause is warranted because it is mixed question of law and fact).

<sup>172</sup> Cf. *United States v. James*, 478 U.S. 597, 609-10 (1986) (barring action under Flood Control Act, 33 U.S.C. § 702c, despite plaintiffs' argument that their claim concerned, not government management of flood control project, but government management of recreational lands on which flood project was located); *Block v. North Dakota*, 461 U.S. 273, 284-85 (1983) (stating that limitations on waiver of sovereign immunity effected by Quiet Title Act cannot be avoided by suing individual federal officer instead of suing government); *United States v. Neustadt*, 366 U.S. 696, 703 (1961) (rejecting the argument that 28 U.S.C. § 2680(h), which bars claims arising out of negligent misrepresentation, "does not apply . . . when the claim is phrased as one 'arising out of' negligence rather than 'misrepresentation'"); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949) (naming official, rather than government, as defendant did not avoid sovereign-immunity bar).

that *other*, protected government conduct *also* was a proximate cause. As discussed above, injuries at the hands of the government may have multiple causes.<sup>173</sup> Assuming that “based upon” means “proximately caused by,” the exception does not require the protected conduct to be the *sole* proximate cause for a claim to be barred; a claim is barred if protected conduct was *a* proximate cause. Recast in statutory terms, the exception applies whenever a claim is based upon protected conduct, even if the claim is *also* based upon *unprotected* conduct. For that reason, a court should not decide the “based upon” issue solely by reference to the conduct that the plaintiff alleges was “the” proximate cause.<sup>174</sup>

## 2. The Approach of the *Fisher Brothers* Majority

The *Fisher Brothers* majority was correct, when deciding the “based upon” issue, not to rely on the plaintiffs’ allegation of proximate cause; the majority was incorrect, however, in adopting an “immediate cause” standard to decide that issue. Under the proper approach, the claim in *Fisher Brothers* was based upon the Commissioner’s decision to withdraw grapes from the market because, to establish proximate cause, Fisher Brothers would have had to prove that negligent lab testing influenced the

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<sup>173</sup> See *supra* Part I.B.1.

<sup>174</sup> It is not clear whether Congress meant “based upon” to mean “proximately caused by.” In contrast to its use of “based upon” in the discretionary function exception, Congress used other language, arguably more suggestive of proximate causation, in two other FTCA exceptions. One such exception bars “[a]ny claim for damages *caused by* the imposition of a quarantine by the United States.” 28 U.S.C. § 2680(f) (1994) (emphasis added). See also *id.* § 2680(i) (refusing to extend FTCA to “[a]ny claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system”). The remaining FTCA exceptions bar claims “arising” out of certain governmental activities. See *id.* § 2680(b) (barring claims “arising out of” loss or mistransmission of mail); *id.* § 2680(c) (barring claims “arising in respect of” collection or assessment of taxes and customs or detention of merchandise); *id.* § 2680(e) (barring claims “arising out of” certain national defense activities); *id.* § 2680(h) (barring claims “arising out of” certain intentional torts); *id.* § 2680(j) (barring claims “arising out of” combatant activities in wartime); *id.* § 2680(k) (barring claims “arising in” foreign country); *id.* § 2680(l) (barring claims “arising from” activities of Tennessee Valley Authority); *id.* § 2680(m) (barring claims “arising from” activities of Panama Canal Company); *id.* § 2680(n) (barring claims “arising from” activities of certain federal banking entities). Ultimately, however, there is no apparent rhyme or reason to the varying formulations used in the exceptions. Thus, it is difficult to conclude confidently that Congress meant the “based upon” inquiry to be a proximate-cause analysis.

Commissioner's decision. To evaluate such proof, a court would have had to scrutinize the basis for the Commissioner's decision. The majority in *Fisher Brothers* reasonably concluded that the discretionary function exception bars judicial scrutiny of the basis for exercising a discretionary function.<sup>175</sup>

*a. The Majority's "Immediate Cause" Standard*

The en banc majority in *Fisher Brothers* held that the claim was based upon the FDA Commissioner's decision to withdraw Chilean grapes from the domestic market because that decision was the "immediate cause" of the plaintiffs' injuries.<sup>176</sup> The majority's reasoning does not support an immediate cause standard.

The majority sought to avoid judicial scrutiny of the Commissioner's decisionmaking process.<sup>177</sup> It pointed out that such scrutiny would be required if Fisher Brothers' claim, which alleged laboratory negligence, went forward.<sup>178</sup> To state a claim in tort, Fisher Brothers had to allege that the laboratory negligence proximately caused its injuries and, to recover, it had to prove that causal connection.<sup>179</sup> That proof necessarily included proof that the results of the negligent lab tests influenced the FDA Commissioner's decision to withdraw Chilean grapes from the domestic market.<sup>180</sup> Specifically, Fisher Brothers had to

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<sup>175</sup> See *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 286 (3d Cir. 1994) (en banc) (citing *United States v. Gaubert*, 499 U.S. 315, 325 (1991), as foreclosing inquiries into official's subjective intent when exercising discretion), *cert. denied*, 116 S. Ct. 49 (1995).

<sup>176</sup> See *id.* "Immediate cause" means "[t]he last of a series or chain of causes tending to a given result, and which, of itself, and without the intervention of any further cause, directly produces the result or event." BLACK'S LAW DICTIONARY 750 (6th ed. 1990). "Immediate cause" differs from "proximate cause" which is "that which in a natural and continuous sequence . . . produces injury, and without which the result would not have occurred." *Id.* at 1225. The "proximate cause" may be followed by other causal factors; if so, the "proximate cause" is not the "immediate cause." See *id.*; PROSSER AND KEETON ON TORTS, *supra* note 7, § 42, at 276-77 (discussing "nearest cause").

<sup>177</sup> See *Fisher Bros.*, 46 F.3d at 286 (without extensive discovery of Commissioner's decisionmaking process, plaintiffs would be unable to prove causal link, and such discovery could skew decisionmaking process).

<sup>178</sup> See *id.* at 286; see also *id.* at 288 (stating that "litigation of [Fisher Brothers' claims] will require extensive inquiry into the process by which [the Commissioner's] decisions were made").

<sup>179</sup> See *supra* note 7 (discussing "proximate cause" requirement of tort law).

<sup>180</sup> See *Fisher Bros.*, 46 F.3d at 286 (stating that examination of role data played in influ-

prove: (1) that the lab technician's departure from the standard of care led to a false-positive test result, and (2) that the false-positive result increased the probability that the Commissioner would decide to withdraw grapes from the market, relative to the probability that he would have come to that decision if the test result had (correctly) turned out negative. To assess that proof, and thereby determine whether Fisher Brothers had established proximate cause, a court would be required to scrutinize the basis of the Commissioner's decision. In other words, it would have to examine the basis for an official's exercise of a discretionary function. The majority believed that "this is precisely the kind of inquiry that the Supreme Court sought to foreclose" in its precedent on the discretionary function exception.<sup>181</sup>

Assume, for now, that Congress did indeed intend the exception to prevent the kind of judicial scrutiny with which the majority was concerned.<sup>182</sup> If so, then the exception should apply whenever a plaintiff must, in order to establish proximate causation, prove that the allegedly wrongful, unprotected conduct influenced the way in which a discretionary function was exercised. The situation in which the exception should apply under the majority's reasoning, described schematically, is as follows: Plaintiff alleges that unprotected conduct (*U*) proximately caused her to suffer injuries (*I*); included in the chain of causation leading from *U* to *I* is the exercise of a discretionary function (protected conduct: *P*); in order to establish the required casual connection between *U* and *I*, plaintiff must prove a particular kind of causal connection between *U* and *P*: namely, that *U* influenced the substance of *P*. A court must determine what role *U* played in *P* to decide whether *U* proximately caused *I*. The *Fisher Brothers* majority believed that such a determination is barred by the discretionary function exception.<sup>183</sup>

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encing decision is necessary for plaintiff to prove causation); *id.* at 289 (Roth, J., dissenting) (Fisher Brothers alleged that "the decision to withdraw Chilean fruit from the market was proximately caused by the positive test results").

<sup>181</sup> *Fisher Bros.*, 46 F.3d at 286.

<sup>182</sup> *But see infra* notes 184-221 and accompanying text (examining that assumption).

<sup>183</sup> *See Fisher Bros.*, 46 F.3d at 286 (stating that Supreme Court's interpretation of discretionary function foreclosed inquiry into exercise of official's discretion).

If the majority correctly understood the purpose of the exception, it erred in two ways by using an “immediate cause” standard. First, the “immediate cause” standard requires courts to determine the *actual* cause or causes of the plaintiff’s injuries. This is unnecessary; courts need only examine the plaintiff’s *allegations* of how the allegedly wrongful conduct caused the injuries. It will be clear from those allegations whether the court will have to assess the influence of unprotected conduct upon protected conduct. Second, the “immediate cause” standard focuses exclusively on the strength of the causal connection between the protected conduct and the injuries (between *P* and *I*). To be sure, that connection is relevant to identifying cases requiring the kind of judicial scrutiny that the majority wanted to avoid; in all such cases, plaintiffs will allege that such a connection exists. But the need for forbidden scrutiny arises only when a plaintiff *also* alleges a causal connection between the allegedly wrongful, unprotected conduct and the protected conduct (between *U* and *P*). Specifically, when the plaintiff alleges that unprotected conduct influenced protected conduct, a court will have to examine the basis for the protected conduct, regardless whether the protected conduct was the *actual* or *immediate* cause of the injuries.

In sum, the reasoning of the *Fisher Brothers* majority supports a simple standard for identifying cases in which a court would have to scrutinize the way in which a discretionary function was exercised. Such scrutiny will be necessary when, in order to establish proximate causation, the plaintiff must prove that the allegedly wrongful, unprotected conduct influenced the way in which a discretionary function was exercised. This “influence” standard will be discussed in greater detail in Part IV, below. Hereafter, a case in which the proposed approach is satisfied — a case in which the plaintiff must, in order to establish proximate cause, show that the allegedly wrongful, unprotected conduct influenced the way in which a discretionary function was exercised — is referred to as a “*Fisher Brothers*-type” action.

b. *The Majority's Understanding of the Purpose of the Discretionary Function Exception*

In suggesting the use of an "influence" standard for resolving the "based upon" issue, it was assumed that the discretionary function exception prevents a court from scrutinizing the basis for protected conduct. Now we must examine that assumption. This section argues that the assumption reflects a reasonable understanding of the purpose of the exception.

i. *Whether the Exception Prevents Only the "Judgmental" Judicial Scrutiny That Occurs in a Direct Challenge to the Exercise of a Discretionary Function*

As an initial matter, it is not obvious that the discretionary function exception prevents the kind of judicial scrutiny that the *Fisher Brothers* majority wanted to avoid. The majority wanted to avoid judicial inquiry into whether and to what extent the Commissioner relied on the results of the Philadelphia lab tests.<sup>184</sup> The only purpose of that inquiry would have been to determine whether laboratory negligence proximately caused the plaintiffs' injuries.<sup>185</sup> The purpose would *not* have been to determine whether the Commissioner's decision was wise.

The type of "nonjudgmental" judicial scrutiny that the majority wanted to avoid differs from the sort of "second guessing" that the discretionary function exception is ordinarily understood to prevent.<sup>186</sup> It is different, for example, from the judicial scrutiny that would have occurred if the plaintiffs in *Fisher Brothers* had challenged the Commissioner's decision directly, by alleging that it was wrongful and that it proximately caused their injuries. That allegation would have required a court to assess the wisdom of the Commissioner's decision. That assessment is quite different from an assessment of the role that a particular datum, such as the Philadelphia test results, played in the Commissioner's decision. The *Fisher Brothers* majority therefore

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<sup>184</sup> See *Fisher Bros.*, 46 F.3d at 286, 288.

<sup>185</sup> See *id.* at 286.

<sup>186</sup> See *id.* at 290 (Roth, J., dissenting) ("if the district court were to adjudicate this case as it is alleged in the complaint by plaintiffs, the court would not be 'second-guessing' a policy-based decision").

erred in saying that the “quality” of judicial scrutiny required to resolve the claim before it would *not* differ from that required to resolve a claim directly challenging the FDA Commissioner’s decision.<sup>187</sup>

The result in *Fisher Brothers* raises the question: What is it about claims directly challenging the exercise of a discretionary function that led Congress to bar them? Is it that, in such a “direct challenge,” a court examines the wisdom of the exercise of a discretionary function — conducts “judgmental” scrutiny? If so, *Fisher Brothers* was wrongly decided (since it applied the exception to prevent nonjudgmental scrutiny); if not, the decision may have been correct.

It is quite doubtful that the purpose of the exception is merely to prevent judicial review of the wisdom of a discretionary function. Such review occurs under statutes other than the FTCA all the time. For example, many official actions that constitute the exercise of a discretionary function are subject to judicial review, including for “abuse of discretion,” under the Administrative Procedure Act (APA).<sup>188</sup> Congress passed the APA and the FTCA in the same year. This fact may reinforce the notion that the discretionary function exception was not intended solely to keep courts from reviewing the wisdom of discretionary decisions. To be sure, in APA-type actions, courts must defer to many aspects of executive decisionmaking.<sup>189</sup> But

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<sup>187</sup> See *id.* at 286.

<sup>188</sup> See 5 U.S.C. § 704 (1994) (“Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review.”); *id.* § 706(2)(A) (authorizing court to “hold unlawful and set aside” agency decisions found to be “an abuse of discretion”); *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967) (APA reflects “basic presumption of review” of administrative action); see generally, e.g., ALFRED C. AMAN & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* §§ 13.2-13.10, at 437-515 (1993) (examining legal standards set forth in § 706 of the APA to be applied by federal courts when reviewing agency decisions); BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 10.34, at 701-03 (1991) (discussing judicial deference to administrative interpretations of law).

Indeed, questions of mootness aside, the Commissioner’s decision in *Fisher Brothers* was probably subject to APA review. See *Fisher Bros.*, 46 F.3d at 285 n.1 (citing statutory and regulatory authority for Commissioner’s actions); see generally *Parke, Davis & Co. v. Califano*, 564 F.2d 1200, 1204-05 (6th Cir. 1977) (discussing reviewability of FDA decisions); cf. *Young v. Community Nutrition Inst.*, 476 U.S. 974, 984 (1986) (reviewing action brought against FDA).

