III. Torts

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III. Torts

Tort law recognizes civil harms, meaning these harms lack criminality.[286] One of the main principles of tort law is that the party responsible for the harm should bear the cost of the conduct.[287] Torts come in many forms that cover a wide array of injuries. There are intentional torts (assault, battery, intentional infliction of emotional distress, etc.); property torts (trespass, conversion, trespass to personal property, etc.); economic torts (fraud, tortious interference with contract, etc.); nuisance; negligence; and strict liability torts. In the context of floodplain management, the types of torts that usually arise, in order of importance, include negligence, trespass to property, and nuisance. Also, in some cases there are strict liability implications. Tort law applies to both government and private actors, but government actors often enjoy some level of "sovereign immunity" as a defense to tort claims. Sovereign immunity receives extended consideration below. However, it is also true that in recent decades, courts have increasingly held government entities liable under these torts for their activities that increase flooding.[288]

III.A. Negligence

Negligence is the most common tort that arises in the context of floodplain management, and a theory commonly used to sue governments for flood-related damages. The common legal definition of negligence is the failure to exercise that care and caution which a reasonable and prudent person ordinarily would exercise under like conditions and circumstances.[289] This includes failure to take an action that a reasonable person would have taken or doing something that a reasonable person would not have done.[290] A person acts negligently if the person does not exercise reasonable care under all the circumstances.[291] Primary factors to consider in ascertaining whether a person's conduct is negligent include whether the act will

[286] Edward J. Kionka, Torts 1 (Thomson/West 2006, Fourth Ed.).

[287] 74 Am Jur 2d Torts § 2.

[288] Jon Kusler, Flood Risk in the Courts: Reducing Government Liability while Encouraging Government Responsibility, Ass'n of State Wetland Managers 1 (2011).

[289] Negligence, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/negligence.

[290] *Id.* Scully v. Middleton, 751 S.W.2d 5 (Ark. 1988).

[291] Restatement (Third) of Torts § 3.

result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

Property owners may assert various reasons for a claim of negligence by government. A common justification for a negligence claim comes in the form of the failed design or maintenance of flood control structures.[292] For instance, in *Reichert v. City of Mobile*, property owners sued the city because their properties were repeatedly flooded due to a poorly designed and maintained storm-water drainage system.[293] The court discusses that municipalities can be held liable if they are negligent in the design and construction of drainage systems, if they negligently fail to correct design or construction problems in their drainage systems, or if they negligently fail to provide appropriate upkeep of their drainage systems.[294] The trial court granted summary judgment in favor of the city and on appeal, the court only reversed the negligent-maintenance claim, but it is important to note that this case turned on a statute of limitations issue rather than the validity of the other claims.[295] *Richardson v. County of Mobile*, is a more recent example that took place in the same city, but in this case the plaintiffs sued the county.[296] Here, the court said that a duty of care arises and a municipality may be liable for damages proximately caused by its negligence in designing or maintaining the drainage system. In this case, the court concluded that the County had no duty to remediate flooding on the plaintiff's private property, because they did not construct the drainage system in this particular subdivision.[297] The plaintiffs could not put forth evidence that the County accepted the responsibility of the drainage system, but left the possibility of plaintiff's recovery for the County's duty to keep their roads safe.[298]

[292] *See, e.g.,* True v. Mayor & Commissioners of Westernport, 76 A.2d 135 (Md., 1950) (The court held the city liable for negligence in failing to keep sewer in proper repair). *Cf. also,* ABC Builders, Inc. v. Phillips, 632 P.2d 925 (Wyo., 1981) (Evidence of city's failure to maintain a drainage ditch was sufficient to establish city's liability for resulting landslide).

[293] Reichert v. City of Mobile, 776 So. 2d 761, 764 (Ala. 2000).

[294] Reichert v. City of Mobile, 776 So. 2d 761 (Ala. 2000) (citing Harris v. Town of Tarrant City, 221 Ala. at 560, 130 (1930).

[295] *Id.* at 766.

[296] Richardson v. City of Mobile, 2020 Ala. Lexis 170 (Ala. 2020).

[297] *Id.* at 9.

[298] Id.

Another way property owners can claim negligence is for administrative failures, such as the inadequate processing of permits[299] or lacking inspections[300] with the assertion that negligence on the part of the government or private actor led to flood damage.[301] For instance, in *Myotte v. Village of Mayfield*, the village was held liable for flood damage caused by rain runoff which was proximately caused by the issuance of a building permit for the industrial park. In this case, a neighboring property owner experienced substantial flooding whenever it rained due to the development of the industrial park.[302] The court found that the village could have implemented a solution to the flooding at a relatively small cost compared to the serious harm to the value of the property owner's land if the flooding were to continue.[303]

Adding these structural "protection" measures, such as storm drain systems, often results in legal risk for government entities at all levels,[304] and that legal risk may develop along with scientific advances promoting understanding of damage, causation, and foreseeability.[305]

[299] Myotte v. Village of Mayfield, 375 N.E.2d 816 (Oh., 1977); Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739 (Ia., 1977) (Approval of a permit for a project by a state administrative agency does not preclude a private lawsuit. In this case, an Iowa court held that approval by a state agency of a stream channelization project did not preclude judicial relief to riparian landowners for damage from the project).

[300] Tuffley v. City of Syracuse, 442 N.Y.S.2d 326 (N.Y., 1981) (Even though this is a minority rule, some courts have held governmental units responsible for inadequate inspections. This case is an example in which the court held that a city was liable based upon a theory of inverse condemnation for acts of city engineer in failing to adequately inspect building site and determine that a culvert running under the site was part of a city storm-water drainage system). For a recent decision highlighting the majority rule, *see* Richardson v. Cty. of Mobile, 2020 Ala. LEXIS 170 (Ala. 2020) (The court found that county review of the work of a private engineer that certified system compliance with county requirements did not create a duty on the part of the county to particular land-owners who were flooded when the system did not, in fact, work properly).

[301] Kunz v. Utah Power & Light Co., 526 F.2d 500 (9th Cir., 1975); Pickle v. Board of County Comm'r of County of Platte, 764 P.2d 262 (Wyo., 1988).

[302] Myotte v. Village of Mayfield, 375 N.E.2d 816 (Oh., 1977).

[303] Id.

[304] Kusler, Government Liability for Flood Hazards 4.

[305] Kusler, Government Liability for Flood Hazards 56-57; Denham v. United States, 646 F. Supp. 1021 (D. Tex., 1986) (Although the federal government is not in general responsible for flood losses, federal agencies may be liable in a specific case for structures that have incidental flood control benefits but are designed and operated primarily for navigation, recreation, or other purposes. In this case, immunity did not apply to the management of recreational facilities in a park); Lott v. City of Daphne, 539 So. 2d 241 (Ala., 1989) (The court held that if the city begins to use natural gully as part of storm water drainage system, city must exercise due care in preventing erosion damage to adjoining properties).

However, the government is still more likely to suffer tort liability for non-regulatory activity than for regulatory activity related to flooding.[306]

In a negligence case, there is no need to prove any intent to cause harm; instead, there is an obligation to prove that the action of the defendant created a foreseeable risk of the injury claimed, among other things. Here, we examine the specific elements that must be met for a plaintiff to prove negligence on the part of a government actor.

To establish a prima facie case for negligence, the following elements must be proved:

1. **Duty** – an obligation to use reasonable care. It requires the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risk. Whether the duty is owed is a question of law for the judge.
2. **Breach** – the failure to conform to the required standard. Breach along with duty are what the court calls the negligent behavior, but often times the term is only used in reference to the breach. Whether the duty was breached is a question of fact for the jury.
3. **Causation** – a reasonably close connection between the conduct and the resulting injury. There are two (2) levels of this analysis.
    - Causation in fact
    - Legal or "proximate" cause
4. **Damage** – actual loss resulting to the interests of another.

III.A.1. Elements of Negligence

III.A.1.a. Duty of Care

A general duty of care is imposed on all aspects of human activity. Everyone is under a legal duty to act as a "reasonable person of ordinary prudence."[307] This person will take precautions against unreasonably risking injury/harm to other people. This duty of care extends from the defendant to the plaintiff in situations where events are reasonably foreseeable.[308] In order to succeed in a negligence claim against a government defendant, the claimant needs to show that

[306] Kusler, Government Liability for Flood Hazards 56. In addition to cases in which government experiences actual legal liability for non-regulatory actions, government may also be subject to the costs of time and legal expenses in litigation on non-regulatory actions *even if the government ultimately prevails in the lawsuit*. *See, e.g.,* Richardson v. Cty. of Mobile, 2020 Ala. LEXIS 170, *2, 2020 WL 6932809 (Ala. Nov. 25, 2020).

[307] https://definitions.uslegal.com/r/reasonable-prudent-man/

[308] 57A Am Jur 2d Negligence § 72.

the government did not act reasonably. There are many factors that can be considered by the court in these determinations.

- **Severity of harm** – Everyone is required to act as a reasonable person, but when there is a great risk, a greater amount of care is required.[309] Further, when it comes to hazardous activities, like construction of levees, the degree of care required moves toward strict liability.[310] When it comes to required warnings, the seriousness of the hazard and who is impacted is considered.[311]
- **Foreseeability** - A reasonable person is only responsible for injuries which are known or could have been foreseen, but the law does not impose an absolute duty to not injure or endanger someone[312] (a more in-depth discussion about foreseeability can be found under the causation element of negligence).
- **Custom** - In order to determine if there is a duty, courts will often look to custom to decide whether conduct was proper. However, there is evidence that courts will not use custom conclusively.[313] Evidence of custom can be overcome by expert testimony or equivalent evidence that the professional standard of care itself is negligent.[314]
- **Emergency** - The care that governments and individuals must exercise in an "emergency" is less than when no emergency exists since government employees must make decisions quickly in the face of emergency and the standard for "reasonableness" is the action of a hypothetical individual performing in an actual

[309] Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Col., 1984); John A. Kusler, Government Liability for Flood Hazards 53, Ass'n of State Wetlands Managers (Apr. 2017).

[310] John A. Kusler, Government Liability for Flood Hazards 53, Ass'n of State Wetland Managers (Apr. 2017). In general, operation or administration of a hazard mitigation measure is considered ministerial and governments are responsible for negligence. Valley Cattle Co. v. United States, 258 F. Supp. 12 (D. Hawaii 1966) (allowing recovery against the United States for flood damage caused by the government's negligent maintenance of a stream and culverts).

[311] Piggott v. United States, 480 F.2d 138 (4th Cir., 1973) (Federal government was potentially liable for drowning of two children at historical beach park despite signs warning that swimming was dangerous where there was no lifeguard or safety equipment).

[312] 57A Am Jur 2d Negligence § 72; McGuire v. Stein's Gift & Garden Center, Inc., 178 Wis. 2d 379, 504 N.W.2d 385 (Ct. App. 1993).

[313] The T.J. Hooper, 60 F.2d 737 (2nd Cir., 1932).

