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## Reconceptualizing Sovereign Immunity

Harold J. Krent

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# Reconceptualizing Sovereign Immunity

Harold J. Krent\*

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## I. INTRODUCTION

The United States generally is immune from suit without its consent. Accordingly, neither Congress nor the executive branch need pay damages<sup>1</sup> for any contract breached, any tort committed, or any constitutional right violated by the federal government.<sup>2</sup> Although the doc-

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\* Assistant Professor of Law, University of Virginia. I would like to thank Ron Cass, Michael Klarman, Saul Levmore, Geoff Miller, Paul Mahoney, Bob Scott, Bill Stuntz, and Nick Zeppos for their thoughtful comments. I would also like to thank Rob Schmidt for his research assistance.

1. Although there has been some debate as to whether sovereign immunity protects the United States against injunctive and mandamus actions, Congress has waived the government's immunity from such nondamage actions. See, for example, 5 U.S.C. § 702 (1988) (stating that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States").

2. The primary exception is the Takings Clause, U.S. Const., Amend. V, which itself requires that compensation be paid. See text accompanying notes 186-96. Although the Supreme Court crafted a limited damages remedy for violation of some constitutional rights in *Bivens*, that rem-

trine of sovereign immunity persists, it persists subject to near unanimous condemnation from commentators. Many have rejected the underlying theory that the "King can do no wrong" as oddly out of place in our republican government<sup>3</sup> and many have noted as well that sovereign immunity was never applied as comprehensively in the past as it is today.<sup>4</sup> Presently, there seems no justification for permitting government wrongdoing to go unremedied. Indeed, sovereign immunity confers upon the government an apparent advantage in the marketplace—unlike private individuals and entities, the government is liable only to the extent it deems appropriate.

Much of sovereign immunity, however, derives not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule. For instance, Congress understandably might conclude that legislators would have too much incentive to conform their actions to the policy preferences of judges if the judiciary could second-guess whether congressional action or inaction were negligent. Furthermore, if the judiciary strictly enforced congressional contracts to the same extent as those of private parties, then succeeding generations might be bound excessively by the dead hand of Congresses past, preventing contemporary Congresses from pursuing current concerns as effectively.

Congress similarly could conclude that some damage actions against executive branch agencies or officials may distort public policy objectives. Although Congress is most concerned with safeguarding its own policy, Congress at times wishes to insulate its delegates in the executive branch who also formulate policy responsive to majoritarian politics. Judicial review could impede majoritarian policymaking if judges were empowered to review certain discretionary executive branch actions for their reasonableness or to force the executive branch to uphold contractual obligations that it believes are no longer in the

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edy can be sought only against federal officials in their individual capacities, subject to qualified or complete immunity. Even then, the Court recently has curtailed availability of the *Bivens* remedy. See note 101.

3. See, for example, Kenneth Culp Davis, 3 *Administrative Law Treatise* § 25.01 at 435-36 (West, 1958) (stating that "nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go"). See also Charles O. Gregory and Harry Kalven, Jr., *Cases and Materials on Torts* 730 (Little, Brown, 2d ed. 1969) (stating that "[n]o very sensible reasons have ever been advanced for this rule [of sovereign immunity]," and that "there long have been ill-defined and arbitrary exceptions to the rule of general immunity"); Raoul Berger, *Estoppel Against the Government*, 21 *U. Chi. L. Rev.* 680 (1954).

4. Edwin M. Borchard, *Government Liability in Tort*, 34 *Yale L. J.* 1, 3 (1924) (stating that "we consider ourselves bound by the fetters of a medieval doctrine, often regarded as having the institutional impregnability of an article of faith, which never had much, if any, justification"); Louis L. Jaffee, *Judicial Control of Administrative Action* at 197-213 (Little, Brown, 1965).

nation's best interests. Moreover, the prospect of market damages in a tort or contract suit might deter even the most committed government officials or legislators from pursuing initiatives that they believe are in the public interest. Justification for continued sovereign immunity, therefore, may stem from concerns for preserving majoritarian policymaking and not from any need to honor hoary traditions.<sup>5</sup>

Immunity thus plays a vital role in our system; it is not so much a barrier to individual rights as it is a structural protection for democratic rule. The dominant justification for sovereign immunity must be that we trust Congress, unlike any other entity, to set the rules of the game. That insight derives from the general political accountability of Congress, both to the public and to the President. Congress may not always resolve the waiver issue wisely; nevertheless, the Constitution vests that decision in majoritarian hands, subject to the Takings and Due Process Clauses.<sup>6</sup> In determining whether waiver is appropriate, Congress plausibly may conclude that the potential harm to majoritarian policymaking from damage actions outweighs the benefits in added deterrence of tortious conduct by the government, increased efficiency in contracting, and more equitable compensation of injured parties.

Those mistrusting Congress may find little comfort in a rule that authorizes Congress to shield itself from damage actions, and I by no means argue that the doctrine of sovereign immunity necessarily leads to better governance, although it may be of some benefit in the contract context.<sup>7</sup> I argue, rather, that despite its bad press, sovereign immunity comports with our constitutional fabric and is at least normatively plausible.

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5. Maintaining government immunity risks substantial injustice by leaving those injured by government actions uncompensated when the same injury inflicted by a private party would be compensable. Although our private law system does not compensate all who are injured by tort or breach of contract, monetary relief is generally available for most claims.

When the defendant is the United States, however, the results differ markedly. The failure to pay compensation perhaps can be justified in part if the political process is available to afford the injured individual or company sufficient relief through other avenues of redress, whether political or administrative. Federal procurement laws that appear adverse to private military contractors might be explained on the ground that such contractors have extracted compensating benefits from Congress or the Defense Department, such as a higher contract price.

Yet, persistence of the doctrine of sovereign immunity at times prevents compensation to "deserving" plaintiffs. Any continuing role for sovereign immunity thus can only be justified by relying on an overriding goal of protecting government policy.

6. See Part IV.C.

7. See text accompanying notes 127-33. It may be that our system, at least in the torts context, would benefit if Congress were required affirmatively to legislate immunity, instead of enjoying immunity as a default rule. Nevertheless, my purpose in this Article is to describe the immunity rules we have, and not to propose an alternate system.

Moreover, retained immunity does not result inevitably in insufficient deterrence of government misconduct or waste. Congressional policy, even if not subject to judicial review through a tort or contract action, is subject to the President's veto power and the electorate's displeasure. Actions by government officials may be checked by layers of internal debate, by the need to fashion policy prospectively, by the political necessity of placating constituents, and by the price that the government must pay to obtain services from the private sector. Congress also can subject executive branch actions to political checks, whether exercised by itself or by the courts. The Department of Defense may change procurement regulations, yet those regulations can be challenged directly under the Administrative Procedure Act ("APA")<sup>8</sup> or indirectly through legislative oversight committees. The political and administrative processes may serve as substitutes for private lawsuits to deter arbitrary government action.<sup>9</sup> The doctrine of sovereign immunity permits Congress to determine when to rely on the political process to safeguard majoritarian policy.

Concerns for safeguarding majoritarian policy, however, do not justify Congress's retention of blanket immunity. There are many instances of government negligence and breaches of contract that do not involve government policymaking.<sup>10</sup> For example, government physicians may operate on the wrong patient, or government procurement officers may breach a contract to take advantage of a cheaper source of supply. Although all damage actions may affect government policy at some level, the less that a particular action jeopardizes purposeful policy, the less the concern from the separation-of-powers vantage point. At the same time, the further the government action is removed from purposeful policy, the more remote the possibility that the political process can act as an effective check upon government conduct. Government actions that are situation-specific, such as physician malpractice, rarely stem from previously set policy, and thus political forces have not molded the challenged action. Immunizing such acts from tort suits

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8. 5 U.S.C. §§ 551-559 (1988).

9. Indeed, the separation-of-powers doctrine was designed to that end. See Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 *Social Phil. & Pol.* 196, 214-17 (1991); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 *Va. L. Rev.* 1253 (1988).

10. The terms "policy" and "policymaking" defy easy definition. A "policy" suggests a course of action preceded by deliberation that is intended to set a model or precedent for future conduct as well. All congressional actions affecting the legal rights of those outside Congress plainly fall within that definition, as perhaps do certain less formal legislative acts that set a course of congressional conduct. Moreover, I consider all agency rules, regulations, and set practices to be policies as opposed to actions reflecting only the judgment or reactions of individual government employees. The line between policy and situation-specific reactions of employees necessarily is fuzzy and I do not propose any original way to describe the difference. Understanding the distinction, however, is fundamental in assessing the nature and impact of governmental conduct.

may not force the government to internalize the costs of its actions, which, in turn, may lead to inefficient governance in the future. Exempting the government from paying damages for breaches of contract when governmental policy is not threatened might permit opportunistic behavior and would likely increase the price that the government must pay for goods and services in the future. Without the deterrent of a tort or contract action, government officials may pursue shortsighted goals at the expense of long-range planning and efficiency.

In this Article I argue that separation-of-powers concerns support vesting the waiver decision in Congress, that Congress's patchwork waivers largely conform to a pattern that is at least normatively plausible, and that courts have intervened to review Congress's waiver decisions only in those rare cases in which the political process is least likely to check governmental wrongdoing.

In Part II, I discuss the structural or separation-of-powers justifications for sovereign immunity. The doctrine of sovereign immunity allows Congress to determine when the need for preserving majoritarian policy, set by Congress itself or its delegates in the executive branch, eclipses the need for private monitoring of governmental conduct. Sovereign immunity plausibly enables Congress to protect majoritarian policy both from the horizontal pull of comparatively unaccountable judges, and from the temporal pull of now unaccountable government officials of the past. Just as Congress likely would not authorize courts to consider whether it was negligent in failing to address the savings-and-loan disaster effectively, so sovereign immunity allows Congress to preclude courts from inquiring through tort actions whether executive banking agencies negligently implemented congressional policy in regulating the savings-and-loan institutions. Similarly, just as Congress typically would not permit courts to hold it to prior agreements or contracts that have become inconsistent with contemporary policy priorities, so sovereign immunity does not force Congress to require executive branch agencies to pay full damages when changed government policy makes a prior contract either more expensive for the private contractor to fulfill or contrary to a newly articulated public policy. Congress is the institutional entity best situated to assess waiver on a case-by-case basis.

In Part III, I analyze government tort law to consider whether Congress's partial rescission of sovereign immunity conforms to the model I have suggested. I conclude that, to a large extent, Congress has retained immunity to safeguard national policymaking, which is checked by the political process. The judiciary, in construing legislative waivers, has been sensitive to that underlying goal.

Although some aspects of the government's retained tort immunity

undoubtedly conflict with the rationale for continued immunity that I sketch, the principal exception to the government's waiver under the Federal Tort Claims Act ("FTCA")<sup>11</sup>—the discretionary function exception—largely is consistent with the model. This exception precludes suit in order to prevent the judiciary and claimants from substantially interfering with the policymaking of Congress and the executive branch when considerable political checks already exist. Justification is more problematic for continued immunity from misrepresentation and other tort claims that do not implicate government policy directly and that, as a consequence, rarely are checked by the political process.

In Part IV, I turn to government contract law and conclude that Congress's limited waivers of immunity in this area also are generally consistent with the suggested model. Congress may have retained immunity without intending to confer upon itself or its delegates in the executive branch an advantage in the marketplace; in fact, retaining partial immunity actually may raise the government's cost of doing business with the private sector. Nevertheless, an immunity rule prevents one Congress from compromising the ability of future generations to fashion policy. Judicial decisions reflect the structural objective of preventing one Congress from binding another in the future. In contrast, when comparatively less concern for policymaking is implicated, Congress generally has waived the government's immunity from contract suit. However, because of the risk that insufficient political checks constrain Congress in its contracting role, courts independently have scrutinized Congress's repudiations of prior commitments under the rubric of the Takings and Due Process Clauses. The Fifth Amendment thus overrides congressional control over immunity decisions in those circumstances in which the political process is least likely to check congressional decisionmaking.

In short, understanding immunity as a means to protect the political process makes sense of much of the patchwork waivers that currently exist. In addition, a process perspective provides a lens with which to assess the desirability of rescinding sovereign-immunity rules completely.

## II. STRUCTURAL PREDICATE OF SOVEREIGN IMMUNITY

Sovereign immunity can be understood as turning on structural separation-of-powers principles of sound governance. Although much ink has been spilled justifying or decrying judicial review of constitutional questions,<sup>12</sup> comparatively scant attention has been paid to judi-

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11. 28 U.S.C. §§ 2671-2680 (1988).

12. See, for example, *Symposium on Democracy and Distrust: Ten Years Later*, 77 Va. L.

cial review of policymaking in the more pedestrian tort and contract contexts. Yet similar questions of institutional competence and deference to majoritarian authority exist. Because judicial review at times may frustrate Congress's policymaking efforts and possibly may arrogate too much of a policymaking function to the judiciary, separation-of-powers concerns suggest that Congress should retain virtually unfettered responsibility to determine when to waive immunity for itself or its delegates in the executive branch. Congress's control over the waiver decision parallels its plenary control over causes of action, jurisdiction of courts, and the like. To that extent the doctrine of immunity is rooted in the Constitution—Congress and the executive branch can be sued only if Congress permits.

In its exercise of discretion over the waiver decision, Congress might retain immunity for a number of reasons. First, Congress might determine that suit over certain legislative and executive branch actions either would be inefficient or impolitic. There is no need here to replay the ongoing debate over a theory supporting judicial review of constitutional questions. Suffice it to say that the justification for judicial review is at its nadir when judges supplant the policymaking of the majority.<sup>13</sup> Indeed, there is presumably less justification for judicial review of policymaking in the tort and contract contexts than in the constitutional setting. Commentators have justified judicial review of constitutional claims by virtue of our system of checks and balances.<sup>14</sup> From this perspective, judges play a critical role in counterbalancing legislative and executive power through their exercise of judicial review to protect structural guarantees. Review of contract and tort challenges is presumably less critical to maintaining a balance of powers among the branches. Justification for judicial review also lies in the need to protect individual liberties. Yet, the rights at stake in common-law actions by definition are less fundamental than those enshrined in the Bill of Rights.<sup>15</sup> A legislator, therefore, generally has the discretion under our system to act reasonably or unreasonably, to follow prior commitments or to change them. The only check on these actions is at the ballot box. It is hardly surprising that Congress has never authorized courts to scrutinize legislation for conformity to common-law tort and

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Rev. 631, 631-879 (1991).

13. John Hart Ely, *Democracy and Distrust* 43-72 (1980); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 768-88 (1991).

14. Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreword: The Vanishing Constitution*, 103 Harv. L. Rev. 43 (1989); Miller, 8 *Social Phil. & Pol.* at 196 (cited in note 9).

15. On the other hand, Congress can override prospectively any judicial determination that a certain course of legislative conduct is negligent, or that a certain legislative agreement is unconscionable. These safeguards make judicial review more defensible.



contract standards. The lawsuits themselves would be costly and the disruption of the legislative process palpable.