<sup>189</sup> See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (recognizing that considerable weight is given to administrative agency’s construction of statute that agency is charged with administering).

similar principles of deference could, and presumably would, be developed under the FTCA in the absence of the discretionary function exception.<sup>190</sup> The availability of APA-type review supports the conclusion that the purpose of the exception is *not* limited to preventing judgmental judicial scrutiny of the exercise of a discretionary function.<sup>191</sup>

ii. Whether the Exception Also Prevents the  
“Nonjudgmental” Judicial Scrutiny That Occurs  
in a *Fisher Brothers*-Type Action

The *Fisher Brothers* majority determined that three kinds of social cost are generated by an FTCA action in which a court must scrutinize the exercise of a discretionary function. First was the cost of large tort judgments against the government. Second was the cost of requiring officials who exercise discretionary functions to defend against FTCA actions. Third was the cost of having an official’s exercise of discretion skewed by her desire to avoid the first two kinds of costs. The majority reasoned that these costs arise and are unacceptable, regardless whether the purpose of the court’s scrutiny is to decide if the plaintiff has established proximate cause (as is required in a *Fisher Brothers*-type action) or is, instead, to assess the wisdom of the exercise of a discretionary function (as is required in a direct challenge).<sup>192</sup>

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<sup>190</sup> For example, in determining whether an official’s conduct violated a regulation (and therefore was unprotected), a court might defer to the agency’s interpretation of the regulation. *Cf., e.g., General Pub. Utils. Corp. v. United States*, 745 F.2d 239, 246 (3d Cir. 1984) (in light of agency’s expertise, Nuclear Regulatory Commission had protected discretion in determining whether “abnormal occurrence” had taken place so as to trigger statutory reporting requirement); ACUS REPORT, *supra* note 4, at 1527 (“from the error minimization vantage point, the exception should be tailored to complement deference accorded administrative decisions on direct [i.e., APA-type] review”).

<sup>191</sup> See ACUS REPORT, *supra* note 4, at 1507 (stating, in light of availability of APA-type review, “[p]lainly, something more than decisional competence is implicated in the discretionary function exception”); *id.* at 1527 (“By placing beyond the FTCA’s purview acts of the type regularly subject to direct supervision . . . , Congress signalled its belief that special concerns about the effects of a review apply when tort litigation is the vehicle for judicial review.”).

<sup>192</sup> See *Fisher Bros.*, 46 F.3d at 286-87 (describing social costs of accepting plaintiffs’ theory); *supra* notes 135-39 and accompanying text (describing this portion of *Fisher Brothers* opinion).

The validity of the majority's reasoning depends on the answers to two questions. First, was the exception intended to prevent the kinds of social cost cited by the majority? Second, are those costs comparable in both a *Fisher Brothers*-type action and a direct challenge?

(A) *The Risk of Large Money Judgments*

The first cost component — the cost of large tort judgments — would flow, not from judicial scrutiny of the Commissioner's decisionmaking, but from the imposition of liability. Such liability would have arisen in *Fisher Brothers* if the court had determined that the positive lab results from Philadelphia were attributable to negligence and that those lab results influenced the Commissioner's decision to withdraw Chilean grapes from the market. The majority was right to rely on this cost component only if a *Fisher Brothers*-type action poses the same risk of a large money judgment as does a direct challenge, and if Congress intended the exception to avoid such large judgments.

A *Fisher Brothers*-type action probably does pose the same risk of a large money judgment as does a direct challenge. When a high-level official, with authority to do so, makes a decision based on considerations of public policy, that decision often affects many people.<sup>193</sup> Such high-level officials must often rely on data gathered by low-level officials who lack authority to consider public policy (and whose conduct is therefore unprotected). Negligence in gathering data can give rise to enormous damages because it is "amplified" through the subsequent, policy-based decision. Thus, poor data, as well as poor policy judgments, can lead to large damages.

Congress may well have intended the discretionary function exception, among other mechanisms, to avoid large money judgments against the United States. The legislative history gives examples of official conduct that would, as well as official conduct that would not, be protected by the exception. The examples of protected conduct could, if challenged in tort, often lead to large money judgments;<sup>194</sup> the examples of unprotected con-

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<sup>193</sup> See *Gray v. Bell*, 712 F.2d 490, 511 (D.C. Cir. 1985).

<sup>194</sup> See H.R. REP. NO. 77-2245, at 10 (1942) (exception is "designed to preclude applica-

duct would, if challenged in tort, usually involve comparatively small money judgments.<sup>195</sup> Furthermore, other FTCA exceptions appear to be designed to bar claims that, if successful, could lead to large money judgments against the government.<sup>196</sup>

Dean Cass has explained that Congress had good reason to worry about large money judgments under the FTCA.<sup>197</sup> He points out that the prospect of recovering a large money judgment from a deep-pocketed defendant tends to encourage the filing of tort actions with little chance of success.<sup>198</sup> There is no defendant with a deeper pocket than the United States, and the cases cited from the outset of this Article illustrate that cases involving discretionary functions can threaten huge liability awards.<sup>199</sup> Dean Cass has also persuasively argued that the error costs to the government of FTCA actions involving protected conduct are greater than the error costs of APA-type actions involving such conduct.<sup>200</sup> Whether or not the review is

tion of [FTCA's sovereign immunity waiver] to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, [and] . . . claims based upon an allegedly negligent exercise by the Treasury Department of the black-listing or freezing powers"); S. REP. NO. 77-1196, at 7 (1942) (same).

<sup>195</sup> See S. REP. NO. 79-1400, at 31 (1946) (citing "negligence in the operation of vehicles" as example of tort for which recovery was permitted); H.R. REP. NO. 79-1287, at 5 (1945) (same); H.R. REP. NO. 77-2245, at 7, 10 (1942) (same); see also *Kosak v. United States*, 465 U.S. 848, 855 (1984) ("One of the principal purposes of the [FTCA] was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal Service were at fault.") (footnote omitted); *Dalehite v. United States*, 346 U.S. 15, 28 (1953) ("Uppermost in the collective mind of Congress [in enacting the FTCA] were the ordinary common-law torts.") (footnote omitted).

<sup>196</sup> See, e.g., 28 U.S.C. § 2680(b) (1994) (barring claims arising from negligent transmission of mail or other postal matter); *id.* § 2680(c) (barring claims arising from assessment or collection of taxes or customs duties); *id.* § 2680(e) (barring claims arising out of administration of Trading with the Enemy Act, 50 U.S.C. App. §§ 1-31); *id.* § 2680(i) (barring claims for damages caused by fiscal operations of Treasury or regulation of monetary system); *id.* § 2680(j) (barring claims arising out of combatant activities of military during wartime).

<sup>197</sup> See ACUS REPORT, *supra* note 4, at 1519-27; see also Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 276-85 (1991) (discussing limited effectiveness of tort liability against government).

<sup>198</sup> See ACUS REPORT, *supra* note 4, at 1523-25 (comparing tort action to playing lottery; if there is big enough prize, people will participate even though the chance of winning is quite small).

<sup>199</sup> See, e.g., *supra* note 1 and accompanying text (discussing several types of liability claims against government).

<sup>200</sup> See ACUS REPORT, *supra* note 4, at 1519-27. Dean Cass explains that an erroneous

nonjudgmental does not appear to affect any components of that cost differential.

One cannot, however, conclude that the exception bars *Fisher Brothers*-type actions merely because they pose the same risk of large money judgments as do direct challenges. The same “amplification” of the effects of low-level negligence may occur whether or not the later, high-level decision is discretionary. That is clear when the facts of *Fisher Brothers* are altered to assume that a statute required the Commissioner to suspend the importation of any fruit found contaminated during FDA lab testing. Because the Commissioner would have no discretion to refrain from suspending imports of the fruit, his decision would not be protected by the discretionary function exception. The extent of economic damages flowing from the laboratory negligence would not differ by virtue of the non-discretionary nature of his decision.

Thus, the majority was justified in relying in part on the comparable risk of large money judgments posed by *Fisher Brothers*-type actions and direct challenges. But that common feature does not, standing alone, support the majority’s application of the exception.

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award of damages, unlike an erroneous award of prospective relief, confers a windfall on one party that cannot be recouped by negotiating changes in the other parties’ future conduct. *See id.* at 1519-20. In addition, he determines that the error costs in damage suits against the government may be distributed asymmetrically, in a way that disfavors the government. *See id.* at 1522. The asymmetry may occur, among other reasons, “because the probable benefits of one course of [government] action may be diffuse and invisible while its potential costs are concentrated and readily apparent.” *Id.* Dean Cass cites as an example the FDA’s approval of a new drug. *See id.* The harm from undue delay in the approval of a new drug is spread among those who would benefit from the drug; the potential beneficiaries are therefore hard to identify and their harm is nigh imperceptible, consisting of the absence of a benefit (such as the absence of side effects of the existing drugs for treating the same condition as the new drug would treat). *See id.* In contrast, undue speed leading to the approval of a new drug that has harmful side effects often perceptibly harms an identifiable group. *See id.* Consequently, an FDA official may err on the side of delay, especially if the potential liability of undue speed is large. *See id.* at 1523. Dean Cass then uses the analogy of one’s decision to purchase a lottery ticket to show that the retroactive nature of damage suits “also increases the amount of litigation, and, particularly where suit is against the government, it prompts more doubtful suits to be brought and to be pressed more vigorously.” *See id.* at 1527.

(B) *The Diversion of Time and Energy of  
Discretionary Decisionmakers*

The majority also relied on the cost of requiring officials who exercise discretionary functions to defend against FTCA actions. Both *Fisher Brothers*-type actions and direct challenges entail judicial scrutiny of such officials' conduct. The fact that the scrutiny is nonjudgmental in the first type does not necessarily mean that it will consume less of the decisionmaker's time and attention.<sup>201</sup>

Congress may have taken these "diversion" costs into account in enacting the discretionary function exception. The Court has done so in crafting rules of official immunity.<sup>202</sup> Moreover, it would be rational for Congress to have taken them into account in the FTCA context if, as was suggested above, a significant proportion of both *Fisher Brothers*-type and direct challenges have little merit.<sup>203</sup> The rationality of considering the diversion cost of FTCA suits would be reinforced by the availability of APA-type judicial review, as well as congressional oversight, of discretionary functions by executive branch officials. These forms of review lessen the need for tort liability to function as a deterrent to official misconduct.<sup>204</sup>

Nonetheless, the comparability of diversion costs generated by *Fisher Brothers*-type and direct challenges does not add much

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<sup>201</sup> See *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 286 (3d Cir. 1994) (en banc) (noting that "there is no difference in the . . . quantity of interference occasioned by judicial second guessing, whether the plaintiff purports to be attacking the data base on which the policy is founded or acknowledges outright that he or she is challenging the policy itself") (emphasis added), cert. denied, 116 S. Ct. 49 (1995).

<sup>202</sup> See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (holding that state prosecutors are entitled to absolute immunity from personal liability under 42 U.S.C. § 1983 for actions in their role as advocates for state). The Court in *Imbler* determined that one reason the common law afforded such immunity was so that a prosecutor's "energy and attention would [not] be diverted from the pressing duty of enforcing the criminal law" to defending against civil actions by resentful defendants. *Id.* at 425. The Court also observed that there were other remedies, besides civil liability, for prosecutorial misconduct. See *id.* at 429.

<sup>203</sup> See *supra* notes 197-200 and accompanying text (discussing factors that tend to encourage filing of tort claims against government).

<sup>204</sup> For that reason, Professor Rogers has argued that the discretionary function exception should be interpreted to bar any FTCA action that involves official conduct that could be reviewed under the APA. See Rogers, *supra* note 4, at 807-09.

support to the majority's conclusion. There is no legislative history or other evidence of congressional concern about such costs. And even if there were, the majority's reliance on that cost is dubious. *Fisher Brothers*-type actions often involve misconduct by low-level officials who are not authorized to consider public policy. In contrast, direct challenges often involve misconduct by high-level policymakers.<sup>205</sup> High-level misconduct may be easier to discover through APA-type review and congressional oversight than is low-level misconduct. If so, diversion costs may be more justifiable in *Fisher Brothers*-type actions than in direct challenges.<sup>206</sup>

(C) *The Effect on Executive Branch Policymaking*

With reference to the third category of social costs, the majority said:

It is not difficult to predict the impact upon policymakers that would result from the fear of virtually unlimited liability and the prospect of virtually interminable litigation associated with the plaintiffs' theory of liability. The "safest" course from the decisionmaker's personal perspective will be to wait for more conclusive data. But that course can carry a very high social cost. This is graphically illustrated by asking what will happen the next time a Commissioner of the FDA has to make decisions like those here involved if the current Commissioner is exposed to this litigation and the United States government is found liable for all the losses here alleged. We believe that the discretionary function exception was intended to make sure every Commissioner's judgment will not be skewed by such considerations.<sup>207</sup>

The court thus focused on the "personal perspective" of officials who exercise discretionary functions.<sup>208</sup> It believed that those officials want to avoid both personal involvement in time-consuming FTCA litigation and large money judgments in tort

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<sup>205</sup> See *United States v. Gaubert*, 499 U.S. 315, 335-36 (1991) (Scalia, J., concurring) (discussing differences between levels of misconduct).

<sup>206</sup> Cf. *Krent*, *supra* note 63, at 1545 (discretionary function exception justified to extent that "policymaking is checked by the political and administrative processes, which diminish the need for monitoring through tort actions").

<sup>207</sup> *Fisher Bros.*, 46 F.3d at 287.

<sup>208</sup> See *id.*

against the government. The first motive justifies application of the exception in a *Fisher Brothers*-type action; the second does not.

(1) Avoidance of Personal Involvement in  
FTCA Litigation

The majority's belief that officials who exercise discretionary functions want to avoid personal involvement in FTCA litigation is reasonable and reflects a reasonable understanding of the purpose of the discretionary function exception. This belief accords with one tenet of the immunity rules that protects officials from personal liability for claims based on constitutional violations. In an early decision for the Second Circuit justifying those rules, Judge Learned Hand "recognized that the very fact of a lawsuit, not the ultimate liability determination, would itself over-deter public officials from the satisfactory performance of their official duties."<sup>209</sup> In addition, the Supreme Court relied on the burdensome nature of litigation when it abandoned a partly subjective standard for qualified immunity in favor of a purely objective one.<sup>210</sup> Thus, precedent on official immunity supports the view of the *Fisher Brothers* majority that officials are motivated to avoid personal embroilment in lawsuits.

The majority's view also accords with a central tenet of administrative law. That tenet generally prohibits courts, in APA-type review proceedings, from "prob[ing] the mental processes" of high-level agency officials.<sup>211</sup> The prohibition on mental probing, like the rules of official immunity, "allow officials to perform their duties without fear of harassment from law-

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<sup>209</sup> William Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1159 (1996) (discussing *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949)).

<sup>210</sup> See *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), for proposition that qualified immunity rules are designed in part "to protect public officials from the 'broad-ranging discovery that can be peculiarly disruptive of effective government'").