[314] Advincula v. United Blood Serv., 678 N.E.2d 1009 (Ill., 1996); Thompson v. Gordon, 948 N.E.2d 39 (2011); Studt v. Sherman Health Sys., 951 N.E.2d 1131 (2011); Matarese v. Buka, 897 N.E.2d 893 (2008).

emergency situation.[315] In other words, acts of a reasonable person in an emergency are subject to a lower standard of care than acts not in an emergency.[316]

- **Applicable Statutes, Ordinances, or Regulations** - In some instances, the duty required of a person or government is prescribed by statute or regulation.[317] However, in general, a violation of a statute or ordinance creates a presumption of negligence or evidence of negligence although it is not, in general, per se evidence of negligence.[318] On the other side of the spectrum, there are statutes that protect people or the government from liability in negligence actions under certain circumstances. In Dyniewicz v. County of Hawaii, the court held that an emergency management statute immunized the state from personal injury claims arising during their performance of civil defense functions whenever the state or political subdivision was engaged in disaster relief functions.[319] The court held that because of the statute, the county could not be sued for inadequate flood warning signage.[320] Another example comes from Castile v. Lafayette City, where the court held that the immunity provision in the Louisiana Homeland Security and Emergency Assistance and Disaster Act absolved Lafayette City of legal responsibility for damage and injuries caused when employees put hurricane debris at an intersection and a traffic accident occurred. The court concluded that the Act covered preparedness, as well as "response to and recovery from emergencies or disasters."[321]

There are also considerations that are specific to floodplain management that are important to look out for in your jurisdiction. For example, in *Richardson v. City of Mobile*,[322] the court compared two different cases, *Royal Automotive, Inc. v. City of Vestavia Hills*[323] and *Lott v. City of Daphne*.[324] Both of these cases involve natural waterway flooding. However, in one case, *Lott*, the court emphasized that the city had been building storm-water infrastructure that drained

[315] Jones v. Munn, 681 P.2d 368 (Ariz., 1984) (This case is an example in which an Arizona court held that the "sudden emergency" doctrine applies where individual is "suddenly confronted with imminent peril.").

[316] Cords v. Anderson, 259 N.W.2d 672 (Wis., 1977).

[317] Braun v. New Hope Township, 646 N.W.2d 737 (S.D., 2002) (This case is an example where a township has statutory duty to erect and maintain adequate barriers and signs to protect the public from damaged township roads.)

[318] John A. Kusler, Government Liability for Flood Hazards 53, Ass'n of State Wetland Managers (Apr. 2017) (citing Distad v. Cubin, 633 P.2d 167 (Wyo., 1981)).

[319] 733 P.2d 1224 (Haw., 1987).

[320] Id.

[321] 896 So.2d 1261 (La., 2005).

[322] 2020 Ala. LEXIS 170 (Ala. Nov. 25, 2020).

[323] Royal Automotive, Inc. v. City of Vestavia Hills, 995 So. 2d 154 (Ala. 2008).

[324] Lott v. City of Daphne, 539 So. 2d 241 (Ala. 1989).

into the natural waterway (a gulch), increasing the flow.[325] The court held that once a municipality undertakes to maintain a 'drainage system,' a duty of care attaches in the continued maintenance of it, and because the gulch was an integral part of the drainage system, it is subject to the same standards of due care to be exercised by the city in preventing harm to adjoining property owners.[326] This is distinguished from the *Royal Automotive* case, where there was no evidence of an integration of the natural waterway into the drainage system.[327] In *Royal Automotive*, despite the City's duty to maintain the creek, previous removals of debris to prevent creek flooding did not constitute flood-related maintenance similar to that in *Lott*, and therefore it must be shown that the water from the City's drainage system, rather than the natural flow of water caused the damage.[328]

Also, when it comes to floodplain management there are multiple explicit duties owed (or not owed) and multiple ways that the courts determine whether or not the government or public party owes a duty.

- **Duty to warn** – A duty to warn is a concept applicable in many circumstances. It means that a party can be held liable for injuries caused to another, where the party had the duty to warn the other of a hazard and failed to do so. Courts have held that government entities may have a duty to warn when the government entity either has knowledge of a hazard or contributes to making the dangerous situation.[329] Additionally, while courts have held that governmental units do not ordinarily have a general duty to warn about all possible hazards, conduct by an official that creates a special relationship with an individual may create such a duty.[330] Governments have a stronger duty to licensees and invitees.[331] Similarly, when the government has created a dangerous situation, government's failure to warn may be considered negligence.[332] Also, courts have overall held that once governmental units have

[325] Id.

[326] Id.

[327] Royal Automotive, Inc., 995 So. 2d 154 (Ala. 2008).

[328] Id.

[329] *Cf.* Avery v. Geneva County, 567 So.2d 282 (Ala., 1990) (noting that "Several other jurisdictions have found a duty to warn those persons downstream when the possibility of a flood exists."); Ducey v. United States, 830 F.2d 1071, 1073 (9th Cir. 1987) (noting that government had a duty to warn downstream landowners when the government knew of the high probability of a 100-year flood and stating that "A defendant has a duty to warn foreseeable victims of foreseeable harm.").

[330] Brown v. MacPherson's, 545 P.2d 13 (Wash., 1975) (state employee who agreed to warn others of avalanche danger but failed to do so was liable).

[331] Kusler, A Comparative Look at Public Liability for Flood Hazard Mitigation, 26 (2009).

[332] Price v. United States, 530 F. Supp. 1010 (S.D. Miss., 1981) (federal government liable for drowning caused by dredging in area filled by sediment resulting from a hurricane).

decided to warn, they must exercise reasonable care in doing so.[333] When warning, governmental units must use care in hazard prediction, the content of the warning, and the methods used to deliver the warning (e.g. flashing lights, sirens, etc.) including maintenance of equipment.[334] Some states and local governments have passed laws or ordinances that limit government liability for the duty to warn for cases in which the government entity was provided notice of a hazardous situation and the opportunity to correct it.[335]

A subcategory of duty to warn applicable to floodplain management is the duty to warn about possible weather-related flooding events. Courts have held that weather predictions are not established fact, and a party providing them is not liable for inadequate predictions.[336] Further, *Brown v. United States* held that the National Oceanic and Atmospheric Administration (NOAA) could not be sued for failure to predict a hurricane when a life was lost because a weather buoy that was not operating properly may have contributed to this lack of predictive capability.[337] The court relied on the "discretionary" exemption to liability with the rationale that predicting storms requires a great deal of discretion and interpretation and that the plaintiff had not shown that the prediction would have been any different had the buoy been operational.[338] However, the duty to use care in warnings has been extended to the prediction process in a few cases. *Pierce v. United States* provides an example in which a court of appeals held that "(s)ince the [Federal Aviation Administration] has undertaken to advise requesting pilots of weather conditions, thus engendering reliance…it is under a duty to see that information which it furnishes is accurate and complete."[339]

[333] Anello v. Town of Babylon, 533 N.Y.S.2d 284 (N.Y., 1988) (the posting of "diving in diving area only sign" and posting of depths were sufficient warnings); Coates v. United States, 612 F. Supp. 592 (D.C. Ill., 1985) (Federal government is liable for failure to give adequate flash flood warning to campers in Rocky Mountain National Park and to develop adequate emergency management plan); Ducey v. United States, 830 F.2d 1071 (9th Cir., 1983) (Federal government is potentially liable for failure to provide warnings for flash flood areas for an area subject to severe flooding in Lake Mead National Recreation Area); Wilson v. Texas Parks and Wildlife Department, 8 S.W.3d 634 (Tex., 1999) (The Texas Supreme Court held the Parks and Wildlife Department potentially liable for in adequately functioning "flood early warning" system which resulted in deaths although the Department did not own the river).

[334] Id.

[335] *E.g.,* Youngblood v. Village of Cazenovia, 462 N.Y.S.2d 526 (N.Y., 1982)

[336] Chanon v. United States, 350 F. Supp. 1039, 1041 (S.D. Tex. 1972)

[337] Brown v. United States, 790 F.2d 199 (1st Cir., 1986).

[338] Id.

[339] 679 F.2d 617, 621 (6th Cir., 1982).

- **Duty of lateral support** – Under common law, a landowner has a duty to provide "lateral support" to adjacent lands, and any digging, trenching, grading, or other activity that removes naturally occurring lateral support is done so at one's peril.[340]
- **Naturally occurring hazards** – Landowners and governments do not have a general affirmative duty to remedy naturally occurring hazards.[341]
- **Duty to rescue** – In general, governments have no duty to rescue, and one rescuer has no duty to another rescuer except to avoid affirmative misconduct.[342] A California court held that a city was not grossly negligent in rescue attempts for a surfer although rescue workers used disfavored surf rescue methods.[343]

Thus, the *duty* element necessary to establish a prima facie case for negligence confers on a person – and a local government – the responsibility to conform to a standard of reasonable care to protect others against unreasonable risks. It is important for floodplain managers to recognize the factors considered by courts in determining if there is a duty and the many ways that duties are owed to the public. Specific duties government entities should pay attention to include: the duty to maintain drainage facilities,[344] the duty to warn, especially when the government is aware of the danger[345] or had a hand in creating the danger,[346] and the duty to act reasonably in both design and the construction of flood related infrastructure.[347]

[340] Blake Constr. Co. v. United States, 585 F.2d 998 (Ct. Cl., 1978) (federal government liable for subsidence due to excavation next to existing buildings).

[341] Bracey v. King, 406 S.E.2d 265 (Ga., 1991) (A Georgia court held that one landowner with a beaver dam on his property was not responsible for removing this dam when it flooded adjacent property). Hall v. United States, 647 F. Supp. 53 (C.D. Ill., 1986); Henretig v. United States, 490 F. Supp. 398 (S.D. Fla., 1980); Gemp v. U.S., 684 F.2d 404 (6th Cir., 1982) (Where hazards are obvious on public lands, courts have generally held that governments have no duty to warn. In this example, the federal government was not liable for failure to provide warning of danger of waterfall since danger was open and apparent).

[342] Decker v. City of Imperial Beach, 209 Cal. App. 3d 349 (Cal., 1989); Sawicki v. Village of Ottawa Hills, 525 N.E.2d 468 (Oh., 1988).

[343] Decker v. City of Imperial Beach, 209 Cal. App. 3d 349 (Cal., 1989).

[344] Rodrigues v. State, 472 P.2d 509 (Haw., 1970); ABC Builders, Inc. v. Phillips, 632 P.2d 925 (Wyo., 1981).

[345] Avery v. Geneva County, 567 So.2d 282 (Ala., 1990); Ducey v. United States, 830 F.2d 1071, 1073 (9th Cir. 1987).

[346] Price v. United States, 530 F. Supp. 1010 (S.D. Miss., 1981).

[347] John A. Kusler, Government Liability for Flood Hazards 53, Ass'n of State Wetland Managers (Apr. 2017); Valley Cattle Co. v. United States, 258 F. Supp. 12 (D. Hawaii 1966).

Decisions in floodplain management cases often turn on the court's characterization of the government's actions as either discretionary or ministerial.[348] This critically important topic receives extensive treatment in its own section on sovereign immunity.

III.A.1.b. Breach of Duty

Breach of duty is the second element required to establish a prima facie case of negligence. A duty has been breached when the standard of care falls short of the level required by law.[349] Breach is typically a question for the trier of fact, which could be a jury or a judge.

When a court is determining whether a defendant breached, they often employ a formula created in *United States v. Carroll Towing*.[350] The court will consider whether the burden of taking precautions is less than the probability of injury multiplied by the gravity of loss.[351] If the burden of taking precautions is less than, the defendant who has the burden will face liability.[352]

In a typical negligence case, the plaintiff has the burden to prove that the defendant was negligent. However, strict liability applies in instances where "abnormally" dangerous activities are carried on. In these cases, the defendant need only show that the defendant caused the injuries. No cases support a finding of strict liability on the part of local governments for flood-related injuries. However, *Ramada Inns, Inc. v. Salt River Valley Water Users' Association* comes close imposing strict liability. While the court held that a plaintiff must prove negligence in order to recover for damage done by water escaping from a failed water control facility, the burden to show negligence is strongly influenced by public policy to encourage the needed supply of water. In this case, the court did not impose "strict liability" per se, but the court's reasoning imposed a standard very similar to it.[353]

There is another legal theory that is applicable to floodplain management that can also shift the burden of proof to the defendant, *res ipsa loquitur*.[354] In Latin, *res ipsa loquitur* means "the thing

[348] Judd v. U.S., 650 F. Supp. 1503 (S.D. Cal., 1987) (In this case, a federal district court held that the Forest Service's decision not to post warning signs at waterfall in national forest ¼ mile from campground and not accessible was discretionary); Mandel v. United States, 793 F.2d 964 (8th Cir., 1986) (In this case, a federal court of appeals held that the Park Service was liable for failure to warn of hidden rocks in stream used for swimming and diving).