Congress itself does not formulate all national policy, however; it delegates some of that responsibility to agencies in the executive branch. At times, Congress has provided for judicial review of agency policymaking to ensure that its delegates are more accountable for their formulation of subsidiary policy. Nevertheless, Congress may determine that judges are institutionally ill-equipped to second-guess some policies formulated by the executive branch, either because of efficiency concerns or fear of judicial errors.<sup>16</sup> Congress explicitly has precluded judicial review in many such instances.<sup>17</sup> Sovereign immunity, therefore, allows Congress to immunize the executive branch from any judicial review when the costs of such review are too great.<sup>18</sup>

Second, even if Congress permits some judicial review, it may fear that judges will impede policymaking if the standard of review effectively permits them to second-guess the coordinate branches. Reviewing certain executive branch actions or omissions for negligence under a reasonableness standard, for instance, would allow courts considerable power. In defining reasonableness, courts could shape public policy in critical ways to a much greater extent than they can under the APA.<sup>19</sup>

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16. Similarly, the political question doctrine is predicated in part on the belief that the costs of reviewing certain sensitive executive branch decisions are too great. For example, judicial decisions may embarrass the conduct of foreign relations, especially since judges do not enjoy any comparative expertise in evaluating such issues. As a result, judges rarely review the President's decision to commit troops abroad or the wisdom of CIA operations. See *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (dismissing challenge to activities in El Salvador); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (same for Nicaragua); *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984) (same for Grenada), appeal dismissed, 765 F.2d 1124 (D.C. Cir. 1985). Contrast *Delums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (challenging President's infringement of congressional warmaking power not a political question). If individual liberties questions are presented, however, the courts may adjudicate the claims. See, for example, *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985). See generally Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. Chi. L. Rev. 643 (1989); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. Pa. L. Rev. 97 (1988); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L. J. 597 (1976) (criticizing current doctrine); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. Rev. 1031 (1985) (same).

17. The APA preserves Congress's ability in appropriate cases to preclude judicial review of administrative action. 5 U.S.C. § 701(a)(1) (1988). See, for example, *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987) (holding decision by general counsel of the NLRB statutorily precluded from review); *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (precluding review of milk marketing orders at the behest of consumers); *United States v. Erika, Inc.*, 456 U.S. 201 (1982) (precluding review of certain benefit determinations under Medicare).

18. Those costs might arise either because of judicial errors or because of the impact of judicial review on the government's primary conduct.

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. See generally R.

The judiciary could become the final arbiter of "good" government.<sup>20</sup>

Third, Congress may wish to avoid the potential for judicial intrusion that would result if judges or juries<sup>21</sup> could impose damages against the government. The potential to incur damages in the tort context, for example, may discourage the government from acting,<sup>22</sup> particularly given that the government rarely receives a direct financial reward for effective regulation or administration.<sup>23</sup> At a minimum, the prospect of liability might induce risk-averse officials to incur excessive costs justifying their actions,<sup>24</sup> or conform any initiatives to the known policy preferences of judges that are likely to hear challenges.

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Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Brookings Inst. 1983); Jerry L. Mashaw and David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. Reg. 257 (1987).

20. Note that this concern does not arise in the contract context because the government itself agrees to the standard under which the contract will be judged. In other words, the government and not a judge or jury imposes the duties that government officers must follow.

21. Historically, individuals have not enjoyed a jury trial right against the government, and even today there are few instances in which juries determine the United States' liability. See generally *Tull v. United States*, 481 U.S. 412 (1987).

22. Injunctive relief is not available against Congress. Nor is a specific performance option available against agency officials. Injunctive relief is not relevant in the tort context, unless the tortious conduct is ongoing.

23. Whether imposed directly against government officials or the government itself, damage awards can interfere with government policymaking. Awarding damages against members of Congress or government officials in their individual capacities (primarily for tort suits) might affect government behavior more radically. Fear of incurring personal liability may chill even the most responsible government official from taking vigorous action. The possibility of indemnification or other contractual agreements such as insurance may minimize the deterrent value of the tort suit against government officials, though officials may still be deterred if the prospect of indemnity is uncertain, or if the officials need to expend funds to defend themselves prior to the indemnity decision. See generally Peter H. Schuck, *Suing Government* 89-98 (Yale, 1983).

Imposing liability directly on the government instead may still alter governmental conduct, although not as noticeably as might a system of official liability. Even though our legal system allows the government to shift costs of tort or contract judgments to taxpayers, that cost spreading may lessen the amount that politicians can hope to obtain from taxpayers for other purposes. Although most damage awards come from the judgment fund, agencies may suffer various repercussions from high damage awards, such as reduced budgets or other forms of discipline from either Congress or the Office of Management and Budget. The very existence of many lawsuits may hamper the effective workings of Congress or an agency because of the need to prepare and defend against lawsuits. Government officials and members of Congress in turn may seek to avoid liability even if the damages do not come from their own pockets. Many identify with the government's interests as a whole and will try to minimize the government's exposure. Others may be motivated to avoid liability by more personal incentives, whether to avoid the stigma of being found liable, or to avoid possible political repercussions.

24. The fear of damage suits might prompt members of Congress or agency officials to wrap themselves in paper work as a means of insulating themselves from liability. Creating a paper trail itself delays government action and adds to the cost of enforcement. The Food & Drug Administration, for example, might fail to evaluate new drugs expeditiously for fear of incurring governmental tort liability, even though the public as a whole may suffer from the delay. The resulting bias towards inaction would be understandable, yet detrimental to effective government. See Schuck, *Suing Government* at 76; Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1140 (1981); Jerry L. Mashaw, *Civil Liability of Government Officers: Property*

In the contracts context, members of Congress arguably should be free to revise agreements entered into by prior Congresses without individually or institutionally compensating all parties whose expectations are sundered. Sovereign immunity not only protects against judicial aggrandizement, but more directly against the grasp of prior politicians. In the absence of immunity, policymakers leaving office might attempt to bind their successors to prior policy—whether in road construction, military procurement, or social insurance programs—by entering into long-term contracts. The prospect of sizeable damage awards could force contemporary lawmakers to adhere to the terms of prior governmental agreements, impairing the ability of contemporary government leaders to fashion policy responsive to current social needs and priorities. Retained immunity promotes the accountability of Congress by limiting the influence of the unelected judiciary and the now unaccountable policymakers of the past. Public policy at times requires that policymakers pursue governance free from the constraint of potential damages.

Despite the possible justifications for continued immunity, it may seem odd that Congress in essence monitors its own conduct by determining when waiver is appropriate. To some extent, that apparent conflict of interest is inherent in our constitutional structure. Judges judge judges,<sup>25</sup> and the executive branch enforces the law with respect to its own officers.<sup>26</sup> If another branch determined when Congress waived immunity, it might gain too much influence over congressional affairs. Perhaps more importantly, the decision whether to waive immunity itself represents significant public policy. For instance, Congress may benefit financially by waiving its contract immunity and thereby encouraging responsible contractors to do business with the government at affordable prices.<sup>27</sup> Although congressional decisions to retain immunity are subject neither to bicameralism nor presentment, Congress is subject to pressure from affected constituents and concerned interest groups. Thus, Congress's control over immunity should be no more surprising than its control over ethics laws, discrimination laws, or any

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*Rights and Official Accountability*, 42 L. & Contemp. Probs. 8, 26-28 (1978); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va. L. Rev. 881, 903-05 (1991) (addressing problem in law enforcement context).

25. See, for example, *United States v. Will*, 449 U.S. 200, 211-17 (1980) (holding that judges may determine compensation clause challenge to statute reducing their own salaries).

26. See, for example, *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that executive branch enjoys constitutional authority to enforce the law with respect to itself).

27. Because one Congress cannot compel future Congresses to waive their immunity, the government may not have the capacity to enter into long-term contracts as effectively as can private parties. See text accompanying notes 123-34.

other critical social issue facing both the government and the nation as a whole.

Of course, tort liability in particular can frustrate the policymaking of private entities as well. Many corporate leaders have complained vigorously that the common-law tort system has stymied their ability to lead their corporations effectively. In fact some have attempted to shed the burden of prior contracts by finding refuge in bankruptcy.<sup>28</sup> Unlike the government, however, such officials presumably are motivated almost exclusively by profit maximization, and the profits they gain may counterbalance the damages they must pay. Even if government officials are not selfless public servants, they rarely act for personal pecuniary gain. And while what is good for Exxon or General Motors may in fact be good for the country, the very purpose of government is to act for the public good, including regulating the activities of Exxon and General Motors when needed. In light of this purpose, we are logically more concerned when the judiciary secondguesses government policy than when it impinges on corporate expertise.

Moreover, the government is less likely to internalize the costs of private damage awards than is a private entity. As a non-profit-maximizing actor, the government does not respond as directly to monetary signals. The government can rationalize damage awards as a cost of public policy; further, damage awards against the government as a whole may have little appreciable effect upon the actions of lower level agency officials. Thus, sovereign immunity reflects not only that judicial secondguessing is more intrusive in the public than in the private sector, but also that tort liability is less likely to compel internalization in the public sector.

The question remains, however, whether the potential costs of judicial review of government torts and contracts outweigh the benefits derived from such judicial oversight. Tort and contract actions may deter the government from carelessness or from pursuing inefficient procurement policies, but our political system was designed in part to safeguard the content of public policy. The web of checks and balances ensures that government officials set public policy in a visible, well-ventilated manner, and that several different branches influence its ultimate content. Before Congress can legislate, both the Senate and House of Representatives must agree and then expend the requisite political capital to present that agreement to the President for his approval.<sup>29</sup>

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28. Compare *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1983) (holding that petition in bankruptcy may excuse company from honoring obligations under collective bargaining agreement).

29. U.S. Const., Art. I, § 7, cl. 23.

The framers hoped that such leavening would enhance the likelihood of public-spirited legislation.<sup>30</sup> Congress has plausible justification at times for relying on political checks to circumscribe its own conduct instead of exposing its policymaking to private monitoring.

The administrative process is similarly designed to minimize rent-seeking or opportunistic behavior.<sup>31</sup> Agencies generally issue regulations only after a series of internal meetings, after affording notice-and-comment procedures to solicit the viewpoints of interested private parties, and after considering Congress's anticipated response.<sup>32</sup> This is not to suggest that policy emerging from either the legislative or administrative process is always wise, but rather that, when the political process serves to check government wrongdoing, Congress might conclude rationally that the gains from private damage actions are unlikely to exceed their costs to the political system.

In contrast, the policy pursued by corporations is not checked directly by the political process. Corporations are responsible primarily to their shareholders, not the public. Moreover, even if shareholders could control the corporate managers effectively, they are unlikely to deter corporate misfeasance in light of their own financial interest. Congress itself can check corporate wrongdoing through regulation. But Congress cannot scrutinize the policy set by every corporation throughout the nation. Furthermore, the electorate does not hold Congress as responsible for General Motors' misfeasance as it does for the government's own negligence.<sup>33</sup>

Unlike private entities, therefore, the government acts subject to considerable political checks and balances. When those checks operate effectively, the benefits from the external monitoring of a tort or contract action are likely to be less significant than in the private sector, and the harm to policymaking is likely to be greater. The doctrine of

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30. See generally Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Univ. of North Carolina, 1969). In addition, when that political process appears skewed, courts have scrutinized independently Congress's decision not to waive immunity under the Takings Clause. The propriety of sovereign immunity can be assessed only within the framework of that Clause, and although the breadth of that safety net is open to continuing dispute, it plainly serves as a judicial check on government action. Sovereign immunity, in other words, has never been absolute because the Takings Clause limits its force. See text accompanying notes 186-95.

31. Whether the administrative or political process can limit effectively the influence of interest groups is a different story. But even those who do not trust the political process to police government conduct might agree that waivers of sovereign immunity largely occur when government conduct is relatively unchecked by the political process.

32. See Peter Strauss, *An Introduction to Administrative Justice in the United States* 161-63, 206-10 (Carolina Academic Press, 1989).

33. Both corporate and government conduct is checked to some extent by market forces. To the extent that Ford received bad press for the Pinto, it sells fewer cars. Similarly, to the extent the government negligently performs services, it may have a harder time raising taxes.

sovereign immunity allows Congress to protect the political process and rely on that process, instead of common-law actions, to deter government wrongdoing.

### III. WAIVERS OF IMMUNITY IN TORT

Congress has never waived its own immunity from either injunctive or damage actions in tort. Congress may act in an unreasonable manner or unreasonably fail to act and escape any judicial scrutiny. Under our system of separated powers, the result could not be otherwise. If judges could assess damages against Congress as a whole or members of Congress individually, their influence over national policy would rise exponentially. The savings-and-loan flasco is a case in point. Arguably, members of Congress acted negligently (if not worse) in failing to take steps to curtail the crisis earlier, and some of the steps Congress did take may have worsened the crisis.<sup>34</sup> For judges to award damages based on that negligence, however, might not only precipitate a fiscal nightmare, but it also would allow judges to secondguess the wisdom of congressional efforts. Challenges to legislative omissions or failures to act would allow reviewing courts even greater leeway to secondguess legislative priorities. Congress would need to cater to the individual policy preferences of judges to avoid possible liability.<sup>35</sup>

Moreover, imposing damages upon either Congress or its members without Congress's consent might have a chilling effect upon future legislative conduct. For fear of incurring liability, Congress might pursue only the most cautious steps in fashioning public policy or invest in costly precautions to protect itself from adverse judgment. Congress also might leave some areas unregulated.<sup>36</sup> To be sure, judicial review would not always frustrate policymaking. For instance, a suit predicated upon failure to process private bills might not overdeter future congressional efforts or afford the judiciary too much influence in legislative affairs. And some judicial review might spur Congress to more conscientious efforts. But those instances are probably the exception, and the costs of allowing judges to carve out those exceptions are high.

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34. See generally John Greenwald, *No End in Sight*, Time 50 (Aug. 13, 1990); Marc Levinson, *Why Our Banks Are Hurting*, Newsweek 42 (Jan. 21, 1991); Steven V. Roberts, *Villains of the S&L Crisis*, U.S. News & World Rep. 53 (Oct. 1, 1990).

35. Note that even with sovereign immunity, if Congress passes a statute expropriating private property, then judges under the Takings Clause may assess damages. See text accompanying notes 186-96. Congressional negligence leading to destruction of that same property, however, probably would not violate the Takings Clause.

36. See text accompanying notes 23-24. Although those opposing government in general might welcome the force for conservatism, permitting such suits might skew congressional priorities in ways unpalatable to many. Indeed, Congress conceivably might leave some areas regulated that otherwise would be deregulated.

Congress thus is on solid ground in retaining immunity for itself and its members from tort suits based upon legislative action or inaction.<sup>37</sup> The immunity rule plausibly can be explained as an effort to protect the political process. The political process, in turn, molds the legislature's product, minimizing the need for external monitoring. The potential harm from judicial oversight likely eclipses any incremental gains from the added deterrent of a tort action.

