ASSIGNING THE BURDEN OF PROOF FOR
THE DISCRETIONARY FUNCTION
EXCEPTION TO THE FEDERAL
TORT CLAIMS ACT:
AN OPTIMAL APPROACH

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I. INTRODUCTION

Until 1946, the doctrine of sovereign immunity posed an immense obstacle to persons seeking compensation through the courts for injuries negligently caused by federal governmental action or inaction. Because the notion that “the King can do no

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wrong” was by this time entrenched in American law, these claimants could not obtain a remedy from the judicial system but rather were required to seek a private bill from Congress. The resulting “private bill system” was recognized to have become arbitrary and inefficient. To overhaul how the federal government compensates those whom it negligently injures—and to make it easier for tort victims to obtain relief—Congress enacted the Federal Tort Claims Act (FTCA) in 1946, waiving the sovereign immunity of the United States for tort claims. With this statute, Congress intended the federal district courts’ doors to swing open for victims of the government’s torts and for the courts to use their authority, power, experience, and knowledge to award compensation.

In crafting the statute, Congress was aware of the potentially damaging effect that an unlimited waiver of sovereign immunity could have on essential governmental functions. As a result, Congress included in the FTCA a section—28 U.S.C. § 2680—detailing thirteen substantive areas in which governmental activity cannot form the basis of a viable tort claim against the government. This section includes what has become known as the “discretionary function exception” (DFE), which essentially bars civil liability arising out of governmental conduct executed either pursuant to a statute or regulation or for which the agent or agency had policy discretion.

The DFE has become one of “[t]he most gaping and frequently litigated” sections of the statute. In the decades following enactment of the FTCA, federal courts engaged in an undisciplined and ultimately destructive form of statutory construction that greatly expanded the relief-limiting effect of the DFE. In particular, federal courts have treated the exceptions for torts caused through the government’s discretionary functions as a condition of judicial jurisdiction and not as a merits provision as it clearly is. One example of this flawed approach is the assignment of the burden of proof for the non-applicability of the exception to FTCA plaintiffs as part of their general burden to invoke the courts’ subject-matter jurisdiction.

1. See Erwin Chemerinsky, Against Sovereign Immunity, 53 STAN. L. REV. 1201, 1202 (2001) (“A doctrine derived from the English premise that ‘the King can do no wrong’ deserves no place in American law.”).
This conflation of merits conditions as an aspect of jurisdiction is not limited to the interpretation of the FTCA. Indeed, commentators have noted a long trend in court decisions inflating the scope of jurisdiction to include simple claim processing rules and statutes of limitations. In recent years, the Supreme Court has attempted to bring discipline back to “jurisdictionality jurisprudence,” instructing lower courts to limit jurisdictional characterization to only those statutory provisions Congress has clearly identified as such, including provisions in waivers of sovereign immunity. The Court has already shown its inclination to limit the jurisdictional label to the threshold provision of the FTCA while treating the other sections as simply establishing the elements of a statutory cause of action. The DFE, along with the other substantive exceptions listed in § 2680, is not a jurisdictional prerequisite but rather a limit on tort claims against the government for which judicial relief can be granted. The Court’s clarifying approach to jurisdiction holds important implications for the scope and application of the DFE and for how the burden of proof in alleging the existence of the exception ought to be assigned.

Since the DFE is not jurisdictional, courts may no longer justify assigning the burden of proof for its non-applicability to the plaintiff on jurisdictional grounds. Instead, courts must examine the role burdens of proof play in pleading doctrine, assess why the burdens for some elements of claims under specific statutes are assigned to plaintiffs and others to defendants, and then apply those principles to the DFE, keeping in mind the provision’s purpose, structure, and test for application. This Note argues that to optimize FTCA litigation and promote Congress’s goals of compensation, transparency, and deterrence, courts must treat the DFE as an affirmative defense and assign its burden of proof to the government.

First, this Note will detail the origins of sovereign immunity and the FTCA. Second, it will describe the evolution of jurisdictionality jurisprudence under the guidance of the Supreme Court from “drive-by jurisdictional rulings” to the “clear-statement principle” and how the current doctrine limits jurisdictionality to the FTCA’s core, threshold section while treating all other sections, including the DFE, as non-jurisdictional. Third, this Note will pro-

6. See infra Part II.
7. See infra Part III.
vide an overview of the DFE, its interpretation by the Supreme Court, and how courts have assigned its burden of proof until now. Finally, this Note will propose an optimal approach to assigning the DFE’s burden of proof, rejecting other approaches that erroneously characterize the DFE as jurisdictional, that compels the government to bear the burden.

II. OVERVIEW OF THE FTCA

A. Origins of Sovereign Immunity in the United States

Long before enactment of the FTCA, sovereign immunity was a widely accepted principle in American law protecting the federal government from being sued in court for money claims without prior governmental consent. However, the American origins of the doctrine are disputed. In England for centuries legal scholars relied upon the maxim, “the King can do no wrong,” to support an absolutist notion of sovereign immunity encompassing two distinct concepts: (1) the Crown could not be subject to suit in courts of law because it was the law, and (2) courts, as mere extensions of the Crown’s authority, could not limit the Crown’s activities. Scholars debate whether sovereign immunity was an “accepted premise underlying—or instead intended casualty[ y ] of—the ratification of the United States Constitution” and Article III specifically. The Constitution did not expressly enshrine that the American government could not be sued for money claims absent consent, although both the Federalist Papers and Constitutional Convention discussed the idea. On the one hand, the formalist approach to sovereign immunity as practiced in royalist England appears to be a censure on the American democratic system. On the other hand, the emergence of something like sovereign immunity in the United States was probably necessary in order to empower the legislative and ex-

8. See infra Part IV.
9. See infra Part V.
12. See Niles, supra note 10, at 1288; see also Chemerinsky, supra note 1, at 1205 (“The text of the Constitution is silent about sovereign immunity.”).
13. See, e.g., Niles, supra note 10, at 1293 (“[S]ince the nation is ruled by the law, and not by individuals, our courts should not only have the authority, but indeed must incur the obligation, to determine when the acts of government violate the law, and to order remedies for the victims of such violations where appropriate.”).
executive branches to act for the collective good rather than focus exclusively on any private individual.\textsuperscript{14} Regardless of the principle’s origins, by 1834 the Court acknowledged that the national government was protected from civil liability by the doctrine of sovereign immunity.\textsuperscript{15} However, in \textit{United States v. Lee}, 106 U.S. 196 (1882), the Court made clear that American democracy was different from England’s feudal system in that agents of the government could be sued for wrongs.

Under the doctrine as it evolved in the Supreme Court, whether the federal government could be subject to civil liability turned on its expression of consent to be sued through legislation.\textsuperscript{16} For instance, in 1887 the government enacted the Tucker Act, waiving immunity for all private citizens’ claims “not sounding in tort” and based upon federal statutes, regulations, and, especially, contracts.\textsuperscript{17} The Tucker Act was a seminal waiver of sovereign immunity promoting efficient operation of the government through private contract while also reinforcing its democratic legitimacy as a government subject to law.\textsuperscript{18} However, there remained a wide gap in the government’s consent to be sued. The government remained immune from tort claims filed in a court.

Injured parties instead would petition members of Congress to pass a private bill that provided direct relief to those “lucky enough to have their particular circumstances discussed in the national legislature.”\textsuperscript{19} The “private bill system” was the exclusive means by which victims of governmental negligence could seek compensation. While the system was never particularly satisfactory, it became increasingly ineffective as the scope of government activity increased, leading to an even greater number of petitions for redress.\textsuperscript{20} Additionally, many proclaimed that the private bill system

\textsuperscript{14} See, e.g., Sisk, \textit{supra} note 11, at 526–27. “Although its powers are granted pursuant to a written Constitution and its agents are beholden to a greater or lesser extent to an electorate, the executive and legislative branches do possess powers of government that may and sometimes must be exercised, despite the objections of a particular individual who may be aggrieved by such actions.” \textit{Id.}

\textsuperscript{15} See \textit{United States v. Clarke}, 33 U.S. 436, 444 (1834) (holding sovereign immunity protected the United States from suit).

\textsuperscript{16} Sisk, \textit{supra} note 11, at 529.


\textsuperscript{18} Sisk, \textit{supra} note 11, at 532–33 (\textit{AL. INTERDISC. L. J.} 467, 467 (1999) (cleaned up)).

\textsuperscript{19} Niles, \textit{supra} note 10, at 1298.

was rigged by political favoritism. Over the years, it became increasingly clear to Congress that the system must be replaced by a suitable substitute.

B. The FTCA

Between 1921 and 1946, over thirty bills were introduced proposing various alternatives to the private bill system. While there was broad consensus on the necessity for a new system, there lacked agreement on what that substitute would look like. One of the main points of disagreement was which branch of government or agency within a branch of government would handle the tort claims. One common concern was whether the government would be exposed to excessive civil liability if civil juries were involved in the decision-making process.

After decades of various proposed statutory waivers, the FTCA was enacted as Title IV of the Legislative Reorganization Act of 1946. The statute was and continues to be a "significant and extensive" waiver of sovereign immunity. The threshold provision, 28 U.S.C. § 1346(b)(1), outlines the scope of the waiver, establishing concurrently both the extent of the government’s potential tort liability and Congress’s grant of jurisdiction to the federal district courts to adjudicate such claims. A plaintiff cannot invoke the

Committee on Claims estimated that between 1,000 and 2,000 claim bills per session were referred to their committee for a hearing. This saturation only worsened over time.

21. See id. (“In addition to Congress’s perceptions that it was spending an inordinate amount of time considering private bills, political officials became more sensitive to public complaints that the private bill system was unjust and wrought with political favoritism.”).

22. Id. at 268.

23. Id. at 268–69.

24. See id. (describing various alternatives, including conferring jurisdiction to the United States Employees’ Compensation Commission or the Court of Claims).

25. Id.


27. Niles, supra note 10, at 1300.

28. See 28 U.S.C. § 1346(b)(1) (2012 & Supp. 2016). “Subject to the provision of [this title], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” Id.
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court’s jurisdiction nor can she succeed on the merits of her claim unless she can prove that her claim is (1) against the United States (2) for money damages (3) for injury or loss of property, or personal injury or death (4) caused by negligent or wrongful act or omission of any employee of the government (5) while acting within the scope of his employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. This threshold waiver of immunity in § 1346(b) is limited by other statutory sections detailed below.

As opposed to the “clumsy” private bill system, the FTCA was intended to “afford instead easy and simple access to the federal courts for torts within its scope,”\(^\text{30}\) According to the Supreme Court in *Dalehite v. United States*, an early case dealing with the waiving statute and its substantive exceptions, the FTCA “is another example of the progressive relaxation by legislative enactments of the rigor of the immunity rule.”\(^\text{31}\) By enacting the statute and upsetting the default protection provided by sovereign immunity, Congress expressed its intention to fully and justly compensate those injured by the government’s negligent activity.\(^\text{32}\) Congress concluded that granting the federal courts jurisdiction under the guidance set out in the statute would be the most effective means of fulfilling these goals.

The FTCA was not intended to provide new bases of liability or causes of action against the government.\(^\text{33}\) Instead, the statute maintains, “The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . .”\(^\text{34}\) Courts may only find the government liable for negligent acts or omissions that would have been considered tortious under applicable state law had the actor been a private party. Congress intended the FTCA to equalize the claims of those injured

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29. *Id.*


31. *Id.* at 30.

32. *See id.* 30–31 (“Through such statutes that change the law, organized government expresses the social purposes that motivate its legislation.”); *see also* *Indian Towing Co. v. United States*, 350 U.S. 61, 68–69 (1955) (“The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities . . . and not to leave just treatment to the caprice and legislative burden of individual private laws.”).

33. *See Dalehite*, 346 U.S. at 43 (“The Act did not create new causes of action where none existed before.”).

by federal employees to those injured by private parties. However, there are some key differences between the private tort regime and the regime created by the FTCA (and provisions added by amendment) intended to limit the government’s exposure to liability. Such limitations were deemed necessary in order to protect the solvency of the public and not unduly hamper government officials in the performance of their duties. These limitations include a strict statute of limitations, an administrative exhaustion requirement, and the preclusion of jury trials, punitive damages, and prejudgment interest.