[349] Hundt v. LaCross Grain Co., 425 N.E.2d 687 (Ind., 1981) (Negligence may arise from breach of a common law duty or one imposed by statute or regulation).

[350] United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

[351] *Id.* at 173.

[352] Id.

[353] Ramada Inns, Inc. v. Salt River Valley Water Users' Association, 523 P.2d 496 (Ariz. 1974).

[354] City Water Power Co. v. Fergus Falls, 128 N.W. 817 (1910).

speaks for itself."[355] *Res ipsa loquitor* allows the plaintiff to meet their burden of proof with circumstantial evidence. The plaintiff is excused from establishing causation if they can show that the instrumentality that caused the accident was in sole, exclusive custody of the defendant. For example, in *City Water Power Co. v. Fergus Falls*, the court held that strict liability did not apply to a claim regarding a failing dam, but permitted the use of *res ipsa loquiter*.[356] The court found that the dam was under exclusive control by the town and that if it had been maintained in the manner required by law, that it would not have broken down in the way that it did.[357]

The most important thing for local governments to keep in mind when it comes to breach is the *Carrol Towing* formula. As climate change increases the probabilities of flooding, so does the likelihood of loss. As Professor Maxine Burkett explained, despite many local governments having limited resources, it is necessary for them to prepare aggressively for the changes global warming warrants.[358] She went on to say that climate change adaptation litigation is likely inevitable.[359] Therefore, it will be imperative for local governments to employ strategies that consider the impacts of climate change and attempt to minimize climate change related disasters.

III.A.1.c. Causation and Foreseeability

The third element of negligence is causation. Causation is heavily intertwined with duty because they both rely on the concept of foreseeability, but the crux of causation is whether there is reasonably close conduct between the action of the defendant and the resulting injury. This requires the existence of "causation in fact"[360] and "proximate cause."[361] The causation element of negligence essentially has two layers.

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[355] https://www.law.cornell.edu/wex/res_ipsa_loquitur

[356] City Water Power Co. v. Fergus Falls, 128 N.W. 817 (1910).

[357] *Id.* at 818.

[358] Maxine Burkett, Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change, 20:3 GEORGE MASON L. REV. 778, 802 (2013).

[359] *Id.* at 802.

[360] 57A Am Jur 2d Negligence § 414 (citing to Kristensen v. United States, 993 F.3d 363 (5th Cir. 2021) (applying Texas law); Rupert v. Daggett, 695 F.3d 417 (6th Cir. 2012) (applying Michigan law); Kemper v. Deutsche Bank AG, 911 F.3d 383 (7th Cir. 2018); Steinle v. United States, 17 F.4th 819 (9th Cir. 2021) (applying California law); Bozelko v. Papastavros, 323 Conn. 275, 147 A.3d 1023 (2016); City of Richmond Hill v. Maia, 301 Ga. 257, 800 S.E.2d 573 (2017); University of Texas M.D. Anderson Cancer Center v. McKenzie, 578 S.W.3d 506, 369 Ed. Law Rep. 470 (Tex. 2019); Stocker v. State, 2021 VT 71, 2021 WL 4032835 (Vt. 2021)).

[361] *Id.* (citing to Rupert v. Daggett, 695 F.3d 417 (6th Cir. 2012) (applying Michigan law); Kemper v. Deutsche Bank AG, 911 F.3d 383 (7th Cir. 2018); Steinle v. United States, 17 F.4th 819 (9th Cir. 2021) (applying California law); Bozelko v. Papastavros, 323 Conn. 275, 147 A.3d 1023 (2016); Majeska v.

III.A.1.c.i. Cause in Fact

The first layer of the causation test is causation in fact. It is easiest to think of causation in fact as a test of cause and effect.[362] Meaning, did the defendant's actions or inactions effect the plaintiff's injury? In legal terms, the question asks, *but for* the act of the defendant, would the injury have occurred? If causation in fact is found than the test moves to proximate cause, because cause in fact alone is not enough to find causation.

III.A.1.c.ii. Proximate Cause

The proximate cause test asks whether legal liability should be imposed where cause in fact has been established and it does this by looking at policy considerations, primarily *foreseeability*.[363] Because proximate cause focuses on policy considerations, it engenders confusion and disagreement across opinions.[364] However, "[o]ne of the most widely quoted definitions is that the proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred."[365] Under the most liberal interpretation, conduct constituting proximate cause need only be a cause which (1) sets off a *foreseeable* sequence of

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District of Columbia, 812 A.2d 948 (D.C. 2002); City of Richmond Hill v. Maia, 301 Ga. 257, 800 S.E.2d 573 (2017)).

[362] 57A Am Jur 2d Negligence § 395.

[363] 57A Am Jur 2d Negligence § 395.

[364] 57A Am Jur 2d Negligence § 395 & § 391.

[365] 57A Am Jur 2d Negligence § 391 (citing to Small v. WellDyne, Inc., 927 F.3d 169 (4th Cir. 2019) (applying North Carolina law); Certain Underwriters at Lloyd's, London v. Axon Pressure Products Incorporated, 951 F.3d 248 (5th Cir. 2020) (applying Louisiana law); Cleveland v. Rotman, 297 F.3d 569 (7th Cir. 2002) (applying Illinois law); Haukereid v. National R.R. Passenger Corp., 816 F.3d 527 (8th Cir. 2016) (applying Arkansas law); Wise v. Southern Tier Express, Inc., 780 Fed. Appx. 477 (9th Cir. 2019) (applying Nevada law); Lemley v. Wilson, 178 So. 3d 834 (Ala. 2015); Sampson v. Surgery Center of Peoria, LLC, 251 Ariz. 308, 491 P.3d 1115 (2021); Neal v. Sparks Regional Medical Center, 2012 Ark. 328, 422 S.W.3d 116 (2012); Delaware Elec. Co-op., Inc. v. Duphily, 703 A.2d 1202 (Del. 1997); Johnson v. Avis Rent A Car System, LLC, 311 Ga. 588, 858 S.E.2d 23 (2021); Burnette v. Eubanks, 308 Kan. 838, 425 P.3d 343 (2018); McIlroy v. Gibson's Apple Orchard, 2012 ME 59, 43 A.3d 948 (Me. 2012); Cascio v. Cascio Investments, LLC, 327 So. 3d 59 (Miss. 2021); Ecker v. E & A Consulting Group, Inc., 302 Neb. 578, 924 N.W.2d 671 (2019); Gilbert v. Stewart, 247 N.J. 421, 255 A.3d 1101 (2021); Hairston v. Alexander Tank and Equipment Co., 310 N.C. 227, 311 S.E.2d 559 (1984); Arnegard v. Arnegard Township, 2018 ND 80, 908 N.W.2d 737 (N.D. 2018); Lockhart v. Loosen, 1997 OK 103, 943 P.2d 1074 (Okla. 1997), as corrected, (Aug. 21, 1997); Hanselmann v. McCardle, 275 S.C. 46, 267 S.E.2d 531 (1980); Wood v. United Parcel Service, Inc., 2021 UT 49, 496 P.3d 139 (Utah 2021); Wagoner v. Commonwealth, 289 Va. 476, 770 S.E.2d 479 (2015); Alger v. City of Mukilteo, 107 Wash. 2d 541, 730 P.2d 1333 (1987)).

consequences, (2) is unbroken by any *superseding cause*, and (3) which is a *substantial factor* in producing a particular injury.

The basic test determines if the act was close enough in the chain of events and whether the defendant's conduct is a *substantial factor*[366] in triggering the injury to hold the defendant legally liable.[367] The law understands that injuries often have innumerable causes and not every one of those causes should give rise to liability.[368]

III.A.1.c.iii. **Foreseeability**

As mentioned, the most common policy consideration looked at to establish proximate cause is foreseeability. Courts have described foreseeability as the touchstone,[369] ultimate test,[370] and key to proximate causation.[371] In order to find that a negligent act or omission is the proximate cause of an injury it must be shown that the actor foresaw or should reasonably have foreseen the consequences.[372]

Thus, the first focus must be on whether the injuries to the plaintiff were reasonably foreseeable versus, highly extraordinary, thereby breaking the chain of causation. The leading case that asks the question of liability to an unforeseeable plaintiff is *Palsgraf v. Long Island Railroad Company*.[373] In *Palsgraf*, the plaintiff was waiting on a train platform when a man boarding the train, with assistance from a train employee, dropped a package that subsequently exploded, causing a scale on the platform to hit her.[374] The court ultimately found that the employees did

[366] Burton v. City of Stamford, 115 Conn. App. 47, 971 A.2d 739 (2009).

[367] *Lea Co. v. North Carolina Board of Transp.*, 374 S.E.2d 866 (N.C., 1989); *Souza v. Silver Dev. Co.*, 164 Cal App. 3d 165 (Cal., 1985). These are examples that show computer modelling techniques make proving causation and allocating fault easier for a landowner.

[368] 57A Am Jur 2d Negligence § 389.

[369] *Id.* at § 448 (citing to Westin Operator, LLC v. Groh, 2015 CO 25, 347 P.3d 606 (Colo. 2015); Blondell v. Courtney Station 300 LLC, 2021 WL 5071480 (Ga. Ct. App. 2021); Kramer v. Szczepaniak, 2018 IL App (1st) 171411, 428 Ill. Dec. 702, 123 N.E.3d 431 (App. Ct. 1st Dist. 2018), appeal denied, 429 Ill. Dec. 273, 124 N.E.3d 469 (Ill. 2019) and appeal denied, 429 Ill. Dec. 315, 124 N.E.3d 511 (Ill. 2019); Wickersham v. Ford Motor Company, 432 S.C. 384, 853 S.E.2d 329 (2020); Cotten v. Wilson, 576 S.W.3d 626 (Tenn. 2019)).

[370] *Id.* (citing to Colaw v. Nicholson, 450 N.E.2d 1023 (Ind. Ct. App. 1983)).

[371] *Id.* citing to Stahl v. Metropolitan Dade County, 438 So. 2d 14 (Fla. 3d DCA 1983)).

[372] 57A Am Jur 2d Negligence § 448.

[373] 248 N.Y. 339, 162 N.E. 99 (1928).

[374] Id.

not have a duty of care to the plaintiff because the injuries were not a foreseeable harm from assisting a man with a package.[375]

It is important to note that many states have disagreed with the *Palsgraf* decision, as they believed it was too narrowly interpreted and the focus should not entirely be on foreseeability, but instead be on the unreasonable act itself. These states instead employed the standard set in the *Palsgraf* dissent. Here, the dissenting judge noted in *Palsgraf,* it is undeniable that except for the explosion, the plaintiff would not have been injured.[376] The dissent stated that there must be a duty to the plaintiff, the breach of which injured her, and whether, "when there is an act that is a threat to the safety of others, the doer of it should be 'liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger.'"[377] The dissenting judge believed that if there was a negligent act, proximate cause should establish liability[378] and that ultimately the question of liability is up to the jury.[379] Even with all the uncertainty, it is clear that the majority of courts prefer to leave the determination of foreseeability to the jury.[380] Nevertheless, because of the differing interpretations of proximate cause and what foreseeability means in determining it, it is important to know how your particular jurisdiction interprets it.

Courts have found that governmental entities are not responsible for foreseeing or acting to avoid "highly speculative dangers."[381] In City of *Sarasota v. Eppard*, the court found that the city was not liable for failing to foresee "highly unusual, extraordinary, or bizarre consequences."[382] As flooding risks continue to rise in the wake of climate change, the foreseeability of these events also rises.[383] Juries may read notice of these trends into negligence cases and as technology advances proving causation and allocating fault is made easier for plaintiffs as

[375] Id.