Congress has delegated a considerable degree of its own power to agencies within the executive branch. Agencies, like Congress, fashion policy that binds the nation. Permitting judicial oversight of executive branch policy decisions through a tort suit likewise could frustrate agency policymaking, although the political checks restraining arbitrary conduct operate less effectively than at the congressional level.<sup>38</sup>

Because the constraints on agency action cannot be trusted fully, Congress has subjected much agency policymaking to judicial review under the APA and other statutory review provisions.<sup>39</sup> Congress has authorized judges to second-guess complex agency policy, even when subject to the political process. Judicial review circumscribes the discretion of agency policymakers. Congress has not fully waived its delegates' immunity from tort suits. Permitting damage actions at the behest of private parties, however, arguably would threaten to skew agency policy more dramatically than would APA review.<sup>40</sup>

In contrast to APA review, the judiciary's power to impose damages for "unreasonable" agency conduct stands as a powerful incentive

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37. The Supreme Court on occasion has alluded to the separation-of-powers underpinnings of immunity from tort actions. For instance, in *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court stated that common-law immunity for municipalities in part was grounded on the concern that "[f]or a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government." *Id.* at 648. But the Court asserted that its reasoning was "grounded not on the principle of sovereign immunity, but on a concern for separation of powers," as if the two doctrines could be so separated. *Id.*

38. Congress in one sense remains accountable for its policy decision to delegate authority. If Congress abuses that authority, voters may trace that abuse to the legislative delegation. One can argue that no judicial review of agency policymaking is appropriate. Yet Congress does not stand as accountable in the public eye for delegated authority, and indeed that lack of accountability is one key reason why Congress chooses to delegate its authority. See Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, *A Theory of Legislative Delegation*, 68 *Cornell L. Rev.* 1 (1982). Thus, most commentators welcome judicial review of agency policymaking, at least in the APA context, because the political checks on such policy, while significant, do not compare to the checks on congressional policy itself.

39. See, for example, Freedom of Information Act, 5 U.S.C. § 552(a), (b) (1988).

40. Review under the APA is quite deferential both as to questions of law and fact. See generally, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Moreover, even when judges determine that agency policy is arbitrary, the agency is free to reformulate that same policy, bolstered by additional supporting evidence. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

to agencies to conform their conduct to whatever the judiciary will likely deem reasonable. Not only could the judiciary disagree with the agency, as it currently can do through APA suits, but that potential disagreement could affect the agencies more because of the prospect of substantial damage awards. Some judges, for instance, might find that the FDIC's regulation of particular thrifts are unreasonable, and that prospect may chill or overdeter government enforcement efforts. The costs and course of agency deliberations might change considerably.<sup>41</sup>

Moreover, review of administrative action through tort likely would be biased because of the presence of a concrete injury that predisposes the decisionmaker to finding the action wrongful.<sup>42</sup> Review of policy cannot proceed as in the more detached context of an APA suit.<sup>43</sup> Thus, Congress's decision to subject agency policy to judicial review under the APA instead of through tort suits is not surprising.

Not all agency actions, however, clearly reflect public policy. Judicial review of the reasonableness of a particular employee's driving<sup>44</sup> or of a government physician's failure to remove a sponge from a patient's abdomen after surgery<sup>45</sup> would not elevate judges into a policymaking role. Although Congress may recognize that the threat of damages likely will affect government employees' conduct, it might conclude that such an effect is beneficial in forcing the employee to take reasonable precautions before acting. In other words, the error costs of judicially determining what is reasonable are modest when policy considerations are not directly at stake, or the cost may be more palatable given the absence of other constraints on such government conduct. Review is less likely to interfere with the political process and judges probably have greater institutional competence in assessing the negligence of fact-specific conduct than in evaluating government-wide policy.<sup>46</sup> Congress

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41. To the extent that the tort system malfunctions, there may be additional reasons to fear subjecting agency policy to review in such a forum. See, for example, Ronald A. Cass and Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 Va. L. Rev. 257, 276-87 (1991) (summarizing imperfections of monitoring through private tort actions).

42. Ronald A. Cass, *The Discretionary Function Exception to the Federal Tort Claims Act*, in II *Administrative Conference of the United States: Recommendations and Reports* at 1503, 1519 (1987) (Consultant Report to the 1987 Administrative Conference of the United States).

43. *Id.* at 1519.

44. *Harper v. United States*, 406 F. Supp. 1141 (E.D. Pa. 1976) (finding Army driver negligent when he did not proceed through intersection in a careful and prudent manner); *Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972) (finding government driver negligent for travelling at excessive speed).

45. *Certain Underwriters at Lloyd's v. United States*, 511 F.2d 159 (5th Cir. 1975) (finding government surgeon negligent in leaving sponge in patient's abdomen, but recovery barred because injury was incident to service).

46. Courts, at the behest of shareholders, analogously have declined to second-guess business decisions of corporations. The complexity of any investment decision, like formation of government policy, makes judicial review extremely problematic. The general rule long has been that, in a



readily might conclude that judicial review of some torts committed by administrative personnel does not threaten majoritarian policymaking.

Congress's waiver of the executive branch's immunity for garden variety tort claims is perhaps less surprising than the delay itself—the FTCA was not enacted until 1946.<sup>47</sup> The FTCA subjects the federal government to liability to the same extent as a private individual under like circumstances.<sup>48</sup> In addition, the law of the forum in which the tortious conduct occurred governs the action.<sup>49</sup> Accordingly, if a private driver would be negligent under state law so would the operator of a postal truck, and if a private physician would be liable for malpractice under state law, so would a physician at a veterans hospital. Congress, however, did not provide for the full measure of common-law relief. The FTCA does not allow punitive damages or prejudgment interest,<sup>50</sup> and Congress has provided only for bench trials.<sup>51</sup>

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derivative shareholder's suit, "[q]uestions of policy of management, expediency of contracts or action . . . may not be questioned [by a court], although the results show that what [the corporation] did was unwise or inexpedient." *Pollitz v. Wabash R.R.*, 100 N.E. 721, 724 (N.Y. 1912).

47. 60 Stat. 842 (1946), codified at 28 U.S.C. § 1346(b) (1988). Congress in 1920 waived the government's immunity to victims of maritime torts under the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1988), and allowed department heads to settle claims for property damage not exceeding \$1000 two years later, Act of Dec. 28, 1922, ch. 17, 42 Stat. 1066, codified at 31 U.S.C. § 216, repealed by the Act of May 9, 1945, ch. 135 § 3, 59 Stat. 225.

With such exceptions, those injured by the government's tortious acts before 1946 could seek political redress only through the cumbersome mechanism of private bills—legislation awarding compensation to individuals because of their injuries received. See 28 U.S.C. § 2509 (1988). The private bill mechanism became quite unwieldy in the face of increased claims against the federal government and competing claims on Congress's time.

Congress has waived (or conditionally waived) its tort immunity in other statutes as well as in the FTCA. See, for example, 31 U.S.C. §§ 3701-3702 (1988) (compensating for property damage sustained by military personnel incident to service); 38 U.S.C. §§ 301-363 (1988) (waiving immunity in part for military personnel for personal injury or death incident to service); id. § 236 (limiting certain claims against Veterans Administration for accidents overseas).

48. 28 U.S.C. §§ 1346(b), 2674 (1988).

49. *Id.*

50. *Id.* §§ 2674, 2402. Perhaps Congress determined that the full measure of damages was not needed either to compensate deserving victims of government negligence or to force the government to internalize the costs of its actions, or perhaps it concluded that the public fisc required that extra protection. Minimizing the amount of damages awarded may protect as well against an activity-level effect. See text accompanying notes 62-69.

51. Prior to the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("FELRTCA"), Pub. L. No. 100-694, 102 Stat. 4563, codified at 16 U.S.C. § 831(c)(2) (Supp. 1990) and scattered sections of Title 28, injured parties could sue government employees for common-law torts, but a litigant's choice of the United States as a defendant under the FTCA barred further recourse against the individual government employee. Plaintiffs could recover from a government official individually even if a claim against the government would be barred by an FTCA exception. The government employee, however, was protected under a judicially crafted official immunity doctrine for any common-law tort involving a discretionary decision arising out of the scope of employment. See also text accompanying notes 110-122.

More importantly, Congress refused to enact a blanket waiver in the FTCA, enumerating numerous exceptions.<sup>52</sup> In large part, those exceptions serve to protect majoritarian policy from secondguessing. For instance, the FTCA excludes claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."<sup>53</sup> Congress apparently determined that military activities in time of war should not be conducted under the shadow of possible damage relief. Similarly, Congress exempted "any claim for damages caused by the imposition or establishment of a quarantine," and "any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system."<sup>54</sup> Permitting suit in these contexts similarly could impede governmental policymaking.

More generally, Congress excluded from the Act any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused,"<sup>55</sup> and most intentional torts, including claims grounded in the misrepresentation of a government employee.<sup>56</sup> The discretionary function exception, and to some extent the misrepresentation exception, protect agency policymaking from the potential intrusion of damage awards.

#### A. *Discretionary Function Exception*

Despite the various formulations that courts have used in applying the discretionary function exception,<sup>57</sup> Congress's articulation of the exception unquestionably helps preserve majoritarian policy. Judges cannot secondguess the discretionary functions of government officials through tort suits without substantially interfering with executive branch policymaking. That policymaking is checked by the political and

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52. 28 U.S.C. § 2680(a)-(n) (1988).

53. *Id.* § 2680(j).

54. *Id.* § 2680(f), (i).

55. *Id.* § 2680(a).

56. *Id.* § 2680(h). Under the FELRTCA, injured parties cannot sue individual government officials even if an FTCA exception bars their claim against the United States. See text accompanying notes 117-21.

57. At times, courts have suggested that the discretionary function exception protects the discretion implicit in discharging all uniquely governmental functions, see *Dalehite v. United States*, 346 U.S. 15, 43-44 (1953), in carrying out all regulatory programs of government, see *Cunningham v. United States*, 786 F.2d 1445, 1447 (9th Cir. 1986), in formulating all governmental decisions at the planning, as opposed to the operational, stage, see *Dalehite*, 346 U.S. at 35-36, and most recently, in protecting all governmental decisions grounded in social, economic, or political policy, see *United States v. Gaubert*, 111 S. Ct. 1267, 1273 (1991) (protecting actions of bank regulators in supervising and then taking over failing savings-and-loan association); *Berkovitz v. United States*, 486 U.S. 531, 539 (1988); *S.A. Empresa de Viacao Aerea Rio Grandense v. United States (Varig Airlines)*, 467 U.S. 797, 814 (1984) (protecting inspection strategy).

administrative processes, which diminish the need for monitoring through tort actions. The discretionary function exception aims to distinguish challenges that are tied directly to regulatory initiatives from garden variety claims that implicate few policy concerns other than protecting the federal fisc.<sup>58</sup> As discussed previously, the prospect of a damage award might overdeter agency policymakers, curbing their responsiveness to public concerns.<sup>59</sup>

Moreover, subjecting agency policy to damage awards under the FTCA also might impede agency policymaking for reasons peculiar to the structure of the FTCA. First, because the FTCA subjects executive branch officials to liability under state law, state law would trump federal policies in the absence of the exception. For instance, in *S.A. Empresa de Viacao Aerea Rio Grandese v. United States (Varig Airlines)*,<sup>60</sup> the court of appeals, applying California law, held that the Federal Aviation Administration ("FAA") was negligent in delegating its responsibility to regulate airplane safety to aircraft manufacturers and in monitoring compliance with safety standards through a spot-check system. The Supreme Court reversed, reasoning that the discretionary function exception precluded suit because the decision to spot check was "grounded in social, economic and political policy," namely, how best to allocate resources to ensure safety.<sup>61</sup> Otherwise, California's good samaritan law would have undermined the supremacy of federal agency policymaking.

Second, because Congress predicated the FTCA on state law, judicial review under the FTCA subjects federal agencies to inconsistent standards throughout the country. For instance, while California imposed a duty to do more than spot check when conducting aircraft

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58. The legislative history of the discretionary function exception is not illuminating. Clearly, however, Congress's intent was to protect executive branch policy. The FTCA's antecedents rested in various prior doctrines protecting the government: judicial reluctance to issue writs of mandamus against officers discharging discretionary government tasks, see, for example, *Kendall v. Stokes*, 44 U.S. 87 (1845); judicial elaboration of common-law immunities for government officials, see, for example, *Spalding v. Vilas*, 161 U.S. 483 (1895); and municipal tort immunity for exercise of governmental functions, see, for example, *Hill v. Boston*, 122 Mass. 344 (1877).

As the House Report accompanying the Act explained:

This is a highly important exception, intended to preclude . . . application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted.

H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942).

59. See text accompanying notes 34-43. Moreover, the presence of an injured party in a tort suit might bias judges against the challenged policy.

60. 692 F.2d 1205 (9th Cir. 1982).

61. 467 U.S. at 814-20.

safety investigations, another state may have adopted different standards. Either the FAA would have to abandon its spot-check inspection program throughout the country because of the uncertainty of where it might be sued, or it would have to adopt different inspection programs for different parts of the country at the expense of uniformity and efficiency. On the other hand, if Congress had grounded the FTCA in an evolving federal common law of negligence, federal judges would have enjoyed greater power to fashion applicable standards of agency conduct.

Even without immunizing the discretionary functions of the government, Congress of course would retain the authority to override adverse judicial determinations. If the Supreme Court had decided *Varig Airlines* differently, for instance, Congress could have exempted inspection claims or good samaritan claims from the FTCA, or more narrowly amended the FTCA to specify that FAA spot checking must be considered "reasonable." Nevertheless, the possibility of congressional intervention, in all but the most outrageous cases, is quite slim, and the ex ante impact of damage actions on administrative agencies may be quite pronounced. In short, Congress's decision to retain immunity from tort suits challenging the discretionary functions of government helps preserve majoritarian policymaking.

The central inquiry in discretionary function exception cases should focus on the degree to which the tort claim threatens agency policy. The discretionary function exception comports with sound principles of majoritarian governance only to the extent that it insulates all agency actions that, like congressional enactments themselves, reflect national policy. Agency regulations and rules should be protected for, much like legislation, they are responsive to the democratic process, and permitting damage actions likely would cause more harm to such policymaking than good in providing added deterrence. From a process perspective, the case for protecting agency acts that bear a more tangential relationship to purposeful policy, such as malpractice or traffic accident claims, is correspondingly less compelling.<sup>62</sup>

To some extent, courts have applied a process approach to the discretionary function exception. Courts routinely have rejected tort challenges to regulations adopted by agencies, such as the FAA's measures to promote air safety,<sup>63</sup> or the INS's measures to control movement

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62. In addition, immunizing such garden variety tort claims might have a distorting effect on government operations, because the government might retain activities in-house that it otherwise would contract out in order to take advantage of favorable immunity rules. See Saul Levmore, *Takings, Torts, and Special Interests*, 77 Va. L. Rev. 1333 (1991).

63. *Miller v. United States*, 522 F.2d 386 (6th Cir. 1975).

across our borders.<sup>64</sup>

Courts also have applied the exception to less formal governmental policymaking. In *Dalehite v. United States*,<sup>65</sup> for instance, the Court immunized the government for its role in the explosions that levelled the port of Texas City, Texas in 1947, and caused severe losses of life and property. As part of the effort to provide food for Europe after World War II, the United States decided to ship fertilizer overseas. The fertilizer contained ammonium nitrate, which is highly combustible. After fertilizer had been loaded on two ships for transport, a fire started on one of the ships, apparently igniting the fertilizer and triggering an explosion.<sup>66</sup> The Court held that the government's actions, both in formulating the plan to export the fertilizer, as well as in implementing the plan through packaging, labelling, and shipping directives, were protected by the discretionary function exception. The Court allowed immunity despite the fact that government officials plainly were aware, or should have been aware, of the substantial danger of shipping the fertilizer under such conditions.<sup>67</sup>

As long as the challenged action stems from governmental policy, precluding a tort action will not necessarily remove all incentive for care. Even in the absence of notice-and-comment rulemaking, agency policy, in the form of either rules of general applicability or deliberative decisions made by senior agency officials, is formulated only after much internal debate and consideration of future ramifications. Its status as policy ensures a certain visibility that leads to some oversight by Congress and lobbying by interested private parties.