<sup>211</sup> *United States v. Morgan*, 313 U.S. 409, 422 (1941) (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938)); see also, e.g., *Florida v. Lorion*, 470 U.S. 729, 744 (1985); see generally 1 DAVIS, *supra* note 104, § 8.6, at 396-401 (discussing courts' deference to specialized agencies' views); Daniel Gifford, *The Morgan Cases: A Retrospective View*, 30 ADMIN. L.J. 237, 276-87 (1978).

suits.”<sup>212</sup> Thus, administrative law, like official-immunity law, recognizes that officials want to avoid personal involvement in litigation. That insight fully applies to litigation under the FTCA.

Finally, the majority’s belief accords with the author’s experience in government service.<sup>213</sup> That experience indicates that high-level government officials abhor involvement in FTCA litigation. There are three apparent reasons for their aversion. First, officials regard tort actions as a personal affront, even if (as is true of FTCA actions) those actions do not threaten them with personal liability. Second, such actions require the officials to deal with career government litigators, whose objective and temperament differ from those of the official (often a political appointee). Third, and perhaps most important, officials believe that they cannot derive any personal benefit from devoting their time to defending an FTCA action. If the defense is successful, it is merely a disaster averted; good news is, from the official’s point of view, no news at all. On the other hand, if the defense is unsuccessful, the official may well suffer serious harm to his career.<sup>214</sup>

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<sup>212</sup> STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 868 (3d ed. 1992).

<sup>213</sup> Ideally, of course, the validity of the majority’s view should be judged by reference to empirical data. Unfortunately, such data is lacking.

<sup>214</sup> See ACUS REPORT, *supra* note 4, at 1523. The report concludes that

[i]f damages for . . . large-scale potential liabilities are in issue, the costs in personal time, in career opportunities, and in public exposure for the individual officer at the pivot of an enterprise liability exposure action well may approach or exceed the costs of involvement in litigation where only his own personal fortune is on the line.

*Id.* See also Krent, *supra* note 63, at 1537 n.23 (“The very existence of many lawsuits may hamper the effective workings of . . . an agency.”). In the author’s experience, high-level officials find APA-type review and congressional review of their policy-based decisions less objectionable than FTCA review. It appears that APA-type review is less objectionable for two reasons. First, it is predictable. It generally occurs only after final agency action, *see* 5 U.S.C. § 702 (1994), and often involves parties and issues that appeared in the administrative process. Second, APA-type review is perceived as less time-consuming than FTCA review, because APA-type review focuses on the very same administrative record that was compiled in the process of making the challenged decision. *Cf.* Krent, *supra* note 63, at 1536 n.19 (“Even under the more deferential standard of the APA, judicial review arguably has imposed a tremendous cost in terms of skewing the agency’s allocation of resources.”) (citations omitted). It appears that congressional oversight is less objectionable than FTCA review because, in the course of congressional oversight, an official can hope to accomplish more than simply avoiding personal embarrassment. The official can create congressional

If the majority was correct that high-level officials want to avoid personal involvement in FTCA actions, the question arises whether they may act on that desire. In theory, the answer is yes. As we have defined the *Fisher Brothers*-type action, it posits that an official can avert the plaintiff's injuries, and the resultant lawsuit, by the manner in which he exercises discretion. In practice, the answer is also likely to be yes. The majority wondered what would happen in future similar cases if it allowed the *Fisher Brothers* action to go forward.<sup>215</sup> One may imagine two possible ways in which an FDA Commissioner would react. As the dissent observed, the Commissioner might minimize reliance on objective data. For example, she could dispense with lab testing and make a decision based only on anonymous phone calls.<sup>216</sup> After all, if the dissent's view had prevailed in *Fisher Brothers*, the lab testing would have been the unprotected chink in the Commissioner's armor. Alternatively, as the majority suggested, the Commissioner could go to the other extreme by requiring more data, from a variety of sources, before making a decision.<sup>217</sup> By taking that route, the Commissioner would limit the causal role of negligence from any one source of data, thereby limiting the chance that negligence from any one source would be found to have "proximately caused" later injuries. In either event, the Commissioner would be acting differently from the way she would act if she had based her decision solely on considerations of public policy. It is quite reasonable to conclude that Congress wanted to avoid this skewing of the exercise of discretionary functions.

One possible objection to the majority's reasoning is that an official may be sued (or fear suit) under the FTCA however he

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allies who, unlike judges, do not come and go from one case to the next and can reward the official with larger appropriations for her agencies and other concrete benefits. See Ronald Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1176 (1981) ("There is considerable evidence that high-level officials are concerned about the budget for their bureaus and consistently attempt to secure larger budgets.") (footnote omitted).

<sup>215</sup> See *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 287 (3d Cir. 1994) (en banc) (discussing impact of allowing action to go forward), *cert. denied*, 116 S. Ct. 49 (1995).

<sup>216</sup> See *id.* at 292 (Roth, J., dissenting) (explaining that Commissioner might avoid testing altogether if liability is imposed in present case).

<sup>217</sup> See *id.* at 287 (stating that Commissioner might decide to wait for more conclusive data if liability is imposed in present case).

decides to exercise a discretionary function. If, for example, the FDA Commissioner decided *not* to ban the importation of a fruit based on reports of its contamination, the Commissioner may have been sued (or feared suit) by someone claiming to have been poisoned after eating allegedly contaminated fruit. That objection would have force if the likelihood and consequences of an FTCA action were about the same regardless how the Commissioner had exercised his discretion (or if the Commissioner perceived them as such). In those circumstances, the Commissioner's decision presumably would not be "skewed" by the prospect of an FTCA action; the risks of litigation posed by the courses of action available to the Commissioner would cancel each other out.

There are good reasons to believe, however, that the prospects of an FTCA action will differ depending on what decision an official makes in any particular case and that the official will perceive the difference. The decision is more likely to lead to an FTCA action if it has a clear and adverse economic impact on an identifiable group of people. It will not be immune from suit just because it also benefits many people, especially if the benefit is hard to identify and insignificant in each instance.<sup>218</sup> Commentators have noted that, because of these factors, tort actions tend to have asymmetric effects on official conduct.<sup>219</sup> *Fisher Brothers* illustrates the point: the benefit to the public of avoiding some possibly poisoned grapes is a diffuse, almost hypothetical good, while the harm of a grape ban is a concrete economic injury visited upon a specific group of people.

## (2) Avoidance of Large Money Judgments Against the Government

The majority erred in relying on its belief that officials who exercise discretionary functions want to avoid large tort judgments against the government. Although that belief may well be

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<sup>218</sup> See ACUS REPORT, *supra* note 4, at 1522 (discussing how impact of government action on specific group affects decision of whether to challenge that action in court).

<sup>219</sup> See *id.*; Cass & Gillette, *supra* note 197, at 284 & n.89, 290 & nn.99-100.

correct, an official's desire to avoid governmental liability should not guide the interpretation of the discretionary function exception for two reasons.

First, such an approach does not accord with Supreme Court precedent. This was shown in the discussion above of *Berkovitz's* implications for the "based upon" issue.<sup>220</sup> *Berkovitz* held that the government could be held liable for negligent lab testing by FDA officials despite the obvious possibility that such liability could influence the way the government regulated vaccine production. The influence would have arisen because of the desire of government officials to avoid government liability. *Berkovitz* thus makes clear that such a desire does not guide the interpretation of the exception.

Second, if courts gave effect to that desire by executive branch officials, they would be disregarding Congress's judgment in enacting the FTCA. It is fair to assume that every executive official wants to avoid government tort liability for every injury attributable to a government employee. The very existence of the FTCA signifies that Congress did not want courts invariably to honor that desire.

### 3. A Common Sense Evaluation of the Majority's Conclusion

Considering only the bottom line, the majority's conclusion makes better sense than the dissent, for two reasons. First, the majority opinion accords with common understanding of the phrase "based upon." Most lay people would agree, in the author's opinion, that the plaintiffs' claim was as much based upon the Commissioner's decision as it was based upon any antecedent laboratory negligence. After all, the Commissioner did not have to respond the way he did to the positive lab results. He could have decided not to withdraw Chilean grapes from the market, despite the positive results, perhaps in the belief that the results might be erroneous or that contamination was not widespread or seriously health-threatening.<sup>221</sup> By the

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<sup>220</sup> See *supra* notes 101-05 and accompanying text (discussing implications of *Berkovitz*).

<sup>221</sup> According to the complaint in *Fisher Brothers*, a grape cannot hold very much cyanide to begin with, and the cyanide breaks down into harmless constituents soon after it has been injected into the grape. See *Balmaceda* Pet. App., *supra* note 118, at 33a n.2 (panel opinion).

same token, he could have done exactly what he did, even if the tests had turned out negative. The testing program was necessarily looking for a needle in a haystack; lack of positive results could not utterly impeach the anonymous reports of contamination. Because the damages seem more closely connected to the Commissioner's decision than to the laboratory testing, it is hard to say that the claim to recover those damages was based upon the negligent testing but was not (at least *also*) based upon the Commissioner's decision.

Second, as discussed above, the dissent's approach would make it easy for plaintiffs to avoid the discretionary function exception by artful pleading. For example, the *Fisher Brothers* plaintiffs did not dispute that the Commissioner's decision to withdraw Chilean grapes from the domestic market constituted the exercise of a discretionary function. Yet they tried to separate that decision from his consideration of the testing data. The distinction is artificial. It ought not make the difference between large-scale liability and total immunity.

#### IV. A PROPOSED APPROACH FOR RESOLVING THE "BASED UPON" ISSUE

Part III determined that the *Fisher Brothers* court erred by using an "immediate cause" standard to resolve the "based upon" issue. This Part first describes an alternative approach to resolving the issue, which was adumbrated in Part III's evaluation of *Fisher Brothers*. The proposed approach is then applied to cases that have presented the "based upon" issue and been the subject of decisions by federal courts of appeals.

##### A. Description of the Proposed "Influence" Standard

As discussed, the *Fisher Brothers* court reasonably concluded that the discretionary function exception bars a court in an FTCA action, when determining proximate cause, from scrutinizing the decisionmaking process underlying protected conduct.<sup>222</sup> The court erred, however, in using an "immediate cause" standard for identifying those cases in which such

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<sup>222</sup> See *supra* notes 131-57 and accompanying text.

scrutiny is necessary. An FTCA action will require the “nonjudgmental” scrutiny that the *Fisher Brothers* court wanted to avoid whenever the plaintiff must, in order to establish proximate cause, prove that the allegedly wrongful unprotected conduct influenced the manner in which a discretionary function was exercised. It is therefore proposed that an “influence” standard be used to resolve the “based upon” issue.<sup>223</sup>

### 1. Overview of the Influence Standard

Here, briefly, is when and how the influence standard would operate. As discussed above, in many cases an FTCA plaintiff's injuries stem from a course of government conduct. When the government invokes the discretionary function exception in those cases, the court must decide what conduct the plaintiff's claim is based upon before it decides whether that conduct constitutes the exercise of a “discretionary function.” Resolution of the “based upon” issue is easy when the plaintiff claims that her injuries were proximately caused by conduct that itself constitutes the exercise of a discretionary function. In that situation, the claim is based upon the conduct identified as the proximate cause and is therefore barred by the exception. That conclusion follows from a recognition: (1) that, to resolve the claim, a court would have to assess the wisdom of the manner in which a discretionary function was exercised; and (2) that the exception was intended to prevent such “judgmental” judicial scrutiny.

Resolution of the “based upon” issue is harder, and the influence standard proposed here comes into play, when the plaintiff claims that his injuries were proximately caused by government conduct that does *not* constitute the exercise of a discretionary function (unprotected conduct). If, in order to prove that claim, the plaintiff must show that the unprotected conduct influenced the manner in which a discretionary function was exercised, the claim is based upon the exercise of a discretionary function. In

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<sup>223</sup> When the plaintiff must show that allegedly wrongful and unprotected government conduct influenced the exercise of a discretionary function, the exercise of a discretionary function is part of the “gravamen of the complaint.” The proposed approach is thus consistent with the Court's understanding in *Nelson* of the “natural meaning” of the term “based upon.” See *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993); *supra* note 112 (discussing *Nelson*).

contrast, if the plaintiff need not show any such influence in order to recover, the claim is not based upon the exercise of a discretionary function.<sup>224</sup>

## 2. Specific Features of the Influence Standard

### *a. Timing of "Protected Conduct"*

The results of applying the influence standard vary, depending on when the protected conduct occurred in relation to the unprotected conduct in the chain of events leading to injury. The influence standard focuses on whether the plaintiff must prove that the allegedly wrongful conduct affected protected conduct. Because of that focus, the influence standard does not bar cases in which the protected conduct occurs *before* the unprotected conduct. On the other hand, the influence standard bars some, but not all, cases in which the protected conduct occurs *after*, or at the same time as, the unprotected conduct.

The influence standard recognizes that, when the protected conduct occurs before the allegedly wrongful, unprotected conduct, a court need not examine the way in which the unprotected conduct affected the protected conduct. For example, suppose that prior to the Chilean Grape Scare, the FDA Commissioner's boss, the Secretary of Health and Human Services (HHS), adopted a regulation requiring the Commissioner, without exception, to withdraw from the domestic market any imported fruit that was found by an FDA laboratory to be contaminated. That regulation would have left the Commissioner in *Fisher Brothers* with no discretion upon receipt of the lab results from Philadelphia; he would have been required to take the actions that he took. In this hypothetical situation, the Secretary of HHS would have exercised a discretionary function *before* the allegedly wrongful, unprotected conduct (the laboratory negligence) occurred. In a lawsuit based on the laboratory negli-

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<sup>224</sup> The "influence" standard, described in terms of "probabilistic causation," *see supra* note 7, provides as follows: The exception applies when, in order to establish proximate cause, the plaintiff must show that the allegedly wrongful, unprotected conduct increased the probability that discretion would be exercised in the manner that it was, relative to the probability that the discretion would have been exercised in the same manner had the allegedly wrongful, unprotected conduct not occurred.

gence, the court would not have to scrutinize the process underlying the (HHS Secretary's) exercise of a discretionary function to determine whether the laboratory negligence was the proximate cause of injury. The chain of events leading from the allegedly wrongful conduct to the plaintiffs' injuries would not have included the discretionary conduct.<sup>225</sup>

The influence standard for resolving the "based upon" issue thus is consistent with *Berkovitz's* construction of the discretionary function exception. As discussed above, *Berkovitz* implies that the exception does not bar a claim that an official has negligently implemented a program that is based on public policy considerations if the official's conduct is not, itself, susceptible to public policy considerations.<sup>226</sup> In such "negligent implementation" claims, the protected conduct precedes the allegedly wrongful, unprotected conduct. The influence standard does not bar such claims.