[376] Palsgraf, 222 A.D. at 168–169

[377] Palsgraf, 248 N.Y. at 347.

[378] *Id.* at 348.

[379] Lang et al. v. Wonneberg et al., 455 N.W.2d 832 (N.D., 1990).

[380] W. Jonathan Cardi, The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm, 91 B.U.L. REV. 1873, 1913 (2011).

[381] *City of Sarasota v. Eppard*, 455 So. 2d 623 (Fla., 1984). In this case the court held that the government was not liable for the plaintiff's injuries after they drove into a bridge maintained by the City because they could not have anticipated that someone driving would have been injured by driving over the curb and being directed into a bridge by the curb's assumption of control over the vehicle.

[382] Id.

[383] EPA, *Climate Change Indicators: Coastal Flooding,* https://www.epa.gov/climate-indicators/climate-change-indicators-coastal-flooding#:~:text=Changing%20sea%20levels%20are%20affecting,estuaries%20and%20nearby%20groundwater%20aquifers.

well.[384] Government entities also need to be aware, as infrastructure ages, that failing to keep sewers and drainage systems in proper repair can lead to negligence claims and ultimately liability.[385]

III.A.1.c.iv. Intervening and Superseding Cause

The intervening cause doctrine is a device used to shift liability and is used as a possible defense for a negligent act.[386] "An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, that constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury."[387] An intervening act becomes a superseding cause that removes liability if the action is foreseeable. A superseding cause is also a subset of the proximate cause inquiry.[388] "A 'superseding cause,' such as to relieve the original negligent actor from liability, is an intervening act of another that was unforeseeable by a reasonable person in the position of the original actor and when, looking backward, after the event, the intervening act appears extraordinary.[389] The term 'superseding cause' also means an independent event that intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original wrongdoer should have foreseen that the law deems it unfair to hold the original wrongdoer responsible."[390] As mentioned, a superseding cause would relieve the original defendant of liability.

III.A.1.c.v. Risk/Cost Benefit Analysis

Another relevant policy consideration looked at when establishing proximate cause is a risk/cost benefit analysis. The courts believe that a reasonable man would only neglect a risk if there was a valid reason in doing so. For example, it would involve considerable expense to eliminate the

[384] Lea Co. v. North Carolina Board of Transp., 374 S.E.2d 866 (N.C., 1989); Souza v. Silver Dev. Co., 164 Cal App. 3d 165 (Cal., 1985). Both of these cases are examples showing that computer modelling techniques make proving causation and allocating fault easier for a landowner.

[385] True v. Mayor & Commissioners of Westernport, 76 A.2d 135 (Md., 1950)

[386] 57A Am Jur 2d Negligence § 537.

[387] Id.

[388] 57A Am Jur 2d Negligence § 542.

[389] For an example of a case in which an act of God was sufficient to absolve a defendant of liability, see Beauton v. Connecticut Light & Power Co., 125 Conn. 76, 3 A.2d 315 (1938) (finding the release of waters impounded by the dam may have been the immediate and first cause of the damage, but because flooding from some other source would have caused equivalent damage to the plaintiff's property, the plaintiff cannot recover damages).

[390] Id.

risk. This leads to a cost/benefit analysis where it is appropriate to weigh the risk against the difficulty in eliminating it.[391] This does not always mean the negligent party is not liable, but it leads to the question of who is more apt to avoid the risk. In *Estate of Strever*, the defendant owed a duty to protect against foreseeable risks or hazards likely to result from its failure to exercise ordinary care in the maintenance of its canal system. [392] The court found that ordinary care is determined by weighing the utility of the conduct in question against the magnitude of the risk involved.[393]

III.A.1.c.vi. **Causation and Strict Liability**

Causation is a necessary element in both negligence and strict-liability actions. Whether proceeding under a strict-liability or negligence theory, proximate cause is a necessary element of a plaintiff's case; the concept of proximate cause is the same in negligence and strict-liability cases.[394]

The most important takeaway from the causation element of negligence is that floodplain managers, when deciding if their acts or omissions can lead to negligence, need to be thinking about foreseeability. It is important to look both backwards and forwards. It is important to consider the ways climate change has impacted flooding in your region in the past and to also consider future projections.

III.A.1.d. Damages

In order to meet the final element required to establish a case of negligence, the plaintiff must demonstrate a concrete, particular, and either actual (past) or imminent injury.[395] Typically,

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[391] *Overseas Tankship Ltd. V. Miller Steamship Co*. (Wagon Mound No. 2), 2 All ER 709 (1966).

[392] 278 Mont. 924 P.2d at 671.

[393] *Id.* (citing Restatement (Second) of Torts § 298 cmt. b (1965)).

[394]57A Am Jur 2d Negligence (citing Wilson v. Bradlees of New England, Inc., 250 F.3d 10, 56 Fed. R. Evid. Serv. 1411, 50 Fed. R. Serv. 3d 771 (1st Cir. 2001) (applying New Hampshire law); Lamb by Shepard v. Sears, Roebuck & Co., 1 F.3d 1184 (11th Cir. 1993) (applying Georgia law); State v. Exxon Mobil Corporation, 406 F. Supp. 3d 420 (D. Md. 2019) (applying Maryland law); John Crane, Inc. v. Jones, 278 Ga. 747, 604 S.E.2d 822 (2004); Dunning v. Dynegy Midwest Generation, Inc., 392 Ill. Dec. 630, 33 N.E.3d 179 (App. Ct. 5th Dist. 2015); Rando v. Anco Insulations Inc., 16 So. 3d 1065 (La. 2009); Brishka v. Department of Transportation, 2021 MT 129, 404 Mont. 228, 487 P.3d 771 (2021); Trull v. Volkswagen of America, Inc., 145 N.H. 259, 761 A.2d 477 (2000); Fabrique v. Choice Hotels Intern., Inc., 144 Wash. App. 675, 183 P.3d 1118 (Div. 3 2008)).

[395] Legal Information Institute, Negligence, https://www.law.cornell.edu/wex/negligence (last visited Dec. 6, 2022).

negligence-related injuries are limited to bodily harm or property harm.[396] Economic loss alone is not usually enough to bring a negligence claim.[397] If the court finds that there was negligence, they will award compensatory damages. The goal of the court is to return the plaintiff to the same condition they were in before the negligent act occurred. This means covering the costs of medical bills and property loss, lost wages, etc. It also sometimes means covering the costs of pain and suffering.[398]

Lawsuits based upon natural hazards have become increasingly expensive for governments.[399] One reason is because of the increased awards for flood-related damages.[400] Flooding, especially flash flooding, has the ability to severely injure and even cause death. There is the obvious risk of drowning, but shallow waters also pose risks.[401] Floodwater itself can contain electrical hazards, toxic substances, sharp objects, and wild animals.[402] Injuries associated with these hazards may render a government entity liable. Further, flooding has increasingly impacted real and private property in the United States. A 2021 study concluded that "floods will cost businesses $26.8 billion in direct lost output and $23 billion in lost output due to downtime in 2022; floods will also inflict $13.5 billion in structural damage to commercial and residential properties and cause 3.1 million lost days of operation during 2022."[403] Local governments and floodplain managers need to be aware of the scope of costs that their potential liability poses when it comes to flood-related negligence claims. That is why it is important for local governments to ensure that their activities do not give rise to successful negligence claims related to flooding.

III.A.1.e. Force Majeure or "Act of God"

"Defenses" to a claim in the broadest sense may be procedural or substantive in nature. Substantive defenses may consist of assertions/evidence that a plaintiff's case fails to prove a key element of their case. For example, it may be termed a defense if a defendant makes the

[396] Id.

[397] Id.

[398] Id.

[399] City of Watauga v. Taylor, 752 S.W.2d 199 (Tex., 1988).

[400] City of Watauga v. Taylor, 752 S.W.2d 199 (Tex., 1988).

[401] Centers for Disease Control and Prevention, Natural Disasters and Severe Weather, https://www.cdc.gov/disasters/floods/floodsafety.html (last visited Dec. 6, 2022).

[402] Id.

[403] Forbes, Zachary Snowdon Smith, Floods Will Cost U.S. Businesses $49 Billion Next Year, Study Says, https://www.forbes.com/sites/zacharysmith/2021/12/16/floods-will-cost-us-businesses-49-billion-next-year-study-says/?sh=3672af4233ad (Dec. 16, 2001, updated April 21, 2022) (last visited Dec. 6, 2022).

case that the injury to the plaintiff was not foreseeable. Procedural defenses, on the other hand, involve claims that proper process has not been followed in the judicial process. Note that this legal guide does not address procedural defenses as these are not particular to flooding or floodplain management issues; for guidance on procedural defense, consult with your attorney.

A key substantive defense of government in flooding cases is the "force majeure" or "Act of God" defense. Basically, this defense argues that the event that caused the flooding was so extreme that the resulting flooding is entirely due to the violence of nature and should not be attributed in any way to government action or inaction.[404] In many ways, the *force majeure* defense cannot always be effectively disentangled from the analysis of foreseeability in either tort or takings law.[405] This is because the *force majeure* defense has often been limited by asking whether or not the event causing the flooding was something that had happened before[406] or could otherwise be foreseen or predicted.[407] Sometimes it appears that language very similar to force majeure or Act of God is used to find that a plaintiff has not proved the existence of a duty or a breach of that duty.[408]

[404] *E.g.,* Michaelski v. Wright, 444 S.W.3d 83, 97 (Tex. App. 2014) (defining an Act of God "as an occurrence caused directly and exclusively by the violence of nature, without human intervention or cause, and could not have been prevented by reasonable foresight or care" (internal quotation marks and citations omitted)).

[405] *E.g.,* Barr v. Game Fish & Parks Comm'n, 497 P.2d 340 (Colo. Ct. App. 1972) (finding that a severe storm that caused a dam to overflow was foreseeable with modern meteorological techniques and was therefore not an Act of God).

[406] *E.g.,* Bradford v. Stanley, 355 So. 2d 328, 1978 Ala. LEXIS 2053 (Ala. 1978) (looking at the maximum experienced rainfall in an area to determine if the storm that caused a structural failure could have been anticipated); Mobile v. Jackson, 474 So. 2d 644, 650 (Ala. 1985) (stating that "the act-of-God defense applies only to events in nature so extraordinary that the history of climatic variations and other conditions, in particular localities, affords no reasonable warning of them.").

[407] Diamond Springs Lime Co. v. American Rivers Constructors, 16 Cal. App. 3d 581 (1971) (examining an engineer's calculation of foreseeable peril to determine if the storm that caused a structural failure could have been anticipated). *But, see,* Biron v. City of Redding, 225 Cal. App. 4th 1264, 1278-80 (2014) (referring repeatedly to a 100-year storm event as an "extraordinary storm" that served as a superseding event causing property loss when it overwhelmed a drainage system designed only for a 10-year storm event) and *id. at* 1270 (noting that "The parties' experts agreed that the March 16, 2009, event was a greater-than-100-year event. It was thus considered to be the result of an "'act of God'" for which City bore no responsibility.").

[408] *Cf., e.g.,* Laspino v. New Haven, 67 A.2d 557, 560 (1949) ("The tragedy [of the two boys drowning] was due not to a danger arising from a nuisance but to one which could 'only exist as a result of an unusual combination of circumstances contributing to the result.'"). *See, also,* Nicholson v. United States, 77 Fed. Cl. 605, 618-19 (Fed. Cl. 2007) (discussing Hurricane Katrina in terms that sound very much like "Act of God" though the phrase is not used).