Furthermore, the statute was considered only a limited waiver because of the thirteen substantive exceptions listed in 28 U.S.C. § 2680 restricting the types of acts or omissions that can form the basis of a tort claim. Most importantly, § 2680 includes the discretionary function exception, precluding liability arising from the exercise of due care in the execution of a statute or regulation and the performance of a discretionary function or duty by a federal agency or employee. Of note, the statute does not provide any further detail on exactly what kind of governmental function should be considered “discretionary.”

35. See United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1637 (2015) (holding that the FTCA’s statute of limitations may be equitably tolled like that of a tort claim against a private defendant because “the FTCA treats the United States more like a commoner than like the Crown”).
36. Niles, supra note 10, at 1300.
41. In addition to the DFE, these exceptions include the following: claims arising from lost or miscarried letters by postal workers; claims arising from the assessment or collection of taxes; claims in admiralty; claims arising from wars or matters of national defense; claims arising when the government imposes or establishes quarantine; claims arising out of certain intentional torts; claims arising from Treasury Department activities or activities involving the monetary system; claims arising out of combat activities by one of the armed forces; claims arising in a foreign country; claims arising from the Tennessee Valley Authority; claims arising from the Panama Canal Company; and claims arising from federal banks. 28 U.S.C. § 2680(a)-(n) (2012).
42. § 2680(a) provides that § 1346(b) does not apply to “any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”
Commentators have suggested that the substantive exceptions to the government’s waiver of immunity were “based on concerns about the functional impact of tort liability on the government.”\(^{43}\) The “governmental functions”\(^{44}\) excepted from Congress’s waiver of immunity were deemed either too important or too elastic to the deterrent effect of tort liability to be included in the FTCA’s waiver of immunity. Additionally, since the FTCA was intended more as an overhaul to the private bill system than a basis for new theories of liability, the thirteen exceptions were added to the statute to more cautiously transfer compensatory power from Congress to the courts.\(^{45}\)

Unfortunately, in the decades following enactment, many federal courts were too cautious when interpreting the § 2680 exceptions. As part of a more general statutory construction trend favoring jurisdictional characterization, many federal courts at all levels interpreted the exceptions in § 2680 as “clearly limit[ing] the jurisdiction of the federal courts . . . .”\(^{46}\) However, in more recent years, the Supreme Court has initiated a new interpretive trend restraining attachment of the jurisdictional label. This has begun to ameliorate how lower courts interpret the FTCA, § 2680, and the DFE in particular.

III.
JURISDICTIONALITY JURISPRUDENCE

A great number of consequences flow from designating a provision in a cause-of-action-creating statute as “jurisdictional” rather than as claim-processing or merits-related. Claim-processing rules or merits-related determinations may limit the scope of a claim, but jurisdictionality strikes at the very heart of a court’s power and authority. The following can occur once a statutory section has been

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\(^{43}\) Niles, supra note 10, at 1300.

\(^{44}\) See Dalehite v. United States, 346 U.S. 15, 32 (1953) (“One only need read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions.”).

\(^{45}\) See Andrew Hyer, Comment, The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis, 2007 BYU L. Rev. 1091, 1094 (“One commentator suggests that the purpose of the FTCA was to relieve Congress of the burdensome private bill procedure, rather than ‘to open the federal government to new theories of tort liability.’ Thus, Congress included thirteen exceptions to this baseline rule.”) (citing Donald N. Zillman, Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act, 1989 Utah L. Rev. 687, 715 (1989)).

\(^{46}\) Carlyle v. U.S. Dep’t of the Army, 674 F.2d 554, 556 (6th Cir. 1982).
deemed “jurisdictional”: The court can rule on the section’s issue sua sponte even if not raised by either of the parties; parties cannot waive the issue; a party at any point in the litigation can raise the issue, even after entry of judgment or on appeal;\(^{47}\) and, since “[f]ederal courts are courts of limited jurisdiction . . . [i]t is to be presumed that a cause of action lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.”\(^{48}\) Thus, once an issue obtains the “jurisdictional” label, it will be presumed that the party invoking jurisdiction bears the burden of proof for that issue.

Despite the serious consequences, for a long period of time courts often neglected close analysis in favor of what has been disparagingly dubbed “drive-by jurisdictional rulings.”\(^{49}\) Claim-processing rules or substantive elements of a cause of action were mischaracterized as jurisdictional conditions.\(^{50}\) Without courts engaging in detailed analysis, a general trend developed that lacked clarity in distinguishing between limitations on the validity of plaintiffs’ statutory claims and limitations on the courts’ power to rule on those claims.

In 2006, observing the quagmire that resulted from “erroneously conflat[ing]” subject-matter jurisdiction with merits-related determinations for a long period of time,\(^{51}\) the Court resolved to guide the lower courts on how to identify more carefully issues that were intended to curb the courts’ power. The effort began in decisions involving private parties and then extended to suits and statutes involving the federal government. In \textit{Arbaugh v. Y & H Corp.}, 546 U.S. 500 (2006), the Court considered Title VII of the Civil Rights Act of 1964, which imposes liability upon employers who discriminate on the basis of impermissible factors, such as race and religion. \textit{Arbaugh} focused on whether Title VII’s statutory limitation excluding from liability employers with less than fifteen employees should be considered a jurisdictional condition or an element of

\(^{50}\) Reed Elsevier, 559 U.S. at 161; Sebelius, 568 U.S. at 153.
the plaintiff’s cause of action. In resolving the question, the Court conceived of the “clear-statement principle”:

If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

In the decade since Arbaugh, the Court has since applied this “readily administrable bright line” to reject the jurisdictional characterization of various provisions ranging across a wide array of statutes. Recognizing the untoward consequences of too readily attaching the jurisdictional label, the Court used the clear-statement principle “to bring some discipline to the use of this term.” The Court has since applied this principle to remove filing deadlines and other “claim-processing rules” from the jurisdictional column. Indeed, even in 1998 before articulation of the clear-statement principle in Arbaugh, the Court recognized that “the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts’ statutory or constitutional power to adjudicate the case.” Thus, the clear-statement principle is not limited to claim-processing rules but also must be applied to statutory provisions detailing the elements of a plaintiff’s cause of action.

52. Arbaugh, 546 U.S. at 510.
53. Id. at 515–16 (internal citation omitted).
54. Id. at 516.
55. See Reed Elsevier, 559 U.S. at 158 (characterizing 28 U.S.C.A. § 411(a), the Copyright Act’s registration requirement, as nonjurisdictional); Henderson v. Shinseki, 562 U.S. 428, 431 (2010) (characterizing 38 U.S.C. § 7266(a), the Provision of Veterans’ Judicial Review Act notice of appeal deadline, as nonjurisdictional); Gonzalez v. Thaler, 565 U.S. 134, 137 (2012) (characterizing 28 U.S.C. § 2253(c)(3), the Antiterrorism and Effective Death Penalty Act’s requirement that a habeas petitioner’s certificate of appealability indicate specifically which issue showed a denial of a constitutional right, as nonjurisdictional); Sebelius, 568 U.S. at 153. (characterizing the deadline for which healthcare providers may file an administrative appeal for reimbursement due them for care to Medicare beneficiaries as nonjurisdictional).
57. See Sebelius, 568 U.S. at 153 (“Key to our decision, we have repeatedly held that filing deadlines are not ordinarily jurisdictional; indeed we have described them as ‘quintessential claim-processing rules.’”) (quoting Henderson, 562 U.S. at 435).
In 2014, the Court advanced this application of the clear-statement principle in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), in which the Court questioned the characterization of the “zone-of-interests test,” the inquiry into whether a plaintiff falls into the class authorized by Congress to sue under a statute, as one of prudential or statutory standing. By mischaracterizing this merits-related determination as a question of prudential standing, lower courts routinely elevated what was simply another element of a plaintiff’s statutory cause of action to the jurisdictional level. The Court attempted to fix this error by instructing courts to “apply traditional principles of statutory interpretation” in determining whether Congress has authorized a plaintiff to avail herself of the legislatively-created cause of action. No assumption should exist that Congress intended a certain element of the plaintiff’s statutory claim to limit the courts’ power to adjudicate the merits of that claim.

The clear-statement principle must be applied to all provisions of a statute creating a cause of action, including those that had once been assumed to be jurisdictional. As the Second Circuit noted in the wake of *Lexmark*, “The Supreme Court has clarified that statutory standing is not jurisdictional unless Congress says so.” Reinforcing *Arbaugh*, “courts are required to examine the text of the statute in order to determine whether it has any effect on jurisdiction.” Under the rubric set by *Arbaugh* and *Lexmark*, labeling a statutory provision, whether claim-processing or merits-related, as jurisdictional requires careful and detailed statutory analysis. If Congress has not clearly stated that the provision is intended to be jurisdictional, then the court has the power to decide the claim on the merits using ordinary rules of statutory interpreta-

59. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014) (“We have on occasion referred to this inquiry as ‘statutory standing’ and treated it as effectively jurisdictional . . . . That label is an improvement over the language of ‘prudential standing,’ since it correctly places the focus on the statute. But it, too, is misleading . . . .”).

60. Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 Okla. L. Rev. 89, 111 (2009) (“[L]ower courts often elevate the statutory standing question above other questions that should be treated similarly. They elevate the question by making it a threshold inquiry . . . . Some courts not only make the statutory standing question a threshold one; they make it jurisdictional.”).


63. *Id.* (citing *Arbaugh* v. Y&H Corp., 546 U.S. 500, 516–17 (2006)).
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tion. It follows that the pleading of a claim, including apportionment of the burden of proof, is a merits-based condition and not of jurisdictional nature.

A. Jurisdictionality Jurisprudence for Waivers of Sovereign Immunity

While the Court’s instruction to apply the clear-statement principle to both claim-processing and merits-related statutory provisions is well settled, some questions arise as to whether the principle should be extended to interpreting statutory waivers of sovereign immunity. The doctrine of sovereign immunity on its own bars courts from hearing claims against the federal government that they might otherwise be able to adjudicate under federal-question jurisdiction. Thus, “[i]t is axiomatic that the United States may not be sued without its consent and the existence of consent is a prerequisite for jurisdiction.”

Prior to enactment of the FTCA, Congress enacted several statutes providing consent, such as the Tucker Act and Suits in Admiralty Act, but the Court’s early uneasiness and lack of familiarity with waivers of sovereign immunity caused “inelegant judicial encounters with waiving legislation.” As a result, the Court set precedent attaching jurisdictional significance to “every provision that could limit, constrain, except, or regulate the process for adjudicating governmental liability . . . .”

Justice O’Connor articulated the Court’s traditional approach in *Lane v. Pena*, 518 U.S. 187 (1996): “[A] waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in the statutory text . . . . Moreover, a waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.” The twin rules requiring a clear statement of Congress’s consent to be sued and strict construction of the statute providing such consent for waivers of sovereign immunity appear to preclude application of the clear-statement principle for jurisdictionality articulated in *Arbaugh* and *Lexmark*.

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69. *Id.*

However, in recent years the Court has demonstrated that the clear-statement principle has a role in construing waivers of sovereign immunity too. Applying the clear-statement principle does not undermine or contradict the strict construction of waiving legislation. Strict construction still persists but should only be invoked when appropriate. For instance, strict construction may still be invoked to interpret the threshold provision in waiving legislation that broadly delineates the class of claims for which immunity is waived and remedies are permitted. Thus, when interpreting the core elements of a waiver, there may exist a presumption against allowing new theories of liability or forms of remedy.