The influence standard bars some, but not all, claims in which protected conduct occurs *after*, or at the same time as, the allegedly wrongful, unprotected conduct. A claim is barred only if the plaintiff must prove that the unprotected conduct influenced the subsequent (or contemporaneous) protected conduct. Suppose, for example, that Secret Service agents violated federal rules by allowing a television crew to film the execution of a warrant to search a suspect's apartment.<sup>227</sup> Suppose, too, that the evidence seized during the search caused an Assistant U.S. Attorney to seek and obtain an indictment against the suspect. The agents' actions clearly are unprotected, since they violate agency prescriptions.<sup>228</sup> The prosecutor's decision, just as clearly, is protected because it is a decision susceptible to public policy analysis.<sup>229</sup> If the suspect sues the government only for

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<sup>225</sup> The same conclusion would not necessarily follow if it were the FDA Commissioner, rather than her boss, who decided in advance that fruit testing positive for contamination would automatically be withdrawn from the market. Courts might well conclude that implicit in that decision was a reservation by the Commissioner of discretion to change her mind in a particular case. *Cf. Bagby & Gittings, supra* note 4, at 237 (discussing whether agency has implicit authority, in individual cases, to revise guidelines).

<sup>226</sup> *See supra* notes 98-100 and accompanying text.

<sup>227</sup> *Cf. Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994) (civil suit against Secret Service agents who invited television crew to videotape search of residence).

<sup>228</sup> *See, e.g., Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (holding that there is no discretion when regulations explicitly prohibit course of action).

<sup>229</sup> *See, e.g., United States v. Armstrong*, 116 S. Ct. 1480, 1486 (1996) (finding that deci-

damages from the media's invasion of his privacy, the suspect will not need to prove that the agents' conduct influenced the prosecutor's decision. The suspect's claim therefore would not be based upon the prosecutor's decision.

*b. Unimportance of Ability to Prove Influence*

It may be easy for the plaintiff in a particular case to show that allegedly wrongful, unprotected conduct influenced subsequent protected conduct. That fact does not affect the application of the influence standard.

*Fisher Brothers* illustrates the point. It may have been obvious from the circumstances of the case that the allegedly negligent laboratory results influenced the Commissioner's decision to withdraw Chilean grapes from the domestic market. After all, when the Commissioner ordered the lab tests, he apparently intended to consider their results. *Fisher Brothers* may therefore have been willing to try to prove proximate cause without testimony by, or discovery from, the Commissioner. Even so, their claim would be barred under the influence standard.

The influence standard is justified primarily by the risk that the prospect of such suits will skew policymaking. To avoid that risk, such suits have to be barred categorically, without regard to a particular plaintiff's willingness to structure her suit in a way that avoids the potential for that suit to skew policymaking.<sup>250</sup>

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sion to prosecute does not lend itself to judicial review); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (same).

<sup>250</sup> Cf. *United States v. Stanley*, 483 U.S. 669, 682-83 (1987) (rejecting proposed test under which *Bivens* remedy would be available for injury incident to military service if maintenance of particular suit seeking recovery for that injury would not call into question military discipline; "the mere process" of applying test to each case "would disrupt the military regime"). For the reason discussed in the text, the proposed approach would also bar a *Fisher Brothers*-type suit if the government attorneys defending the suit conceded that the allegedly wrongful, unprotected conduct influenced subsequent protected conduct: Such a concession would not affect the fact that the mere prospect of such suits could skew policymaking by executive branch officials. A suit in that situation would be barred for the additional reason that executive-branch officials cannot waive federal sovereign immunity; only Congress can do so, by legislation. See, e.g., *United States v. Mitchell*, 463 U.S. 206, 215-16 (1983) (stating that only legislature, through legislation, can consent to suits against government); *United States v. Shaw*, 309 U.S. 495, 501 (1940) (stating that officer cannot confer jurisdiction through his actions).

c. *Settings in Which the Influence Standard Applies*

The influence standard applies in all of the factual settings in which the “based upon” issue may arise: in cases involving the regulation of public safety; the provision of public services; the management of public lands; the regulation of businesses; and criminal law enforcement.<sup>231</sup> The *Fisher Brothers* court observed that the protected conduct at issue there — the FDA Commissioner’s decision to withdraw Chilean grapes from the domestic market — was a regulatory decision.<sup>232</sup> Regulatory decisions typically are distinguished from, for example, governmental decisions about public works and public lands.<sup>233</sup> But the *Fisher Brothers* court, properly, did not limit its holding to the regulatory context.<sup>234</sup> The Supreme Court, in *Berkovitz*, rejected the government’s argument that the discretionary function exception immunizes all regulatory action, whether or not it involves policymaking discretion.<sup>235</sup> By the same token, the Court has emphasized that the exception protects policy judgments “not of a regulatory nature.”<sup>236</sup> Thus, the Court has made clear that the exception protects discretionary policymaking whether or not it takes place in a regulatory program. Likewise, the influence standard is applicable both in and outside of the regulatory context.

d. *Nonexclusivity of the Influence Standard*

The influence standard focuses on one situation — the *Fisher Brothers*-type action — in which a court should conclude that a claim is based upon the exercise of a discretionary function. There are two other such situations, and possibly a third.

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<sup>231</sup> See *infra* Part IV.B (describing cases in which “based upon” issue has arisen).

<sup>232</sup> See *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 286-87 (3d Cir. 1994) (en banc), *cert. denied*, 116 S. Ct. 49 (1995).

<sup>233</sup> See, e.g., *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 810 (1984) (discussing distinction between regulatory and non-regulatory functions).

<sup>234</sup> See *Fisher Bros.*, 46 F.3d at 282 (broadly rejecting attempt to circumvent discretionary function exception).

<sup>235</sup> See *Berkovitz v. United States*, 486 U.S. 531, 538 (1988) (rejecting government’s argument that discretionary function exception precludes liability for “all acts arising out of regulatory programs of federal agencies”).

<sup>236</sup> See *Varig Airlines*, 467 U.S. at 810.

The first is obvious and has already been described. As the courts have assumed, a claim is based upon protected conduct when the plaintiff identifies that very conduct as the wrongful conduct that proximately caused his injuries. Thus, the exception would have barred a claim by the growers in *Fisher Brothers* that their injuries were proximately caused by the FDA Commissioner's wrongful decision to withdraw Chilean grapes from the domestic market. Such a claim would require a court to scrutinize the wisdom of an official's exercise of a discretionary function. The claim would therefore be based upon the protected conduct. In this situation, courts should give controlling weight to the plaintiff's proximate cause allegation.

Second, although the influence standard does not categorically bar claims in which the protected conduct *precedes* the allegedly wrongful, unprotected conduct, proof of such claims in individual cases is limited by the statutory term "based upon." The limit comes into play when the plaintiff tries to use the manner in which a discretionary function was exercised to show that subsequent unprotected conduct was wrongful.

For example, suppose a plaintiff claims that she was injured because of a laboratory scientist's negligent failure to perform a required test on a lot of polio vaccine. Suppose, further, that the scientist was trained by the government; that the training was inadequate; and that the inadequacy of the training contributed to the scientist's failure to perform the required test. Assume (as the Supreme Court would likely hold) that the government's decisions regarding the training of its scientists is protected conduct, but that the duty to carry out the required test is unprotected conduct.<sup>257</sup> A claim based on the failure to perform the test would not be categorically barred. That does not mean, however, that the plaintiff could introduce evidence of the government's inadequate training to show that the scientist acted negligently. On the contrary, a court should refuse to consider that evidence; if the court relied on that evidence to find negligence, it would be second-guessing the government's decisions regarding training. Thus, when a plaintiff uses evidence of the way in which a discretionary function was exercised

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<sup>257</sup> See *supra* notes 66-80 and accompanying text (discussing *Berkovitz*).

to show that later, unprotected conduct was negligent or otherwise “wrongful,” the plaintiff’s claim is based upon the protected conduct.<sup>238</sup>

Justice Scalia’s concurrence in *Gaubert* suggests a third possible situation in which a claim may be based upon the exercise of a discretionary function.<sup>239</sup> Justice Scalia argued that bank regulators exercised a discretionary function in prescribing and enforcing the conditions under which they would refrain from taking over a bank.<sup>240</sup> That was true, he maintained, even if the regulators’ enforcement of a particular condition — for example, their selection of an outside consultant to advise the bank — was negligent and entailed only “ordinary standards of business judgment,” and not “consider[ation] [of] matters of Government policy.”<sup>241</sup> Justice Scalia reasoned that such actions were part and parcel of the broader decision whether to take over the bank, a decision that plainly involved protected discretion.<sup>242</sup> This reasoning may be justified as reflecting an interpretation of the term “based upon” — the claims ostensibly based upon the negligent selection of a consultant were actually based upon the decision whether to take over the bank. Or, the reasoning may reflect an interpretation of the term “function”:

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<sup>238</sup> Proof that conduct was “wrongful” means proof that, if the conduct were that of a private party, the private party would be liable under the tort law of the state where the conduct occurred. See *supra* note 40 and accompanying text (describing Court’s interpretation of “wrongful” in discretionary function exception). Proof that conduct was wrongful is thus distinct from proof that conduct violates the Court’s two-step test for identifying the exercise of discretionary conduct. The former is necessary to establish substantive liability in tort; the latter is necessary to prove that the government has waived sovereign immunity from tort liability. Although a plaintiff may not use evidence of the prior exercise of a discretionary function to show that later conduct was wrongful, that evidence may be used to show that the later conduct failed the two-step test. For example, recall the hypothetical in which the Secretary of HHS exercises a discretionary function by promulgating a regulation requiring the FDA Commissioner to withdraw food from the market if an FDA laboratory finds it to be contaminated. See *supra* text accompanying note 225. A plaintiff may rely on that regulation to show that the Commissioner’s failure, after such a laboratory finding, to withdraw food from the market constitutes unprotected conduct.

<sup>239</sup> See *United States v. Gaubert*, 499 U.S. 315, 334-39 (1991) (Scalia, J., concurring) (describing his analysis of why bank regulators’ conduct was protected by discretionary function exception).

<sup>240</sup> See *id.* at 338-39 (Scalia, J., concurring); *supra* notes 106-11 and accompanying text (discussing *Gaubert*).

<sup>241</sup> See *Gaubert*, 499 U.S. at 337 (Scalia, J., concurring).

<sup>242</sup> See *id.*, at 338-39 (Scalia, J., concurring).

The selection of a consultant was one of the acts that made up the bank regulators' exercise of a discretionary function — namely, determining under what conditions to take over the bank.<sup>243</sup>

### B. Application of the Influence Standard

Although *Fisher Brothers* has been the only decision by a federal court of appeals to address the “based upon” issue, the issue has arisen in other cases decided by federal courts of appeals. An application of the influence standard to the facts of those cases yields principles for resolving four recurring types of challenges by FTCA plaintiffs: (1) challenges based on the data underlying the exercise of a discretionary function; (2) challenges based on a procedural violation accompanying the exercise of a discretionary function; (3) challenges to the implementation of a decision based on protected discretion; and (4) challenges to various aspects of the criminal law enforcement process.

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<sup>243</sup> As discussed *supra* notes 40-43 and accompanying text, it appears that, in the discretionary function exception, Congress used the term “function” in contradistinction to “act.” In that prior discussion, it was suggested that the distinction signifies that not all discretionary acts are protected by the exception. The distinction may, in the alternative, signify that some *non-discretionary* acts *are* protected by the exception. The latter interpretation would hold true if Congress used function to mean the set of acts carried out to achieve an official objective. *Cf.* Rogers, *supra* note 4, at 798, 805. If so, unprotected acts could be part of a broader, protected “function.” There is a problem, however, with interpreting the term “function” too broadly. An overly broad interpretation would lead the discretionary function exception to shield from liability many official actions that violate statutory or regulatory prescriptions or that, though discretionary, are not susceptible to public policy considerations. An expansive definition of “function” also would conflict with *Berkovitz*. The government argued in *Berkovitz* that all of the allegedly wrongful conduct, including the misapplication of objective testing criteria, was included within the FDA’s discretionary function of regulating the drug industry. *See* Brief for Respondents, at 13-14, 24-25, *Berkovitz v. United States*, 486 U.S. 531 (1988) (No. 87-498) (focusing on whether agency function, rather than act or duty, is discretionary). The Court’s decision in *Berkovitz* implicitly rejected that argument and the broad interpretation of the term “function” on which the argument was premised. *See Berkovitz*, 486 U.S. at 534 (deciding that only certain actions were discretionary).

1. FTCA Claims Ostensibly Based Upon the Data Underlying the Exercise of a Discretionary Function

*Fisher Brothers*, of course, involved a claim ostensibly based upon the negligent collection of data used in the subsequent exercise of a discretionary function. The reasoning of *Fisher Brothers* leads to the conclusion that, in general, such claims are barred by the discretionary function exception.<sup>244</sup> That is also the usual (but not invariable) result under the influence standard, as shown by its application to the facts of four other cases involving negligent data collection.

a. *Johnson v. United States Department of Interior*<sup>245</sup>

In *Johnson*, the plaintiff claimed that a park ranger was careless both when he took a report from a hiker about a hiking accident and when he conveyed that report to the rangers responsible for deciding whether and when to rescue the hiker's companions.<sup>246</sup> One of the hiker's companions died before the rescue mission found him, and his estate brought an FTCA action based on the rangers' conduct. The Tenth Circuit initially determined that the rangers' decision to undertake a rescue mission was protected conduct.<sup>247</sup> Thus, the estate could not recover for undue delay in deciding to undertake the mission.<sup>248</sup> The court then determined that the protection afforded to the rescue decision also extended to the antecedent conduct of gathering and conveying information about the accident:

The gathering of information from an individual reporting a potential problem and the communication between rangers is inextricably tied to the rescue decision. The ultimate decision is necessarily based upon this information. With respect to

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<sup>244</sup> See *supra* notes 176-221 and accompanying text (discussing majority holding in *Fisher Brothers*).

<sup>245</sup> 949 F.2d 332 (10th Cir. 1991).

<sup>246</sup> See *id.* at 334-35.

<sup>247</sup> See *id.* at 338-39.