In a flooding case after Hurricane Harvey,[409] a trial court found that a plaintiff had no cognizable property right that would support a takings claim because the plaintiffs had no property right to "perfect flood control."[410] In addition, the court said that Hurricane Harvey's rainfall was an "Act of God," and that that was "so unusual that it could not have been reasonably expected or provided against."[411] On appeal, this decision was reversed. The appeals court said that "Acts of God relate, if at all, to whether a taking has occurred, not whether a party has a cognizable property interest. For example, in *Kerr*, the Texas Supreme Court gave six reasons for concluding that a taking had not occurred under the Texas constitution, one of which was that the flooding resulted from Acts of God. Other cases that the Government cites similarly do not stand for the broad proposition that property is held subject to Acts of God."[412] In essence, *Milton* reversed *not* because it said specifically that Hurricane Harvey was not an Act of God. Rather, said the *Milton* court, the lower court had erred by granting summary judgment due to finding, on various grounds, that the property owners lacked a cognizable property right.[413] The *Milton* court specifically noted that "Act of God" is a defense to a takings claim, not part of the determination of a cognizable property interest.[414] The court thus reversed the grant of summary judgement in favor of the government and remanded the case for trial on whether or not a taking occurred.[415]

While *force majeure* or "Act of God" may have been a more common defense in the past,[416] dramatically improved meteorological modeling of potential rain and flood events has arguably begun to limit this defense.[417] Of even more concern to local governments should be questions

[409] In re Downstream Addicks & Barker Flood-Control Reservoirs, 147 Fed. Cl. 566 (2019).

[410] Id.

[411] In re Downstream Addicks & Barker Flood-Control Reservoirs, 147 Fed. Cl. 566, 578-79 (2019).

[412] Milton v. U.S., 36 F.4th 1154 (Fed. Cir. 2022)

[413] Milton v. U.S., 36 F.4th 1154, 1160-62 (Fed. Cir. 2022).

[414] Milton v. U.S., 36 F.4th 1154, 1161-62 (Fed. Cir. 2022).

[415] Milton v. U.S., 36 F.4th 1154, 1162-63 (Fed. Cir. 2022).

[416] Beauton v. Connecticut Light & Power Co., 125 Conn. 76, 3 A.2d 315 (1938) (upholding a trial court finding for a defendant who claimed the Act of God defense); Keystone Elec. Mfg. Co., City of Des Moines, 586 N.W.2d 340, 351 (Ia., 1998) (noting that "In determining whether a flood should be characterized as ordinary or extraordinary, courts consider whether the flood's 'occurrence and magnitude should or might have been anticipated, in view of the flood history of the locality and the existing conditions affecting the likelihood of floods, by a person of reasonable prudence.'").

[417] *Lang et al. v. Wonneberg et al*. provides an example showing that at one time an "Act of God" was a common and successful defense to losses from flooding and erosion; however, at common law "Acts of God" must not only be large scale hazardous events but must also be unforeseeable. *Lang et al. v. Wonneberg et al*., 455 N.W.2d 832 (N.D., 1990). Mobile v. Jackson, 474 So. 2d 644 (1985) (denying an Act of God defense and noting that "the act-of-God defense applies only to events in nature so extraordinary that the history of climatic variations and other conditions, in particular localities, affords no reasonable warning of them.").

of infrastructure design: If infrastructure is designed based on only past data for rainfall events even though projections for future events may show significantly greater rainfall, will the government be liable for a design that *did not* consider the future projections of rainfall or flooding? Local governments would be well advised to understand that if they undertake to design new or rebuilt drainage infrastructure, they can reduce their probability of future liability by designing for reasonable projections of increased intensity of rain events and for rising seas. If designing for future flooding would be too expensive for a local government to bear, the local government might consider not adding new infrastructure or not redesigning existing drainage infrastructure as long as the existing infrastructure is well maintained. This might be the route to avoid increased potential liability even if the infrastructure already fails to stop flooding.[418]

Force majeure remains difficult to accurately assess as it seems, in part, to be a defense that depends heavily on public policy considerations in how it is applied by courts. Courts seem to be asking themselves, even if not too openly, "What are the policy implications of allowing this defendant to claim force majeure as a defense?" If force majeure is allowed as a defense, the plaintiff—and those similarly situated now and in the future—must absorb the cost of harm, whereas if the defense is denied, the defendant could potentially bear the cost.

Overall, based on increasing understanding and ever-increasing accuracy of computer modeling of both weather and long-term climate trends, it is expected that the Act of God defense will continue to be eroded based on less and less ability to claim that extreme events were not foreseeable, even if they had not previously occurred.

[418] For example, for an exploration of how increasing sea levels might impact local government liability for drainage, see, Thomas Ruppert & Carly Grimm, *Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-Level Rise*, FLA. BAR J., Vol 87, No. 9 (2013).

III.B. Trespass to Land

Another tort that comes up in floodplain management-related lawsuits is trespass to land. Though, it is less commonly used than it was in the past. Trespass is often thought of in the criminal sense, e.g., a person intentionally entering onto property that does not belong to them. In tort law, the property owner may file a lawsuit against a trespasser for actual and/or compensatory damages resulting from the trespass.[419] At common law, a trespass can be any physical invasion of property, including flooding.[420] Trespass to land is most commonly seen today as an additional claim in lawsuits that are primarily brought under a negligence or unconstitutional takings theory.[421]

[419]https://www.law.cornell.edu/wex/trespass#:~:text=In%20tort%20law%2C%20trespass%20is,another%20person's%20legal%20property%20rights.

[420] Hadfield v. Oakleim County Drain Com'r, 422 N.W.2d 205 (Mich., 1988); Avery v. Geneva County, 567 So.2d 282 (Ala., 1990)

[421] John Kusler, No Adverse Impact Floodplain Management and the Courts, NO ADVERSE IMPACT, 14 (2004). See also Borough of Upper Saddle River v. Rockland County Sewer Dist. #1, 16 F. Supp. 3d 294 (S.D. N.Y. 2014); Macias v. Bnsf Ry. Co., 2020 U.S. Dist. LEXIS 111398, 2020 WL 3469680; Modern, Inc. v. State, 444 F. Supp. 2d 1234 (M.D. Fla. 2006); Musumeci v. State, 43 A.D.2d 288, 291 (N.Y. App. Div. 1974).

III.C. Nuisance

A nuisance is a common law tort that is often used by landowners when their property is damaged by flooding. The Latin phrase *sic utere tuo, ut alienum non laedas* is the foundation of many nuisance court decisions.[422] The phrase means *use your own property so as to not harm another's*.[423] The goal of nuisance law is to balance the property interests of neighbors.[424] The common law provides real property owners the right to use and enjoy their land as they see fit, but no landowner (public or private) has the right to use their land in a manner that substantially interferes, in a physical sense, with the use of adjacent lands.[425]

Nuisance law is important in floodplain management because government acts can create liability. In *Sandifer Motor, Inc. v. City of Rodland Park*, the court found a nuisance where flooding was caused by the city blocking a sewer system by dumping debris into a ravine.[426] Some examples of activities that are likely to be subject to nuisance suits are dikes, dams, levees, and the construction of roads, seawalls, and other structures that increase flooding or erosion on other lands.[427]

There are two types of nuisances: private nuisance and public nuisance. A private nuisance is when an individual's use and enjoyment of their land is substantially and unreasonably interfered with.[428] A public nuisance is when a right that the general public shares is unreasonably interfered with.[429]

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[422] https://environment.probeinternational.org/chapter-2-so-not-harm-another/; Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 492 (S.Ct., 1987); Mugler, 123 U.S. at 667; Fertilizing Co. v. Hyde Park, 97 U.S. (7 Otto) 659, 667 (1878); Munn v. Illinois, 94 U.S. 113, 124 (1877); Pennsylvania vs. Plymouth Coal Co., 81 A. 148, 151 (Penn. 1911); Empire State Insurance Co. v. Chafetz, 278 F.2d 41 (CA5 1960)

[423] https://environment.probeinternational.org/chapter-2-so-not-harm-another/

[424] https://environment.probeinternational.org/chapter-2-so-not-harm-another/

[425] Kusler, Government Liability for Flood Hazards.

[426] 628 P.2d 239 (Kan., 1981).

[427] https://www.law.du.edu/images/uploads/rmlui/conferencematerials/2007/Friday/NoAdverseImpactIsitaMythorReality/NAILegalPaper102805.pdf at 10

[428] https://www.law.cornell.edu/wex/nuisance#:~:text=A%20public%20nuisance%20is%20when,through%20a%20thing%20or%20activity. *See, e.g.,* Borough of Upper Saddle River v. Rockland County Sewer Dist. #1, 16 F. Supp. 3d 294, 334 (S.D. N.Y. 2014).

[429] https://www.law.cornell.edu/wex/nuisance#:~:text=A%20public%20nuisance%20is%20when,through%2

When determining the reasonability of an act, courts will often employ the reasonable use doctrine balancing test.[430] They weigh the gravity of harm against the utility of the land use/conduct of the defendant.[431] When deciding gravity of harm, the courts consider, for example, investment-backed expectations, extent of harm, and the burden on the party causing the harm to avoid it. Some examples of what courts consider when determining if the utility of land/conduct of the defendant is appropriate include suitability of the land use/conduct, value of the activity to society, the ability or impracticability for the party causing the harm to avoid the damage.[432] Remedies for nuisance claims are limited to damages and injunctive relief.

As mentioned, landowners use nuisance law as a vehicle to sue governments for damaging property. Below are some decisions that act as good examples or provide rules laid out by various courts.

Barnhouse v. City of Pinole[433] -- This is an example from California, in which the court held that there was a continuing, abatable nuisance by the city for approving and accepting an uphill subdivision that caused flooding. On appeal, the court held that the trial court erred in eliminating the nuisance claim due to government immunity. The applicable law "provides that public entities are not liable for injury caused by public improvements if the improvements have been approved in advance or designed in accordance with previously approved standards and there is substantial evidence on the basis of which a reasonable governmental entity could have adopted or approved the design or standards." The court found that this immunity can be lost if the act is not in conformity with the above standard, and in this specific case, the city and state were potentially liable for nuisance for an inadequate drainage system that was approved and accepted by the city.

Borough of Upper Saddle River v. Rockland County Sewer Dist. #1[434] -- This is a citizens' suit brought by the Borough of Upper Saddle River, New Jersey under the Federal Water Pollution Control Act and state common law, alleging that, in the course of operating a sewage treatment facility, Rockland County has polluted and will likely continue to pollute the Saddle River. The plaintiffs brought four causes of action: continuing violations under section 301 of the Clean Water Act, private nuisance, public nuisance, and trespass claims under state common law. The

0a%20thing%20or%20activity. *See, e.g.,* Borough of Upper Saddle River v. Rockland County Sewer Dist. #1, 16 F. Supp. 3d 294, 336 (S.D. N.Y. 2014).

[430] *See, e.g.,* Borough of Upper Saddle River v. Rockland County Sewer Dist. #1, 16 F. Supp. 3d 294, 335 (S.D. N.Y. 2014).

[431] *See, e.g.,* Borough of Upper Saddle River v. Rockland County Sewer Dist. #1, 16 F. Supp. 3d 294, 334-35 (S.D. N.Y. 2014).

[432] *See, e.g.,* Emerick v. Town of Glastonbury, 2015 Conn. Super. LEXIS 1246 33-35 (Sup. Ct. Conn. 2015).

[433] 183 Cal. Rptr. 881 (Cal.,1982).

[434] 16 F. Supp. 3d 294 (S.D. N.Y. 2014).

court indicated that water pollution may constitute a private nuisance,[435] that sewage spills may support a cause of action for a public nuisance,[436] and that, in that case, sewage spills could not support the trespass claim as the plaintiffs could not conclusively establish exclusive ownership and right to exclude of the waterway at issue.[437]

Bracey v. King[438] -- Landowners and governments do not have a general affirmative duty to remedy naturally occurring hazards. A Georgia court held that one landowner with a beaver dam on his property was not responsible for removing this dam when it flooded adjacent property.

Butler v. Ads[439] -- The Wisconsin Supreme Court held as a matter of public policy that the City of Shell Lake was not liable for gradually rising waters in Shell Lake and resulting flood damage.