In contrast, nondeliberative actions, whether an employee's operation of a truck or the malpractice of a physician, generally do not stem from any prior debate, have not been taken with an eye to future consequences, and are not subject to ex ante monitoring from Congress, interest groups, or the agency itself.<sup>68</sup> In the absence of liability, political

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64. *Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982).

65. 346 U.S. 15 (1953).

66. *Id.* at 22-23.

67. *Id.* at 37-44.

68. Even in the absence of a tort suit, some ex post review is possible through political pressure. If physician malpractice is widespread, Congress or the VA might institute reforms to minimize recurrences. In addition, victims might gain Congress's ear and receive compensation despite the absence of a tort suit. Indeed, victims of the explosion in *Dalehite* exerted sufficient pressure to spur Congress to pass a relief act, awarding up to \$25,000 per person. Texas City Disaster Relief Act, 69 Stat. 707 (1955).

Yet neither Congress nor agencies stand as responsible in the public eye for the exercise of authority Congress delegates. Even a policy decision to tolerate negligence by lower level employees is not as clearly traced to the principal. The attenuated link, in combination with the lack of ex ante monitoring, suggests the need for some oversight ex post. A tort suit represents an effective check in this context because it is unlikely to interfere with government policy.

checks instill more care in deciding whether to ship fertilizer than in steering the freighter. Indeed, the decision to ship the fertilizer was reached at the cabinet level, and presumably only after much discussion of the advantages and disadvantages. Thus, even though application of the discretionary function exception removes a vehicle for deterring government accidents, it does so only in contexts in which the political process already acts as a safeguard.

The government's retained immunity in tort also may be based on an attendant activity-level effect. For instance, 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. But the activity-level effect justification is limited, for it cannot easily explain Congress's waiver of immunity for more garden variety torts, which also have the potential to overdeter the government. Theoretically, imposing liability upon postal service truck drivers could induce the government to stop subsidizing mail; the same holds true for imposing liability upon physicians in veterans hospitals. Yet Congress has waived the government's immunity from such tort claims presumably because the gains from added deterrence outweigh any potential harm stemming from an activity-level effect. The need to preserve government policy, as opposed to government activities themselves, has considerably more explanatory power.

Congress might have sought to protect majoritarian policymaking through other means. For instance, it could have changed the underlying liability standard of negligence, authorized some form of affirmative good faith defense, or reduced the availability of damages even further. Whether such steps would have struck the balance more effectively between the need to preserve government policy and the need to deter wasteful conduct is beyond the scope of this Article. My argument is rather that Congress's decision to immunize the government when internal checks circumscribe its actions is quite defensible from a normative perspective.

Nonetheless, recent cases may be overprotective of government from a process perspective, by failing to force the government to internalize the costs of its activities in situations in which government policy is less obviously threatened. In *United States v. Gaubert*,<sup>69</sup> the Court apparently expanded the discretionary function exception to include not only policy determinations, but also those actions of subordinate agency officials that are "grounded in the policy of the regulatory re-

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69. 111 S. Ct. 1267 (1991).

gime," and are "susceptible to policy analysis."<sup>70</sup> Thus, the Court held that bank regulators in determining the propriety of bank loans and bank litigation were protected by the discretionary function exception because the challenged acts were all "susceptible to policy analysis."<sup>71</sup>

The challenged acts in *Gaubert* may have been connected intimately to bank policy, as they were intended to revivify failing thrifts. But the justification for immunizing all government acts merely "susceptible" of choice or discretion is more elusive.<sup>72</sup> Consider, for instance, *Flynn v. United States*,<sup>73</sup> a recent case in which plaintiffs alleged that members of the National Park Service negligently attempted to restore order at the scene of an automobile accident.<sup>74</sup> Upon arriving at the scene in the middle of the road, Park Service personnel activated emergency lights and drove to the side of the road, allegedly distracting the car behind them which continued ahead and collided into survivors from the first accident. The Tenth Circuit held that the park rangers were shielded from liability by the discretionary function exception.<sup>75</sup>

As government employees, the park rangers in *Flynn* were vested with discretion in responding to emergencies, but their decision to activate the lights and turn to the side of the road did not stem from any policy previously formulated. Their situation-specific reactions may merit exoneration, but not necessarily the cloak of immunity. The nexus between the challenged actions and purposeful government policy is simply too attenuated, and even if the employees' decision was "susceptible to policy analysis," no internal checks safeguarded the challenged governmental action. To put it another way, the benefits from judicial review in such contexts are likely to outweigh the harm to majoritarian governance.<sup>76</sup>

Irrespective of whether or where to draw a line between government acts pursuant to policy and those "susceptible to policy analysis," the discretionary function exception avoids judicial secondguessing of agency policy. Formulation of policy is left to the agency itself with

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70. *Id.* at 1275.

71. *Id.* at 1277-79.

72. Justice Scalia in concurrence also chided the majority for its open-ended approach. *Id.* at 1281 (Scalia concurring). The majority's analysis may reflect its sympathy with the government's plight in combatting the savings and loan crisis.

73. 902 F.2d 1524 (10th Cir. 1990).

74. *Id.* at 1526-27.

75. See also *Johnson v. United States*, 949 F.2d 332 (10th Cir. 1991) (stating that park ranger's alleged failure to rescue mountain climbers protected by exception).

76. For a more thorough articulation of my views concerning the discretionary function exception, see Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. Rev. 871 (1991).

congressional supervision and possibly limited judicial review under the APA. Despite the lack of a damages check, the political and administrative process constrains government policy and minimizes the potential for arbitrary government conduct.

### B. *Misrepresentation Exception*

The FTCA also retains the federal government's immunity for all claims arising out of misrepresentations by government officials.<sup>77</sup> Individuals must rely upon the advice or information conveyed by a government agent at their own peril. At first glance, the misrepresentation exception is unrelated to the process justification for retained immunity. Almost by definition, a misrepresentation, whether intentional or negligent, does not constitute policy warranting protection.<sup>78</sup> In general, immunity is justified in this area, if at all, only by the fear of overdeterrence and attendant activity-level effect. But Congress's decision to retain immunity for the misrepresentations of government agents does help safeguard public policy in at least two respects.

First, some misrepresentations stem from purposeful policy. Consider, for instance, the facts in *Frigard v. United States*.<sup>79</sup> Plaintiffs invested funds in a firm, which unknown to them allegedly was a cover for a CIA operation. Plaintiffs asserted that the firm mismanaged their funds and that, but for the CIA's support of the firm, they would not have made the investment.<sup>80</sup> Certainly, the CIA may have misrepresented the company's status, but it presumably did so as part of a carefully thought out intelligence operation. The misrepresentation exception, in part, protects against judicial secondguessing of such purposeful government action. Just as with the discretionary function exception, deterrence should stem from the political process.

There are undoubtedly few cases in which government agencies purposefully misrepresent or lie to the public. More often misrepresentation claims sound in negligence. A misleading turn signal that precipitates a car crash can be viewed as either a garden variety tort or as a misrepresentation of the direction in which the car is heading.<sup>81</sup> A failure to warn of known dangers in a federal park can be considered as

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77. 28 U.S.C. § 2680(h) (1988).

78. Congress presumably crafted the misrepresentation exception out of general financial concerns. See, for example, H. Rep. No. 1287, 79th Cong., 1st Sess. 5 (1946).

79. 862 F.2d 201 (9th Cir. 1988). See also *Redmond v. SEC*, 518 F.2d 811 (7th Cir. 1975) (similar facts).

80. 862 F.2d at 202-03.

81. See, for example, *United States v. Neustadt*, 366 U.S. 696 (1961) (holding the government immune for alleged misrepresentation of Federal Housing Administration appraiser).



either negligence or an implicit misrepresentation of the park's safety.<sup>82</sup> And, as in general negligence cases, some negligent misrepresentations stem from purposeful government policy. Even after notice-and-comment rulemaking, the Food and Drug Administration may misrepresent that a certain drug is safe or the Environmental Protection Agency (EPA), after considerable study, may misrepresent that a certain type of treatment facility is effective.<sup>83</sup> Immunity is appropriate in such contexts to protect the policymaking process.

In general, however, misrepresentations by government officials, intentional or negligent, do not reflect purposeful policy. Most claims of government misrepresentation arise out of the government's negligent dissemination of information, whether by the National Weather Service (NWS)<sup>84</sup> or by various inspection agencies.<sup>85</sup> The process approach cannot explain immunity for such cases because no governmental policy per se is at stake, but rather, the judgment of an individual government employee. Similarly, an inspector's assessment of a home or a contract officer's estimate of state tax law consequences do not reflect purposeful policy and set no precedent for future governmental conduct. Few process checks safeguard the content of such governmental communications, for there is generally no way to monitor their substance ex ante. Like other nondeliberative acts of government employees, misrepresentations can form the basis for suit against the United States without

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82. See generally *Boyd v. United States ex. rel. U.S. Army Corps of Engineers*, 881 F.2d 895 (10th Cir. 1989). In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), for example, the plaintiff sued for lost cargo when a tug ran aground allegedly because of the Coast Guard's negligence in failing to repair a lighthouse. The government defended in part on the ground that it was liable at most for misrepresentation in representing to travellers that the lighthouse was operative. The Court found the government liable for negligence without even addressing the misrepresentation argument.

83. See, for example, *City of Garland v. Zurn Indus., Inc.*, 870 F.2d 320 (5th Cir. 1989) (holding that the misrepresentation exception applied to deny a third-party claim against the EPA for approving plans for sewage treatment facility that, when built, did not work effectively); *Pennbank v. United States*, 599 F. Supp. 1573 (W.D. Pa. 1985) (applying misrepresentation exception when bank lost payments from the Farmers Home Administration and the EPA when a sewer system that was approved by both agencies failed to operate properly).

84. See, for example, *Baroni v. United States*, 662 F.2d 287 (5th Cir. 1981) (holding that alleged failure of the Federal Housing Administration to calculate proper flood height was protected by misrepresentation exception); *Bartie v. United States*, 216 F. Supp. 10 (W.D. La. 1963) (holding that alleged failure of the NWS to warn of tidal wave was protected by misrepresentation exception), aff'd on other grounds, 326 F.2d 754 (5th Cir. 1964); *National Mfg. Co. v. United States*, 210 F.2d 263 (8th Cir. 1954) (holding that alleged failure of government officials to warn of flood was protected by misrepresentation exception); *Clark v. United States*, 218 F.2d 446 (9th Cir. 1954) (same). See also *Mt. Homes, Inc. v. United States*, 912 F.2d 352 (9th Cir. 1990) (holding that the failure of the Farmers Home Administration to include proper state tax information on cost estimate sheets was protected under misrepresentation exception).

85. See, for example, *United States v. Neustadt*, 366 U.S. 696 (1961); *Block v. Neal*, 460 U.S. 289 (1983); *Garbarino v. United States*, 666 F.2d 1061 (6th Cir. 1981).

jeopardizing majoritarian governance. Congressional waiver of immunity for such tort suits likely would lead to more benefit in terms of needed deterrence than detriment in disrupting government policy.

Nonetheless, Congress's decision to retain immunity for such misrepresentation claims might reflect a secondary protection of policymaking: preserving the government's policy decision to communicate information in the first instance. One of the chief functions of government is to disseminate information, and it may be impossible to prevent employees, at times, from either miscommunicating or failing to communicate necessary information. Unlike private parties, the government may communicate information for a wide variety of reasons unrelated to any profit motive; indeed, the poor generally benefit considerably from such communications.<sup>86</sup> Liability might have a greater effect in the governmental context than in the private sector because, while entities in both sectors would have to pay damages, the government generally does not derive a compensating financial benefit from the effective dissemination of information.<sup>87</sup>

Retained immunity for misrepresentation claims, therefore, might be justified if the potential harm of forcing the government to curtail its activities outweighs the benefits of added deterrence. If damage actions would curtail advice to the public from the Internal Revenue Service or Health and Human Services officials, then immunity might be justified. Similarly, the government might curtail the NWS's activities drastically if negligent dissemination of information could give rise to a tort suit.<sup>88</sup> On the whole, we might be better off by sanctioning government advice and information without exacting overly stringent controls, for fear of shutting down or cutting back dramatically on such information services.

Though plausible, the activity-level effect rationale<sup>89</sup> is not wholly

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86. Michael Braunstein, *In Defense of a Traditional Immunity—Toward an Economic Rationale for not Estopping the Government*, 14 Rutgers L. J. 1, 32-39 (1982) (arguing that the loss from chilling government communications will likely eclipse losses from detrimental reliance upon such communications). Of course, the poor are not the only beneficiaries of government communications. The wealthy sometimes benefit from free governmental communications as well as from free advice disseminated by the SEC to corporations or by the Comptroller of the Currency to law firms and banks. Government officials, in fact, may impart information as a way of incurring constituent support.

87. Some private companies charge directly for dissemination of information.

88. This is not to suggest that, in the absence of the exception, liability necessarily would be crippling. At common law, all public and private entities disseminating information are immune from actions for reporting negligent information in the absence of a close relationship to the plaintiff. See, for example, *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 148-49 (5th Cir. 1971). See also W. Page Keeton, et al., *Prosser and Keeton on Torts* § 109 at 755-65 (5th ed. 1984).

89. See text accompanying note 69.

persuasive. As an initial matter, predicting whether such an activity-level effect will arise is quite difficult. In many contexts, the government has sufficient incentives to make the representation even if the prospect of a damages action exists. In *United States v. Neustadt*,<sup>90</sup> plaintiffs relied to their detriment upon an allegedly negligent appraisal of a Federal Housing Administration inspector, paying in excess of the appraised property's fair market value.<sup>91</sup> Because the government agency backed the mortgage, it seemingly had sufficient incentive to continue inspections even if it could have been sued.<sup>92</sup> In other words, permitting suit based on misrepresentation may be compatible with implementation and formulation of government policy.

Continued immunity for all government misrepresentations might not be necessary to protect against an activity-level effect. Every time the government is liable for a tort under the FTCA, particularly in the regulatory context, an activity-level effect may arise. Congress has protected against that consequence to some extent by taking the damages question out of a jury's hands and by precluding punitive damages.<sup>93</sup> While a congressional decision to waive tort liability for misrepresentations theoretically could induce the government to abandon a particular policy of disseminating information to the public, such concerns are not persuasive enough to make the case for blanket immunity.<sup>94</sup>

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90. 366 U.S. 696 (1961).

91. The Court ruled that Section 2680(h) encompasses claims arising out of negligent, as well as willful, misrepresentations and dismissed the claim. *Id.* at 704-08.