<sup>248</sup> See *id.* at 335, 338-39.

each reported incident, Park rangers are in the unique position to assess the quality and quantity of information offered. No meaningful way exists for this court to consider the nature of these acts apart from the total rescue decision.<sup>249</sup>

The holding in *Johnson* was correct. Applying the influence standard, the discretionary function exception barred not only the claim directly challenging the rescue decision but also the claims ostensibly based upon the antecedent, allegedly improper information gathering and reporting. That is true even if the information gathering and reporting were unprotected conduct because, for example, they were not susceptible to public policy considerations. The claims regarding that presumably unprotected conduct were barred because, to establish that that conduct was the proximate cause of the plaintiff's injuries, the plaintiff had to show that this unprotected conduct influenced protected conduct. Specifically, the hiker's estate in *Johnson* had to prove that the carelessness of one ranger in taking and conveying the report of the hiking accident influenced the subsequent decision by other rangers to undertake a rescue (in particular, its timing). The claims of negligent information gathering and reporting were therefore based upon protected conduct and barred by the discretionary function exception.

*b. Patterson v. United States*<sup>250</sup>

In *Patterson*, the plaintiffs claimed that a mine inspector from the federal Office of Surface Mining (OSM) negligently reported the conditions at a mine, and that his negligence caused OSM to decide not to use emergency funds to improve those conditions.<sup>251</sup> The plaintiffs purported to challenge only the inspector's conduct, and not OSM's subsequent discretionary decision not to spend emergency funds.<sup>252</sup> A Fourth Circuit panel held that the discretionary function exception did not bar the action, because the inspector violated mandatory inspection

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<sup>249</sup> *Id.* at 339-40.

<sup>250</sup> 856 F.2d 670 (1988), *vacated*, 866 F.2d 1538, *rev'd on reh'g en banc*, 881 F.2d 127 (4th Cir. 1989) (affirming district court decision).

<sup>251</sup> *See id.* at 671.

<sup>252</sup> *See id.* at 673.

guidelines.<sup>253</sup> The Fourth Circuit sitting en banc, however, vacated the panel's decision and held that the exception *did* bar the action, because OSM's decision not to spend emergency funds involved protected discretion.<sup>254</sup> The en banc court did not explain why it chose to treat the claim as being based upon the protected conduct of OSM rather than the unprotected conduct of the inspector.

The en banc court's choice can be justified by applying the influence standard. In order to demonstrate proximate cause, plaintiffs in *Patterson* had to show that the allegedly wrongful, unprotected conduct influenced protected conduct — that the failure of mine inspectors to accurately report on mine conditions influenced OSM's decision not to spend emergency funds. The plaintiffs' claim was therefore based upon OSM's decision (protected conduct) and barred by the exception.

c. *In re Glacier Bay*<sup>255</sup>

*Glacier Bay* concerned "the methods and procedures the government uses to prepare, as a public service, nautical charts of United States waters."<sup>256</sup> The case arose when a ship using one of those nautical charts ran aground on a rock in Cook Inlet, Alaska. The rock was not noted on the chart. Companies with a security interest in the ship sued under the FTCA. They claimed that, in omitting the rock, government hydrographers had violated mandatory government surveying guidelines. The government argued that the claim was barred by the discretionary function exception, even if the hydrographers' conduct was unprotected, because the subsequent decision by higher-level officials to approve public release of the chart was protected.<sup>257</sup> The district court accepted that argument and dismissed the action.<sup>258</sup> The Ninth Circuit vacated and remanded in relevant part, thereby

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<sup>253</sup> See *id.* at 673-74.

<sup>254</sup> *Patterson v. United States*, 881 F.2d 127, 127-28 (4th Cir. 1989).

<sup>255</sup> 71 F.3d 1447 (9th Cir. 1995). While in the Justice Department, the author worked on *Glacier Bay*.

<sup>256</sup> *Id.* at 1450.

<sup>257</sup> See *id.* at 1449-51.

<sup>258</sup> See *id.* at 1450-51.

allowing the claim to proceed.<sup>259</sup> The Ninth Circuit's decision is correct under the influence standard.

The Ninth Circuit determined that the district court had disregarded *Berkovitz* and other decisions by relying on the discretionary nature of the ultimate decision to approve public release of the chart.<sup>260</sup> "The proper question to ask," the court of appeals explained, "is not whether the Government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance."<sup>261</sup> The court determined that "[e]ven if [government] reviewers had discretion to approve the final charts, such discretion would not shield allegedly negligent non-discretionary acts by the hydrographers."<sup>262</sup> The court recognized the possibility that, "because [government] supervisors ultimately approved the surveys in question, [the plaintiffs] may not be able to show any alleged hydrographer errors actually caused them injury."<sup>263</sup> That possibility, in the court's view, implicated the issue of proximate cause, an issue of tort liability that was "irrelevant to discretionary function inquiry."<sup>264</sup>

On the surface, the fact pattern of *Glacier Bay* parallels that of *Fisher Brothers*. In both cases, the plaintiff purported to challenge unprotected data gathering; that unprotected conduct was followed by protected conduct. In both cases, moreover, the *protected* conduct was, at least, a "but for" cause of the alleged injuries. The security holders in *Glacier Bay* would have had no claim against the government if the chart had not been approved for public release. The plaintiffs in *Fisher Brothers* would not have suffered significant economic harm if the FDA Commissioner had decided not to withdraw Chilean grapes from the market. Accordingly, in both cases the "sequential" condition for applying the influence standard was satisfied: the protected conduct occurred *after* the unprotected conduct in the chain of events leading to the alleged injuries.<sup>265</sup>

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<sup>259</sup> See *id.* at 1451-54.

<sup>260</sup> See *id.* at 1451.

<sup>261</sup> *Id.* at 1455 ("We reemphasize that analysis of the discretionary function exception must proceed on an act by act basis.").

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> See *supra* Part IV.A.2.a (explaining that results of applying influence standard vary,

Closer consideration under the influence standard, however, reveals a distinction that justifies the different results of *Glacier Bay* and *Fisher Brothers*. To establish proximate cause, the plaintiffs in *Fisher Brothers* had to show that the Philadelphia lab results influenced the FDA Commissioner's decision to ban grapes.<sup>266</sup> In contrast, the plaintiffs in *Glacier Bay* did not have to show that the omission of the fatal rock influenced the decision to approve the public release of the chart.<sup>267</sup> Put another way, they did not have to show that the official who approved the chart relied on the "truth of the matter" asserted by the allegedly negligent omission. By comparison, the growers in *Fisher Brothers* did have to show that the FDA Commissioner relied at least to some extent on the truth of the matter asserted by the allegedly negligent Philadelphia lab results.<sup>268</sup> Because the plaintiffs in *Glacier Bay* did not have to show that the unprotected conduct influenced the protected conduct, their claim regarding the unprotected conduct was not based upon the protected conduct under the influence standard.<sup>269</sup> The Ninth Circuit therefore correctly reversed the dismissal of the action.<sup>270</sup>

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depending on whether protected conduct precedes, follows, or occurs at same time as, allegedly wrongful, unprotected conduct).

<sup>266</sup> See *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 285-86 (3d Cir. 1994) (en banc), cert. denied, 116 S. Ct. 49 (1995).

<sup>267</sup> See *Glacier Bay*, 71 F.3d at 1454-55.

<sup>268</sup> To put the same point in terms of "probabilistic causation," see *supra* note 224, the plaintiffs in *Glacier Bay* did not have to show that the omission of the rock increased the probability that the chart would be approved, compared to the probability that it would have been approved had the rock's presence been noted.

<sup>269</sup> See *Glacier Bay*, 71 F.3d at 1453.

<sup>270</sup> The Ninth Circuit was also correct in observing in *Glacier Bay* that the government might still rely on the discretionary nature of the chart review process to defeat recovery. See *id.* at 1451. The government could attempt to show that, because of the relevant officials' broad discretion to approve or disapprove the release of a chart, it was entirely speculative whether the defective chart would be approved. Such a showing might, for example, have entailed evidence of low approval rates. The evidence might so attenuate the causal link between the hydrographer's oversight and the ship's grounding that a court could decide, as a matter of state law, that proximate causation was not proven. In addition, the government might altogether sever the causal link between the unprotected conduct and the injuries through evidence that the chart approval process itself was so faulty that it constituted a superseding cause under state law. Cf. *Exxon Co., U.S.A. v. Sofec, Inc.*, 116 S. Ct. 1813, 1819 (1996) (interpreting admiralty law to incorporate "superseding cause" doctrine). An FTCA claim directly challenging the chart-approval decision would be barred by the discretionary function exception, as the *Glacier Bay* court held. See *Glacier Bay*, 71

d. *Appley Brothers v. United States*<sup>271</sup>

In *Appley Brothers*, a federally licensed grain warehouse was operating with inventory shortages.<sup>272</sup> Department of Agriculture inspectors noted those shortages during an inspection, directed their elimination, and later conducted a special inspection to check compliance with the ordered elimination of the shortages.<sup>273</sup> Although the shortages continued, they were negligently not noted by the inspectors during the special inspection.<sup>274</sup> As a result, plaintiff farmers and others continued to deposit grain with the warehouse.<sup>275</sup> Ultimately, the warehouse's federal license to operate was revoked. The plaintiffs claimed in their FTCA action that the Department of Agriculture would have revoked the license sooner, causing plaintiffs to lose less money, but for the failure of federal warehouse inspectors during the special inspection to follow mandatory inspection procedures.<sup>276</sup> The government argued that the claim was barred because of the discretionary nature of the decision whether to revoke a warehouse license.<sup>277</sup>

The Eighth Circuit held that the claim was not barred by the discretionary function exception.<sup>278</sup> The court agreed with the government that the decision whether to revoke the license was protected conduct.<sup>279</sup> On the other hand, the court agreed with the plaintiffs that the inspectors' conduct was not protected, because it "violated . . . the mandatory requirements of the grain inspector's handbook."<sup>280</sup> The court considered it dispositive that "[t]he causative fact in [the plaintiffs'] claims is the inspectors' failure to follow the mandatory requirements of the handbook, not the Secretary's failure to revoke [the

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F.3d at 1454 (recognizing that chart approval requires discretionary judgment).

<sup>271</sup> 7 F.3d 720 (8th Cir. 1993).

<sup>272</sup> *See id.* at 721.

<sup>273</sup> *See id.* at 721-22.

<sup>274</sup> *See id.*

<sup>275</sup> *See id.*

<sup>276</sup> *See id.* at 722-23.

<sup>277</sup> *See id.* at 723.

<sup>278</sup> *See id.* at 725-27.

<sup>279</sup> *See id.* at 725, 727.

<sup>280</sup> *See id.* at 725.

warehouse's] license."<sup>281</sup> The inspectors' failure to determine whether inventory shortages continued to exist, the court held, "prevented the Secretary from exercising discretion to decide whether to revoke [the warehouse's] license."<sup>282</sup>

The Eighth Circuit believed that the case before it posed "a very close question,"<sup>283</sup> and the question remains close when the case is analyzed by applying the influence standard. The influence standard plainly bars a claim when the plaintiff must show that the unprotected conduct affected the *way* in which an official exercised a discretionary function.<sup>284</sup> It is less clear whether the standard also should bar a claim when the plaintiff must show that unprotected conduct caused an official to *fail* to exercise a discretionary function. Resolution of the latter claim would not require a court to examine the basis for a policy-based, substantive decision — such as a decision not to revoke a warehouse license — since no such decision was made.

The same difficulty arises in many FTCA cases that do not present the "based upon" issue. In those cases, plaintiffs claim that they were injured because of the failure of a government official to exercise protected discretion.<sup>285</sup> Such claims do not require the courts to assess the wisdom of any policy-based, substantive decision.<sup>286</sup> Nonetheless, most courts, including the Eighth Circuit, have held that such claims fall within the discretionary function exception.<sup>287</sup> Those courts rely on the language of the exception which bars not only claims based upon the exercise of a discretionary function but also claims based upon the "*failure to exercise*" a discretionary function.<sup>288</sup>

<sup>281</sup> *Id.* at 726.

<sup>282</sup> *Id.* at 725-26.

<sup>283</sup> *Id.* at 725.

<sup>284</sup> *See id.* at 725-27. It is clear, for example, that the plaintiffs in *Fisher Brothers* would have had to show that the positive test results from Philadelphia influenced the Commissioner's decision to withdraw Chilean grapes from the market, and that the plaintiffs in *Johnson* would have had to show that the negligent reporting by a park ranger influenced the decision concerning whether and when to undertake a rescue.

<sup>285</sup> *See, e.g., In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d at 982, 996 (9th Cir. 1987) (finding that plaintiff's claims were based on government's failure to warn of radiation exposure danger).

<sup>286</sup> *See id.* at 998 (holding that government's lack of policy to warn road workers of presence of dioxin qualified as discretionary function).

<sup>287</sup> *See Bacon v. United States*, 810 F.2d 827, 829 (8th Cir. 1987); *Fishback & Killefer*, *supra* note 4, at 299 & n.51 (citing cases relying upon discretionary function exception).

<sup>288</sup> *See, e.g., Atmospheric Testing Litig.*, 820 F.2d at 996-99 (indicating that statute exempts

The reasoning of these courts supports the conclusion that, applying the influence standard, the claim in *Appley Brothers* was based upon the failure to suspend or revoke the grain warehouse license. Plaintiffs in *Appley Brothers* alleged that their injuries were proximately caused by the inspectors' failure to note the continuing grain shortages.<sup>289</sup> To support that allegation, plaintiffs had to prove that the inspectors' failure influenced higher-level officials not to suspend or revoke the license.<sup>290</sup> To assess that proof, the court would have had to scrutinize the reason for the latter officials' failure to act.<sup>291</sup> The discretionary function exception bars such scrutiny.<sup>292</sup>

## 2. FTCA Claims Ostensibly Based Upon Procedural Violations Accompanying the Exercise of a Discretionary Function

In two cases decided by federal courts of appeals, FTCA plaintiffs alleged that their injuries were proximately caused by the

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any claim based on failure to exercise or perform discretionary function).

<sup>289</sup> See *Appley Bros. v. United States*, 7 F.3d 720, 721-22 (8th Cir. 1993).

<sup>290</sup> See *id.* at 725-26.

<sup>291</sup> See *id.* at 723-27 (discussing effect of failure to check warehouse's compliance with noted violations on application of discretionary function exception).