But as courts turn their focus away from the essential scope and core substance of the statutory waivers, rules of strict construction governing waivers of sovereign immunity may give way to other tools of statutory construction. As Justice Alito stated in a 2007 decision, “The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction.” Once courts conclusively determine that Congress has consented for the government to be sued and defined the scope of the immunity waiver, they must respect the waiver that Congress has enacted. Strict construction extending the jurisdictional label to all provisions of the statutory waiver runs the risk of contravening congressional intent. Instead, application of Arbaugh and Lexmark’s clear-statement principle to non-core or non-threshold provisions would comport with the shared, underlying purpose of all waivers of sovereign immunity: granting authority to courts to

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71. See, e.g., Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 95–96 (1990) (holding that equitable tolling applies to suits against the government pursuant to waivers of sovereign immunity unless Congress wishes to provide otherwise).
72. Sisk, supra note 11, at 561.
73. See Orff v. United States, 545 U.S. 596, 601–02 (2005) (interpreting 43 U.S.C. § 390uu of the Reclamation Act strictly so that “[c]onsent is given to join the United States as a necessary party defendant” is read to only allow joining the government in an action between other parties, not suing the United States alone).
74. Sisk, supra note 11, at 565.
77. See Dolan v. U.S. Postal Serv., 546 U.S. 481, 491–92 (2006) (holding that application of strict construction for the FTCA is “unhelpful” because it runs “the risk of defeating the central purpose of the statute” which “waives the Government’s immunity from suit in sweeping language.”) (citations omitted).
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adjudicate and ultimately redress private claims against the government out of a sense of justice.\textsuperscript{78}

B. Jurisdictionality Jurisprudence for the FTCA

Construction of the FTCA is no exception to this rising trend bringing discipline to the use of jurisdictionality. In fact, the Court has hinted that it may be even more eager to limit strict construction and jurisdictional labeling to the core provision of the FTCA than other waiving legislation.\textsuperscript{79} The Court’s inclination may be due to the unique, remedial purpose of the FTCA: spreading the costs of government action or inaction among the indirectly benefiting public rather than concentrating the burden on the directly injured party.\textsuperscript{80} The traditional approach to construing statutory waivers of sovereign immunity that generously attaches the jurisdictional label undermines Congress’s “central purpose” in enacting the FTCA.\textsuperscript{81}

Since 28 U.S.C. § 1346(b) is the core, threshold provision of the FTCA, courts must exclusively establish adjudicatory authority over private tort claims against the government under that provision.\textsuperscript{82} Thus, the courts do not have the power to even consider the merits of the plaintiff’s claim unless it meets the six substantive elements listed in § 1346(b).\textsuperscript{83} Those elements include: (1) a claim against the United States (2) for money damages (3) for injury or loss of property, or personal injury or death (4) caused by negligent

\textsuperscript{78} See United States v. Shaw, 309 U.S. 495, 501 (1940) (“A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities permit, prerogatives of the government yield to the needs of the citizen.”).

\textsuperscript{79} See United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1637 (2015) (“[A]ll that is special about the FTCA cuts in favor of allowing equitable tolling [which requires limiting jurisdiction labeling]. As compared with other waivers of [sovereign] immunity (prominently including the Tucker Act), the FTCA treats the United States more like a commoner than like the Crown.”).

\textsuperscript{80} See Rayonier Inc. v. United States, 352 U.S. 315, 320 (1957) (“Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight.”).

\textsuperscript{81} Dolan, 546 U.S. at 491–92.

\textsuperscript{82} See FDIC v. Meyer, 510 U.S. 471, 477 (1994) (“Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and ‘render[ed]’ itself liable.”) (quoting Richards v. United States, 369 U.S. 1, 6 (1962)).

\textsuperscript{83} See Meyer, 510 U.S. at 477.
or wrongful act or omission of any employee of the Government (5) while acting within the scope of his employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. Unlike other provisions that have mistakenly been victims of “drive-by jurisdictional rulings,” Congress has clearly stated that the FTCA’s core provision was intended as the jurisdictional prerequisite to its waiver of immunity, thus satisfying the clear-statement principle of Arbaugh. For example, whether a government employee was “acting within the scope of his . . . employment” and whether the “circumstances” are as such that a “private person would be liable” under the applicable state law are jurisdictional questions that must be satisfied before courts have authority to reach the merits of the claim.

Since the statutory provisions comply with Arbaugh’s clear-statement principle, the jurisdictional conditions contained in § 1346(b) of the FTCA set forth threshold limits on the scope of Congress’s statutory waiver of sovereign immunity and are to be interpreted under the rule of strict construction. Any theory of liability and request for judicial redress must strictly meet all six elements in order to be “cognizable” and “actionable” under § 1346(b). And once the plaintiff’s claim is cognizable, “[j]urisdiction of the defendant now exists where the defendant was immune from suit before . . . .” As the Court explained in Feres, “[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages.”; see also United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1628 (2015) (“[T]he FTCA’s jurisdictional grant appears . . . in . . . Title 28, § 1346(b)(1).”). At that point, the courts have the adjudicatory authority to allow or deny a claim on its merits based on the test prescribed by § 1346(b) and other sections, such as the substantive exceptions listed in § 2680, statute of limitations in § 2401(b), or administrative exhaustion requirement in § 2675.

86. See § 1346(b) (“[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages.”); see also United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1628 (2015) (“[T]he FTCA’s jurisdictional grant appears . . . in . . . Title 28, § 1346(b)(1).”).
87. Sisk, supra note 11, at 556 (quoting Meyer, 510 U.S. at 477 (quoting 28 U.S.C. § 1346(b))).
90. Id.
91. Id.
By contrast, the Court has held that the rule of strict construction ought not reflexively to be applied to sections of the FTCA that do not constitute jurisdictional conditions. These other conditions appear outside of § 1346(b), and a key example is the Court’s treatment of the statute of limitations for the filing of FTCA claims that is set forth in § 2401(b). Using similar principles that undergird Arbaugh, in Kwai Fun Wong, Justice Kagan, writing for the majority, described time bars in suits against the government pursuant to a waiver of sovereign immunity as subject to the same “rebuttable presumption of equitable tolling” as those in suits against private parties. Since the Government could not prove that Congress intended the time bar located in 28 U.S.C. § 2401(b) to be jurisdictional, the Government did not rebut the presumption.\textsuperscript{92} Because filing deadlines are ‘“quintessential claim-processing rules,’ which ‘seek to promote the orderly process of litigation’ but do not deprive a court of authority to hear a case, . . . the Government must clear a high bar to establish” that they are jurisdictional.\textsuperscript{93} The rule of strict construction did not apply and the filing conditions were not jurisdictional—they were claim-processing rules dealing with the merits.

In Kwai Fun Wong, Justice Kagan utilized a few different tools of statutory construction to support her conclusion. She highlighted the language of § 2401(b) and its similarity to other nonjurisdictional statutes of limitations.\textsuperscript{94} Further, she noted that the “statutory context” separating the filing deadline from the jurisdictional grant in § 1346(b) supported the Court’s reading.\textsuperscript{95} Finally, the lack of a clear statement from Congress in the statute’s legislative history solidified the Court’s decision.\textsuperscript{96} These analytical tools used for interpreting § 2401(b) are not unique to the FTCA’s claim-processing rules but can also be applied for interpreting the merits-related sections of the statute, such as the substantive exceptions in § 2680.

Indeed, the Court in an earlier decision declined to apply the rule of strict construction when interpreting § 2680(b) of the FTCA that excepts certain government conduct from the scope of the government’s waiver. In Dolan, the Court held that § 2680(b), which excludes “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter” from giving rise to

\textsuperscript{92} Kwai Fun Wong, 135 S. Ct. at 1631 (citing Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 95–96 (1990)).
\textsuperscript{93} Kwai Fun Wong, 135 S. Ct. at 1632 (citations omitted).
\textsuperscript{94} Id. at 1632–33.
\textsuperscript{95} Id. at 1633.
\textsuperscript{96} Id.
liability, should not be strictly construed.\textsuperscript{97} Upon applying ordinary tools of statutory interpretation, the Court concluded that § 2680(b) did not exclude relief for the plaintiff’s tort claim arising from the Postal Service’s negligent placement of mail on her porch.\textsuperscript{98} If the Court were to apply strict construction as the government argued, then it likely would have interpreted “negligent transmission of letters or postal matter” literally to encompass the negligent placement of mail by a postal worker that caused bodily injury and barred the plaintiff’s claim.

In support of its ruling, the Court emphasized that the § 2680 exceptions “qualifying [the FTCA’s] waiver of sovereign immunity for certain category of claims” were located in a separate statutory section from the jurisdictional grant contained in § 1346(b).\textsuperscript{99} As “exceptions” to the “jurisdictional grant” and waiver of sovereign immunity rather than components of it, interpreting the exceptions does not implicate the rule of strict construction in favor of the sovereign.\textsuperscript{100} According to the decision in \textit{Dolan}, “‘unduly generous interpretations of the [FTCA] exceptions run the risk of defeating the central purpose of the statute,’ . . . which ‘waives the Government’s immunity in sweeping language . . . .’”\textsuperscript{101} Instead, the § 2680 exceptions should be construed so as to identify “‘those circumstances which are within the words and reason of the exception’—no less and no more.”\textsuperscript{102} While strict construction of § 1346(b) prevents expansion of the government’s liability beyond congressional intent, strict construction of the scope of the § 2680 exceptions would undermine the remedial purpose of the statute.

Like with the § 2680(b) “mail” exception, Congress did not intend the § 2680(a) “discretionary function” exception to operate as a jurisdictional prerequisite limiting the power of the courts to consider the merits of a plaintiff’s FTCA claim. Rather, once courts recognize that a plaintiff’s claim is cognizable under the six elements listed in § 1346(b), then they have the authority to proceed to the merits and determine if the claim justifies granting relief under all sections of the FTCA, including the DFE. Simply put, courts must determine whether the DFE bars relief \textit{pursuant to their jurisdiction}.

\begin{itemize}
  \item \textsuperscript{97} Dolan v. U.S. Postal Serv., 546 U.S. 481, 485 (2006) (quoting 28 U.S.C. § 2680(b)).
  \item \textsuperscript{98} Id. at 492.
  \item \textsuperscript{99} Id. at 485.
  \item \textsuperscript{100} Id. at 485–86, 491.
  \item \textsuperscript{101} Id. at 492 (quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984); and then quoting United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)).
  \item \textsuperscript{102} Dolan, 546 U.S. at 492 (quoting Kosak v. United States, 465 U.S. 848, 553 n.9 (1984); and then quoting Dalehite v. United States, 346 U.S. 15, 31 (1953)).
\end{itemize}
The DFE is not a limit on their jurisdiction. The DFE is not jurisdictional and is not subject to the rule of strict construction that extends to jurisdictional sections of the statute but rather the ordinary tools of statutory interpretation.

Nowhere in the FTCA has Congress clearly stated that the DFE is intended to be jurisdictional, and the legislative history provides no support for reading that term into the statute. Granted Congress does not need to “incant magic words” in order to attach jurisdictionality to a statutory provision, despite the Arbaugh clear-statement principle. Nevertheless, Congress must provide at least clear instruction to the courts. None exists for the DFE. Nowhere in the entire section, much less subsection, or legislative history do the words “jurisdiction” or “jurisdictional” appear.

Further, the DFE and all of the other substantive exceptions are located in § 2680, separate from the FTCA’s jurisdiction-granting provision in § 1346(b).

Nevertheless, some lower courts have interpreted § 2680 differently. The section reads, “The provisions of this chapter and Section 1346(b) of this title shall not apply to” the thirteen substantive exceptions. These courts have interpreted the text as showing a clear statement from Congress that the section is jurisdictional because it refers back to the jurisdictional grant in § 1346(b). However, such interpretations contravene the Court’s rejection of jurisdictional interpretation based on statutory section cross-refer-

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103. See, e.g., Parrott v. United States, 536 F.3d 629, 634 (7th Cir. 2008). “‘[W]hat sovereign immunity means is that relief against the United States depends on the statute; the question is not the competence of the court to render a binding judgment, but the propriety of interpreting a given statute to allow particular relief.’ That principle resolves this jurisdictional debate, too. The statutory exceptions enumerated in § 2680 . . . limit the breadth of the Government’s waiver of sovereign immunity, but they do not accomplish this task by withdrawing subject-matter jurisdiction from the federal courts.” Id. (quoting United States v. Cook Cty., 167 F.3d 381, 389 (7th Cir. 1999)).


107. See, e.g., Abreu v. United States, 468 F.3d 20, 25 (1st Cir. 2006) (reasoning that the language of § 2680 provides that if the DFE applied then “the jurisdictional grant of section 1346(b) [would] not”).
Section 2680’s referral back to the jurisdictional threshold provision of the FTCA does not stand in for a clear statement or instruction from Congress that courts should treat the DFE as a limitation on their adjudicatory authority. As a result, like other statutory waivers of sovereign immunity, strict construction should be limited to the threshold provision granting jurisdiction to the federal courts, i.e., § 1346(b), and ordinary tools of statutory interpretation should be used to read all other provisions of the FTCA.