City of Columbus v. Myszka[440] -- Here, the City of Columbus, Georgia was liable for a continuing nuisance for approving and accepting an uphill subdivision, which caused flooding.

Emerick v. Town of Glastonbury[441] -- This is an example of a private nuisance for flooding and degradation of water quality caused by the town approving upstream developments and directing stormwater into a stream that flowed across the plaintiff's property. The Connecticut Superior Court denied the owner summary judgment on all of the claims, including nuisance claims, finding that the Town had raised genuine issues of material fact as to what caused the damage to the plaintiff's property. The court noted that climate change, "especially an increase in intense precipitation," could be responsible for the erosion and increased stormwater flow on the property.

Hagge v. Kansas City S. Ry Co.[442] -- In this Missouri example, the court held that damage done to land by the occasional overflow of a stream caused by a railroad was a nuisance.

Hibbs v. City of Riverdale[443] -- In this Georgia example, the court found that the sole act of approving a construction project that causes an increase in surface water runoff cannot impose

[435] Borough of Upper Saddle River v. Rockland County Sewer Dist. #1, 16 F. Supp. 3d 294, 334-35 (S.D. N.Y. 2014).

[436] Borough of Upper Saddle River v. Rockland County Sewer Dist. #1, 16 F. Supp. 3d 294, 337 (S.D. N.Y. 2014).

[437] Borough of Upper Saddle River v. Rockland County Sewer Dist. #1, 16 F. Supp. 3d 294, 339-40 (S.D. N.Y. 2014).

[438] 406 S.E.2d 265 (Ga., 1991).

[439] 717 N.W.2d 760 (Wisc. 2006).

[440] 272 S.E.2d 302 (Ga., 1980).

[441] 2015 Conn. Super. LEXIS 1246 (Sup. Ct. Conn. 2015).

[442] 104 F. 391 (W.D. Mo., 1990).

[443] 478 S.E.2d 121, 122 (Ga., 1996).

liability on a city for a nuisance. The court further observed, however, that: "(W)here a municipality negligently constructs or undertakes to maintain a sewer or drainage system which causes the repeated flooding of property, a continuing, abatable nuisance is established, for which the municipality is liable."

Lott v. City of Daphne[444] -- This Alabama court held that if the City begins to use natural gully as part of stormwater drainage system, the City must exercise due care in preventing erosion damage to adjoining properties.

Martinovich v. City of Sugar Creek, Mo.[445] - The court found that the City was not responsible for a sewer and catch basin constructed by a private developer and never accepted by the City.

Provost v. Gwinnett County[446] -- In this case, the court held that the County was not liable for approving upstream property development because the jury found insufficient connection between development of upstream property and damage to downstream property.

Shields v. Arndt[447] -- New Jersey courts traditionally treated interference with a riparian owner's natural flow right as a per se nuisance, and here the court found that a diversion of stream water through a ditch was a nuisance.[448]

[444] 539 So. 2d 241 (Ala., 1989).

[445] 617 S.W.2d 515 (Mo., 1981).

[446] 405 S.E.2d 754 (Ga., 1991).

[447] 1842 WL 3345 (Ch. 1842).

[448] See also Smith v. Orben, 119 N.J.Eq. 291 (Ch. 1935); Stevenson v. Morgan, 63 N.J.Eq. 805 (1902).

III.D. Governmental and Sovereign Immunity from Liability

Constitutional and torts law converge with the concepts or doctrines of governmental and sovereign immunity.[449] The doctrine of immunity of the sovereign or state from suit in their courts without the sovereign's or state's express permission[450] springs from the ancient English maxim, "the King can do no wrong."[451] In U.S. jurisprudence, the doctrine has evolved over time through a series of court decisions and legislation navigating the boundaries and tensions among the federal government and the several sovereign states.[452] The federal courts, and

[449] *See* Justin Gundlach & Jennifer Klein, CLIMATE CHANGE, PUBLIC HEALTH, AND THE LAW 145-49, Michael Burger & Justin Gundlach eds. (2018) (discussing *Arkansas Game and Fish Commission v. United States*, 568 U.S. 23 (2012) and *Saint Bernard Parish Government v. United States*, 121 Fed. Cl. 687 (2015) *rev'd*, 887 F.3d 1354 (Fed. Cir. 2018).

[450] *Immunity*, BLACK'S LAW DICTIONARY (7th ed. 1999). The terms "sovereign immunity" and "government immunity" are often conflated, but are different legal concepts. Sovereign immunity protects the United States, states individually, and their branches, including agencies, boards, hospitals, and universities. Government immunity technically protects only political subdivisions of the state, including counties, municipalities, towns, villages, and school districts.

[451] *See Gibbons v. United States* 75 U.S. 269 (1868); *Owen v. City of Independence, Missouri, et al.*, 445 U.S. 622, 645 n.28 (1980); 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 6-7 (2d ed. 1984) (quoting Blackstone); 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 210 (1985); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); *see also* HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED, 3D ED. 67 (https://books.google.com/books?id=ag4yAAAAIAAJ). Retrieved July 28, 2022 ("*Rex non potest peccare* . . . The king can do no wrong. It is an ancient and fundamental principle of the English constitution, that the king can do no wrong." Citations omitted).

[452] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review of federal legislative actions); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (establishing the legitimacy of the Supreme Court reviewing state court decisions); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (upholding the constitutionality of congressional legislation creating the Second Bank of the United States against a claim that such legislation was beyond Congress' powers and thus impinged on the states' reserved powers); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (supremacy of federal statutes over state statutes); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 865 (1824) (If Congress does not authorize a state regulation or taxation of federal instrumentalities, the possibility of interference with a substantive federal policy is sufficient to raise a presumption of immunity; rejecting Ohio's argument that when Congress is silent, the presumption should be against immunity). The historical origins of government immunity are traced, and early cases analyzed, in a series of articles: Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L. J. 1, 129, 229 (1924-25); *Governmental Responsibility in Tort*, 36 YALE L. J. 1, 757, 1039 (1926-27); 28 COL. L. REV. 577, 734 (1928). Recognition of Borchard's role may be seen in Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 LAW & CONTEMP. PROB. 214 (1942).

particularly the U.S. Supreme Court, continue to provide fora for disputes over the allocation of power among the states and the federal government,[453] and the liability or immunity of government actors, agencies, agents, officers, municipalities, and other subdivisions of government.

III.D.1. Federal *Sovereign* Immunity

III.D.1.a. Introduction

Federal sovereign immunity is woven throughout the jurisprudence of litigation with the federal government.[454] As the Court stated over 70 years ago, "[I]t is too late in the day to urge that the [federal] Government is just another private litigant, for purposes of charging it with liability."[455] Indeed, the United States may not be subjected to suit at all, absent its own express consent pursuant to the doctrine of federal sovereign immunity.[456] For many years after the ratification of the Constitution, there were no exceptions to the immunity of the federal government from suit in court. Since the Constitution declared "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," all claims against the federal government had to be addressed by Congress.[457] Congress attempted to pass on this claims processing work to the courts, but the Court declared that a violation of the separation of powers.[458]

[453] DONALD L. DOERNBERG, SOVEREIGN IMMUNITY *OR* THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 5-6 & n.30 (2005).

[454] Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 440 (2005).

[455] *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383 (1947).

[456] Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 440 (2005).

[457] U.S. Const. art. I, § 9.

[458] *Hayburns Case*, 2 U.S. 409 (1792).

III.D.1.b. Federal Tort Claims

At the United States' beginning in 1789, citizens could not sue the federal government.[459] The remedy for citizens claiming to have suffered wrong was to petition Congress for redress.[460] If Congress accepted the petition, it would pass a private bill authorizing disbursement of compensation from the treasury.[461] As the nation grew and federal government expanded, Congress established a court of claims in 1855 for the purpose of evaluating non-tort claims and recommending a congressional response.[462] However, the court of claims functioning as an advisory body saved Congress less time than anticipated.

The outbreak of the Civil War in 1860 and the many federal claims that followed led President Lincoln in 1861 to propose giving the court of claims the power to render final judgments, and Congress reorganized the court of claims in 1863 giving it such authority, and gave the Court jurisdiction to review Court of Claims judgments.[463] That removed contract claims from Congress' purview, but left federal tort claims to be resolved by private bill.[464]

[459] *See generally*, LARRY W. YACKLE, FEDERAL COURTS 358-63 (2d ed. 2003). *See also* Alfred Hill, *In defense of Our Law of Sovereign Immunity*, B.C. L. REV. 485, 540 (2001) (describing the Supreme Court's recognition of the United States sovereign immunity as a "position . . . from which the Court has never swerved. . . ." and citing *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846) and *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834).

[460] DONALD L. DOERNBERG, SOVEREIGN IMMUNITY *OR* THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 81 (2005).

[461] *See* RICHARD H FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 961 (5th ed. 2003). *See e.g.*, *Langford v. United States*, 101 U.S. 341 (1879) (observing that only Congress can give remedy for claims sounding in tort).

[462] Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855). *See also*, DONALD L. DOERNBERG, SOVEREIGN IMMUNITY *OR* THE RULE OF LAW 82 (2005).

[463] Act of March 3, 1863, ch. 92, 12 Stat. 765 (1863). *See also* Wiecek, The Origin of the United States Court of claims, 20 AD. L. REV. 387, 398 (1968); LEON HURWITZ, THE STATE AS DEFENDANT 22 (1981).

[464] DONALD L. DOERNBERG, SOVEREIGN IMMUNITY *OR* THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 82 (2005).

United States v. Lee [465] arose from the seizure of the estate of Confederate General Robert E. Lee by federal forces during the Civil War.[466] The Arlington estate--1,100 acres on the Potomac River--was converted into a military station and cemetery for the burial of deceased sailors and soldiers.[467] The Arlington estate was sold on January 11, 1864, to pay outstanding taxes, but the lawsuit claimed that the tax sale was improper due to an erroneous tax commission rule that payment of taxes—after advertisement of sale for back taxes—would be refused from anyone but the owner appearing in person.[468]

A jury found in favor of the Lees.[469] The U.S. Attorney General, before the Court on behalf of the government officers who seized the estate, argued that (1) no judgment could be held in favor of Mr. Lee against the government officers because they held "the property as officers and agents of the United States, and (2) it is appropriated to lawful public uses."[470] The Court, upholding the jury, explained their reasoning, conceding that the first point was established law, but not the second point:[471]

> "This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property held by such persons as officers or agents for the government."[472]

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[465] *United* States *v. Lee*, 106 U.S. 196 (1882). "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives." *Id*. at 221.

[466] Now, Arlington National Cemetery. For more on the *Lee* case's fascinating historical background, see GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT: CASES AND MATERIALS 117-19 (Foundation Press 2000 & Supp. 2004); Enoch Aquila Chase, *The Arlington Case: George Washington Curtis Lee Against the United States of America*, 15 VA. L. REV. 207 (1929); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1634-36 (1997).

[467] *United States v. Lee*, 106 U.S. 196, 198 (1882). The site would become Arlington National Cemetery.

[468] *United States v. Lee*, 106 U.S. 196, 200 (1882). The Court referenced a series of cases by which it established the proposition that where tax commissioners refused to receive taxes, "their action in thus preventing payment was the equivalent to payment in it effect upon the certificate of sale." *Id* at 200-202.

[469] *United States v. Lee*, 106 U.S. 196, 197 & 199 (1882).

[470] *United States v. Lee*, 106 U.S. 196, 204 (1882).

[471] *United States v. Lee*, 106 U.S. 196, 204 (1882).

[472] *United States v. Lee*, 106 U.S. 196, 204 (1882).

The defense in *Lee* emphasized the officers' use of Arlington for public purposes. Citing *Osborn v. Bank of United States* (1824),[473] the Court's majority concluded that public use was not dispositive.[474] Further, the Court noted that the defense position was also inconsistent with the Fifth Amendment.