<sup>292</sup> The correctness of the majority view on the "failure to exercise discretion" issue is beyond the scope of this Article. In addressing that issue, however, courts should recognize that two kinds of discretion may be involved. An official may have both "substantive" discretion — discretion to make a substantive decision, such as whether to revoke a warehouse license — and "circumstantial" discretion — discretion to decide under what circumstances he will exercise substantive discretion. If the official has circumstantial discretion, an action directly challenging his failure to exercise substantive discretion would require judgmental judicial scrutiny of the way in which the official exercised circumstantial discretion. See *Atmospheric Testing Litig.*, 820 F.2d at 996-99 (discussing government's failure to warn test participants of health problems resulting from radiation exposure). In other words, the court must decide whether it was wise for the official not to act. See *id.* at 997 (discussing magnitude of risk to which test participants were exposed and potential risk of creating public anxiety if government gave warnings). Similarly, when the plaintiff in a *Fisher Brothers*-type action claims that unprotected conduct led to a subsequent failure to exercise substantive discretion, the court must, to resolve the claim, apply nonjudgmental judicial scrutiny to the manner in which circumstantial discretion was exercised. See *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 285-87 (3d Cir. 1994) (en banc) (analyzing exercise of circumstantial discretion), *cert. denied*, 116 S. Ct. 49 (1995). In other words, the court must decide whether the allegedly wrongful, unprotected conduct increased the probability that a discretionary function would not be exercised, relative to the probability that it would have been exercised had the wrongful conduct not occurred. See *id.* at 286.

government's violation of a procedural requirement associated with the exercise of a discretionary function. The courts of appeals in these cases reached conflicting results. The proper resolution of this conflict can be determined by applying the influence standard.

*a. Jayvee Brand, Inc. v. United States*<sup>293</sup>

In *Jayvee Brand*, the Consumer Product Safety Commission (CPSC) issued a regulation banning the use of a flame retardant called "Tris" on children's clothing.<sup>294</sup> Manufacturers of children's sleepwear sued the CPSC under the FTCA, claiming that, in imposing the ban, the CPSC had failed to follow the statutorily required procedures.<sup>295</sup> Although the D.C. Circuit provided scant reasoning for its holding,<sup>296</sup> it upheld the dismissal of the suit.<sup>297</sup> The influence standard, however, provides a principled basis for the holding.

In the lead opinion, Judge Bork concluded that "making a discretionary decision without following mandated procedures should be characterized, for the purposes of the FTCA, as an abuse of discretion."<sup>298</sup> The discretionary function exception applies, by its terms, "whether or not the discretion involved be abused."<sup>299</sup> Thus, Judge Bork would have brought the CPSC's procedural violation within the terms of the statute by treating it as a component of the agency's substantive decision to ban Tris. In support of that result, Judge Bork cited: (1) his finding "absolutely no evidence that in enacting the FTCA Congress intended to police internal governmental law-making procedure with

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<sup>293</sup> 721 F.2d 385 (D.C. Cir. 1983).

<sup>294</sup> *See id.* at 387. The CPSC determined that Tris was a carcinogen. *See id.*

<sup>295</sup> *See id.*

<sup>296</sup> *See generally* RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 1006 (2d ed. 1994) (discussing *Jayvee Brand*).

<sup>297</sup> *See Jayvee Brand*, 721 F.2d at 395 (affirming dismissal by district court). Judge Bork wrote the lead opinion, one section of which concluded that the suit was properly dismissed under the discretionary function exception. *See id.* at 389-90. Senior Circuit Judge Lumbard concurred in the dismissal of the suit based on a different section of Judge Bork's opinion, which did not discuss the discretionary function exception. *See id.* at 395 (Lumbard, J., concurring).

<sup>298</sup> *Jayvee Brand*, 721 F.2d at 390.

<sup>299</sup> 28 U.S.C. § 2680(a) (1994).

damage actions"; and (2) his view that the "thrust" of the FTCA evinced the contrary intention.<sup>300</sup> Senior Circuit Judge Lumbard concurred solely on the basis of those two impressionistic remarks about the FTCA in general; he did not believe, however, that the result could be specifically justified under the discretionary function exception "without straining unduly on common sense or past precedent."<sup>301</sup> The remaining member of the panel, Judge Edwards, wrote separately to state that he concurred "only in the result."<sup>302</sup>

Applying the influence standard, the court would have first recognized that the plaintiffs purported to base their suit upon the CPSC's violation of procedural requirements. That procedural violation, of course, was unprotected conduct.<sup>303</sup> The government argued, in effect, that the suit was actually based, not upon the procedural violations, but upon the CPSC's substantive decision to ban Tris, which the plaintiffs conceded was protected conduct.<sup>304</sup> The "based upon" issue is resolved by determining that, to establish proximate causation, plaintiffs would have had to show that the unprotected conduct influenced the protected conduct: more specifically, that the CPSC's procedural violations influenced its substantive decision to ban Tris. Thus, the action was based upon the substantive decision, and, because that decision was protected conduct, the action was barred by the discretionary function exception.<sup>305</sup>

Application of the influence standard explains the relevance of factors that were cited as significant, without explanation, in the opinions in *Jayvee Brand*. As discussed above, the influence standard recognizes that the kind of judicial scrutiny that the

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<sup>300</sup> See *Jayvee Brand*, 721 F.2d at 391-92.

<sup>301</sup> *Id.* at 395 (Lumbard, J., concurring) ("I would rest our affirmance squarely on the finding that Congress never intended to open the federal government to tort liability for procedural infractions in the promulgation of administrative rules."); *id.* at 393 (Lumbard, J., concurring) (concluding that "at bottom we arrive at our decision because we do not know how to confine this new cause of action were we to accept the broad principle propounded by [plaintiffs]").

<sup>302</sup> See *id.* at 395 (Edwards, J., concurring).

<sup>303</sup> See *id.* at 389 (stating that procedural violations involve non-discretionary decisions).

<sup>304</sup> See *id.*

<sup>305</sup> See *id.* at 389-90 (dismissing case because of discretionary function exception); cf. Bagby & Gittings, *supra* note 4, at 236-37 (criticizing result in *Jayvee Brand* and arguing that Judge Bork's decision does not encourage agencies to act responsibly).

*Fisher Brothers* majority wanted to avoid will not be required when the protected conduct occurs *before* (rather than after or at the same time as) the unprotected conduct.<sup>306</sup> Judge Bork's remark, that in *Jayvee Brand* "[p]rocedure and substance [were] intertwined,"<sup>307</sup> points up the contemporaneous occurrence of the protected and the unprotected conduct in that case. Judge Bork again alluded to the relevance of the sequence in which the protected conduct and the unprotected conduct occurred when he distinguished the case before the court from *Hatahley*<sup>308</sup> — in which the Court held that the exception did not bar an FTCA claim based on a procedural violation — on the ground that in *Hatahley* the protected conduct occurred *before* the unprotected conduct on which the claim was based.<sup>309</sup> That distinction is appropriate for the same reasons, discussed above, that the exception would not have applied if, before the Chilean Grape Crisis arose, the Secretary of HHS had promulgated a regulation requiring the FDA Commissioner to ban any fruit that was found by an FDA laboratory to be contaminated.<sup>310</sup>

Both Judge Bork and Senior Circuit Judge Lumbard also mentioned the causal connection between the unprotected conduct and the protected conduct. Judge Bork remarked that the plaintiffs "might very well have been subjected to the same Tris ban had statutory procedures been followed."<sup>311</sup> Judge

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<sup>306</sup> See *supra* Part IV.A.2.a.

<sup>307</sup> *Jayvee Brand*, 721 F.2d at 389.

<sup>308</sup> See *supra* notes 39-40 and accompanying text (discussing *Hatahley*).

<sup>309</sup> See *Jayvee Brand*, 721 F.2d at 389.

It is clear that the exception does not apply when a government employee fails to follow obligatory procedures in applying a rule that itself is an exercise of discretion. *Hatahley v. United States*, 351 U.S. 173 . . . (1965) . . . . This entails liability for improper executive action occurring *after and in the implementation of a rule previously adopted*. It is equally clear, on the other hand, that if appellants challenged the substance of an agency-formulated ban on Tris-treated garments, the discretionary function exception would shield the United States from liability. . . . We are presented here, however, with a third case: an attack, not on the rule or its execution, but on the procedures by which the Tris ban was formulated and adopted.

*Id.* (emphasis added).

<sup>310</sup> See *supra* note 225 and accompanying text.

<sup>311</sup> *Jayvee Brand*, 721 F.2d at 393.

Lumbard similarly listed the lack of a causal connection between the CPSC's procedural violation and its substantive decision among the factors relevant to dismissal of the case.<sup>312</sup> The judges erred, however, in implying that it was the lack of such a connection that justified dismissal of the suit. What matters is that, in order to prove proximate cause, plaintiffs had to prove the existence of such a causal connection — the procedural violations influenced the substantive decision to ban Tris. It does not matter whether they would have been successful in mounting such proof or not. The mere fact that such proof was required barred the suit, because, in evaluating the proof, a court would have had to examine the basis for an agency's exercise of a discretionary function. For that reason, the suit was based upon the substantive decision to ban Tris and, hence, barred by the discretionary function exception.

b. *Myers & Myers, Inc. v. United States Postal Service*<sup>313</sup>

The D.C. Circuit considered its decision in *Jayvee Brand* “arguably contrary” to the Second Circuit’s decision in *Myers & Myers*.<sup>314</sup> Indeed, the results of the two decisions cannot be reconciled. Application of the influence standard leads to the conclusion that *Myers & Myers* was decided incorrectly.

In *Myers & Myers*, the Postal Service refused to renew contracts under which the plaintiffs hauled mail by truck between post offices.<sup>315</sup> The plaintiffs sued the government under the

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<sup>312</sup> See *id.* at 396 (Lumbard, J., concurring) (suggesting that most plaintiffs in such cases would not be able to show causation).

Here, in view of the novel form of tortious conduct involved, the anomaly of submitting this distinctively federal claim to the vagaries of state law, the potentially limitless number of private suits based on agencies’ procedural infractions, coupled with the unlikelihood of most plaintiffs making the necessary showing of causation to prevail, and Congress’s providing an alternative remedy for procedural infractions by declaring the resulting rules unlawful, it is extremely unlikely that Congress ever intended to submit the federal government to tort liability for such infractions. On that basis alone, I would reject [the plaintiffs’] claim.

*Id.* (emphasis added).

<sup>313</sup> 527 F.2d 1252 (2d Cir. 1975).

<sup>314</sup> See *Jayvee Brand*, 721 F.2d at 393.

<sup>315</sup> See *Myers & Myers*, 527 F.2d at 1253-54.

FTCA for damages arising from the non-renewal.<sup>316</sup> “The basis of the [plaintiffs’] claim [was] that the Postal Service failed to renew the [plaintiffs’] contracts solely because of the Service’s wrongful and negligent interpretation of information received by the Service concerning the [plaintiffs’] truck rental arrangements.”<sup>317</sup> The plaintiffs alleged that the Service misinterpreted the information because it evaluated the information without the notice and hearing required by due process and Postal Service regulations.<sup>318</sup> The Second Circuit recognized that the Service’s decision not to renew the contracts constituted the exercise of a discretionary function.<sup>319</sup> Nonetheless, the court summarily rejected the government’s contention that a tort claim grounded upon the procedural violation was barred by the discretionary function exception.<sup>320</sup> The court reasoned that “a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority.”<sup>321</sup>

In *Jayvee Brand*, the D.C. Circuit supposed that “*Myers & Myers* may be distinguishable . . . because of the differences in the nature of the processes in issue.”<sup>322</sup> The *Jayvee Brand* court explained: “The decision to award a government contract — although requiring discretion — seems to us more like a decision requiring discretion in the execution of policy than does a legislative determination, which itself requires policy judgments.”<sup>323</sup> But the D.C. Circuit ultimately doubted that the distinction between quasi-adjudicatory and quasi-legislative determinations justified the conclusion that “[a]ny procedural irregularity” connected with a quasi-adjudicatory determination — such as the decision not to renew a government contract — should “give rise to a cause of action for damages.”<sup>324</sup> That doubt was well-founded for the same reason, discussed above, that the influ-

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<sup>316</sup> *See id.* at 1254.

<sup>317</sup> *Id.* at 1255.

<sup>318</sup> *See id.* at 1257-58.

<sup>319</sup> *See id.* at 1256-57.

<sup>320</sup> *See id.* at 1261.

<sup>321</sup> *Id.* at 1261 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

<sup>322</sup> *Jayvee Brand v. United States*, 721 F.2d 385, 393 (D.C. Cir. 1983).

<sup>323</sup> *Id.*

<sup>324</sup> *See id.* at 393-94.

ence standard does not apply only to regulatory decisions.<sup>325</sup> Thus, as the D.C. Circuit in *Jayvee Brand* all but admitted, its decision conflicted with the Second Circuit's decision in *Myers & Myers*.

Application of the influence standard to *Myers & Myers* closely resembles its application to *Jayvee Brand*. In *Myers & Myers*, as in *Jayvee Brand*, the plaintiff had to show that the unprotected conduct influenced the protected conduct. In *Myers & Myers*, that showing entailed proof that the Postal Service's failure to give plaintiffs notice and a hearing contributed to its improper interpretation of the information and its resulting decision not to renew plaintiffs' contracts. Regardless of whether the plaintiffs could have mounted such proof, the fact that they were required to do so makes their suit one based upon the non-renewal of their contracts — a decision protected by the discretionary function exception.<sup>326</sup> In sum, analysis of *Jayvee Brand* and *Myers & Myers* under the influence standard yields a rule applicable in regulatory and other contexts in which an agency exercises a discretionary function without following prescribed procedures: The discretionary function exception bars a claim ostensibly based upon a procedural violation accompanying the exercise of a discretionary function.<sup>327</sup>

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<sup>325</sup> See *supra* notes 231-36 and accompanying text.

<sup>326</sup> The D.C. Circuit observed in *Jayvee Brand* that, "in *Myers & Myers*, had proper procedures been followed, the plaintiff[s] apparently would have received the contracts for whose loss [they] sought damages." *Jayvee Brand*, 721 F.2d at 393. That observation implies that determining whether a suit is barred by the discretionary function exception depends on plaintiffs' ability to prove that the allegedly wrongful unprotected conduct affected the protected conduct. That implication is erroneous for reasons already discussed. See *supra* notes 311-12 and accompanying text (arguing judges erred in implying that lack of causal connection justified dismissal). It is the necessity for plaintiffs to prove such a causal connection, rather than their ability to do so, that triggers the application of the exception.

<sup>327</sup> *Myers & Myers* shows that procedural violations may have a substantive dimension. See *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252, 1255 (2d Cir. 1975) (explaining that plaintiff alleged Postal Service's substantive decision was flawed because it failed to follow notice and hearing procedures). Indeed, some procedural requirements may, on their face, reveal their substantive dimension. For example, suppose a statute or regulation expressly required an agency, when making a certain decision, to consider specific public policy factors, such as the impact on the environment. The decision would be protected by the exception, since it would entail consideration of public policy. Under the influence standard, the exception would bar an FTCA action alleging that the agency failed to consider the impact on the environment. That is because, in such an action, the plaintiff would have to show that the procedural violation influenced the agency's substantive deci-

3. FTCA Claims Ostensibly Based Upon the Wrongful and Unprotected Implementation of a Protected Policy Decision: *Autery v. United States*<sup>328</sup>

*Autery* did not squarely present the “based upon” issue. The case is discussed here nonetheless, because it illustrates one aspect of applying the influence standard that, it is hoped, will clarify analysis of the discretionary function exception as a whole. Under the influence standard, *Autery* was incorrectly decided.