IV. OVERVIEW OF THE DFE AND THE BURDEN OF PROOF

The DFE has been described as “[t]he most gaping and frequently litigated of the FTCA’s exceptions.” The provision maintains immunity for negligence claims based on two separate categories of governmental acts: (1) the exercise of due care in the execution of a statute or regulation and (2) the performance of a discretionary function or duty by a federal agency or employee. While the language in the first half of the provision is fairly simple and clear so that its application has not led to much dispute, it is the broad language in the second half referring to “discretionary functions” from which the provision garners its name and reputation.

Congress provided little explicit guidance on the purpose or application of the DFE. As a result, the Supreme Court experimented with various formulations, hoping to promote ease of application and predictability while also excluding claims that “the discretionary function exception was designed to shield.” However, when defining the scope of the exception’s application, the

108. See Gonzalez v. Thaler, 565 U.S. 134, 145 (2012) (“Congress set off the requirements in distinct paragraphs and, rather than mirroring their terms, excluded the jurisdictional terms in one from the other.”).
109. Levine, supra note 4, at 1541.
111. Niles, supra note 10, at 1302–03.
112. See id. at 1301 (“Unlike the other exceptions, the discretionary function restriction is stated in broad terms, has resulted in a substantial limitation on the liability of the United States in a wide range of circumstances, and has fostered a substantial jurisprudence.”).
Supreme Court has never addressed whether the DFE is an affirmative defense, whose burdens of pleading and proof is to be assigned to the government, or an element of the cause of action, to be assigned to the plaintiff. Assigning the burdens of pleading and proof can have profound implications in civil litigation: The party bearing the burden of pleading must introduce the issue into the case; the party bearing the burden of proof must be the first to provide core evidence on that issue; and the party bearing the burden of proof must risk losing the case if the fact-finder is equally persuaded by both sides. Thus, whether the plaintiff or government bears the burden of proof for the DFE in FTCA cases carries some very real practical stakes. Prior to the Court’s most recent case dealing with the DFE, the Sixth and Seventh Circuits were the only two courts of appeal to consider the burden question, each assigning the burden to the government. Furthermore, the first scholars examining the DFE treated it as an affirmative defense.

However, a division developed following the Court’s decision in United States v. Gaubert, 499 U.S. 315 (1991), in which the Court altered the test for when the exception applies. Before Gaubert, the Supreme Court had established the modern test for applying the DFE in Varig Airlines, 467 U.S. 797, 813 (1984), and Berkovitz v. United States, 486 U.S. 531 (1988). Rejecting the even earlier standard that focused on the status of the government actor, the Court concentrated on the “nature of the conduct” for governing whether the DFE applies. The conduct must be the product of “judgment or choice . . . based on considerations of public policy.” In Berkovitz, the Court detailed the two-step test: The DFE will not apply (1) when a federal statute, regulation, or policy spe-
specifically prescribes a course of action for the employee or agency to follow and, if no such prescription exists, then (2) when the judgment is of the kind that the DFE was not designed to shield, the kind of decision that did not involve policy judgment. The two-prong Berkovitz test has been described as providing a “concrete framework” and “workable test” for applying the DFE, focusing on the nature of the action and the considerations of the actor.

In Gaubert, the Court revised its test for applying the DFE in two key ways. First, it held that if it can be shown that any statute, regulation, or even agency guideline authorizes the governmentactor in question to exercise discretion, then its very existence creates a “strong presumption” that the actor’s discretionary act is grounded in policy and, thus, protected by the DFE. Second, when analyzing whether the actor’s judgment or choice was grounded in policy, courts should not focus on the actor’s “subjective intent” but rather “whether [the actions] are susceptible to policy analysis.” While never expressly overruling prior doctrine, Gaubert drastically altered the then-existing substantive scope of the DFE.

The Gaubert formulation diverges from the critical inquiries in Berkovitz by introducing the novel “presumption” and opportunity for “policy-susceptibility analysis,” shifting focus to objective and hypothetical, rather than subjective and actual, factors. Gaubert’s alterations to the test for the DFE’s application upend the careful balance Congress established between the FTCA’s waiver of sovereign immunity and the DFE’s protection of core government functions.

A. Gaubert Contradicts Legislative History and Congressional Intent

Scholars have argued that Gaubert’s application of the DFE contravenes Congress’s purpose in enacting the FTCA and DFE. The FTCA symbolized Congress’s acknowledgement that sovereign immunity does not justify failing to compensate tort victims simply

120. Id.
121. Hyer, supra note 45, at 1103.
123. Id. at 325.
124. See, e.g., Niles, supra note 10, at 1353 (“[T]he Supreme Court’s current interpretation of the exception expands the provision’s limitations well beyond their intended scope.”).
because their injurers happened to be federal employees. The Court’s expansion of the scope and applicability of the DFE undercuts Congress’s broad, remedial purpose for enacting the FTCA. Gaubert broadens the application of the DFE beyond the limited roles intended by Congress to the point of re-instating the pre-FTCA status quo.

Unquestionably, Gaubert is not faithful to the legislative history of the DFE. This legislative history is important given the statute’s failure to define what it means by “discretionary function.” Legislative history demonstrates that Congress intended the provision to mitigate the FTCA’s effect on certain essential governmental functions not amenable to tort liability, but not to exclude from liability every government act that involves some element of discretion. Gaubert magnified the DFE’s scope beyond congressional intent.

For instance, testifying to the House Judiciary Committee in support of an FTCA predecessor, Assistant Attorney General Francis Shea explained that the statute was not intended to allow “the propriety of a discretionary administrative act” to be “tested through the medium of a damage suit in tort.” The Committee adopted language in its House Report to Congress echoing that of the Assistant Attorney General, emphasizing “this is a highly important exception, intended to preclude” suits derived from “authorized activity, such as flood-control or irrigation project” or “a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission,” where “the only

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125. See Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955) (“The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities . . . .”).

126. See, e.g., Niles, supra note 10, at 1334 (“Gaubert’s ‘presumption’ of the policy-grounded nature of all governmental discretionary acts serves, and indeed seems implicitly grounded in, a concept of absolute sovereign immunity which . . . was expressly rejected, at least as applied to negligent torts, by the FTCA.”).

127. See, e.g., Hyer, supra note 45, at 1095 (“[I]n enacting the exception, Congress did not define discretionary function and commentators suggest that Congress provided little concrete guidance as to its intended scope.”).

128. See, e.g., Gray v. Bell, 712 F.2d 490, 508 (D.C. Cir. 1983). “[W]e first note that the language of the discretionary function clause discloses virtually nothing about the scope of its protection. Literal adherence to the phrase ‘discretionary function’ leads to blind alleys. Because virtually all decisions in the realm of human experience involve some element of discretion, any interpretation focusing on the plain import of the statutory language would swallow the general waiver of sovereign immunity in the FTCA.” Id. at 508.

ground for suit is the contention that same conduct by a private individual would be tortious.”

The Court in Dalehite, one of the earliest Supreme Court cases addressing the DFE, interpreted this history as Congress including the provision to reserve consent to be sued for “acts of a governmental nature or function,” while preserving governmental liability for “ordinary common law torts” from agents acting within their scope of employment, such as “negligence in the operation of vehicles.” As demonstrated in Dalehite, the Court did not consider the sparse legislative history as providing detailed instruction on how to apply the DFE but rather as highlighting obvious, extreme examples of what should and should not be covered. Thus, the Court in Varig Airlines observed that, since the legislative history consistently referred to acts of regulatory agencies as examples of what Congress intended the DFE to cover, clearly “Congress wished to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” The Court’s interpretation emphasized three important roles that the DFE serves: (1) formally maintaining the separation of powers, (2) functionally precluding the impossible task of fitting policy decision making into the judicial formula for determining negligence,


132. Id.

133. Id.; see H.R. Rep. No. 76-2428, at 3 (1940).

134. See Levine, supra note 4, at 1541 n.21. “The legislative history regarding what types of claims were to be protected is sparse. It deals largely with isolated examples that lie at the extremes. For example, it makes clear that ordinary negligence in operating a motor vehicle would not be protected discretionary conduct, while the Treasury Department’s use of its blacklisting and freezing powers would.” Id.


136. E.g., Bruce A. Peterson & Mark E. Van Der Weide, Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity, 72 Notre Dame L. Rev. 447, 480 (1997). First, preventing “judicial second-guessing” preserves the separation of powers. See id. (“Without a discretionary function exception to governmental tort liability, the judiciary would be able, through tort plaintiffs, to obtain substantive review powers over most governmental endeavors.”); Niles, supra note 10, at 1312 (“These are the kinds of decisions that should
Despite the justifiable criticisms aimed at Gaubert, the decision remains the governing rule on how to determine whether the DFE defeats liability. However, what Gaubert does not decide is the assignment of the burden of proof to show the applicability of the DFE.

be made, whenever possible, by government officials directly accountable to the constituencies affected. If decisions of this kind could be routinely challenged in a court of law . . . the democratic process would be replaced . . . by government through litigation."

Second, federal courts are ineffective at judging the reasonableness of policy-based decisions that incorporate the concerns of competing constituencies and the use of scarce resources and impact large swaths of people in non-fact specific ways. See Niles, supra note 10, at 1313 ("Courts are ill suited, however (as the traditional justiciability doctrines of standing and ripeness demonstrate), to address disputes involving broad questions of policy with a potentially prospective impact on large numbers of people."). Third, the DFE reduces the time and resources the government must spend in FTCA litigation.

137. Varig Airlines, 467 U.S. at 814 (holding that the DFE "protect[s] the Government from liability that would seriously handicap efficient government operations.") (quoting United States v. Muniz, 374 U.S. 150, 163 (1963)). First, the DFE prevents government agencies and actors from making discretionary decisions based not upon competing policy choices but rather avoiding liability for the government. See Niles, supra note 10, at 1309 (stating that the exception is a trade-off that limits compensation to those injured but preserves "societal benefits to be gained from efficient and prompt execution"). Second, the DFE reduces the time and resources the government must spend in FTCA litigation. Id. at 1310.

138. See Rosebush v. United States, 119 F.3d 438, 444 (6th Cir. 1997) (Merrit, J., dissenting) (describing Gaubert as having "swallowed, digested, and excreted the liability-creating sections of the Federal Tort Claims Act"); Allen v. United States, 816 F.2d 1417, 1424 (10th Cir. 1987) (McKay, J., concurring) ("[T]he rule that 'the king can do no wrong' still prevails at the federal level in all but the most trivial matters."); see also Nelson, supra note 20, at 279 ("The Court's Gaubert opinion is a specific target of much of this negative commentary, because most public law scholars view Gaubert as an expansion of sovereign immunity beyond prior Supreme Court interpretations of the DFE . . . "); Hyer, supra note 45, at 1091 ("Although the Gaubert presumption has remained the law for seventeen years, it has been consistently decried by commentators as applying the discretionary function exception too broadly and in effect swallowing the purpose of the FTCA."); Niles, supra note 10, at 1351–32 ("[T]he substantive impact of the [Gaubert] interpretation also serves to drastically limit the exposure of the United States to liability."); Peterson & Van Der Weide, supra note 136, at 448 ("This phrase ['susceptible to policy analysis'] is now raised by the government’s lawyers in countless negligence lawsuits against the United States, and it has greatly restricted the federal government’s tort liability for all but the most mundane transactions.").
B. Gaubert and the Burden of Proof

There is little disagreement that Gaubert’s “presumption” and “policy-susceptibility analysis” modify the Berkovitz test for when the DFE applies, limiting the types of government activities that could give rise to tort liability. However, some have further interpreted the decision as procedurally impacting who proves the applicability of the exception and how that is done, while others have noted that Gaubert never changed the procedural status quo. Division over whether the Court intended to alter the procedure for pleading and proving the DFE has caused a circuit split over the DFE’s burden of proof.