92. In medical malpractice cases, courts have held the exception inapplicable. In *Keir v. United States*, 853 F.2d 398 (6th Cir. 1988), plaintiffs alleged that a government physician misrepresented that he was an ophthalmologist when he was only certified as an optometrist. He thereby induced consent to treatment. The court permitted the misrepresentation claim to proceed. *Id.* at 410-11.

In *Keir*, there was scant danger of an activity-level effect; government physicians for many reasons must communicate their qualifications and status. See also *Ramirez v. United States*, 567 F.2d 854 (9th Cir. 1977) (allowing claim for physician's failure to disclose risk of surgery).

93. Alternatively, Congress could protect against an activity-level effect by waiving immunity only for misrepresentations that are considered grossly negligent. At common law, for instance, even good samaritans are shielded only from claims of ordinary negligence, not from assertions of intentional wrongdoing or gross negligence. Continued limited liability, therefore, might not result in an untoward activity-level effect. See generally William M. Landes and Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Legal Stud. 83, 119-24 (1978). Moreover, even if less information is disseminated as a result of damages liability, the information should be more credible and might be more efficient in the long run.

94. It should not be surprising that courts have begun to chip away at the misrepresentation exception. The Supreme Court in *Block v. Neal*, 460 U.S. 289 (1983), permitted suit under the FTCA in circumstances quite similar to those in *Neustadt*. The plaintiff had received a loan from the Farmers Home Administration for construction of a prefabricated house. After inspecting the house three times, agency officials issued a report that the construction was in accord with specifications. Upon subsequently discovering serious defects, plaintiff sued the agency for failure to conduct an adequate inspection and failure to supervise construction of the home. The *Block* Court

In sum, Congress's articulation of the misrepresentation exception reflects concern for protecting policy formulated by the policymaking branches. Imposing liability for misrepresentations by government agents might frustrate policy formulated by Congress or the agency, or might induce those entities to curtail the flow of government information. Yet continued immunity for all misrepresentation claims is unjustified from a process perspective because the gains from review of some misrepresentation claims are likely to exceed any losses stemming from interference with government activities.<sup>95</sup>

### C. Bivens Claims

Unlike waivers for actions sounding in tort or contract, Congress has never waived the federal government's general immunity from damage claims predicated directly upon the Constitution. Constitutional requirements are largely indeterminate and the policymaking branches cannot be expected to predict or to agree with the content of the Supreme Court's continuing constitutional lawmaking. Permitting damage actions would exact too high a toll in terms of interference with majoritarian policymaking.

For instance, consider the Federal Communications Commission's ("FCC's") foray into affirmative action policies. The FCC grants a preference to minorities in considering applications for broadcast licenses.<sup>96</sup> After the FCC began reexamining the controversial policy, Congress prohibited the FCC from spending any appropriated funds to change it.<sup>97</sup> The point is not whether the FCC preference constitutes good pol-

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distinguished *Neustadt* on the ground that the plaintiff was challenging not only the negligent communication of information, but also the agency officials' failure to use due care in supervising construction of her home. *Id.* at 296-98. The Court explained that the misrepresentation exception did not shield government conduct inducing reliance, assuming that liability would exist under state law, but merely the government's negligent dissemination of information. *Id.* at 298-99. See also *JM Mechanical Corp. v. United States*, 716 F.2d 190, 194-95 (3d Cir. 1983) (holding that the government's misrepresentation that a performance bond had been paid did not preclude suit for government's alleged failure to procure substitute performance); *Cross Brothers Meat Packers, Inc. v. United States*, 705 F.2d 682, 684 (3d Cir. 1983) (allowing claim for negligent grading of meat by Agriculture Department officials).

95. Similarly, immunity from equitable estoppel claims is unwarranted from a process perspective. Congress has declined to waive its immunity for promises of its agents. Yet, a misrepresentation by a governmental agent does not represent government policy and has not been checked by the political process. Permitting recovery on the basis of agents' misdeeds should spur the government to supervise its agents more effectively. If there were sound empirical reasons to fear collusion between governmental officials and the public, then protection against the indirect circumvention of purposeful policy might warrant immunity. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 427 (1990). But in the absence of such data, the justification for continued immunity remains elusive.

96. See 92 F.C.C.2d 849 (1982).

97. Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat 1329-

icy or is even constitutional,<sup>98</sup> but rather that considerations of minimizing damages arguably should not burden formulation of such a policy. The same can be said of other controversial governmental policies, from restrictions on funding to hospitals,<sup>99</sup> to restrictions on the amount of money that veterans can pay attorneys to represent them in administrative hearings.<sup>100</sup> Congress's decision to retain immunity for constitutional violations plausibly preserves majoritarian policy.

Immunity for all constitutional violations, however, is unnecessary to protect majoritarian policy. In the wake of *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>101</sup> in which the Supreme Court implied an action for monetary damages under the Fourth Amendment against federal officials in their individual capacities,<sup>102</sup> Congress waived the government's immunity from damage actions arising out of certain constitutional violations. In response to publicity surrounding several notorious raids by federal law enforcement personnel, Congress in 1974 authorized suit under the FTCA for *Bivens* claims as well as some intentional torts based upon acts or omissions of investigative and law enforcement officers.<sup>103</sup> Congress's choice to waive immunity for *Bivens* actions only with respect to law enforcement personnel suggests Congress's fear that waiving the government's immunity completely would have an untoward impact upon policymaking.

Congress's limited waiver conforms in part with the process justifi-

31 (1987).

98. The Court surprisingly held that it was constitutional. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

99. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

100. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

101. 403 U.S. 388 (1971). Courts have narrowed the scope of the *Bivens* remedy by circumscribing its availability. See generally *Schweiker v. Chilicky*, 487 U.S. 412 (1988). The *Chilicky* Court stated:

The concept of special factors counselling hesitation in the absence of affirmative action by Congress has proved to include an appropriate judicial deference to indication that congressional inaction has not been inadvertent. When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

*Id.* at 423. See also *Chappell v. Wallace*, 462 U.S. 296 (1983); *Bush v. Lucas*, 462 U.S. 367 (1983).

The Court has not clarified the extent to which Congress can preclude a *Bivens* cause of action. Compare the discussion in *Carlson v. Green*, 446 U.S. 14, 18-19 (1980), which suggests that the Court will defer to an adequate congressional system of relief, with the more recent discussion in *Chilicky*, which indicates that as long as Congress has addressed a general problem, implying a cause of action is inappropriate.

102. Government officials are protected by qualified immunity, which precludes damages unless the officials violated clearly established rights of which a reasonable person should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

103. Pub. L. No. 93-253, 88 Stat. 50 (1974), codified at 28 U.S.C. § 2680(h). See generally Jack Boger, Mark Gitenstein, and Paul R. Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. Rev. 497 (1976).

cation for continued immunity. Constitutional violations and intentional torts committed by law enforcement personnel rarely stem from considered governmental policy, but rather from the situation-specific reactions of individual employees. Permitting judicial review and damage awards should not impede executive branch policymaking significantly. Congress's decision to waive immunity for law enforcement torts, but not for the torts of other officials,<sup>104</sup> reflects an understanding that immunity from damage actions is most important when government policy that is subject to political checks is directly at stake.

This understanding of Congress's waiver illuminates a controversy that has arisen under the revised FTCA. Several courts have questioned whether the discretionary function exception protects the government from liability for constitutional violations or intentional torts committed by law enforcement personnel, despite Congress's recent waiver. In *Sutton v. United States*,<sup>105</sup> the Fifth Circuit held that courts must harmonize the two sections of the FTCA. In *Sutton*, the plaintiff alleged that a postal inspector manipulated evidence connected to his investigation of a forged deed and thereby induced several grand juries to issue indictments. The court stated that when the conduct in question is of the type for which Congress intended to waive immunity by permitting claims for some intentional torts, the discretionary function exception should not apply.<sup>106</sup> The court then remanded the claim to determine whether there was in fact a conflict between the two sections in the case.<sup>107</sup> Although the court's contemplated accommodation is far from clear, it certainly suggested that the law enforcement proviso amended in part the discretionary function exception.<sup>108</sup>

The process approach, however, suggests that the discretionary function exception should apply irrespective of the law enforcement proviso.<sup>109</sup> If the constitutional violation stems from purposeful policy, then Congress, consistent with its waivers in related contexts, presumably intended that the political process take its course. Imposing dam-

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104. In *Chilicky*, for example, the plaintiffs challenged the government officials' improper administration of the social security program. 487 U.S. at 4. Although misguided, the continuing disability review program reflected purposeful agency policy and ultimately was remedied through the political process. See Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

105. 819 F.2d 1289 (5th Cir. 1987).

106. *Id.* at 1300.

107. *Id.*

108. *Id.* at 1297-98. But see *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983) (holding that the discretionary function exception applies to *Bivens* claims).

109. This is not to suggest that the postal inspector's action necessarily warranted protection under the discretionary function exception, but merely that the court should make such inquiry. Indeed, a more complete waiver of *Bivens* claims arguably would not harm policymaking because of the independent protection provided by the discretionary function exception.

ages threatens to dampen the ardor and vigor of policymaking. The touchstone of immunity for constitutional claims, as for common-law tort claims, may well be the extent to which judicial review would compromise or distort public policy and the correlative degree to which such policy is protected by the political process.

#### D. Immunity for Government Employees

In addition to determining whether to waive the federal government's immunity, Congress must consider the related question of whether to permit tort actions against individual employees. Immunizing the government as a whole would not protect the policymaking branches' interests sufficiently if government employees could be sued personally. To the contrary, employees might become overly cautious in formulating and carrying out government policy. Employees do not receive a direct financial reward for competently executing policy, so a damage award might skew their behavioral incentives.<sup>110</sup> In order to continue attracting qualified personnel, the government likely would have to indemnify such employees for all but the most egregious incidents. If officials are not immune from suit, the exceptions to the FTCA might lose their protective effect. Judicial crafting of common-law standards, however, has obviated in part Congress's need to determine the level of immunity for government employees.

Courts, acting to protect the coordinate branches of government, generally have held governmental employees immune for any common-law tort involving a modicum of policy<sup>111</sup> committed within the scope of their employment.<sup>112</sup> Just as the discretionary function exception protects federal government policymaking, so does the doctrine of official immunity. The ability of government officials to formulate and to implement policy would be disrupted seriously if such officials could be threatened with personal liability, even if protected through indemnification or insurance.<sup>113</sup>

On the other hand, governmental policymaking is not as clearly jeopardized if government employees are sued for nondiscretionary or

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110. See notes 23-24.

111. Even Justice Holmes's famous decision denying immunity in *Miller v. Horton*, 26 N.E. 100 (1891) (finding no immunity for a public health official who destroyed plaintiff's horse unless the horse was in fact diseased), was overruled in *Gildea v. Ellershaw*, 298 N.E.2d 847 (1973).

112. See, for example, *Spalding v. Vilas*, 161 U.S. 482 (1896) (holding the Postmaster General immune from a suit challenging his allegedly malicious dissemination of information in connection with his official duties); *Barr v. Mateo*, 360 U.S. 564 (1959) (finding the Acting Director of Rent Stabilization immune from a libel charge stemming from a communique issued in connection with his official duties).

113. See note 23.

situation-specific acts. In *Westfall v. Erwin*,<sup>114</sup> the Supreme Court addressed the question of the proper scope of official immunity. A civilian employee at an Army Depot filed a negligence suit against his supervisors, asserting that he had received severe chemical burns because of the defendants' negligence in storing toxic soda ash. The government officials defended in part by claiming official immunity. The Court explained that the purpose of official immunity is not to protect erring officials, but rather "to insulate the decisionmaking process from the harassment of prospective litigation."<sup>115</sup> The Court noted a difference between discretionary conduct and conduct that is not the product of independent judgment, as only in the former case can the threat of liability shackle government operations.<sup>116</sup> In rough parallel to the discretionary function exception, official immunity should protect purposeful decisionmaking and not reactions to situation-specific events. That decisionmaking, in turn, is checked at least somewhat by the political process. Even though Congress declined under the FTCA to waive the government's immunity for intentional torts or misrepresentations, injured parties after *Westfall* still might obtain redress from an individual government employee if that employee did not participate in setting policy.

To ensure that suits against individual government employees did not jeopardize government policymaking, Congress repudiated *Westfall*, conferring absolute immunity upon all government officials for common-law torts committed within the scope of employment.<sup>117</sup> If the Attorney General certifies that the defendant employee was acting within the scope of his or her duties, then the United States is substituted as the defendant, and recourse against the United States is exclusive of any other remedy.<sup>118</sup>

For example, the Supreme Court held in *United States v. Smith*<sup>119</sup> that the new grant of immunity precluded a malpractice suit against a government physician even when the FTCA exempted such a claim because the malpractice took place overseas.<sup>120</sup> The Court reasoned that Congress simply did not manifest much "solicitude for tort plaintiffs' rights."<sup>121</sup> The Court explained that claims precluded by the FTCA ex-

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114. 484 U.S. 292 (1988).

115. *Id.* at 296.

116. *Id.* at 296-97.

117. FELRTCA (cited in note 51).

118. 28 U.S.C. § 2679(b), (d) (Supp. 1990).

119. 111 S. Ct. 1180 (1991).

120. The FTCA excludes "any claim arising in a foreign country." 28 U.S.C. § 2680(k) (1988).

121. 111 S. Ct. at 1189. See also *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990) (precluding suit against individual government employee for assault and battery). The Act, however, does except any action "which is brought for a violation of the Constitution of the United States." 28



ception also are precluded against employees.<sup>122</sup>

Although there may be sound reasons of governance to shield federal employees from some tort claims, blanket immunity is difficult to reconcile with the goal of forcing the government to account for the costs of its actions. The new legislation deprived plaintiffs of a remedy even for torts committed by government employees that do not implicate directly government policy and that have not been checked by the political process. As a result, not only may more injured plaintiffs go uncompensated, but the government may have insufficient incentive to supervise its employees as well. That congressional expansion of immunity cannot be reconciled with the process model because separation-of-powers concerns simply do not require immunizing governmental employees for most nondiscretionary acts.

#### IV. WAIVERS OF IMMUNITY IN CONTRACT

Our constitutional system generally immunizes the federal government from contract as well as tort claims. As Alexander Hamilton explained: "Contracts between a Nation and individuals are only binding on the conscience of the sovereign, and . . . confer no right of action independent of the sovereign will."<sup>123</sup> Private contracting parties generally have no recourse against Congress<sup>124</sup> or executive agencies for any breach. Sovereign immunity allows each Congress to determine whether to honor an agreement made with a prior legislature or agent, free in most instances from the threat of damages or injunctive relief. Only the Takings and Due Process Clauses constrain Congress's otherwise unfettered discretion to abandon or unilaterally modify contractual obligations.

The consequences of continuing immunity are manifest. Private contractors face continual uncertainty when contracting with the government. Congress or a government procurement officer may reconsider and revise an agreement without paying full damages.<sup>125</sup> The private

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U.S.C. § 2679(b)(2) (1988). Congress may have feared that it lacked the power to eliminate *Bivens* remedies against federal government officials unless some alternative remedy were available. See note 73.

122. 111 S.Ct. at 1189-90 (quoting H.R. Rep. No. 100-700 at 6).