In *Autery*, a rotted locust tree in the Great Smokey Mountain National Park fell on a car, killing the driver and injuring his passenger as they drove to the visitor’s center in the park.<sup>329</sup> The government successfully argued that an FTCA suit based on the accident was barred by the discretionary function exception. The Eleventh Circuit determined that the “development and implementation” of the park’s “tree inspection plan” were “grounded in social, economic and public policy.”<sup>330</sup> It based that determination on its supposition that

[t]o decide on a method of inspecting potentially hazardous trees, and in carrying out the plan, the Park Service likely 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.<sup>331</sup>

The court in *Autery* almost certainly erred in concluding that the discretionary function exception protected the entire injurious course of government conduct, including the ground-level implementation of the tree inspection policy. It is exceedingly doubtful that the park rangers and maintenance personnel re-

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sion. *Cf. Rogers, supra* note 4, at 777, 788-789 (stating that an agency “abuses,” rather than “exceeds,” its discretion when it bases decision on grounds other than those it is required to consider). An agency’s failure to consider a statutorily mandated factor would ordinarily, however, be subject to review in an APA-type proceeding. *See supra* note 188 and accompanying text.

<sup>328</sup> 992 F.2d 1523 (11th Cir. 1993). While in the Justice Department, the author worked on *Autery*.

<sup>329</sup> *See id.* at 1524.

<sup>330</sup> *See id.* at 1530.

<sup>331</sup> *Id.* at 1531.

sponsible for actually looking for rotted trees were authorized to consider public policy while doing so. That doubt should not have been resolved in favor of the government.<sup>332</sup> To be sure, the Court in *Gaubert* said that, when a government agent exercises discretion under a policy, "it must be presumed that the agent's acts are grounded in policy."<sup>333</sup> But the Court also allowed the plaintiff to allege and prove "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."<sup>334</sup> The presumption surely was overcome in *Autery* by evidence of the position and duties of the officials who actually inspected for tree hazards.<sup>335</sup> As the court of appeals described it, the policy was to "hav[e] park rangers and maintenance personnel first inspect trees from the roadway, and then, if in their judgment, the trees evidenced sufficient decay to demand a closer inspection, to take appropriate action."<sup>336</sup> The visual inspection of trees for decay is not susceptible to public-policy considerations.<sup>337</sup> Consequently, negligent inspection was not protected by the discretionary function exception.<sup>338</sup>

The court in *Autery* might have avoided its erroneous conclusion to the contrary if it had followed the approach proposed

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<sup>332</sup> See *supra* note 63 (citing cases holding that government bears burden of proving applicability of exception).

<sup>333</sup> *United States v. Gaubert*, 499 U.S. 315, 324 (1991).

<sup>334</sup> See *id.* at 324-25.

<sup>335</sup> See *id.* at 335 (Scalia, J., concurring) (explaining that, ordinarily, government employees working at operational level are not responsible for policy decisions).

<sup>336</sup> *Autery*, 992 F.2d at 1529 (original emphasis omitted).

<sup>337</sup> Compare *Toledo v. United States*, 95 F. Supp. 838 (D.C.P.R. 1951), which, like *Autery*, involved an FTCA claim for damages caused when a rotted tree on federal land crushed a car. The tree in *Toledo* was grown as part of a government experiment to determine what types of tropical plants grew well in Puerto Rico. See *id.* at 840. The court in *Toledo* correctly determined that, in these circumstances, a decision to allow an experimental tree to remain standing after it began to rot was susceptible to public policy considerations. See *id.* at 840-41.

<sup>338</sup> See *Autery*, 992 F.2d at 1527-29. Public policy may have underlain antecedent conduct, such as deciding how much time rangers should devote to tree inspections. Thus, the discretionary function exception would have barred the plaintiffs in *Autery* from arguing that the rangers did not have enough time to do adequate inspections. See *id.* at 1531; *supra* text accompanying note 331; cf. *Routh v. United States*, 941 F.2d 853, 857 (9th Cir. 1991) (stating that *Gaubert* does not require court to presume that discretionary act of low-level official involved protected discretion in absence of regulations signifying grant of authority to exercise such discretion).

here. To apply the influence standard, a court must initially identify what conduct the plaintiff is purporting to base her claim upon. The plaintiffs in *Autery* had two potential bases for their tort claim: the development of the tree inspection policy and its implementation. The *Autery* court failed to distinguish between these two theories of recovery, as is clear from its statement that the “development and implementation” of the policy were “grounded in social, economic and public policy.”<sup>339</sup> The plaintiffs in *Autery* conceded that the development of the policy was protected conduct.<sup>340</sup> That concession, however, did not prevent them from asserting a claim based upon the implementation of the policy. Such a claim would not be regarded as really being based upon the antecedent protected conduct under the influence standard.<sup>341</sup> Instead, the validity of the negligent implementation claim would depend solely on whether the implementation itself constituted a discretionary function. More generally, the influence standard clarifies that not all conduct implementing government policy is protected by the exception.

#### 4. FTCA Claims Based Upon Criminal Law Enforcement Activities

The government’s enforcement of criminal laws, like its performance of civil functions, typically entails both conduct that is protected by the discretionary function exception and conduct that is not so protected. It is therefore not surprising that the “based upon” issue has arisen in FTCA cases involving criminal law enforcement. A discussion of two such cases shows that the courts have not resolved the “based upon” issue consistently in this context, and that the influence standard would provide such consistency.

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<sup>339</sup> See *Autery*, 992 F.2d at 1530.

<sup>340</sup> See *id.* at 1527.

<sup>341</sup> See *supra* notes 98-100, 226 and accompanying text (discussing negligent implementation claims and how such claims would be analyzed under influence standard).

a. *Gray v. Bell*<sup>342</sup>

In *Gray v. Bell*, the former Acting Director of the Federal Bureau of Investigation (FBI), L. Patrick Gray, sued the former Attorney General, Griffin Bell, as well as the United States. Gray's suit concerned the Justice Department's decision to seek an indictment against him for conspiring to violate the civil rights of relatives and friends of suspected members of the Weatherman Underground Organization.<sup>343</sup> Gray alleged: (1) that prosecutors presented false or incomplete evidence to the grand jury and inadequately investigated Gray's complicity in civil rights violations committed by low-level FBI agents; (2) that this conduct was unconstitutional; and (3) that it caused the grand jury to return an indictment against him and the Justice Department to pursue a prosecution on the indictment.<sup>344</sup>

The D.C. Circuit held that Gray's FTCA claims against the government were barred by the discretionary function exception. In so holding, the court analyzed separately the government's decision to institute a prosecution and the antecedent investigation and presentation of the case to the grand jury.<sup>345</sup> The court determined that the government's decision to institute a prosecution "clearly falls," as a categorical matter, within the exception.<sup>346</sup> By contrast, the court regarded pre-prosecution activities to be "not so easily characterized" as a categorical matter.<sup>347</sup> The court ultimately found it unnecessary to decide the proper characterization of pre-prosecution activities. It found that, in the case before it, the pre-prosecution activities were "too intertwined" with the decision to prosecute to be separated meaningfully.<sup>348</sup> The court explained that "each allegation of improper investigatory conduct is inextricably tied to the decision to prosecute and the presentation of evidence to the Grand Jury. . . . Indeed, the gist of Gray's complaint focuses on alleged causal links between the negligent investigation, the presentation

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<sup>342</sup> 712 F.2d 490 (D.C. Cir. 1983).

<sup>343</sup> *See id.* at 492-94.

<sup>344</sup> *See id.* at 493-95.

<sup>345</sup> *See id.* at 513-16.

<sup>346</sup> *See id.* at 515.

<sup>347</sup> *See id.*

<sup>348</sup> *See id.* at 516.

of false and misleading evidence, and the ultimate prosecution.”<sup>349</sup> The court emphasized, though, that “there can be cases where conduct of the prosecutor prior to, or even after, the initiation of Grand Jury proceedings is removed sufficiently from the decision to prosecute that the discretionary function clause would not provide any protection.”<sup>350</sup> The court cited as examples “participation by prosecutors in illegal searches and seizures during the course of an investigation, or the dissemination of defamatory information to the media.”<sup>351</sup> Those actions could be disassociated from the subsequent decision to prosecute, the court believed, “because the harm alleged in such cases is distinct from the harm caused by the ultimate prosecution itself.”<sup>352</sup>

The influence standard furnishes an analytic undergirding for the D.C. Circuit’s conclusion in *Gray*. Former FBI Director Gray challenged government conduct — a criminal investigation and the presentation of evidence to a grand jury — that would not be protected by the exception if, as Gray asserted, it violated the Constitution or other legally binding prescriptions.<sup>353</sup> The D.C. Circuit correctly concluded that it was not necessary to determine whether that conduct was indeed protected. Even if it were unprotected, Gray’s claims regarding that conduct were based upon the ultimate decision to prosecute, and therefore barred by the exception. That is so because, to establish that the allegedly wrongful pre-prosecution activities proximately caused his injuries, Gray had to prove that they influenced the decision to prosecute him. Gray’s own complaint acknowledged the need for such proof; it focused on the “causal links between the negligent investigation, the presentation of false and misleading evidence, and the ultimate prosecution.”<sup>354</sup> Consequently, the resolution of Gray’s claim would have required judicial inquiry into the basis for the decision to prosecute him. His claims, ostensibly based upon unconstitutional pre-prosecution activities, were

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<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 515.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *See, e.g.,* *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (holding that discretionary function exception only covers discretionary acts).

<sup>354</sup> *Gray*, 712 F.2d at 516.

therefore based upon the decision to prosecute and, hence, barred by the discretionary function exception.

The D.C. Circuit observed that the exception would not necessarily bar claims based on a prosecutor's personal involvement in a pre-prosecution illegal search or in defamation.<sup>355</sup> The court reasoned that "the harm alleged in such cases is distinct from the harm caused by the ultimate prosecution itself."<sup>356</sup> That reasoning accords with the influence standard, if, as the court appeared to assume, the plaintiff sought only damages attributable to the search or to the defamation, and not damages attributable to the subsequent prosecution. Such claims are not based upon the decision to prosecute for the reason discussed above: To prevail on such claims, the plaintiff does not need to show that the illegal search or the defamatory conduct influenced the decision to prosecute.<sup>357</sup> The plaintiff may recover for damages arising from the search or the defamation, and such damages may arise from such conduct, whether or not the conduct leads to a prosecution.<sup>358</sup>

*b. Payton v. United States*<sup>359</sup>

In *Payton*, a parolee from federal custody, Whisenant, murdered three women, including the plaintiffs' decedent.<sup>360</sup> Whisenant's prison records, according to plaintiffs, repeatedly diagnosed him as psychotic and described him as violent and assaultive.<sup>361</sup> The plaintiffs sued the government under the FTCA, asserting multiple theories of liability: (1) the United States Parole Board was negligent in releasing Whisenant, given the evidence of his violence and psychosis; (2) the Parole Board

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<sup>355</sup> See *id.* at 515 (stating that there can be cases where prosecutor's conduct prior to initiation of proceedings is not protected by discretionary clause).

<sup>356</sup> *Id.*

<sup>357</sup> See *supra* notes 227-29 and accompanying text (explaining that harm caused by invasion of privacy during illegal search is distinct from harm caused by later prosecution).

<sup>358</sup> See, e.g., *Moore v. Valder*, 65 F.3d 189, 196-97 (D.C. Cir. 1995) (holding that discretionary function exception did not bar claim based on prosecutor's disclosure of grand jury testimony to unauthorized third parties because that conduct was not "inextricably tied" to discretionary decisions regarding prosecution).

<sup>359</sup> 679 F.2d 475 (5th Cir. 1982) (en banc).

<sup>360</sup> See *id.* at 477-78.

<sup>361</sup> See *id.* at 478.

negligently failed to require post-release treatment or supervision of Whisenhant; (3) the Parole Board negligently failed to acquire, read, or consider records that revealed Whisenhant's homicidal tendencies; (4) the federal Bureau of Prisons (BOP) failed to supply the Parole Board with such records; (5) the government had a statutory duty to ascertain the nature and extent of Whisenhant's psychosis and to determine whether he should be hospitalized for the entirety of his sentence; and (6) the BOP was negligent in providing psychiatric treatment to Whisenhant.<sup>362</sup> The district court dismissed the entire complaint on discretionary function grounds.<sup>363</sup> After a panel of the Fifth Circuit reversed, an en banc rehearing was granted. The en banc Fifth Circuit held that three of the six claims were barred by the exception. Under the influence standard, in contrast, five of the six claims would be barred.

The en banc court held that the Parole Board's decision to release Whisenhant, as well as its decision whether to require post-release treatment or supervision, involved the exercise of protected discretion, and the claims regarding those decisions were therefore barred.<sup>364</sup> The court concluded that the exception also barred the claim that the Parole Board failed to adequately consider Whisenhant's records; the court reasoned that "the manner and degree of consideration with which the Board examines these materials is inextricably tied to its ultimate [parole] decision."<sup>365</sup>

The remaining claims were not barred by the exception, in the court's view. The BOP was required by statute to furnish Whisenhant's records to the Parole Board; the alleged breach of that requirement therefore was not discretionary.<sup>366</sup> Similarly, the government was required by statute to examine and make a report to the Attorney General on any prisoner alleged to be insane, so that the Attorney General could decide whether to

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<sup>362</sup> See *id.*

<sup>363</sup> See *Payton v. United States*, 468 F. Supp. 651, 656 (S.D. Ala. 1979), *rev'd*, 636 F.2d 132 (1981), *rev'd on reh'g en banc*, 679 F.2d 475 (5th Cir. 1982) (dismissing case for failure to state a cause of action due to discretionary function exception).

<sup>364</sup> See *Payton*, 679 F.2d at 480-81 (holding that parole decision was within discretionary power).

<sup>365</sup> *Id.* at 482.