While many have observed the problems in the lower courts posed by the Gaubert formulation for the applicability of the DFE, few have commented on the burden of proof question that arose following the Court’s decision. Some lower courts correctly noted that since the Supreme Court never indicated otherwise, the burden is most appropriately placed on the government as an affirmative defense. Others mistakenly relied on Gaubert as support for assigning the burden to the plaintiff, raising obstacles in a plaintiff’s quest for trial and discouraging those at the margin from ever bringing claims in the first instance.

The Ninth Circuit in Prescott v. United States, 973 F.2d 696 (9th Cir. 1992) agreed with the burden allocation scheme previously endorsed by the Sixth and Seventh Circuits, concluding, “Gaubert, of course, did not deal with the burden of proof question.” Just a few years later, though, the Tenth and Eleventh Circuits declined to adopt the Ninth Circuit’s analysis, reasoning that assigning the burden of proof to the government “may be suspect in light of Gaubert.” The First Circuit has also expressly adopted the reasoning of the Tenth and Eleventh Circuits.

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139. See, e.g., Nelson, supra note 20, at 279.
140. One expansive article recommends a uniform burden allocation scheme assigning the burden of proof for all provisions of the FTCA to the plaintiff, including a section devoted to the DFE. See generally Ugo Colella & Adam Bain, The Burden of Proving Jurisdiction Under the Federal Tort Claims Act: A Uniform Approach to Allocation, 67 FORDHAM L. REV. 2859 (1999). Another comment focuses on the burden of proof for the DFE and suggests amending FRCP 8(c) to include the DFE as an affirmative defense. See generally Bosworth, supra note 5.
141. Prescott v. United States, 973 F.2d 696, 702 n.4 (9th Cir. 1992).
142. Kiehn v. United States, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993); see Autery v. United States, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993).
143. See Montijo-Reyes v. United States, 436 F.3d 19, 24 n.7 (1st Cir. 2006) (“[T]he law presumes that the exercise of official discretion implicates policy judgments,’ so Plaintiffs ‘bear the burden . . . of demonstrating that the [Corps’]
Bearing in mind the Tenth and Eleventh Circuits’ skepticism of Prescott, some circuit courts have failed to even consider the Ninth Circuit’s analysis and simply assigned the burden to the plaintiff as part of her invocation of subject matter jurisdiction.\footnote{144} By strictly construing the DFE as a “jurisdictional prerequisite,”\footnote{145} these courts did not even attempt to deliberate the most appropriate and optimal assignment of the burden of proof. Instead, they simply relied on Gaubert to support the type of “jurisdictional drive-by ruling” for the DFE that the Court has been trying to fix since Arbaugh.

Other circuits have noted the split but declined to decide one way or the other on the issue.\footnote{146} And finally, some, such as the Third Circuit, have agreed with the Ninth Circuit, stating, “[A]bsent an explicit statement from the Supreme Court that the plaintiff bears the ultimate burden, we continue to believe that the burden of proving the applicability of the discretionary function exception is most appropriately placed on the Government.”\footnote{147}

The disagreement over the burden of proof for the DFE is partially derived from the “well-nigh impossible” task for scholars and jurists alike in differentiating between substance and procedure and pinpointing the relation between the two in various contexts of civil litigation.\footnote{148} The hazy substance-procedure dichotomy extends conduct was not at least susceptible to policy related judgments.’”) (quoting Wood v. United States, 290 F.3d 29, 37 (1st Cir. 2002)).

\footnote{144} E.g., Welch v. United States, 409 F.3d 646, 649 (4th Cir. 2005); Aragon v. United States, 146 F.3d 819, 823 (10th Cir. 1998).

\footnote{145} Aragon, 146 F.3d at 823.

\footnote{146} See St. Tammany Par. ex rel. Davis v. Fed. Emergency Mgmt. Agency, 556 F.3d 307, 315 n.3 (5th Cir. 2009) (“While the plaintiff bears the burden of showing an unequivocal waiver of sovereign immunity, it is less clear whether the plaintiff or the government bears the burden of proof to show whether a discretionary function exception to a waiver of sovereign immunity applies. Our sister courts of appeals are split.”); Sharp ex rel. Estate of Sharp v. United States, 401 F.3d 440, 443 n.1 (6th Cir. 2005) (“We note that there appears to be some debate as to the impact of this so-called Gaubert presumption on the question of which party bears the burden of proving the applicability (or inapplicability) of the discretionary-function exception . . . . [W]e need not settle this issue here.”).


\footnote{148} A. Leo Levin & Anthony G. Amsterdam, Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 1, 15 (1958); see, e.g., Carrie Leonetti, Watching the Hen House: Judicial Rulemaking and Judicial Review, 91 Neb. L. Rev. 72, 97 (2012) (“[T]he task of differentiating the substantive from the procedural has been an elusive one for many courts.”). “Courts have been befuddled by the task of differentiating the substantive from the procedural . . . . Substantive law is said to create and define legal rights with respect to persons and
to rules of evidence in general and burdens of proof in particular. But the ambiguous language of Justice White’s decision in Gaubert itself only added to the problem. Following his description of the Gaubert presumption, Justice White, writing for the majority, stated, “For a complaint to survive a motion to dismiss [pursuant to the DFE], it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.”

This short phrase coupled with the lack of clarity on the Gaubert presumption has led to the aforementioned division among courts. While Justice White crafted a rebuttable presumption in Gaubert, he failed to spell out exactly how that presumption should function in presenting and proving evidence during FTCA litigation. The vagueness in Justice White’s statement is only further exacerbated by the inherent and widespread ambiguity, confusion, and disagreement over the definition and application of “presumptions” generally, despite Federal Rule of Evidence 301.

As one their property. Practice and procedure may be described as the legal machinery by which substantive law is made effective. The boundary, however, is imprecise.” James R. Wolf, Inherent Rulemaking Authority of an Independent Judiciary, 56 U. MIAMI L. REV. 507, 527 (2002). “Everybody knows that ‘procedure’ and ‘substance’ are elusive words that must be approached in context, and that there can be no one, indeed any, bright line to mark off their respective preserves.” Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. PA. L. REV. 1015, 1187–88 (1982).

149. See, e.g., Richard Henry Seamon, An Erie Obstacle to State Tort Reform, 43 Idaho L. Rev. 37, 91–92 (2006) (explaining how burdens of proof may be “substantive” for purposes of Erie analysis but “procedural” for purposes of conflicts law); Lea Brilmayer & Ronald D. Lee, State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflicts of Law, 60 NOTRE DAME L. REV. 833, 848–49 (1985) (“Burden of proof, likewise, is characterized as substantive for Erie purposes and procedural for conflicts purposes.”) (citing Sampson v. Channell, 100 F.2d 754, 762 (1st Cir.), cert. denied, 310 U.S. 650 (1940)).


151. See Bosworth, supra note 5, at 104 (“[C]ourts and scholars alike have questioned whether the decision created a framework for dealing with burden of proof in the context of the DFE. In particular, they have grappled with [motion to dismiss] language from Justice White’s majority opinion.”) (first citing Kiehn v. United States, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993); then citing Autery v. United States, 992 F.2d 1523, 1526 n.6 (11th Cir. 1993)).

152. See Fed. R. Evid. 301. “In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.” Id. See also, e.g., Ronald J. Allen, Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform, 76 Nw. U. L. REV. 892, 894 (1982). “[T]he word ‘presumption’ is merely a label applied to various manipulations of other judicial prerogatives . . . . Rule 301, in short, has
commentator observed, “The Court failed to discuss what kind of showing would be sufficient for a plaintiff prior to a motion to dismiss (which means in her complaint and prior to discovery) to rebut the ‘presumption’ . . .”\textsuperscript{153} The Court’s relative silence on the procedural impact of its decision also resulted in the division among courts on the burden of proof. Courts that have assigned the burden of proof to the plaintiff must reconsider their positions. First of all, \textit{Gaubert} does not support assigning the burden of proof to the plaintiff. Second, nothing in the legislative history supports assigning the burden to the plaintiff. Third, those lower courts that have assigned the burden to the plaintiff have done so on the basis of the discredited view that the DFE is a jurisdictional prerequisite—the kind of mistaken “jurisdictional drive-by ruling” that the Supreme Court has been trying to fix since \textit{Arbaugh}.\textsuperscript{154}

No matter the criticisms of the Court’s decision, \textit{Gaubert} was not intended to alter how courts apportion the burdens pleading or proof for the DFE. Instead, federal courts must reject discredited, pre-\textit{Arbaugh} methods of statutory construction that wrongly infuse the exception with jurisdictionality and adopt a burden allocation scheme that optimizes efficiency in litigating the applicability of the DFE and promotes the goals of the FTCA as a whole, such as transparency, compensation, and deterrence.

\textsuperscript{153} Niles, \textit{supra} note 10, at 1327.

\textsuperscript{154} Some commentators have asserted that even though other Section 2680 substantive exceptions may be nonjurisdictional, the DFE must nevertheless be considered a jurisdictional prerequisite because its text and purpose deal with justiciability. \textit{See} Sisk, \textit{supra} note 11, at 557 n.226. “In appropriate cases, some exceptions to the FTCA may have jurisdictional implications by way of justiciability limitations on the federal judiciary. For example, the discretionary function exception is grounded in ‘separation of powers concerns.’ Accordingly, as I have written previously, ‘the discretionary function exception appears to be a species of the “political question” doctrine.’\textit{ Id.} (citing Niles, \textit{supra} note 10, at 1323)); \textit{see} Niles, \textit{supra} note 10, at 1315 (“[DFE was enacted because] courts are ill suited, however (as the traditional justiciability doctrines of standing and ripeness demonstrate), to address disputes involving broad questions of policy with a potentially prospective impact on large numbers of people.”). Such an understanding of the DFE that infuses the provision with constitutional or prudential interests in the separation of powers or justiciability is based on theoretical shaky ground. \textit{See} Parrott v. United States, 536 F.3d 629, 634 (2008) (“[T]he question is not the competence of the court to render a binding judgment.”) (quoting United States v. Cook Cty., 167 F.3d 381, 389 (7th Cir. 1999)).
C. The DFE Is an Affirmative Defense

Since the Arbaugh clear-statement principle for jurisdictionality confirms that the DFE was not intended to be a jurisdictional prerequisite, it is no longer self-evident that the jurisdiction-seeking plaintiff in FTCA actions maintains the burden of proving the non-applicability of the DFE.155 Furthermore, the Court did not assign the burden in Gaubert. On the other hand, the mere fact that the DFE is non-jurisdictional and that the Court did not expressly assign the burden to the plaintiff does not necessarily support the idea that the government must bear the burden of proof of the applicability of the exception. As with any issue in civil litigation, it remains possible that either the plaintiff bears the burden of proof as an “essential” element of her claim or the government bears the burden of proof as an “affirmative defense.”156 But assigning the burden based purely on an arbitrary framing of the issue or manipulation of syntax is sloppy methodology that leads to adverse results.157

Instead, the DFE burden allocation scheme requires stronger, clearer reasoning. In recent years, commentators have been using economic models to explain the allocation of burdens of proof.158 The law and economics justification for burden allocation, particularly as explained by Thomas Lee in his article, “The Economics of Legal Burdens,” is a useful guide for consideration of the burden of proof for the DFE, and special knowledge of economics is unnecessary to perceive their import.159 First, one must identify the underlying, social optimization functions performed by proof burdens in civil litigation generally and then, keeping those functions in mind, determine the effects of assigning the burden for the DFE in FTCA


157. Id.


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litigation. Finally, weighing those effects, one must identify the party upon which assignment would further the goals of the FTCA while minimizing the social costs of litigation. Upon applying these steps, it is evident that the socially optimal burden allocation scheme minimizing the social costs of FTCA litigation assigns the burden of proof to the government. In other words, the applicability of the DFE is an affirmative defense. 160

The “burden of proof” as heretofore used actually refers to three separate burdens: (1) the burden of pleading, (2) the burden of production, and (3) the burden of persuasion. 161 It is well settled that the party carrying the burden of pleading an issue usually also carries the burdens of production and persuasion. 162 The DFE should be no exception. 163 In the socially optimal burden allocation scheme for the DFE, the government must plead, produce evidence, and persuade the fact-finder (which is a federal judge in FTCA cases) that the exception applies to each discrete act within its course of conduct or risk losing on the issue. This burden allocation scheme minimizes the direct and error costs flowing from FTCA litigation, furthering the statute’s goals of deterrence and compensation.