123. *The Federalist* No. 81 at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

124. Congress in large measure is treated like any other contracting party that has the power to set the terms and conditions of its contractual obligations, including the power to limit its exposure to damage actions. Differences, however, remain. Private parties that limit their own exposure to damages do so at the risk that courts will find the contract provisions unconscionable, see, for example, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), or that Congress will intervene in the contracting relationship. More importantly, Congress and government officials can agree to a particular course of conduct and later breach this agreement without liability due to a change in political priorities. See text accompanying notes 154-85.

125. See text accompanying notes 139-73.

contractor likely will respond by charging more for its services to self-insure against the possibility that full contract performance will not occur.

At the same time, immunity prevents Congress from fully precommitting to long-term contractual relationships. Unlike a private party, Congress cannot pledge to stay its course in the future. Even if the present Congress waived immunity for a long-term contract, future Congresses could revoke the waiver just as future Congresses can alter regulatory programs. All laws, in other words, are subject to change irrespective of the wishes of the enacting legislature. As a result, the government has less flexibility in contracting,<sup>126</sup> and must, at least in theory, pay more for the goods and services it requires. At first blush, therefore, persistence of sovereign immunity in the contract setting—unlike in tort—seems contrary to the government's interest.

Despite the disadvantages, however, the need to preserve the ability of future generations to fashion policy responsive to contemporary majoritarian concerns plausibly justifies immunity. Permitting full damages might allow current members of Congress and the executive to "lock in" government policy through contractual arrangements at the expense of future flexibility. Congress, of course, influences the future with every step that it takes, whether in domestic or foreign policy, as the current budget deficit all too plainly attests. Yet, by providing liquidated damages in case of a governmental change in policy (or providing for specific performance), government leaders could dictate future policy much more effectively.<sup>127</sup> The temptation to commit the country to a course that the outgoing policymakers favor might be too strong for Congress to resist.

Consider that before the Federalists gave up the reins of power in 1801, they attempted to gain control over the federal judiciary by creating judgeships.<sup>128</sup> The newly elected Republicans, however, successfully repealed the Act after they assumed office. Had the Federalists instead entered into long-term contracts with circuit court executives, the Republicans might have been stymied in the absence of governmental

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126. See generally Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Cal. L. Rev. 2005 (1987); Ian E. MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo Classical, and Relational Contract Law*, 72 Nw. U. L. Rev. 854 (1978).

127. In contrast, continuing immunity rules do not protect the government necessarily from paying costs imposed by the negligence of prior generations. Government negligence in storing nuclear waste, for example, may saddle future generations with great clean-up costs. In the absence of sovereign immunity, however, even if the prospect of tort liability would deter some government wrongdoing, future generations would have to bear costs by paying tort judgments stemming from the government's prior negligence.

128. Circuit Court Act of 1801, ch. 517, 26 Stat. 826. See *Stuart v. Laird*, 5 U.S. 299 (1803).

immunity.<sup>129</sup> Neither Congress nor the President<sup>130</sup> should be able to bargain away the sovereignty of future governments. Sovereign immunity is warranted in the contract context if the harm from allowing one Congress to bind future Congresses outweighs the benefit from enforcing the government's precommitment to full contractual performance.

Viewed this way, sovereign immunity in contract, like that in tort, protects majoritarian policymaking. Just as a congressional determination to enter into an agreement is largely immune from judicial scrutiny, so is the congressional decision to terminate that agreement.

As in the tort context, the absence of a damage remedy does not leave the congressional decision to breach unchecked. There are two principal constraints. First, bicameralism and presentment must precede any change in congressional policy, and the administrative process may mold any change in executive branch policy. Those who stand to lose from the change may utilize political channels to attempt to alter the government's course, like any other targets of governmental regulation. Although contemporary majorities may find it all too expedient to renege upon prior obligations, at times the political process constrains such actions. Second, with each decision to breach, Congress must confront the likely consequences of increased prices for future goods and services, as well as increased difficulty in entering into future long-term contracts.

On balance, those two constraints demonstrate relatively powerful reasons to prefer the policy decisions of current, rather than past, legislatures. Because our political system tends to submerge future interests, Congress may decide to conclude a long-term contract without sufficient regard for future consequences. Politicians and their constituents strive to maximize current benefits.<sup>131</sup> Constituents are generally more interested in their own welfare than in future generations and they may discount considerations for future welfare because of their inability to determine who in fact will be in power a generation hence. For their part, politicians seek reelection by appearing to respond to constituents' current needs.

Even if a Congress wished to account for future interests, it likely

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129. It seems that by creating new judgeships, the Federalists sought to produce the same binding effect in light of Article III's Compensation Clause. The Supreme Court, however, was unpersuaded, at least given the political tenor of the times. See *Stuart v. Laird*, 5 U.S. 299 (1803) (upholding repeal).

130. See Michael W. McConnell, *Why Hold Elections? Using Consent Decrees To Insulate Policies From Political Change*, 1987 U. Chi. Legal F. 295, 319 (concluding that the President cannot bargain away most attributes of sovereignty).

131. See generally M. Hayes, *Lobbyists and Legislators: A Theory of the Political Process* (1981).

could not, due to unforeseeable future events.<sup>132</sup> To be sure, Congress's repudiation of a prior agreement may discount future interests in enhanced bargaining power,<sup>133</sup> but that repudiation compromises Congress's own ability to enter into long-term agreements and comes at the political expense of alienating affected contracting partners. The doctrine of sovereign immunity, therefore, presupposes a greater trust in the current process culminating in repudiation, than in the past process that led to the original agreement.

Private entities, however, frequently find it to their advantage to enter into long-term contracts, even though they may value short-term expediency at the expense of long-term gains and cannot foresee the future. Yet, unlike private entities, Congress's identity and that of the public as a whole changes over time.<sup>134</sup> Births, deaths, immigration, and emigration all transform the political community, resulting in an influx of newcomers who did not participate in enacting the original congressional agreement. Individuals can bind themselves through contract, but they generally cannot bind their descendants let alone other third parties. Although shareholders in a private corporation may also change, newcomers are not compelled to invest if they disagree with the company's long-term strategy. Citizens, in comparison, would have little choice, short of exit, but to live under the long-term contracts made by prior Congresses. Thus, there is greater reason to permit repudiation of contractual obligations by the government than by private parties.

Just as important, there is more reason to fear that the private contracting parties, absent the ability to precommit, would abuse a privilege of contractual immunity. Political checks do not constrain private entities' decisions whether to breach prior commitments, and third parties affected by the decision do not have a say in the corporate decision. Individual corporations may not be concerned about damaging their ability to engage in long-term contracts in the future, particularly if they intend to dissolve or are on the verge of insolvency. A damage remedy is required to force these private parties to internalize the cost of breach. In contrast, even if protected by immunity, Congress must

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132. Indeed, legislators recognize that, even if they attempt to serve future interests by following a particular course, they cannot ensure that their successors will maintain that direction. See generally Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. Bar. Found. Res. J. 379 (cogently addressing limits on Congress's ability to dictate future policy and undo prior policy); Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contract Clause*, 88 Colum. L. Rev. 647 (1988) (same with respect to power of state legislatures).

133. The efforts of some developing nations to repudiate their public debt provide a helpful analogy.

134. See generally Sterk, 88 Colum. L. Rev. 647.

expend considerable political capital in disavowing prior commitments and jeopardize its ability to contract in the future.

The concern for preserving majoritarian policymaking, however, does not warrant blanket immunity. Continued immunity is warranted only to the extent that it protects future policymaking. Given that contract liability rests on a judgment that the defendant breached a standard that the defendant itself helped create, judicial review for conformance to that standard<sup>135</sup> would not interfere unduly with any policymaking function,<sup>136</sup> unless the government's reasons for the breach stem from a desire to change policy in light of new conditions or political priorities.

Because judicial review of contracting agreements poses less risk to policymakers than does review of the reasonableness of government or legislative action, one would expect Congress to permit damage actions more fully in contract than in tort. One would also expect more extensive waivers of contract immunity because Congress arguably benefits more from retained immunity in tort than in contract. Congress in fact has waived the federal government's immunity in contract more completely, agreeing to pay close to market damages for most garden variety breaches by executive branch officials.<sup>137</sup> Yet Congress has not waived its own immunity from suit, and there remain significant pockets where Congress and the courts will not even hold agency officials fully to their prior commitments. Unlike in the tort context, however, courts have second-guessed Congress's repudiation of prior agreements under the Takings and Due Process Clauses to ensure that the government's breach stems from policy concerns as opposed to sheer opportunism.<sup>138</sup>

#### A. *Liability of Executive Branch for Breach of Contract*

Immunity questions often arise in contract claims stemming from public projects or military procurement. In contrast to tort claims, Congress first waived the executive branch's immunity from contract suit

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135. Similarly, the judiciary reviews governmental action for conformance to applicable rules and regulations—standards that the government helped set.

136. Third-party review still has the potential to interfere with agency prerogatives. Compare *United States Dep't of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc) (addressing the loss of agency control if third parties review agency's conduct for conformance to applicable rules and regulations).

137. Tucker Act, 28 U.S.C. §§ 1491-1503 (1988).

138. In comparison, courts have not superintended Congress's failure to waive immunity in the tort context, with the exception of claims for expropriated property. There is likely less danger of "singling out" in the tort context. More important, unlike in tort, courts in the contract context must decide which congressional policy to honor: the original commitment or the breach. Complete immunity arguably evinces insufficient concern for the majoritarian policy underlying that initial commitment.

prior to the Civil War.<sup>139</sup> Although the waiver was not complete in various respects, most contractors could assert breach of contract claims in the specially created Court of Claims.<sup>140</sup> The waiver was viewed as indispensable to the efficient operation of government, for without it, qualified private contractors might not undertake government projects and the government could not obtain the goods and services it needed at affordable prices.

Indeed, concerns for majoritarian governance raise no substantial case for immunizing most contract claims against the executive branch. Judges generally can determine whether a breach exists without second-guessing government policy. In construing an ambiguous term in the contract, for instance, a court would no more threaten agency formulation of policy than it does routinely by construing statutes or agency regulations. Although some discretion exists in determining whether an agency has breached a contract, that discretion is likely more canalized than in determining reasonableness.

Moreover, the mere threat of a damages action generally would not chill socially useful governmental initiatives. Indeed, the theory of contract damages is in part that a contracting party will breach only when it is efficient to do so.<sup>141</sup> The threat of damages, therefore, is consistent with profit-maximizing behavior. If no damages were permitted, government procurement officers might engage too readily in opportunistic conduct. Contractors likely would respond by charging more for the initial contract. That higher price might limit the amount of goods and services that the government could obtain, thus increasing the overall costs of government.

Despite the United States general waiver of immunity from suit for breach of contract in the Tucker Act,<sup>142</sup> Congress and the courts have directed that special contract rules apply to the government, allowing it to escape the full consequences of a breach in many settings. The government generally need not pay full damages upon terminating a contract for its convenience,<sup>143</sup> nor need it usually pay damages when a sovereign act of government interferes with the private contractor's per-

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139. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 614 (1855). See also Act of March 3, 1863, ch. 92, 12 Stat. 765, 768 (1863).

140. For a history of the waiver of executive immunity to contract liability, see Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 634-84 (1985).

141. Richard A. Posner, *Economic Analysis of the Law* at 105-14 (Little, Brown, 3d ed. 1986).

142. 28 U.S.C. §§ 1491-1509 (1988). Congress has waived the government's immunity from contract suits in particular circumstances as well. See, for example, 41 U.S.C. § 601 (1988); 10 U.S.C. § 2312 (1988) (waiver for military contracts).

143. See text accompanying notes 145-56.

formance of a government contract.<sup>144</sup> Yet, regardless of the danger of inefficient contracting behavior, concerns for majoritarian governance support the partial continued immunity.

### 1. Termination for the Convenience of the Government

One of the chief distinctions between the government and the private sector is that the government usually can terminate a contract without cause for the convenience of the government, whether because of changed needs or different political priorities.<sup>145</sup> Congress, agencies and courts have limited recovery in various contexts to costs incurred, profit on work done, and costs of preparing the termination settlement proposal.<sup>146</sup> Such terminations are not considered breaches of contract and anticipatory profit is not allowed. Consider a government contract for natural gas. If the price of natural gas suddenly plummets due to new discoveries of deposits, then the government presumably could terminate the contract.<sup>147</sup> Certainly, the government could terminate the contract without paying full damages if the government subsequently decided to implement a new solar energy program.

As a corollary to the termination for the convenience of government doctrine, suits for specific performance against the government are not allowed.<sup>148</sup> Specific performance would afford private contractors a weapon to gain relief based on their expectancy interest, and more importantly, to force the government to expend funds for work it no longer believes to be in the nation's interests.

Concerns for preserving majoritarian policymaking generally support these restrictions on contract breach remedies. Congress has been reluctant to force the executive branch to continue a contract that is no

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144. See text accompanying notes 154-73.

145. Almost every major contract now includes a provision allowing termination for convenience of the government. The court in *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), placed some restrictions on the government's ability to terminate contracts, suggesting at a minimum that the government could not avoid its obligation to pay anticipated profits when, at the time it enters into a requirements contract, it realizes that it can obtain an item that the contract covers for less than the contract price. Termination is appropriate, however, when circumstances change. See also *Salsbury Industries v. United States*, 905 F.2d 1518 (Fed. Cir. 1990). The government has little incentive to terminate a contract when the contract nears completion. For a history of the government's right to terminate, see John Cibinic, Jr. and Ralph C. Nash, *Administration of Government Contracts* at 817-30 (Geo. Wash. Univ., 2d ed. 2d printing 1986).

146. See generally Cibinic and Nash, *Administration of Government Contracts* at 817-19 (cited in note 145). See also *Torncello*, 681 F.2d at 765; *Salsbury*, 905 F.2d at 1522.

147. Termination is probably appropriate as long as the sudden drop in prices was unforeseeable, or at least unforeseen.

148. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 607-11 (D.C. Cir. 1992) (distinguishing specific relief from specific performance).

longer deemed in the public interest, because to lock the government into a contract would tie its hands when flexibility is needed. Payment of expectation damages might impede officials' willingness to change policy. Contract rules should not coerce the government into purchasing more natural gas than necessary. Likewise, if the political priority for the B-2 bomber changes, as it recently has,<sup>149</sup> previously entered contracts may be terminated, subject to payment of reliance damages and profit on work completed. In turn, although the private contractor may not receive full contract damages, it generally will anticipate that possibility by raising its bid accordingly,<sup>150</sup> forcing the government to pay more for goods and services than would a private entity.<sup>151</sup>

Congress might well determine that the higher cost of doing business may be justified by the need to preserve the government's flexibility in terminating unwanted contracts. Some inefficiencies doubtless arise because the government cannot reassure skittish contractors that it will honor the contract or pay full market damages. But those higher front-end costs of government contracts may have the salutary effect of forcing a current administration to assume more of the cost of government contracting to prevent it from foisting too many of those costs on future policymakers. Therefore, the special termination rule not only protects government flexibility, it also safeguards against government measures that could mortgage the future.<sup>152</sup>

Unlike discretionary function exception cases, however, there may not be substantial process checks protecting against arbitrary invocation of the termination provision. Government contracting officers at a relatively low level may terminate a contract without considerable internal agency debate, even though regulations differ from agency to agency.<sup>153</sup> Nonetheless, the requirement to pay some damages, includ-

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149. In his 1992 State of the Union Address, President Bush recommended curtailing the B-2 bomber program substantially. See Boroughs, *Carnage on the Coast*, 112 U.S. News & World Rep. 58 (May 18, 1992).