> "Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without compensation. Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them."[475]

The *Lee* majority reasoned, "It is to be presumed in favor of the jurisdiction of the court that a plaintiff may be able to prove the right which he asserts in his declaration."

> "What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of the plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under orders of the President, have seized the estate, and converted one part of it into a military fort and another into a cemetery.
>
> It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defence [sic] stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation."[476]

The Court concluded the tax sale was illegal,[477] stripped the federal officers of sovereign immunity, and agreed that suit against them was proper. The Court held that the Constitution's

[473] *Osborn v. Bank of the United States*, 22 U.S. 738 (1822).

[474] *United States v. Lee*, 106 U.S. 196, 204 (1882).

[475] *United States v. Lee*, 106 U.S. 196, 21 (1882).

[476] *United States v. Lee*, 106 U.S. 196, 220 (1882).

[477] *United States v. Lee*, 106 U.S. 196. 204 (1882).

prohibition on lawsuits against the federal government did not extend immunity to officers of the government themselves,[478] rendered judgment against them for the depravation of property without due process, and held that officers of the government were creatures of—and bound to obey—the law.[479]

In 1887, Congress again expanded the court of claims' jurisdiction, but relief against the government was still a matter of grace, not of right.[480] The Tucker Act[481] allowed citizens to sue the federal government for claims based on the Constitution. In 1911, Congress transferred this jurisdiction to the federal district courts.[482] In 1948, the Little Tucker Act[483] was passed, giving federal district courts original jurisdiction, concurrent with the court of claims, over any civil action against the federal government and gave federal circuit courts concurrent jurisdiction with the court of claims for amounts of up to $10,000.[484] In 1992, the court of claims was renamed the Court of Federal Claims and consisted of 16 judges appointed to terms of 15 years. Appeals from the Court of Federal Claims are heard by the U.S. Court of Appeals for the Federal Circuit. The Court of Federal Claims hears only Fifth Amendment takings claims, claims for tax refunds, and suits against the government based on contract disputes.[485] It does not have jurisdiction to hear tort claims against the federal government;[486] those claims must be brought under the Federal Tort Claims Act.[487]

[478] *United States v. Lee*, 106 U.S. 196, 207-23 (1882).

[479] *United States v. Lee*, 106 U.S. 196, 218 (1882).

[480] Act of March 3, 1887, ch. 359, 24 Stat. 505 (1887) ("The Tucker Act"), 28 U.S.C. § 1491. *See* DONALD L. DOERNBERG, SOVEREIGN IMMUNITY *OR* THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 82 (2005).

[481] Act of March 3, 1887, ch. 359, 24 Stat. 505 (1887) ("The Tucker Act"), 28 U.S.C. § 1491.

[482] Act of March 3, 1911, ch. 231, 36 Stat. 1087 (1911).

[483] Act of June 25, 1948, ch. 646, 62 Stat. 869 (1948) ("The Little Tucker Act"), 28 U.S.C. § 1346(a)(2).

[484] 28 U.S.C. § 1346(a)(2).

[485] 28 U.S.C. § 1491.

[486] 28 U.S.C. § 1346(a)(2).

[487] Act of Aug. 2, 1946, ch. 753, Title IV, 60 Stat. 842 (1947) (current version at 28 U.S.C. §§ 1346, 2671-2680 (2018)).

III.D.1.b.i. Federal Tort Claims Act ("FTCA")

Background

Prior to World War II, Congress had waived its immunity over a greater list of claims.[488] But it was not until 1946, with the growing burden on Congress to handle tort claims and the public perception of poor government responsiveness, that Congress was prompted to pass the FTCA.[489] The FTCA waived the federal government's immunity regarding some torts,[490] but the concept of sovereign immunity for some tortious government conduct survives.[491]

The FTCA allows recovery 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 of employment, under circumstances where the United States, if a private person, would

[488] *See* DONALD L. DOERNBERG, SOVEREIGN IMMUNITY *OR* THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 83 (2005).

[489] *See* Act of Aug. 2, 1946, ch. 753, Title IV, 60 Stat. 842 (1947) (current version at 28 U.S.C. §§ 1346, 2671-2680 (2018)). The provisions of the Act appear in various sections of the United States Code. Appendix 1 of 3, LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS (1992) identifies the locations of provisions of the Act in the United States Code. On the heels of two decades of congressional inaction, the Federal Tort Claims Act ("FTCA") finally passed following the 1945 B-25 Empire State Building plane crash, where a bomber piloted in thick fog crashed into the north side of the Empire State Building. The U.S. government offered money to families of the victims, some of whom accepted, but others initiated a lawsuit that resulted in congressional passage of the FTCA of 1946. The FTCA gave U.S. citizens the right to sue the federal government, and the statute was made retroactive to 1945 in order to allow the plane crash victims to seek recovery. *See State Ins. Fund v. United States*, 346 U.S. 15, 24-30 (1953).

[490] Under the Act, plaintiffs could not recover against the federal government for acts of employees within the scope of their employment, prejudgment interest, punitive damages, or attorneys' fees, though they could receive costs. Act of Aug. 2, 1946, ch. 753, Title IV, 60 Stat. at 844 (1947). The Act excluded recovery for certain claims: federal employees exercising due care in execution of a statute, even if the statute was invalid; claims arising from loss, miscarriage, or negligent transmission by the post office; customs or duty claims; claims for negligent retention of property by customs officials; admiralty claims for which remedies exist outside the statute; claims under the Trading with the Enemy Act of 1917, 40 Stat. 411, codified at 12 U.S.C. § 95 and 50 U.S.C. § 4301 et seq.; quarantine claims; claims arising in the Canal Zone; institutional torts; claims involving fiscal operations of the treasury; claims from combatant activities; claims arising in a foreign country; and claims with respect to the Tennessee Valley Authority. Act of Aug. 2, 1946, ch. 753, Title IV, 60 Stat. at 845 (1947).

[491] *See* DONALD L. DOERNBERG, SOVEREIGN IMMUNITY *OR* THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 83 (2005).

> be liable to the claimant in accordance with the law of the place where the act or omission occurred."[492]

The FTCA is strictly construed in favor of the federal government, and all ambiguities are decided in favor of the government.[493] The FTCA operates vicariously; if a government employee commits a tort in the course of their employment, the federal government, rather than the employee, becomes the defendant.[494] All awarded damages are paid by the government, not the employee.[495] The FTCA is the exclusive remedy in any civil case resulting from actions committed by a federal employee in the course or scope of their employment.[496] If the federal employee is sued in state court, the U.S. Attorney General will have the case removed to federal court, once it has been certified that the employee was acting within the course or scope of their employment, so that the case is justiciable.[497]

There is no right to a jury trial for claims brought under the FTCA, except for actions to recover wrongfully collected taxes or penalties.[498] Compensatory damages are the only

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[492] 28 U. S. C. §1346(b)(1); *Molzof v. United States*, 502 U.S. 301 (1992) (the FTCA relies on the substantive tort law of the state in which the claim is filed); *Midwest Knitting Mills, Inc. v. United States*, 950 F.2d 1295 (7th Cir. 1991) (if a particular tort action is not recognized in the state, the plaintiff cannot sue).

[493] *See, e. g., Library of Congress v. Shaw*, 478 U. S. 310,318 (1986) ("'The consent necessary to waive the traditional immunity must be express, and it must be strictly construed'") (quoting *United States v. N. Y. Rayon Importing Co.*, 329 U. S. 654, 659 (1947)); *Ruckelshaus v. Sierra Club*, 463 U. S. 680, 685 (1983) ("Waivers of immunity must be 'construed strictly in favor of the sovereign,' ... and not 'enlarge[d] ... beyond what the language requires' "); *United States v. Sherwood*, 312 U. S. 584, 590 (1941) (Because "a relinquishment of a sovereign immunity ... must be strictly interpreted," we construe the statutory language with "conservatism").

[494] *See Laird v. Nelms*, 406 U.S. 797, 801 (1972); *United States v. Shearer*, 473 U.S. 52, 55 (1985); *Sheridan v. United States*, 487 U.S. 392, 397 (1988); *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 420 (1995); WILLIAM B. WRIGHT, THE FEDERAL TORT CLAIMS ACT 78-79 (1957); James E. Pfander & Neil Aggarwal, *Bivens, The Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. ST. THOMAS L.J. 417, 450 (2011); *Brownback v. King*, 141 S. Ct. 740, 745 (2021), 209 L. Ed. 2d 33, 2021 U.S. LEXIS 1198, 28 Fla. L. Weekly Fed. S 666, 2021 WL 726222.

[495] The extent of the federal government's liability under the FTCA is determined by state law, except that punitive damages are not allowed. 28 U.S.C. § 2674; *Molzof v. United States*, 502 U.S. 301 (1992). *Cf. Portis v. Folk Const. Co., Inc.*, 694 F.2d 520 (8th Cir. 1982) (contractor constructing a flood control structure for ACOE "shared" federal government immunity when flood damage resulted from that structure).

[496] 28 U.S. C. § 2679.

[497] 28 U.S. C. § 1441 provides general information about removal. It lets defendants remove a case to the federal court for the district where the action is pending in state court. A civil action based on the Constitution or federal law can be removed without regard to residence of the parties.

[498] 28 U.S.C. §§ 1346(a)(1) and 2402.

damages recoverable.[499] Attorneys' fees claimed by attorneys for successful plaintiffs are limited to 25 percent (25%).[500] Unlike many state tort claims acts, the FTCA has no damages cap.[501] The amount recoverable is unlimited, other than limitations to which a private party would be subject to under the relevant state law.[502] Thus, the federal government is able to take advantage of any damage limitations or tort reform measures in the state in which the suit is pending.[503]

III.D.1.b.ii. FTCA Exceptions and Post-FTCA Jurisprudence

While the FTCA broadly waives the federal government's sovereign immunity, there are major exceptions.[504] In addition to product liability claims,[505] discretionary, ministerial, and some intentional acts are not actionable under the FTCA.[506]

Discretionary Acts

As with most state tort claims acts and state case law involving claims against states and local governments, the most significant exception to liability under the FTCA is the

[499] 28 U.S.C. § 2674.

[500] 28 U.S.C. 2678.

[501] E.g., *Malmberg v. United States*, 816 F.3d 185, 193 (2d Cir. 2016) ("Damages in FTCA actions are determined by the law of the state in which the tort occurred."); *Lockhart v. United States*, 834 F.3d 952, 955 (8th Cir. 2016) (similar); *Reilly v. United States*, 863 F.2d 149, 161 (1st Cir. 1988) (similar). Thus, if the state in which the tort occurred has enacted statutes that cap the amount of damages a plaintiff may recover in a state law tort case, those statutory caps may likewise limit the damages a plaintiff may recover from the United States in an FTCA case. E.g., *Clemons v. United States*, No. 4:10-CV-209-CWR-FKB, 2013 WL 3943494, at *2 (S.D. Miss. June 13, 2013) ("[S]tate law damages caps apply in FTCA cases."); *Bowling v. United States*, 740 F. Supp. 2d 1240, 1267 (D. Kan. 2010) ("With respect to compensatory damages, under the FTCA, damages are determined by the law of the state where the tortious act was committed, and presumes the application of any relevant damage caps that might be applied in the case of a private individual under like circumstances."); *see also*, Kevin M. Lewis, *The Federal Tort Claims Act (FTCA): A Legal Overview*, CONGRESSIONAL RESEARCH SERVICE, (last updated Nov. 20, 2019) https://www.everycrsreport.com/reports/R45732.html#ifn298 (site last visited Aug 23, 2022).

[502] 28 U.S.C.S. § 2674.

[503] *Carter v. United States*, 982 F.2d 1141 (7th Cir. 1992).

[504] *See* 28 U.S.C. § 2680.