V. JUSTIFYING THE PROPOSED ASSIGNMENT

Demonstrating that the burden of proof for any issue should be assigned to the defendant as an affirmative defense is a difficult task. The default rule is that the plaintiff bears the burdens of

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160. See Prescott v. United States, 973 F.2d 696, 702 (9th Cir. 1992) (“[A]n exception to the FTCA’s general waiver of immunity, although jurisdictional on its face, is analogous to an affirmative defense . . . .”).

161. Colella & Bain, supra note 140, at 2894 (citing 2 McCORMICK ON EVIDENCE, supra note 156, § 357). “Burden of pleading” refers to the initial duty of introducing an issue into the matter. “Burden of production” refers to the duty to produce sufficient evidence on an issue to prevent an adverse directed verdict. And “burden of persuasion” refers to the duty to persuade a fact-finder to a requisite degree of belief less risking an adverse decision.

162. Colella & Bain, supra note 140, at 2894.

163. See Stewart v. United States, 199 F.2d 517, 519 (7th Cir. 1952). “The [§ 2680] exceptions referred to are available to the government as a defense only when aptly plead and proven.” Stewart, 199 F.2d at 519. In contrast, “it is true that some courts have suggested that the exceptions of § 2680 are defenses to be pled and proven by the government . . . . We disagree . . . . Only after a plaintiff has successfully invoked jurisdiction by a pleading that facially alleges matters not excepted by § 2680 does the burden fall on the government to prove the applicability of a specific provision of § 2680.” Carlyle v. U.S. Dep’t of the Army, 674 F.2d 554, 556 (6th Cir. 1982).
pleading and proof for all issues. 164 This rule is generally preferable because it minimizes certain direct social costs that necessarily arise out of any litigation. However, deviating from the default allocation scheme can be justified as long as other costs are sufficiently economized. First, though, one must comprehend the costs minimized by the default rule before demonstrating how other saved costs can outweigh them when shifting the burden of proof to the defendant for certain issues, such as the DFE.

A. The Burden of Pleading

Assigning the burden of pleading to the plaintiff on all issues is the clearest and simplest allocation scheme. The legal system would not need to waste resources determining which party must plead which issues. Instead, the plaintiff could plead affirmatively all issues part of her prima facie case in addition to pleading affirmatively “the absence of those matters [usually] categorized as affirmative defenses.” 165 Since the primary function of pleading is to facilitate communication and signaling between the parties as to the issues being disputed, the clearest, simplest rule minimizes the direct costs of inefficient signaling in litigation. 166 If the plaintiff bears the burden of pleading for all issues, then both parties can be assured that only those raised in the complaint will be implicated in the case.

Similarly, the default rule places the burden of proof for any issue on the plaintiff. Under this allocation scheme, when the evidence for a certain issue supports a ruling in favor of the defendant just as much as a ruling in favor of the plaintiff, 167 then the defendant prevails so that the burden effectively functions as a “tiebreaker.” 168 First, this slight advantage for the defendant minimizes post-judgment direct costs associated exclusively with a ruling in favor of the plaintiff. Remedy, enforcement, and transaction costs associated with post-judgment compensation are all saved if

164. 2 McCormick on Evidence, supra note 156, § 337 (“The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.”).
165. Lee, supra note 156, at 7.
166. Id. at 6.
167. In other words, in light of the evidence the fact-finder is just as likely to make an error judgment in favor of the plaintiff as an error judgment in favor of the defendant. See id. at 13.
168. Id. at 11.
the defendant is not found liable. Second, the default rule economizes on the pre-judgment direct costs of litigation by deterring plaintiffs’ claims that are based on indeterminate liability. Favoring the defendant in the case of a “tie” will deter the plaintiff with a claim at the substantive and evidentiary margin from ever filing suit because she knows she can only prevail if she persuades the fact-finder that her case is more convincing than the defendant’s.

Despite the default rule economizing the costs of litigation and post-judgment compensation detailed above, there are other counter-balancing costs that justify shifting the burden to the defendant on certain issues. These counter-balancing costs can all be found in the pleading and proving of the DFE. Therefore, upon weighing the costs minimized by assigning the burdens to the plaintiff against those minimized by assigning to the government, the courts must adopt an optimal allocation scheme for FTCA litigation that lays the burdens of pleading and proof upon the government.

Generally, assigning to the defendant the burden of pleading issues that do not coincide with those elements indispensable to a plaintiff’s claim can minimize the direct costs of pleading. Prima facie elements are those issues that inevitably arise for a plaintiff to prevail, while affirmative defenses are those that arise less frequently. Obliging plaintiffs to plead the absence of facts giving rise to an affirmative defense is unnecessarily costly in all those cases in which the issue would have never been raised otherwise. The pleadings become needlessly extensive and cluttered, diminishing the value of their communication and signaling functions. Therefore, assigning the burden of pleading sporadically-raised, affirmative defenses to the defendant removes the costs of even raising these issues in the vast number of cases. The costs of pleading affirmative defenses are expended only when necessary.

The relationship between FTCA §§ 1346(b) and 2680(a) operates similarly to the relationship between prima facie elements and affirmative defenses in other actions. As the threshold provision of the FTCA, § 1346(b) outlines the elements necessary for any tort claim against the government to be “actionable.” As explained above, a plaintiff cannot either invoke the court’s jurisdiction or succeed on the merits of her claim unless she can prove that her

169. Id. at 12.
170. Id. at 14–15.
171. Id. at 7.
172. Id. at 29 n.92.
173. See FDIC v. Meyer, 510 U.S. 471, 477 (1994) ("[A] claim is actionable under § 1346(b) if it alleges the six elements outlined . . . ").
claim is (1) against the United States (2) for money damages (3) for injury or loss of property, or personal injury or death (4) caused by negligent or wrongful act or omission of any employee of the Government (5) while acting within the scope of his employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.\footnote{174} No matter what, each and every one of these issues will arise and the direct costs of pleading them must be expended in an FTCA action.

But the issue of DFE applicability, whether the employee’s conduct was the exercise of an authorized discretionary function grounded in policy, does not inevitably coincide with these elements.\footnote{175} For instance, the question of \textit{whether} the government was negligent is material in every FTCA action, but the question of \textit{how} the actor was negligent is only relevant when applying the DFE.\footnote{176} Thus, while the provision may be the most “frequently litigated of the FTCA’s exceptions,”\footnote{177} it is certainly not raised in every FTCA action. Obligating the plaintiff to plead the non-applicability of the DFE, even when the issue is not guaranteed to be relevant, causes unnecessary costs in communication and signaling between the parties. By shifting the burden to the government, those costs will only be expended in cases in which the exception is guaranteed to arise.

Another justification for assigning to the defendant the burden of pleading an issue is because the defendant’s relative cost of pleading that issue is lower than the plaintiff’s.\footnote{178} The direct costs of pleading an issue are tied proportionally to the scope of the issue in dispute. The broader the issue, the higher the costs of efficiently signaling and communicating the legal parameters to the other party. Furthermore, the broader the issue, the higher the costs of initially investigating the factual basis of the allegations. Therefore, if one party’s “version” of the issue in question is narrower than the other’s, assigning the burden of pleading to that party economizes

\footnotetext[175]{See Lee, supra note 156, at 7 (“[A]n ‘affirmative defense’ might be defined as a matter not ordinarily expected to coincide with the elements entitling to prevail on a certain issue.”).}
\footnotetext[176]{See Whisnant v. United States, 400 F.3d 1177, 1185 (9th Cir. 2005) (“While the district court is correct to the extent that the question of whether the government was negligent is irrelevant to the applicability of the discretionary function exception, the question of how the government is alleged to have been negligent is critical.”) (citation omitted).}
\footnotetext[177]{Levine, supra note 4, at 1541.}
\footnotetext[178]{Lee, supra note 156, at 8.}
on the costs.\textsuperscript{179} For example, if a plaintiff in a contract enforcement action were obliged to plead the absence of mistake, she must account for the parties’ belief of accurate facts pertaining to each and every provision in the entire contract. Instead, the defendant has the burden of pleading mistake because she can point to a single provision whose underlying facts she or the plaintiff inaccurately believed to be true.

Just as a plaintiff pleading the absence of mistake must account for every provision in a contract, a plaintiff pleading the non-applicability of the DFE would also have to allege the non-applicability of every other exception contained in § 2680. Section 2680 lays out the thirteen substantive categories for which Congress qualified its waiver of sovereign immunity in the FTCA, of which the DFE is only a single exception.\textsuperscript{180} The FTCA plaintiff’s “version” of the issue is not merely the non-applicability of the DFE but rather the non-applicability of every single one of the § 2680 exceptions. Since the legal and factual scope of the plaintiff’s version is so much greater, the relative cost of pleading for the plaintiff is much greater than for the government.

Just a few years after the FTCA was enacted, when courts were just starting to grapple with the statute, the Seventh Circuit in \textit{Stewart v. United States} observed the “preposterous” result that ensues from assigning the burden of pleading the non-applicability of the DFE to the plaintiff.\textsuperscript{181} It would require the plaintiff in her complaint to “negative” all of the thirteen exceptions enumerated in § 2680, as opposed to assigning the burden of pleading to the government who can raise just a single exception, such as the DFE, as a defense.\textsuperscript{182}

The Sixth Circuit later criticized the \textit{Stewart} decision to the extent that it assumed assigning the burden of pleading the DFE to the plaintiff requires the plaintiff to plead every other exception.\textsuperscript{183} But as the Ninth Circuit in \textit{Prescott} explained, the circuit courts’ positions are actually in agreement.\textsuperscript{184} Both require that the facts

\begin{footnotesize}
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\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} \textit{Dolan v. U.S. Postal Serv.}, 546 U.S. 481, 485 (2006).
\item \textsuperscript{181} \textit{Stewart v. United States}, 199 F.2d 517, 520 (7th Cir. 1952).
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{See Carlyle v. U.S. Dep’t of the Army}, 674 F.2d 554, 556 (1982) (“We disagree with Stewart . . . that the plaintiff must disprove every exception under § 2680 . . . .”).
\item \textsuperscript{184} \textit{See Prescott v. United States}, 973 F.2d 696, 702 (9th Cir. 1992). “Today, we follow [the Sixth and Seventh] circuits and adopt the rule as set forth by the Sixth Circuit in Carlyle . . . . As the Seventh Circuit reasoned in \textit{Stewart}, placing the burden on the plaintiff would ‘impose upon the plaintiff the burden of proving
alleged in the plaintiff’s complaint must be facially outside of the DFE, which actually minimizes the direct costs of litigation by deterring plaintiffs from filing claims obviously barred by the exception. However, assigning to the plaintiff the burden of pleading specifically and particularly the non-applicability of the DFE along with all of the other § 2680 exceptions has the opposite effect.

B. The Burden of Proof

Just as social cost optimization justifies shifting to the defendant the burden of pleading certain issues, such as the DFE, so too does it justify shifting the burden of proof. For instance, there are issues in any litigation for which a defendant can access and produce core evidence, evidence that both parties will use as part of their respective arguments, at a lower cost than the plaintiff. The burden of proof properly incentivizes the defendant as the “least-cost producer” to initially produce such core evidence that can then be shared by both parties each offering their own formulation of the facts. The defendant will invest in the production of that core evidence before and at a lower cost than the plaintiff because if there is a “tie,” which is the default outcome of litigation before evidence is produced, the defendant will lose her case. The plaintiff will not have to waste resources duplicating the defendant’s efforts.

There are two chief instances when the defendant can access and produce evidence at a lower relative cost than the plaintiff: (1) when the issue in question involves conduct where the plaintiff may not have been involved and (2) when the defendant has superior incentives to keep records of the interaction giving rise to the issue. Consider how the doctrine of res ipsa loquitur functions in medical malpractice tort cases. If the accident occurred while the plaintiff was unconscious in an operating room, then she must overcome prohibitive costs to access and produce evidence showing the defendant’s negligence whereas the defendant recorded and maintained relevant evidence during the procedure. Shifting the burden of proof for the absence of negligence to the defendant ensures that the party who can access and produce evidence central
to both parties’ version of the facts at the lowest relative cost will do so.