150. The contractor, however, probably cannot extract a pledge from the government that if it terminates the contract, it will pay the contractor liquidated damages. Indeed, courts have permitted the government to terminate contracts for convenience even when no termination clause was included in the contract. See, for example, *G.L. Christian and Assoc. v. United States*, 312 F.2d 418 (Ct. Cl. 1963); *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321 (1875) (suggesting that the executive's power to suspend work is inherent in its authority from Congress to enter into contracts).

151. Alternatively, the prospect of incomplete damage awards might be offset by the security attendant upon contracting with a party whose financial health, at least in the short term, is not in question. Compare Eule, 1987 Am. Bar Found. Res. J. at 424 (cited in note 132) (suggesting that the full measure of damages should be required for all state breaches of contract).

152. The rule of immunity is also important to check the power of congressional agents in the executive branch. Agency officials cannot easily pledge more to private parties than Congress is willing to accept.

153. See, for example, 48 C.F.R. § 949.101 (1984) (stating that procurement executive in De-



ing profit on work performed, and the need to assure a competent pool of contractors if similar goods or services are desired in the future, minimize the potential for abuse. Thus, the failure to waive immunity fully in the contract context, as reflected in the termination for convenience doctrine, arguably protects the future flexibility of policymakers when the potential for wasteful conduct, though it exists, is limited.

## 2. Sovereign Act Doctrine

In addition to the power to terminate contracts, the government also may breach any contract due to a "sovereign act" of government.<sup>154</sup> Unlike contracts between private parties, contracts between the government and a private party must be read in the framework of the government's sovereign authority. When the government breaches a contract because of a policy decision, the government is not liable for the standard common-law measure of damages. The government benefits from relying upon the sovereign act doctrine, for not only is the government immune from paying anticipated profits, as it is under the termination for convenience doctrine, but it also need not compensate the private contractor for any loss of actual profit sustained due to the sovereign act.<sup>155</sup> As with the termination for convenience doctrine, awarding full damages or excusing the contractor's performance might make it too costly for the government to change policy when the public interest so dictates. Sovereign acts, in other words, like all regulatory exercises of power, may injure private parties without generally triggering a duty to compensate. At the same time, as under the exceptions in the FTCA, sufficient process checks arguably protect against arbitrary government action.

Although the sovereign act doctrine is controversial, courts for the last century have applied it consistently. The Supreme Court has explained that:

The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to . . . violate the particular contracts into which it enters with private persons. . . . Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.<sup>156</sup>

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partment of Energy must be notified before any termination actions on certain contracts); *id.* § 1849.102 (stating that headquarters must approve major NASA terminations).

154. The doctrine initially was developed by courts on behalf of the policymaking branches. See generally Cibinic and Nash, *Administration of Government Contracts* at 268-71 (cited in note 145).

155. See *Horowitz v. United States*, 267 U.S. 458, 460-61 (1925); *Tony Downs Food Co. v. United States*, 530 F.2d 367, 370-71 (Ct. Cl. 1976).

156. *Horowitz*, 267 U.S. at 461 (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865)).

For instance, in *Atlas Corp. v. United States*<sup>157</sup> a uranium mining company alleged that the government breached a fixed price contract for uranium by passing a statute<sup>158</sup> and implementing regulations<sup>159</sup> requiring all uranium mining companies to stabilize mill tailings—the ore residue after extraction of the uranium. Because of the considerable expense involved, plaintiff argued that the government breached its contractual obligation by requiring the company to expend much more than expected without reimbursement from the government. The court rejected the breach of contract argument, reasoning that the agency's imposition of stabilization and disposal requirements constituted sovereign acts undertaken for the public good.<sup>160</sup>

Similarly, in *Amino Brothers Co. v. United States*<sup>161</sup> the Army Corps of Engineers contracted with the plaintiff to work on a flood control project. When the Corps of Engineers released water from floodgates at an upstream dam, however, the water washed out plaintiff's project, causing plaintiff to incur substantial expenses in terms of materials lost and delay. Plaintiff alleged that the government breached the contract by interfering with its ability to discharge its contractual obligations. Nonetheless, the court held that the Army Corps of Engineers was acting in its sovereign capacity by releasing the water upstream because its action "affected the public generally and was not directed solely toward the plaintiff."<sup>162</sup> Accordingly, the court permitted no recovery.

Concerns for majoritarian governance support this result. If courts could impose liability on the government for its sovereign acts, the costs of compensating private parties for the increased expenses of performing government contracts might deter the government from effectuating public policy. Just as Congress and government agencies generally are immune from any damages caused by their exercises of regulatory authority, whether through zoning, food regulation, or banking oversight,

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See also *Deming v. United States*, 1 Ct. Cl. 190, 191 (1865) (stating that "[t]he United States as a contractor are not responsible for the United States as a lawgiver").

157. 895 F.2d 745 (Fed. Cir. 1990).

158. Uranium Mill Tailings Radiation Control Act, Pub. L. No. 95-604, 92 Stat. 3021 (1978).

159. See 40 C.F.R. § 192 (1991); 10 C.F.R. § 40 (1992).

160. 895 F.2d at 754.

161. 372 F.2d 485 (Ct. Cl. 1967).

162. *Id.* at 491. If the Corps of Engineers delayed the plaintiff's project directly, then the court likely would have awarded damages, due to the government's implied duty to cooperate. See, for example, *United States v. Behan*, 110 U.S. 338 (1884); *Blinderman Constr. Co. v. United States*, 695 F.2d 552 (Fed. Cir. 1982); *Kehm Corp. v. United States*, 93 F. Supp. 620 (Ct. Cl. 1950). If the Corps of Engineers negligently released water upstream, then that action could be subject to an FTCA challenge.

so government agencies are immune from the additional costs imposed on private contractors by sovereign acts of government.<sup>163</sup>

Moreover, in the absence of the sovereign act doctrine, procurement officers could impede the policymaking ability of Congress itself.<sup>164</sup> Through contracts, administration officials could commit the entire government to a course of action that Congress subsequently could not change without paying full damages. Perhaps the government should pay full damages, but continued immunity is understandable as a response to the risk that contracting officers or other mid-level administration officials will exercise too much control over future policy.

For instance, high interest rates and inflation in the early 1980s helped precipitate a major crisis in the thrift industry. In response to this crisis, federal bank regulators in part tried to encourage private groups to purchase failing thrifts by reducing minimum capital requirements and pledging to allow purchasers to include in the capital requirement the amortized goodwill of the acquired thrifts. Several years later, it became apparent that relaxing capital requirements was a flasco that fueled the collapse of the industry. Congress responded in the Financial Institutions Reform, Recovery, and Enforcement Act<sup>165</sup> by prohibiting the use of goodwill to meet the capital reserve requirements. There would be a significant cost if Congress could not now change its regulation of thrifts in light of the critical crisis in the industry.<sup>166</sup>

Although the sovereign act doctrine protects government policymaking, it removes the check on inefficient breaches effected by a damages action. Yet, to the extent that internal and external political forces check formulation of government-wide policy, the sovereign act doctrine is more palatable, for such policy has been leavened through bicameralism, notice and comment, or other comparable procedures. The uranium mining companies in *Atlas Corp.* had significant opportunity to lobby Congress and the concerned agencies prior to adoption of the relevant requirements. Regulations governing operation of the upstream dam in *Amino Brothers* were announced previously and exposed to public criticism, particularly from the public living in that general vicinity.<sup>167</sup>

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163. Government agencies are only liable in the rare instance when the regulatory exercise or contractual breach violates the Takings Clause. See *Atlas Corp.*, 895 F.2d at 756-58 (rejecting a takings claim).

164. See note 152.

165. Pub. L. No. 101-73, 103 Stat. 183 (1989), codified at 12 U.S.C.A. § 1811 (1989).

166. Although several district courts initially held that Congress could not alter the contractual rights of thrifts, the courts of appeal so far have upheld the congressional change. See, for example, *Guaranty Financial Services, Inc. v. Ryan*, 928 F.2d 994 (11th Cir. 1991); *Carteret Savings Bank v. Office of Thrift Supervision* 963 F.2d 567 (3d Cir. 1992).

167. *Amino Bros.*, 372 F.2d 488.

On the other hand, if the government's act is related more directly to the contract in question, then such checks are absent. Consider *Sun Oil Co. v. United States*.<sup>168</sup> In that case, the plaintiff oil companies had obtained a lease from the United States, through the Department of the Interior, to drill for oil and gas off the coast of California. Plaintiffs alleged that the Secretary of Interior breached this lease by denying their application for a permit to install a drilling platform at one key site. They asserted that the subsequent delay caused substantial damage. The government defended its actions on the ground that overriding environmental concerns led the Secretary to deny the permit—that the denial was a sovereign act excusing the breach. The court, however, decided to the contrary, concluding that because environmental concerns were fully aired before granting the lease, only a substantial showing of new harms would justify denial of the permit.<sup>169</sup> It reasoned that the Secretary's actions did not apply to the public generally, but were directed principally at the oil company lessees.<sup>170</sup> The *Sun Oil Co.* decision reflects that retained immunity makes the most sense when political checks protect against wasteful conduct.

Private contractors are unlikely to charge the federal government significantly more in light of the sovereign act doctrine. They always confront the risk that new government regulations will make their contractual obligations more expensive to meet. In the uranium case, for instance, the private contractors would have to assume the extra expense if new regulations required different safety procedures at the mining sites, unless they had allocated that expense *ex ante*.<sup>171</sup> If the contract becomes impossible or at least impracticable to complete, a different result may follow,<sup>172</sup> otherwise, private contracting parties in-

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168. 572 F.2d 786 (Ct. Cl. 1978).

169. *Id.* at 815-17.

170. *Id.* at 817. See also *Volentine & Littleton Contractors v. United States*, 169 F. Supp. 263 (Ct. Cl. 1959) (closing of flood gates to permit another contractor to work did not constitute sovereign act); *E.C. Ottinger v. United States*, 88 F. Supp. 881 (Ct. Cl. 1950) (failing to refer workers to contractor did not constitute sovereign act). But see *Derecktor v. United States*, 128 F. Supp. 136 (Ct. Cl. 1954) (finding that State Department's interference with plaintiff's purchase of ship from U.S. Maritime Commission was not actionable as breach of contract).

171. Indeed, compensating such parties for the costs of governmental regulation might be inefficient in that it could induce private contractors to ignore the potential for government regulation and thus to overinvest in a given enterprise. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509, 520-36 (1986).

172. The Restatement (Second) of Contracts § 264 (1986) specifically excuses performance if governmental constraints prevent discharge of contractual obligations: "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." See also *International Minerals and Chem. Corp. v. Llano*,

jured by changes in governmental regulations have no recourse.<sup>173</sup>

The policy underpinnings to the sovereign act doctrine are thus discernible. In the absence of immunity, public policy might be threatened if Congress compensated all those contractually injured by public policy in one form or another. The prospect of such damage awards might deter the policymaking branches from revising policy to meet changing priorities, just as it might if all those injured by new regulations could similarly recover for any injuries suffered. Further, full damage awards are not essential to police wasteful government activity when existing political checks already constrain public policy. There is little chance that the government will manufacture a public policy reason merely to escape from a losing contract. Finally, the sovereign act doctrine helps preserve majoritarian governance by making it harder for one administration to bind another. As with the termination for convenience doctrine, therefore, the benefits from common-law damage awards—greater efficiency and lower initial contract prices—arguably do not outweigh the potential costs to majoritarian policymaking.

### B. *Liability of Congress for Breach of Contract*

Although Congress has waived the executive branch's immunity for most contract claims, it has never waived its own. The failure to waive immunity is particularly understandable given that Congress's capacity to contract is just one arrow in its quiver of regulatory strategies. The government's power to contract, in other words, may resemble the power to regulate more closely than the power to contract in the private sector. Through contracting, the government can advance a wide panoply of social goals. It can stimulate the economy, promote affirmative action, or help small businesses. Thus, it is not surprising that Congress has retained its flexibility to alter congressional contracts and agreements when the dictates of public policy so warrant.

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*Inc.*, 770 F.2d 879 (10th Cir. 1985) (discharging party's obligation under gas sales contract because of its duty to comply with New Mexico's environmental regulations); *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976) (excusing aircraft manufacturer because its voluntary compliance with government requests to expedite production of military equipment came within terms of excusable delay clause).

173. Contractors themselves might blunt the force of the sovereign act doctrine by insisting upon an appropriate provision in the contract that guarantees the contractor a price adjustment if sovereign acts should increase the cost of performance. There are apparently no reported cases in which contractors successfully protected themselves from the consequences of a sovereign act. Courts, however, have continued to advert to the possibility of contracting around the sovereign act doctrine. See, for example, *Amino Bros.*, 372 F.2d at 491; *Gerhardt F. Meyne Co. v. United States*, 76 F. Supp. 811, 815 (Ct. Cl. 1948). Even if the government could pledge compensation for breach due to a sovereign act, however, sovereign immunity still would preclude the government from limiting its right to take such actions in the future. *Amino Bros.*, 372 F.2d at 491.

Concerns for majoritarian governance militate strongly in favor of some form of continued immunity for congressional contracts. Imposing damages for congressional breaches of contract could allow one Congress to exert too much influence over the policy choices of future legislators.<sup>174</sup> By implementing policy initiatives in the form of contracts, Congress could make it prohibitive for subsequent generations to alter those initiatives, whether in arms procurement, social security, or interstate highway construction. As our defense needs change, Congress should remain free to strike new deals. Courts could impede Congress's ability to fashion policy with an eye to current needs if they forced Congress to satisfy all the obligations of its predecessors.<sup>175</sup> Immunity thus enables each Congress to be more responsive to contemporary priorities.

The Supreme Court has been sympathetic to that need for immunity, consistently construing congressional enactments to preserve Congress's exercise of sovereign power.<sup>176</sup> Because sovereign power is an "enduring presence" that controls all contracts, it "remain[s] intact unless surrendered in unmistakable terms,"<sup>177</sup> particularly when the contract implements a comprehensive social program that would affect millions of individuals.<sup>178</sup> The Supreme Court has read into most legislation the implied condition that Congress always can change policy if new conditions make that course appropriate.

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174. See *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23 (1977) (stating that the Contract Clause "does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty"). As Justice Brennan said in his dissent: "One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days." *Id.* at 45 (Brennan dissenting).

175. Supreme Court analysis of the state impairment of contract doctrine presents an interesting analogy. As with sovereign act cases, the Court has been much more likely to uphold "impairments" when the contracts involve sovereign prerogatives, such as promotion of safety, that should not be bargained away. See, for example, *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919)). See also Eule, 1987 Am. Bar. Found. Res. J. at 419-24 (cited in note 132); Sterk, 88 Colum. L. Rev. at 668-88 (cited in note 132).