<sup>366</sup> See *id.*

hospitalize the prisoner; the alleged failure to carry out that examination and reporting requirement thus did not involve discretion.<sup>367</sup> Finally, although the BOP may have had discretion in deciding whether to give Whisenhant psychiatric treatment in the first place, the provision of the treatment did not involve protected discretion.<sup>368</sup>

Judge Tjoflat, joined by three other judges, dissented from the majority's opinion to the extent that it allowed two of the claims to stand.<sup>369</sup> Specifically, he believed that the court should have upheld the dismissal of the claim based on the BOP's failure to provide required records to the Parole Board, and the claim based on the government's failure to evaluate and report on Whisenhant's sanity. He determined that allowing those claims to proceed ignored that Congress did not "intend[] to permit plaintiffs to route their claims *through* a palpably discretionary act *to* an antecedent act, and thereby to maintain an action which the exception would otherwise bar."<sup>370</sup> In his view, permitting plaintiffs to do so, as a general matter, "frustrated" the "[t]hree predominant justifications" for the exception and, on the facts before it, also threatened to skew parole decisions.<sup>371</sup>

The first justification for the discretionary function exception identified by Judge Tjoflat was to promote the separation of powers by "sparing" public officials from the "vexation and time expenditure of lawsuits" that could result in a "loss of independence in their decision-making."<sup>372</sup> He determined that purpose was thwarted by allowing a "claim based on the acts of

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<sup>367</sup> See *id.* at 482-83.

<sup>368</sup> See *id.* at 483.

<sup>369</sup> See *id.* at 483-93 (Tjoflat, J., dissenting, joined by Roney, Hill, and Frank M. Johnson, Jr., JJ.). Four other judges wrote separately to state that they would have allowed all of the claims to go forward. See *id.* at 493-94 (Fay, J., joined by Henderson and Thomas A. Clark, JJ.); *id.* at 494 (Clark, J., concurring in part and dissenting in part). Finally, Judge Kravitch joined the majority opinion except for its holding that the discretionary function exception barred the claim that the Parole Board failed to adequately consider Whisenhant's records; she believed that the claim "[did] state a cause of action sufficient to withstand a motion to dismiss." *Id.* at 493-94.

<sup>370</sup> See *id.* at 486 (Tjoflat, J., concurring in part and dissenting in part) (emphasis added).

<sup>371</sup> See *id.* at 486-87 (Tjoflat, J., concurring in part and dissenting in part).

<sup>372</sup> See *id.* at 486 (Tjoflat, J., concurring in part and dissenting in part).

individuals who feed information to the ultimate decisionmaker, or who perform other acts antecedent to the exercise of discretion."<sup>373</sup> He observed that, to prevail in the case before the court, "the plaintiffs must prove that the alleged antecedent acts caused Whisenant's premature parole."<sup>374</sup> To do so, they would have to "explore . . . the decision-making process of the Parole Board" and, in particular, "analyze the probable effect of certain information on the parole decision."<sup>375</sup>

The second justification for the discretionary function exception cited by Judge Tjoflat was that courts are not equipped to make policy determinations of the sort that underlie the exercise of a discretionary function.<sup>376</sup> He believed that courts similarly are ill-equipped to gauge the effect of an antecedent negligent act upon the exercise of a discretionary function.<sup>377</sup>

The third justification for the discretionary function exception offered by Judge Tjoflat was "to prevent the enormous and unpredictable financial cost which could result from judicial re-examination of governmental decisions."<sup>378</sup> He observed that "all parole decisions overlay ministerial acts which can be performed negligently so as to affect the ultimate exercise of discretion."<sup>379</sup>

In addition to citing these generally applicable justifications for the discretionary function exception, Judge Tjoflat emphasized the impact of liability on the substance of parole decisions. In particular, he suggested that Parole Board officials would be motivated to either deny prisoners parole or delay it as long as possible to avoid FTCA claims alleging that the release of a prisoner was premature or otherwise improper.<sup>380</sup>

Judge Tjoflat did not rely on the statutory term "based upon," and his dissent in *Payton* was not cited in the *Fisher Brothers* opinion. Nonetheless, Judge Tjoflat's dissent closely tracks the *Fisher*

<sup>373</sup> See *id.*

<sup>374</sup> See *id.*

<sup>375</sup> See *id.*

<sup>376</sup> See *id.* at 487 (Tjoflat, J., concurring in part and dissenting in part).

<sup>377</sup> See *id.*

<sup>378</sup> See *id.*

<sup>379</sup> See *id.*

<sup>380</sup> See *id.* at 492-93 (Tjoflat, J., concurring in part and dissenting in part) (explaining that imposition of liability would result in delay of parole).

*Brothers* majority. Judge Tjoflat's concern about "enormous and unpredictable liability" corresponds to the *Fisher Brothers* majority's concern about the social cost of "virtually unlimited" governmental liability.<sup>381</sup> Judge Tjoflat's concern about "the vexation and time expenditure" to which federal officials would be exposed corresponds to the *Fisher Brothers* majority's concern about the social costs attending "the demands of the litigation process on the most valuable human resources of the regulatory agency."<sup>382</sup> Finally, Judge Tjoflat's concern that parole decisions could be skewed corresponds to the *Fisher Brothers* majority's concern about "the impact upon policymakers that would result from the fear of virtually unlimited liability and the prospect of virtually interminable litigation."<sup>383</sup> As discussed above, those concerns, to varying degrees, reflect a reasonable understanding of the discretionary function exception.<sup>384</sup>

The one justification that was cited in Judge Tjoflat's dissent but not in the *Fisher Brothers* opinion is not persuasive, as a general matter. Judge Tjoflat's dissent asserted that courts would have difficulty determining whether, and to what extent, improper data gathering and other antecedent wrongful conduct affected parole decisions.<sup>385</sup> This is undoubtedly correct. That difficulty, however, is likely to arise primarily when the discretion is exercised by a group, such as the Parole Board, instead of a single official. In any event, courts face similar difficulty in other areas of the law requiring them to divine the intent of a governmental body.<sup>386</sup> Thus, the difficulty does not relate to any insti-

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<sup>381</sup> See *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 286 (3d Cir. 1994) (en banc) (explaining that government liability for policy choices has prohibitive social cost), *cert. denied*, 116 S. Ct. 49 (1995); see also *supra* notes 192-220 and accompanying text (analyzing this portion of *Fisher Bros.*).

<sup>382</sup> See *Fisher Bros.* at 286-87.

<sup>383</sup> See *id.* at 287. In addition to the specific points of concurrence discussed in the text, compare *id.* at 285 (rejecting plaintiffs' "attempt to avoid application of the discretionary function exception by looking behind the injury-causing decision and finding fault with an aspect of the data on which it may have been based") with *Payton*, 679 F.2d at 486 (Tjoflat, J., concurring in part and dissenting in part) (stating that Congress did not "intend[] to permit plaintiffs to route their claims through a palpably discretionary act to an antecedent act, and thereby to maintain an action which the exception would otherwise bar").

<sup>384</sup> See *supra* notes 381-83 and accompanying text (discussing Judge Tjoflat's concerns).

<sup>385</sup> See *Payton*, 679 F.2d at 487 (Tjoflat, J., concurring in part and dissenting in part) (referring to decisionmaking of Parole Board in arguing that courts "are not equipped to investigate and weigh the factors which enter into the decisions of the other branches").

<sup>386</sup> *Cf., e.g., Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (referring to difficulty of

tutional lack of competence or separation-of-powers concerns unique to application of the exception.

With the exception just noted, Judge Tjoflat's analysis is consistent with the analysis proposed in this Article. The only other possible inconsistency arises from his suggestion, at one point, that the exception bars claims ostensibly based upon *any* act "antecedent to a discretionary function."<sup>387</sup> That suggestion conflicts with an application of the influence standard, which would, for example, permit a claim based on damages flowing directly from an illegal search that preceded a decision to prosecute the plaintiff. Judge Tjoflat ultimately made clear that he, too, would permit such claims to proceed.<sup>388</sup> He emphasized that the problem with two of the claims that the majority allowed to stand was that, "[t]o prevail, the plaintiffs must prove that the alleged antecedent acts caused Whisenant's premature parole."<sup>389</sup> Thus, Judge Tjoflat would not apply the exception if the plaintiff did not have to prove that the antecedent act on which the claim was based influenced the exercise of a discretionary function. Indeed, it is for that reason that Judge Tjoflat would not have dismissed the claim that the Bureau of Prisons was negligent in administering Whisenant's psychiatric care.<sup>390</sup> Judge Tjoflat agreed that the claim was not barred by the exception, based on his understanding that "the negligent psychiatric treatment of Whisenant proximately caused the plaintiffs' injuries *without* the mediation of the parole decision."<sup>391</sup> Thus, the results for which Judge Tjoflat argued in *Payton* are the same that would obtain under the influence standard.

The majority opinion in *Payton* does not directly address the extent to which the discretionary function exception bars claims ostensibly based on unprotected, antecedent conduct. It does hold, with little discussion, that the exception bars a claim based on conduct — namely, the Parole Board's alleged failure to adequately consider Whisenant's records — that is "inextricably

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determining legislative motive).

<sup>387</sup> See *Payton*, 679 F.2d at 483-85, 487 (Tjoflat, J., concurring in part and dissenting in part).

<sup>388</sup> See *id.* at 486 (Tjoflat, J., concurring in part and dissenting in part).

<sup>389</sup> See *id.*

<sup>390</sup> See *id.* at 484 n.1. (Tjoflat, J., concurring in part and dissenting in part).

<sup>391</sup> See *id.* (emphasis added).

tioned to" the exercise of a discretionary function — namely, the parole decision.<sup>392</sup> The court did not find any other antecedent conduct to be inextricably tied to the discretionary conduct. Thus, it is clear that the majority's "inextricability" standard does not bar all of the claims that would be barred under the influence standard. Indeed, the majority's standard may be better understood as reflecting an interpretation of the statutory term "function" than as reflecting an interpretation of the statutory term "based upon."<sup>393</sup>

### C. *The Impact of the Influence Standard on Current Law*

The application of the influence standard resolves two circuit conflicts and dispels a third, apparent circuit conflict. Applying the influence standard confirms that the D.C. Circuit's decision in *Jayvee Brand* conflicts with the Second Circuit's decision in *Myers & Myers* over whether an FTCA claim will lie for procedural violations accompanying the exercise of a discretionary function. Under the influence standard, the D.C. Circuit correctly held that such claims do not lie. In addition, applying the influence standard identifies the conflicting approaches of the en banc Third Circuit in *Fisher Brothers* and the Fifth Circuit in *Payton*, with respect to FTCA claims ostensibly based upon unprotected conduct preceding the exercise of a discretionary function. Lastly, application of the influence standard demonstrates that there is no such conflict between *Fisher Brothers* and *Glacier Bay*, despite the surface similarity of the fact patterns of those cases.

In only one case discussed above (*Autery*) would application of the influence standard allow a claim to proceed that was held to be barred. In all other cases, application of the influence standard supported the dismissal of claims, including claims that were allowed to proceed by the courts of appeals. In light of that pattern, it is probable that judicial acceptance of the influence standard would, on balance, expand the discretionary function exception.

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<sup>392</sup> See *id.* at 482.

<sup>393</sup> See *supra* note 243 and accompanying text (discussing the meaning of the term "function" in the discretionary function exception).

That result does not reflect the author's view regarding the social desirability of the doctrine of sovereign immunity, in general, or of the discretionary function exception, in particular.<sup>394</sup> Instead, this Article's proposal of the influence standard reflects a judgment about the meaning of the statutory text of the discretionary function exception — specifically, the phrase “based upon.” The objective of this Article is to propose a way of better effectuating the legislative intent underlying the exception. “[P]erhaps . . . when what has been accomplished by existing legislation has been made clear, determination of what additional legislation is necessary will also be more apparent.”<sup>395</sup>

### CONCLUSION

This Article proposes an approach for analyzing a recurring, largely unrecognized issue concerning the scope of the discretionary function exception to the FTCA. The issue arises when: (1) an FTCA plaintiff's injuries stem from a course of governmental conduct; (2) the plaintiff contends that the injuries were proximately caused by government conduct that does *not* constitute the exercise of a discretionary function; but (3) the government contends that the injuries were caused, instead, by other government conduct that *does* constitute the exercise of a discre-

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<sup>394</sup> It should be noted, however, that even some critics of sovereign immunity have recognized the need to protect executive branch discretionary decisionmaking from the skewing effects of tort litigation. See 5 DAVIS, *supra* note 104, § 27:11, at 60-65 (arguing that “theoretical foundation” for principle underlying discretionary function exception is “strong”); 5 *id.* § 27:13, at 73-74; 5 *id.* § 27:45(4), at 247-48; Schuck, *supra* note 52, at 114-15 (identifying purposes of discretionary function exception as to “encourage vigorous decisionmaking by agencies and to limit judicial second-guessing of policy judgments entrusted to those with programmatic and administrative responsibility for the outcomes”; describing these as “valid, indeed essential,” purposes); *id.* at 116 (explaining that author's proposal for revising governmental liability rules would be “[c]oupled with the existing exception for discretionary functions”); see also Kratzke, *supra* note 209, at 1111-29 (arguing that several exceptions to FTCA should be repealed, but that discretionary function exception “provides a good focal point” for determining appropriate scope of government tort liability); *cf.*, e.g., *McCall v. Batson*, 329 S.E.2d 741, 742-43 (S.C. 1985) (abrogating state sovereign immunity from tort suits in state court, with exception for, inter alia, claims based on discretionary activities); ACUS REPORT, *supra* note 4, at 1186 (stating that “[d]evices other than liability . . . seem appropriate guarantors of socially desirable conduct” for activities of some officials who, apart from liability, “have relatively good, if imperfect incentives to act in a socially desirable fashion”).

<sup>395</sup> Peck, *supra* note 4, at 242.

tionary function. The conflicting contentions in such a case require a court to determine which government conduct the claim is based upon within the meaning of the statute that prescribes the discretionary function exception.

Most federal courts, including the Supreme Court, have assumed in the situation just posited that the plaintiff's claim is based upon whatever government conduct is alleged to have been wrongful and to have proximately caused the plaintiff's injuries. As the *Fisher Brothers* case illustrates, however, that assumption can lead to results that the discretionary function exception was intended to prevent. Congress intended the exception to prevent courts in FTCA actions from scrutinizing the way executive branch officials exercise discretionary functions. Such scrutiny is required even in some cases in which the plaintiff purports to base a claim on governmental conduct that does not itself constitute the exercise of a discretionary function.

This Article proposes an "influence" standard for identifying those cases. Thus, the standard applies when a plaintiff contends that his injuries were proximately caused by conduct that does not itself constitute the exercise of a discretionary function (unprotected conduct). The standard asks whether, to prove that contention, the plaintiff must show that the unprotected conduct influenced the manner in which a discretionary function was exercised. If so, the plaintiff's claim is based upon the exercise of a discretionary function and hence barred by the discretionary function exception.

The influence standard would be applicable in many cases that have been decided by the lower federal courts. Those cases have been decided without reference to the statutory phrase "based upon" and without consistent results. The influence test provides an approach grounded in the statutory text that produces consistent results. More important, those results better accord with the purpose of the discretionary function exception than have the actual results in many cases.