In FTCA cases, the government can access and produce core evidence on the applicability of the DFE at a lower cost than the plaintiff. First, both of the *Gaubert* prongs rely on statutes, regulations, policies, and procedures that may either prescribe a course of conduct or authorize the use of policy discretion. The government inevitably retains a comparative advantage in accessing not only statutes and regulations available in the public record but also policies and procedures contained in employee manuals and internal memoranda. The government’s superior familiarity with these statutes, regulations, and policies also places it in a better position to determine whether any of them potentially govern certain acts or omissions in a given course of conduct.

Second, since the government is in the business of formulating and implementing policy, it can more effectively demonstrate whether the conduct at issue is “susceptible to policy analysis.” During the court’s “particularized and fact-specific inquiry,” it is much more reasonable and efficient for the policy experts in government rather than the private citizen plaintiff to initially show whether “the acts or omissions in question flowed from a choice based on social, economic, and political policy.” Assigning the burden of proof for the applicability of the DFE to the government guarantees that the least-cost producer will be incentivized to initially provide core evidence on the issue.

The second optimization justification for generally assigning the burden of proof for an issue to the defendant is to minimize error costs, the social costs incurred when the fact-finder makes a decision in favor of the wrong party. Since the burden of proof theoretically functions as a tiebreaker, it is only dispositive when

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190. See Bosworth, *supra* note 5, at 133 (“Imagine for a moment the thousands of federal statutes or regulations—that only the government could possibly be aware of—that apply to any given factual scenario. Moreover, consider the myriad ‘policies’ that have been promulgated by federal agencies within employee handbooks and internal memoranda . . . . [T]he majority of these policies are unavailable to laypersons or lawyers.”).

191. See id. (“[T]he government is necessarily in a better position to determine whether such policies apply to a FTCA case.”).


194. See Lee, *supra* note 156, at 5 (“Error costs are the social costs associated with erroneous legal judgments . . . . inclu[ding] decisions for undeserving defendants . . . and decisions for undeserving plaintiffs . . . .”).
liability is indeterminate based on the record. Liability is indeterminate when ex ante a decision for the plaintiff is correct just as often as it is erroneous or, in other words, when it is equally likely that the plaintiff and the defendant deserve to prevail.

The default rule assigning the burden of proof to the plaintiff is intended to deter plaintiffs from bringing suits of indeterminate liability in order to minimize the direct costs of litigation. This is based upon the assumption that the costs of an erroneous decision in favor of the defendant are equal to the costs of an erroneous decision in favor of the plaintiff. However, even when liability is indeterminate, it is possible for error costs to be unequal.

When an erroneous decision in favor of the defendant is costlier than an erroneous decision in favor of the plaintiff, despite each equally deserving to prevail, assigning the burden of proof to the defendant minimizes error costs. This justification for assigning the burden of proof to the defendant corresponds to the judicial edict that substantive or policy determinations, derived either from legislative expressions of policy or the judiciary’s view of the principles at stake, may impel the courts to use burden allocation to discourage “disfavored” claims. Defenses may be “disfavored” because they deter plaintiffs from initiating litigation intended to further certain policy goals. Thus, burden allocation can discourage “disfavored” defenses by slightly raising the hurdle for their success and encourage plaintiffs to file suits of indeterminate liability in furtherance of policy goals. In the FTCA context, erroneously applying the DFE barring the plaintiff’s claim is socially costlier than erroneously failing to apply the exception allowing the plaintiff’s claim to proceed. When the evidence is unclear whether the government actor was using authorized discretion when accidentally injuring the plaintiff, the policy goals of the FTCA, such as transparency, compensation, and deterrence, weigh in favor of waiving sovereign immunity rather than barring the claim under the DFE.

The harm suffered by an individual forced to bear the entire burden of governmental negligence is greater than the sum of inci-

195. *Id.* at 11.
196. *Id.* at 13.
197. *Id.* at 20–21.
198. *Id.* at 21–22; see Colella & Bain, *supra* note 140, at 2895–96 (“[T]he reality of burden allocation is in keeping with Professor McCormick’s suggestion . . . that burden allocation can also turn on ‘special policy considerations such as those disfavoring certain defenses.’”) (quoting 2 *McCormick on Evidence, supra* note 156, § 337).
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dental harms borne by each taxpayer when the government compensates an individual claimant. 199 Leaving a claimant “destitute or grievously harmed”200 because of an erroneous application of the DFE is socially costlier than mistakenly permitting to proceed a plaintiff’s claim that the DFE was meant to bar. By assigning the burden of proof for the DFE to the government, plaintiffs with FTCA claims at the margin of the DFE’s substantive scope will be incentivized to bring their suits, fulfilling the remedial purpose of the statute. This allocation also saves the social cost difference between an erroneous application of the DFE and an erroneous denial of the government’s motion to dismiss.

VI. HOW THE PROPOSED ASSIGNMENT SHOULD FUNCTION

To grasp how this allocation scheme should operate procedurally, one must begin before the action is even commenced. Presumably, the plaintiff will comply with the FTCA’s procedural requirements of administrative presentment and exhaustion outlined in 28 U.S.C. §§ 2401(b) and 2675(b) before filing her complaint in federal court. Since the government agency from whom the plaintiff must initially request relief is not required to notify the plaintiff of its reason for final denial, 201 it must be assumed that the plaintiff is not aware why her claim was rejected.

A. Pleadings

Thus, once the plaintiff commences her action, the complaint is vital to determining the applicability of the DFE because the facts alleged in the complaint provide the starting basis for arguments in pre-trial motions, where the vast majority of DFE litigation occurs. 202 Furthermore, even among those disagreeing on the burden of proof question, “in the context of a motion to dismiss, the courts have widely held that the plaintiff must . . . plead facts that facially allege matters outside of the discretionary function exception.” 203 Thus, while the plaintiff does not bear the burden of pleading the

200. Id.
201. See 28 C.F.R. § 14.9(a) (2017) (“The notification of final denial may include a statement of the reasons for the denial.”).
non-applicability of the DFE, the facts that she alleges in the complaint may nevertheless doom her claim.

The plaintiff’s complaint must contain facts that at least plausibly state a substantive FTCA claim under the six elements prescribed by § 1346(b), which concurrently establish the court’s subject matter jurisdiction. As the party asserting jurisdiction, it is incontrovertible that the plaintiff bears the burden of pleading, and later proving, these facts. However, since the DFE is non-jurisdictional, the plaintiff does not bear a similar burden to plead facts that would show its non-applicability. Rather, the plaintiff must allege facts in her complaint that do not “show upon their face the applicability of the ‘discretionary function’ exception.”

Some courts have interpreted this widely held requirement as assigning the burden of pleading to the plaintiff. But, I argue, such is not the case. Instead, the plaintiff’s requirement is analogous to the Seventh Circuit’s approach to complaints containing the elements of an affirmative defense: If the plaintiff “admits all the ingredients of an impenetrable defense” despite also alleging all of the elements of a viable claim, then she may “plead [herself] out of court.” Thus, a plaintiff cannot plead facts that on their face alone would establish the applicability of the DFE, despite also alleging all of the essential elements for an FTCA claim outlined in § 1346(b). However, she is not required to plead the negative of the DFE or any other the exceptions contained in § 2680.

204. See, e.g., Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (“[W]e . . . require . . . only enough facts to state a claim of relief that is plausible on its face.”).

205. See FDIC v. Meyer, 510 U.S. 471, 477 (1994) (“A claim comes within this jurisdictional grant—and thus is ‘cognizable’ under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above.”) (quoting Loeffler v. Frank, 486 U.S. 549, 562 (1988)).

206. See, e.g., Stewart v. United States, 199 F.2d 517, 520 (7th Cir. 1952) (“It is a universal rule, so far as we are aware, that a party who invokes the jurisdiction of a federal court must allege all facts necessary to give the court jurisdiction of the subject matter.”).

207. Contrary to the exceptions contained in § 2680. See Stewart v. U.S. Dep’t of the Army, 199 F.2d 517, 520 (7th Cir. 1952) (“[T]he necessity for negativing such exceptions in the complaint would impose upon the plaintiff the burden of proving such
The plaintiff’s requirement to plead matters that are at least “facially outside”212 of the DFE is no simple task, especially when the cause of action arises out of government activity in a highly regulated area in which government actors are authorized to maintain wide discretion for decision-making.213 The plaintiff must remain aware not to allege facts regarding the government actor’s consideration of policy factors or a statute or regulation granting discretion that obviously authorized the conduct in question. For instance, a plaintiff’s complaint should not reference in her complaint the Home Owner’s Act that expressly grants discretionary authority to prescribe regulations to the Federal Home Loan Bank Board and then base her negligence claim on that very discretionary authority.214 Otherwise, the plaintiff’s complaint would not survive a facial attack by the government’s Fed. R. Civ. P. 12(b)(1) or 12(b)(6) motion to dismiss that does not even raise matters outside of the complaint.215

Because of the pitfalls that could befall FTCA plaintiffs, Justice White reminded them in Gaubert that “[f]or a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.”216 As discussed above, many lower courts have misinterpreted this language as assigning the burden of pleading to plaintiffs.217 I would argue, though, that Justice White was simply instructing plaintiffs that their complaints must not be facially defective in reference to the substantive standard for the DFE detailed in Gaubert.218

Once the plaintiff has pleaded facts that do not show on their face the applicability of the exception, the government’s hurdle to cross in its motion to dismiss is much higher. While some commentators have criticized this approach as “impos[ing] negative averments. Such a result would border on the preposterous.”); Carlyle, 674 F.2d at 556.

212. Carlyle, 674 F.2d at 556.
213. Bosworth, supra note 5, at 125.
217. See supra notes 153, 163, 165 and accompanying text.
218. See supra note 5, at 125 (“At most, Justice White’s iteration was a reminder to plaintiffs like Gaubert . . . . that their complaints ought to allege conduct that would not obviously be captured by said agencies’ regulations and statutes.”); Colella & Bain, supra note 140, at 2929 (“Some lower courts have interpreted this language to mean that FTCA plaintiffs bear the ultimate burden of pleading and proving that the discretionary function exception does not apply. This reading of Gaubert, however, is overbroad.”).
only a wafer-thin burden,"\(^\text{219}\) this line of criticism fails to consider that the DFE is non-jurisdictional and should function as an affirmative defense.

**B. Motion to Dismiss**

Once the plaintiff has filed her complaint, the government must decide whether to plead and prove that plaintiff’s claim should be dismissed because relief is barred by the DFE. Because the DFE and other § 2680 exceptions have long been treated as limitations on the courts’ jurisdiction, the government has traditionally moved to dismiss FTCA claims pursuant to the DFE under Rule 12(b)(1).\(^\text{220}\) However, as it becomes increasingly acknowledged that the DFE is not a limitation on the courts’ adjudicatory authority but rather on the plaintiff’s entitlement to relief, the government may be required to move to dismiss under Rule 12(b)(6).

This same question has recurred in a similar context, motions to dismiss claims for mandamus relief pursuant to 28 U.S.C. § 1361.\(^\text{221}\) Analogous to the issues underlying the FTCA and DFE, § 1361 grants jurisdiction to the district courts to compel a federal officer to perform a ministerial, non-discretionary duty owed to the plaintiff.\(^\text{222}\) Courts are split on whether the defendant’s motion to dismiss goes to a defect in subject matter jurisdiction or failure to state a claim because the question of jurisdiction under § 1361 “is intertwined with the merits.”\(^\text{223}\) Those that treat motions to dismiss as challenging the merits of the claim under Rule 12(b)(6) opt to do so because the “issues of fact are central to both subject matter jurisdiction and the claim on the merits . . . .”\(^\text{224}\) For now, courts can adopt the same approach for the DFE. But as more recognize that the exception is non-jurisdictional, they will no longer have to justify their approach based on the “intertwined” nature of the jur-

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\(^\text{219}\) Colella & Bain, *supra* note 140, at 2925.

\(^\text{220}\) Id. at 2870.

\(^\text{221}\) See 28 U.S.C. § 1361 (2012) (“The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”).

\(^\text{222}\) See, e.g., Heckler v. Ringler, 466 U.S. 602, 616 (1984) (“The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if . . . the defendant owes him a clear nondiscretionary duty.”).