176. See *National R.R. Passenger Corp. v. Atchison, T. & S.F. R.R.*, 470 U.S. 451 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). State courts initially took the lead in developing doctrines to prevent state legislatures from binding the hands of their successors. See, for example, *Metropolitan Bd. of Excise v. Barrie*, 34 N.Y. 657, 667 (1866) (upholding the revocation of a liquor license on the ground that no state legislature can bind future legislatures through power to contract); *Moore v. State*, 48 Miss. 147 (1873) (upholding the revocation of lottery license on similar grounds).

177. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986). The Court in *Proprietors of the Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Peters) 420, 544 (1837), stated that "any ambiguity in the terms of the contract, must operate against the adventurers and in favour of the public."

178. *Public Agencies*, 477 U.S. at 53.

In *Bowen v. Public Agencies Opposed to Social Security Entrapment*,<sup>179</sup> California brought a Fifth Amendment challenge to Congress's alleged breach of an agreement to allow any state to withdraw its employees from the social security system. Prior to 1983, states wishing to enroll their employees in social security executed an agreement with the Secretary of Health and Human Services that specified the type of employees who were covered. However, when the number of withdrawals from the system threatened its financial integrity, Congress amended the Social Security Act by repealing the termination provision to prevent states from withdrawing employees even if a termination notice had been filed prior to enactment of the amendment.<sup>180</sup>

The Supreme Court unanimously upheld the legislation, concluding that Congress had not breached any contractual right or understanding.<sup>181</sup> The Court commented that the contractual right at issue did not constitute a property right under the Fifth Amendment. "Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare."<sup>182</sup> Because Congress retained its right under the initial enactment to "repeal, alter, or amend" any provision,<sup>183</sup> the 1983 legislation did not violate California's rights, but merely modified a general regulatory program. California, like other affected states, can vindicate its interests through logrolling in Congress.

On the other hand, continued immunity may undervalue the majoritarian pedigree of the earlier congressional commitment. The current majority may give short shrift to the obligations of its predecessors. Political checks cannot safeguard the public interest fully when the proposed congressional repudiation would harm only a relative few, particularly if the coalitions favoring such contractual arrangements have dissipated, and if the disadvantaged few have little current political power.<sup>184</sup> The danger that a current majority simply will repudiate debts owed to a minority always exists,<sup>185</sup> such as if Congress terminated social security payments for one hundred individuals selected by lottery. Even though we may wish to encourage Congress to reexamine policy set by past legislatures, contemporary political process checks

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179. 477 U.S. 41 (1986).

180. Pub. L. No. 98-21, 97 Stat. 71-72, codified at 42 U.S.C. § 418(f) (1983).

181. 477 U.S. at 53-54.

182. *Id.* at 55.

183. *Id.* at 53.

184. See generally Levmore, 77 Va. L. Rev. at 1333 (cited in note 62).

185. Because of the efforts of states to repudiate Revolutionary War debts, the framers were alert to protect against such possible conduct. See Gordon S. Wood, *The Creation of the American Republic, 1776-1787* at 273-82 (Univ. of North Carolina, 1969). States as well as municipalities since have attempted such repudiations. See Sterk, 88 Colum. L. Rev. at 668-88 (cited in note 132).

may not protect prior contracting parties adequately, and may not value sufficiently the prior majoritarian commitment.

### C. Fifth Amendment Constraints

The doctrine of sovereign immunity, however, is not absolute. Although courts have not applied the Takings and Due Process Clauses as substantive restrictions on the government's general immunity from tort, they have invoked the Clauses to superintend uncompensated breaches of contract. Congress's extensive waiver of its agents' contractual immunity largely obviates consideration of any constitutional constraints in that context. But Congress's continuing retention of immunity for itself has forced consideration of the constitutional issues, and courts consistently have asserted (and occasionally held) that at some point congressional breaches violate the Takings Clause or related due process principles.<sup>186</sup>

Judicial review of congressional determinations to breach arguably is consistent with the concerns for preserving majoritarian policy underlying the sovereign immunity doctrine. Although the determination to breach may reflect majoritarian policy, so did the prior congressional obligation. In light of the inability of the political process to protect fully against congressional self-dealing, review under the Fifth Amendment supplies an external check to minimize opportunistic behavior.<sup>187</sup> Courts in effect must evaluate the processes underlying the two governmental determinations—agreement and breach—to determine whether to allow the breach. Although there is a strong bias against permitting

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186. Invalidating congressional action under the Due Process Clause may have different consequences from finding that just compensation must be awarded. Compare *Public Agencies*, 477 U.S. at 55 (discussing the limits of the Takings Clause) with *Lynch v. United States*, 292 U.S. 571, 579 (1934) (invalidating congressional breach under the Due Process Clause). See also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (stating that the Supreme Court has long held that the Due Process Clause limits Congress's ability to effect retroactive changes.)

This Article does not address the significance of the remedial distinction, but focuses on the contexts in which either clause may be invoked to invalidate a congressional enactment.

187. Alternatively, the entire problem of sovereign immunity could be viewed through the lens of takings analysis. We could inquire why some government actions condemning property, regulating property, and amending contracts require compensation, and others do not. The absence of any one explanatory theory has often been noted. See, for example, Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393 (1991).

At a minimum, many commentators have noted that takings law can be understood as a way to prevent the government from singling out those who cannot wield effective power in the legislature. See, for example, Levmore, 77 Va. L. Rev. 1333, 1334-35 (cited in note 62); Frank Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1602-03 (1988); Laurence H. Tribe, *American Constitutional Law* § 9-6 at 605 (Foundation, 2d ed. 1988). There are many ways to define the set of those who merit special protection from government takings, and fortunately that task lies outside the scope of this Article. Rather, I am suggesting only that the Court's takings analysis in the contracts context reflects an effort to prevent such singling out.



one Congress to bind future generations, if the legislative determination to breach does not stem from legitimate policy considerations, then it may be more consistent with democratic governance to invalidate the breach in order to uphold the obligation of the prior Congress.

The Court's decision in *Lynch v. United States*<sup>188</sup> provides a helpful example. There, the plaintiff sued to contest the federal government's refusal to pay the proceeds of an insurance contract issued under congressional auspices during World War I.<sup>189</sup> The government insurance plan was designed to facilitate the war effort by bolstering domestic support. In 1933, however, Congress repudiated its obligations under one aspect of the insurance plan, which affected only several hundred policy holders.<sup>190</sup> Although there may have been widespread sympathy for survivors of World War I veterans, sympathizers could not have been expected to lobby against the repeal during the Depression, particularly given that the overwhelming majority of insurance policies were still honored. Though the potential difficulty of offering similar insurance contracts in the future may have constrained Congress to some extent, the pressing need to address the country's economic ills presumably thrust aside concerns for the future efficacy of insurance plans. The Court, not surprisingly, invalidated the repeal under the Due Process Clause.<sup>191</sup>

Through the Takings or Due Process Clause, therefore, courts can police the current Congress's self-dealing, determining when to honor the commitment of the prior Congress. In the regulatory context, however, the risk of opportunistic behavior is slight. Changes in regulatory agreements generally are checked adequately by the political process.<sup>192</sup> To the extent that the government action arises from a program to promote the public good<sup>193</sup> and affects more individuals, there is less reason to question whether the political process has been open. California,

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188. 292 U.S. 571 (1934).

189. War Risk Insurance Act, 40 Stat. 398 (1917), codified at 38 U.S.C. §§ 1901-1988 (1988).

190. Economy Act (Maintenance of Credit of United States) of March 20, 1933, 48 Stat. 8; Veterans' Administration, Annual Report of the Administrator of Veterans Affairs, H. Doc. No. 322, 74th Cong., 2d Sess. 23 (1935).

191. The Court reasoned that the United States was without power to annul binding contracts, at least in the absence of supervening conditions. Although the Court recognized that "there was in March, 1933, great need of economy," it concluded that Congress could not simply repudiate its obligations. 292 U.S. at 580. See also *Perry v. United States*, 294 U.S. 330, 350-54 (1935) (limiting Congress's repudiation of obligation to redeem war bonds). The Court more recently suggested that congressional breaches, as in *Lynch* and *Perry*, could constitute takings under the Fifth Amendment. *Public Agencies*, 477 U.S. at 55. See also *Atlas Corp.*, 895 F.2d at 756-58. The Court, however, is unlikely to require that any party injured by a congressional breach of contract be compensated with its full expectancy interest.

192. See text accompanying notes 181-83 and note 192.

193. *Id.* at 226-27.

for instance, can protect itself from change in social security policy through lobbying in Congress. When Congress breaches a regulatory agreement with California, it recognizes that procuring California's cooperation in the future may be more difficult.<sup>194</sup>

In contrast, there is more reason to question the actions of the contemporary Congress when it legislates in a proprietary context. Individuals and businesses contracting with the government generally have less ability to shape congressional deliberations through coalition-building or logrolling, and Congress has less reason to fear that isolated breaches with individuals will deter others from contracting with Congress in the future. Courts apparently inquire in such circumstances whether the congressional repudiation is based on a change in general policy, which is checked by the political process, or on mere financial self-interest. If, for instance, Congress simply refuses to pay a contractor for building a new addition to the Library of Congress, there is no compelling reason to rely on the checks provided by the political process. On the other hand, if Congress decides to suspend all building programs, despite a prior pledge, that change should be immune from secondguessing even though it disrupts the expectations of a contractor selected to build the addition.

In essence, the reviewing courts withdraw their preference for the contemporary political process when the legislative action resembles a

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194. Similarly, in *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894 (6th Cir. 1990), the state loan commission sued to block Congress's unilateral decision to change the terms of its relationship with state loan agencies implementing the student loan program. Under terms of the original agreement, Higher Education Act of 1965 § 422, Pub. L. No. 89-320, 79 Stat. 1236, codified at 20 U.S.C. § 1072 (1988), the federal government reinsures the state agencies' guarantee of student loans. The state agencies receive administrative cost allowances from the federal government, as well as at least partial reimbursement for losses sustained due to defaults by student borrowers. In 1987, Congress mandated that any excess reserve funds in the state agencies would be transferred to the federal government through several possible means, such as withholding governmental reinsurance payments. Pub. L. No. 100-203, 101 Stat. 1330-36. In this regulatory context, the political process checks likely are sufficient. Most states operate a guaranteed student loan program, and the Secretary has contracted with state loan commissions in almost every state to administer the program.

Although not every state loan commission administered the program as efficiently as Ohio, those that did easily could have voiced their opposition to the new statute. Less efficient states may have formed a coalition to urge Congress to pass the new legislation, yet Ohio and the more efficient states may have extracted some concession on another piece of legislation in exchange. Viewed another way, the state loan commissions fully participated in the decision forcing transfer of the excess fund reserves, and we trust the political safeguards of federalism.

If Ohio alone were singled out by the new legislation, the takings question would be tougher, although the court probably still would have ruled in favor of the federal government because of the regulatory nature of the prior agreement. See also *Peterson v. United States Dep't of Interior*, 899 F.2d 799 (9th Cir. 1990) (rejecting a contract-based challenge by local water districts and landowners to unilateral federal action that raised the price certain landowners had to pay for water from federal reclamation projects).

repudiation of debt.<sup>195</sup> As it stands, however, the inquiry into the nature of the breached agreement is a rough proxy for the infinitely more complex inquiry into the comparative trustworthiness of the legislative process that led to enactment of the original agreement and the process that resulted in breach.

In sum, immunity from contract suit may be vital to preserve the discretion of the policymaking branches in formulating national policy, and Congress has refused to tie its own hands by opening itself, and its delegates, to market rules for breach of contract.<sup>196</sup> While Congress can waive the government's immunity in the short run, it cannot precommit succeeding Congresses to abide by its own waiver decisions. Courts generally have respected such rules of differential liability, protecting Congress's ability to choose when the government needs flexibility to change regulatory requirements, free from fear of incurring common-law liability on the contract. By shielding government policy from damage assessments, retained immunity prevents current governments from tying the hands of governments to follow. When inadequate process protects against government opportunism, however, courts have second-guessed Congress's failure to waive immunity through takings or due process jurisprudence.

## V. CONCLUSION

The doctrine of sovereign immunity is perplexing in view of its tenuous grounding in history, the seemingly inequitable results it produces, and the absence of any traditional rationale justifying such favored treatment for the federal government. Yet the inequity and incoherence of blanket immunity has led commentators and courts to overlook plausible justifications for a more circumscribed doctrine.

Sovereign immunity can be seen as a fundamental attribute of our scheme of separation of powers. Congress plausibly should be entrusted to ascertain when imposing damages upon the policymaking branches would interfere too substantially with democratic governance. Congress may get it wrong, but sovereign immunity allows it to protect democratic rule, both from the horizontal grasp of judges and the temporal reach of prior policymakers.

In the tort context, Congress plausibly has concluded that judicial

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195. For instance, instead of a takings approach, some might prefer that courts enforce congressional precommitments not to breach within the same generation as long as there have been no unforeseen economic or political developments. That approach has problems as well. Determining what constitutes a "generation" or what constitutes "unforeseen developments" may prove quite daunting, and the costs of judicial sorting could prove too high. Moreover, repudiation of a long-term contract for purely financial reasons may be problematic despite a change in generation.

196. See text accompanying notes 139-73.

review of the substance of legislative and executive branch policy under general reasonableness principles would arrogate too much authority to courts. The prospect of damages might hinder or skew the policymaking branches' efforts to fashion policy. Thus, Congress's protection of policymaking efforts through the FTCA's discretionary function exception makes eminent sense, as does part of the protection afforded by the misrepresentation exception and continued immunity from some *Bivens* claims. Similarly, Congress's decision not to impose full contract damages for government breaches of contract encourages government efforts to revise policy in light of pressing social needs. In addition, this decision prevents present Congresses and administrations from gaining too much control over the public policies of those that are to follow. The sovereign act doctrine and limitations in the relief available to government contractors both reasonably safeguard government policymaking.

Continued immunity in even these limited contexts, however, imposes a substantial toll upon individuals injured by arbitrary government action, whether in tort or contract. To some extent, the lack of full damages relief is justified by the compensating advantages to government contractors in terms of higher price, the security of contracting with a fiscally sound party, and the ability to lobby for relief from Congress through private bills and public relief acts. Still, from the perspective of a corrective justice principle, immunity unquestionably works some injustice. Moreover, the government's failure to pay full compensation may lead to wasteful government conduct.

Nonetheless, the need to protect the political process arguably warrants the costs of inadequate compensation and possibly insufficient deterrence of government waste. It is for Congress to determine when evaluation of government policy should take place in the political rather than in the judicial arena. And the line that congressional waivers generally follow is quite coherent. There is less reason to fear, and correspondingly to review in court, purposeful government policy. Such policy, whether formulated by Congress itself or by agencies, has been subjected to significant political checks, which should minimize the potential for abuse. Government wrongdoing doubtlessly will continue, but redress should come from the political rather than judicial process.

Retained immunity thus makes sense when the potential harm from judicial review—interference with government policymaking—outweighs any incremental gains from added deterrence of government tortious behavior and added efficiency in government contracting. The case against waiver is most compelling in protecting purposeful governmental action that is subject to the checks and balances inherent in our political system. Such checks minimize the need for common-law monitoring, and instead suggest the propriety of political resolution of

the dispute. Thus, although the case for blanket immunity is tenuous, our system of separated powers assigns Congress the power to determine when continued immunity is appropriate to protect the political process.