\(^\text{224}\) Montez v. Dep’t. of the Navy, 392 F.3d 147, 150 (5th Cir. 2004).
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risdictional and merits issues but rather simply because the DFE is exclusively a merits issue.

In its motion, the government may mount a facial or factual attack. The government will choose a facial attack when it can show that the plaintiff’s complaint is facially defective, meaning it can be shown that the DFE applies based exclusively upon the facts alleged in the complaint. Essentially, in such a case, the plaintiff loses her claim by pleading herself out of court. More likely, though, the plaintiff will have alleged facts that do not obviously require DFE application on the face of the complaint and so the government will have to mount a factual attack raising matters outside the pleadings that compel dismissal.

When the government mounts a factual attack, regardless of whether it is moving to dismiss for lack of subject matter jurisdiction or failure to state a claim, the motion should be converted into and adjudicated under a Rule 56 motion for summary judgment standard.\(^{225}\) In ruling on a Rule 56 motion and considering matters outside of the pleadings, the court must make all reasonable inferences from the factual record in favor of the plaintiff, the non-moving party.\(^{226}\) And while the plaintiff bears the burden of showing there are genuine issues of material fact, the government bears the ultimate burden of establishing that the \textit{Gaubert} test is met and the DFE applies.\(^{227}\)

To meet its burden, the government must produce evidence and persuade the court that the only reasonable inferences that can be drawn from the undisputed factual record establish that each discrete act in the government’s course of conduct was subject to the DFE. Upon examining the evidence produced by the government, the plaintiff may produce her own contravening evidence or

\(^{225}\) Every circuit court that has considered the question has endorsed Rule 12 “conversion” in FTCA actions on the grounds that the jurisdictional issues are “intertwined” with the underlying merits of the claim. \textit{See} Colella & Bain, \textit{supra} note 140, at 2867–71 (discussing Rule 12(b)(1) conversion in FTCA actions). As the DFE is recognized as non-jurisdictional and the government is required to move under Rule 12(b)(6), then conversion can no longer be justified by the “intertwined” standard. Nevertheless, under the Rules of Civil Procedure if matters outside of the pleading in Rule 12(b)(6) are presented and considered by the court, then “the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.” \textit{Fed. R. Civ. P. 12(b)}.\(^{226}\) \textit{See} Olson v. United States, 306 Fed. App’x 360, 363–64 (9th Cir. 2008) (viewing factual record on DFE applicability in light most favorable to the plaintiffs).\(^{227}\) Miller v. United States, 163 F.3d 591, 594 (9th Cir. 1998) (citing Prescott v. United States, 973 F.2d 696, 702 (9th Cir. 1992)).
argue based on the core evidence in the existing record that genuine issues of material fact exist as to whether the DFE bars her FTCA claim. Once the parties have produced all of their evidence and completed their arguments, the court must make a “particularized and fact-specific inquiry” to determine whether the conduct in question was grounded in social, economic, and political policy.228

To meet its burden of production, the government may present all relevant statutes, regulations, policies, and procedures that potentially govern the course of conduct at issue.229 The government would then aim to show that none of the relevant statutory, regulatory, or procedural material produced prescribes a specific course of conduct to which the allegedly tortious employee or agency failed to adhere.230 Next, the government would show that the employee or agency’s course of conduct was grounded in policy considerations, the type of conduct that the DFE was intended to protect from tort liability.231

The government can accomplish this in a variety of ways: It can submit testimony or documentary evidence showing that the actor actually considered policy in the decision-making or the course of conduct had policy implications; it can demonstrate that the employee or agency was acting pursuant to a discretion-granting statute or regulation creating a presumption that the conduct was grounded in the same policy considerations that the statute or regulation intended to further; or, without actually presenting further evidence, it may formulate a hypothetical policy analysis that demonstrates the conduct in question is susceptible to that same analysis.232

In presenting its argument, the government must disaggregate the course of conduct in question into discrete acts, showing that each discrete act is protected by the DFE.233 It cannot simply frame a series of acts, omissions, and decisions by various actors at various times as a single, elastic, all-encompassing action. Such a formula-

228. Prescott, 973 F.2d at 700.
231. See Gaubert, 499 U.S. at 324 (citing Dalehite v. United States, 346 U.S. 15, 36 (1953)).
232. See Colella & Bain, supra note 140, at 2930–931.
233. See, e.g., GATX/Airlog Co. v. U.S., 286 F.3d 1168, 1174 (9th Cir. 2002) (“[W]hen determining whether the discretionary function exception is applicable, ‘the proper question to ask is not whether the Government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance.’”) (citation omitted).
tion would fail the court’s “particularized and fact-specific inquiry.”\textsuperscript{234} If the government fails to persuade the court that just a single act in the relevant course of conduct was either not violative of a statutory or regulatory directive or not grounded in policy considerations, then the court must rule in favor of the plaintiff.\textsuperscript{235}

Just as the government must disaggregate the course of conduct in question into discrete acts, it must also disaggregate and specifically identify the policy considerations and implications underpinning each discretionary act. The government may not simply “waive the flag of policy as a cover for anything and everything it does . . . .”\textsuperscript{236} It must present evidence or analysis in the record supporting an argument beyond a “bald incantation of ‘policy.’”\textsuperscript{237} While evidence of the actor’s subjective intent to actually weigh policies is not required,\textsuperscript{238} there still must be evidence in the record supporting an argument that each act could have potentially been informed by such policy balancing and consideration.\textsuperscript{239}

Once the government has produced its evidence and/or policy analysis, the plaintiff may respond. She can present a statute, regulation, policy, or procedure prescribing the actor’s conduct and decision-making that the government neglected to raise. She may also respond with her own policy analysis showing that the government employee or agency could not have possibly considered any competing social, economic, and safety policies in its course of conduct.\textsuperscript{240} If the government highlighted a relevant, discretion-granting statute or regulation, then the plaintiff may rebut the pre-

\textsuperscript{234} Prescott v. United States, 973 F.2d 696, 700 (9th Cir. 1992).
\textsuperscript{235} See Peter H. Schuck & James J. Park, The Discretionary Function Exception in the Second Circuit, 20 QLR 55, 62 (2000) (“[T]he Second Circuit has relied upon a far more discriminating approach . . . . [C]ourts should disaggregate . . . the agency’s course of conduct—and then apply the two prongs of the Berkovitz-Gaubert test to each discrete element . . . .”).
\textsuperscript{236} Terbush v. United States, 516 F.3d 1125, 1134 (9th Cir. 2008).
\textsuperscript{237} Id. at 1135.
\textsuperscript{238} See United States v. Gaubert, 499 U.S. 315, 325 (1999) (“The focus of the inquiry is not on the actor’s subjective intent.”).
\textsuperscript{239} See Singh v. United States, 718 F. Supp. 2d 1139, 1145 (N.D. Cal. 2010) (ruling against the government because its declaration in the record speaks only to the actor’s consideration of budget, and not budget weighed against safety concerns).
\textsuperscript{240} See Niles, supra note 10, at 1330. “Prior to Gaubert, the plaintiff had the option of acknowledging that any number of policy issues might have informed the action at issue in its cause of action, but that, in fact, none of them did have any impact on the decision of the government official involved. After Gaubert, that option is taken away and the plaintiff must demonstrate that policy considerations could not possibly have affected the decision . . . .” Id.
sumption that the actor’s conduct furthered those same policy considerations.241 In presenting her evidence and argument, the plaintiff’s goal is simply to establish that there are genuine issues of material fact as to whether the DFE applies to any one of the government’s discrete acts.242

Once the parties have completed producing, sharing, formulating, and arguing the evidentiary record, the court must make its decision on the motion. As a Rule 12 conversion, the court must make all reasonable inferences in favor of the plaintiff. Further, the court must keep in mind at all times that the government bears the “risk of non-persuasion.”243 As a result, if the court as a fact-finder concludes that the evidence offered by the government is not credible, then it is bound to rule in favor of the plaintiff.244 On the other hand, if the government’s proffered evidence would compel a court to apply the DFE under the controlling legal principles, then the court must weigh it against the proof the plaintiff produced. If the court is more or equally compelled by the plaintiff’s proof and finds that there are genuine issues of material fact, then the government has not met its burden. The court is required to rule in favor of the plaintiff, deny the motion, and proceed to the next stage of trial.245

241. See Terbush, 516 F.3d at 1130 (“[W]e do not quickly accept that every minute aspect of the NPS’s work is touched by the policy concerns of the Organic Act.”). But see supra note 153 and accompanying text explaining that the Court in Gaubert did not discuss what kind of showing by the plaintiff could rebut the presumption.

242. See Miller v. United States, 163 F.3d 591, 594 (9th Cir. 1998).

243. See Lee, supra note 156, at 11 (“[B]urden of proof in this sense functions as a tiebreaker . . . aptly referred to as the ‘risk of nonpersuasion.’”).

244. See St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding in an employment discrimination case that a court’s rejection of a defendant’s proffered evidence does not compel a ruling in favor of the plaintiff only because the plaintiff at all times bears the ultimate burden of persuasion for the issue). Contra Colella & Bain, supra note 140, at 2899 (“Courts should not make credibility determinations when deciding whether the United States has met its burden of production.”).

245. See Colella & Bain, supra note 140, at 2932. “In theory, it should not matter where the burden of persuasion lies because the party that submits the weightier evidence should prevail under a preponderance of the evidence standard. In practice, however, the burden of proof in the discretionary function context is vitally important, because, as Prescott illustrates, courts can use the burden of proof as a procedural tool for granting or denying dispositive motions . . . .” Id.
VII.
CONCLUSION

The DFE is crucial to the FTCA’s overall scheme, but it was not intended to overshadow the statute’s expansive waiver of sovereign immunity. The Supreme Court has bolstered this view when interpreting the substantive scope of the § 2680 exceptions: “[I]n the FTCA context . . . unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute.”\(^{246}\) Just as “unduly generous interpretations” of the DFE are disfavored because they undermine Congress’s policy goals, so too are “unduly generous” applications of the exception where the government has not met its burden of proof.

Congress enacted the FTCA because it recognized the disproportionate harm caused by the negligence of government actors that could befall private citizens without judicial remedy because of the doctrine of sovereign immunity. The Court explained in Rayonier:

> Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees.\(^{247}\)

Congress made the policy determination that spreading the risk of harm caused by governmental misfeasance across all taxpayers is preferable to concentrating it on a single victim. Furthermore, the statute serves both an important deterrent function by forcing the government to internalize the costs of its negligent actions and a transparency function by alerting the public to the negative externalities of such conduct.\(^{248}\)

On the other hand, the DFE serves an important counter-balancing function, limiting the United States’ exposure to liability and judicial interference with governmental policy-making. According to the Court in Varig Airlines, Congress included the DFE in the statute to prevent judicial “second-guessing” of government deci-

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\(^{248}\) Levine, supra note 4, at 1569–70.
sions that “would seriously handicap efficient government operations.” Article III courts are simply not well suited to determine whether a certain, undefined category of essential governmental functions is reasonable or not. Exposing such functions to tort liability could chill necessary decisive governmental action. Still, scholars question the chilling effect of statutes such as the FTCA where the taxpayers rather than individual government actors pay judgments. While weighing the purposes underlying the DFE against those underlying the FTCA in general is a difficult empirical endeavor, the Supreme Court’s consistent instruction to lower courts to effectuate the broad remedial purpose of the statute signals the priority of Congress’s waiver of immunity above competing concerns. Assigning the burden of pleading and burden of proof for the DFE to the government comports with the bedrock principles of the FTCA. Since “the FTCA treats the United States more like a commoner than like the Crown,” the federal government, just like every other commoner tort defendant, must bear the burden of proof for affirmative defenses, including the DFE. Congress granted the government a statutory shield to protect essential discretionary functions from being exposed to tort liability, but in order for the government to enjoy its benefits, it must do the work of pleading and proving the DFE’s applicability.


250. Niles, supra note 10, at 1304 (citing Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 1 (1963)).

251. Peterson & Van Der Weide, supra note 136, at 482.

252. Levine, supra note 4, at 1569 (citations omitted).

253. 14 CHARLES ALAN WRIGHT ET AL., supra note 76, at § 3658 n.11.