[505] *See generally*, *Goeway v. U.S.*, 886 F. Supp. 1268 (S.C. 1995) (claims involving exposure of an infant to toxic chemicals barred under either independent contractor or discretionary function exception); *Laird v. Nelms*, 406 U.S. 797 (1972).

[506] 28 USCS § 2680(h)

"discretionary function" exception.[507] 28 U.S.C. § 2680(a) precludes recovery from the government for:

> "[A]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, 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."[508]

The discretionary function exception is the most litigated exception to the FTCA.[509] A "discretionary function" is an act involving an exercise of personal judgment, and the exception furthers the legislative branch's desire to prevent judicial "second-guessing" by entertaining tort actions of legislative and administrative decisions grounded in social, economic, and political policy.[510] The discretionary function exception applies unless a plaintiff can demonstrate that a reasonable person in the official's position would have known that the action was illegal or beyond the scope of that official's legal authority.[511] In the leading case interpreting and applying this section, the Court ruled that the FTCA precludes recovery based upon conduct of administrators "in establishing plans, specifications or schedules of operations."[512] The initial burden is on the plaintiff to prove subject matter jurisdiction in a case brought pursuant to the FTCA.[513] Most federal courts

[507] *See* 28 U.S.C.A. §2680(a).

[508] 28 U.S.C. § 2680 (2018).

[509] RICHARD A. EPSTEIN, CHARLES 0. GREGORY, HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS 859 (4th ed. 1984). The annotations following 28 U.S.C.A. § 2680(a) list more cases than any other FTCA provision. *See* LESTER S. JAYSON, 2 HANDLING FEDERAL TORT CLAIMS § 248.01 at 12-20 (1986) (arguing that "[p]robably, no other provision of the Federal Tort Claims Act has been regarded as more difficult to understand or to apply.").

[510] *United States v. Gaubert*, 499 U.S. 315,323 (1991); *Berkowitz v. United States*, 486 U.S. 531, 537 (1988); *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984); *United States v. Muniz*, 374 U.S. 150, 155 n.9 (1963) (noting that, "the only remaining exceptions having no counterpart in the present Act barred liability for governmental activity relating to flood control, harbor and river work, and irrigation projects. To the extent that these activities constitute 'discretionary function[s],' the exception of 28 U. S. C. § 2680(a) still preserves government immunity.") (citations omitted).

[511] *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

[512] *Dalehite v. United States*, 346 U.S. 15 (1953). Later cases have interpreted *Dalehite* as distinguishing between planning conduct and operational conduct with liability imposed in connection with operations. *See Indian Towing Co. v. United States*, 350 U.S. 61 (1955). The FTCA is analyzed in detail in LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES (1964 with current supplements).

[513] *See* 28 U.S.C. § 1346(b); *see also Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) (citation omitted), *cert. denied*, 466 U.S. 958 (1984); *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987),

require the government then to prove that the discretionary function exception applies.[514]

Ministerial Acts

Immunity from tort liability does not apply if the action was mandated by law or regulation and the government actor had no choice or discretion in how to undertake the action.[515] Ministerial acts neither require a federal official's discretion because they followed an adopted regulatory scheme and cannot be changed, nor do they involve any special expertise. Similarly, if the government builds and operates something, then it has a ministerial duty to maintain it, and will be liable for failing to do so.[516] An important difference for floodplain managers and their attorneys to recognize between discretionary and ministerial or proprietary actions is that the government has broad latitude to use benefit/cost analysis for discretionary actions but not for ministerial ones.

Intentional Acts

The FTCA provides exceptions from its general waiver of sovereign immunity for certain intentional torts. One of these exceptions is "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[517] The intentional tort

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cert. denied, 487 U.S. 1204 (1988): *West v. Federal Aviation Administration*, 830 F.2d 1044, 1046 (9th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988).

[514] *See Evans v. United States*, 2022 U.S. Dist. LEXIS 67983; *Myers v. United States*, 652 F.3d 1021, 1028 (2011); *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002); *see also Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005).

[515] *See Berkowitz v. United States*, 486 U.S. 531, 536 (1988); *Dalehite v. United States*, 346 U.S. 15, 34 (1953) (exception protects "the discretion of the executive or the administrator to act according to one's judgment of the best course").

[516] *See Dalehite v. United States*, 346 U.S. 15, 35-36 (1953); *Tucci v. District of Columbia*, 956 A.2d 684 (D.C. 2008).

[517] 28 U.S.C. § 2680(h); *see Baroni v. United States*, 662 F. 2d 287 (5th Cir., 1981) (federal government not susceptible to suit for misrepresentation due to FTCA exception where Federal Housing Administration mistakenly identified flood-level location, which led to future residents' houses being flooded; courts have been reluctant to hold governmental units liable for inherent inaccuracies and tradeoffs made in mapping; FHA not liable to purchasers of housing units for miscalculation of 50-year flood height in approving plans for a subdivision due to "flood control" exemption); *Britt v. United States*, 515 F. Supp. 1159 (D. Ala., 1981); *Weitzman v. Pima Cty.*, 2009 U.S. Dist. LEXIS 141003 (D. Ariz. 2009) (where county plat map showed part of plaintiff's property located in 50-year floodplain, but county and FEMA FIRMs showed it was not, and plaintiff did not insure property that was subsequently flooded and destroyed; sovereign immunity protected both the county and the federal government from suit); *Christopherson v. Bushner*, 2021 U.S. Dist. LEXIS 82593 (W.D. Mo. 2021) (discussing in detail

exception is inapplicable to torts that fall outside of the scope of the § 1346(b) general waiver.[518] Claims against the government for intentional infliction of emotional distress are not excepted from the FTCA.[519] The Court has taken a very strict approach to the reading of § 2680. There "is no justification for this Court to read exemptions into the Act beyond those provided by Congress."[520]

Claims based on intentional actions that are excluded from the FTCA, but that rise to the level of constitutional torts, may be brought against federal officials in their individual capacities.[521] In *Bivens v. Six Unknown Agents*,[522] the Court held that a violation of the Fourth Amendment protection against unreasonable searches and seizures by a federal agent acting under color of their authority gives rise to a cause of action for damages for

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FEMA's responsibility to property owners to update FIRMs. There were multiple tort claims against FEMA for changing a FIRM before and after a couple bought a home that subsequently flooded and was not insured, despite the owners having inquired multiple times as to the status of the property's propensity to flood; sovereign immunity largely prevented FEMA or FEMA representatives from being found responsible under 42 U.S.C. § 1983 or *Bivens*); *Columbia Venture v. Dewberry*, 604 F.3d 824 (4th Cir., 2010) (plaintiff failed to appeal change to FIRM, claim against independent contractor denied; allowing litigation against independent contractors would undermine purpose of the NFIA and transfer litigation costs to FEMA through increased contract prices): *see also Atl. Coast Pipeline, LLC v. Nelson Cty. Bd. of Supervisors*, 443 F. Supp. 3d 670 (2020) (citing *Columbia Ventures*) (pipeline company claims denial of local permit preempted by Natural Gas Act of 1938; following lengthy discussion of Nelson County's Floodplain Regulations, the court held that revised flood management regulations were not made in correspondence with any federal statute and the regulatory restrictions placed directly opposed the purpose of federal law).

When sued for negligence or breach of professional contract or implied warranty, architects and engineers and their government employers or contractors are generally held, at a minimum, to a "reasonable care" standard applicable to other architects and engineers in their profession. The elements of an action for breach or negligence are often the same. *See e.g.*, *Klein v. Catalano*, 437 N.E.2d 514 (Mass 1982); *City of Mounds View v. Walijarvi*, 263 N.W.2d 420, 424 (Minn. 1978) (engineers and architects are not held strictly liable for any damage that may result from their work).

In general, courts have held that a selection of appropriate technology is discretionary. But some courts have held that a very high level of technology must be applied when the risks are great and improved technologies are available even though they may not be generally applied in the profession or area. *See The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932) (owner of tug company liable to owner of two barges lost in a storm for failure to equip tug boats with radios (which would have provided timely warnings of approaching storm) although such radios were not common practice on tugs in 1928; radios could have been provided at small cost and would have been of great value).

[518] *Sheridan v. United States*, 487 U.S. 392, 400 (1988)

[519] *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990).

[520] *Rayonier, Inc. v United States*, 352 U.S. 315 (1957).

[521] *See Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).

[522] *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).

their unconstitutional action.[523] Victims of a constitutional tort by a federal agent may have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.[524] The plaintiff must allege that they were deprived of a constitutional right by a federal agent acting under color of federal authority. These *Bivens* actions are the federal counterpart to a civil rights action brought under 42 U.S.C. § 1983.

Post-FTCA Jurisprudence

After World War II, the War Assets Administration allegedly entered into a contract to sell surplus coal to the Domestic & Foreign Commerce Corp.[525] The Administration refused to deliver the coal to Domestic and instead executed a new contract to sell it to someone else.[526] In *Larson v. Domestic and Foreign Commerce Corp.*,[527] Domestic sought to transform a contract grievance with the federal government into a dispute with an individual government officer who should be restrained from violating the law.[528] The officer was not a party to the contract and the relief sought would have impinged directly on the federal government.[529] Reframing a complaint against the federal government as a controversy with an individual government agent was the case in *Lee*[530] 70 years earlier. The suit in *Lee* was allowed to go forward notwithstanding sovereign immunity. The outcome in *Larson* was quite different.[531]

The *Larson* Court rejected the argument that the denomination of the party defendant determined the applicability of sovereign immunity.[532] The Court did not accept the argument that a suit against an officer invariably may be distinguished from one against the United States simply by the arrangement of names in the pleading.[533] The Court

[523] *Bivens v. Six Unknown Agents*, 403 U.S. 388, 389 (1971).

[524] WHITNEY K. NOVAK, REGULATING FEDERAL LAW ENFORCEMENT: CONSIDERATIONS FOR CONGRESS 3, Congressional Research Service Legal Sidebar (June 24, 2020).

[525] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 684 (1949).

[526] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 684 (1949).

[527] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).

[528] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949).

[529] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 & n.9 (1949).

[530] *United* States *v. Lee*, 106 U.S. 196 (1882).

[531] *See* Gregory Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, Part II.C, 58 OKLAHOMA L. REV. 439, 447-51 (2005).

[532] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 686-89 (1949).

[533] *Larson*, 337 U.S. 682, 687 (1949) (citing *In re Ayers*, 123 U.S. 443 (1887)); *Minnesota v. Hitchcock*, 185 U.S. 373, 387 (1902) (". . . whether a suit is one against a State is to be determined, not by

must look to the relief sought in the suit to determine if the complaint framed against an officer is in reality against the federal government:

> "In each such case [where specific relief is sought] the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained. . . . In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction."[534]

Beyond suits involving the personal activities of the officer, the *Larson* Court articulated two instances in which an officer would be regarded as acting separately from the government and thus subject to individual suit without implicating sovereign immunity.[535] First, when an officer acts beyond their delegated authority under a statute, they then are not acting as an agent of the government; their actions beyond statutory limitations are considered "individual and not sovereign actions."[536] If the officer is not doing the business that "the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden," then their actions are *ultra vires* and a suit for specific relief against the officer may proceed.[537] Second, when an officer acts pursuant to statutory authority, but their conduct breaches constitutional margins, the suit may proceed against the officer individually.[538] "Here, too, the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign."[539]

As for the suggestion that *Lee* stands as precedent for a broader avenue of relief against government officers, the *Larson* majority characterized *Lee* as a particular example of a government officer acting in contravention of a constitutional limitation on authority, specifically the Fifth Amendment Takings Clause, and thus falling within the Court's

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the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered . . . .").

[534] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949).

[535] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-91 (1949).

[536] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949).

[537] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949).

[538] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949).

[539] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949).

articulation of the second category of permissible officer suits.[540] Because the holding of the property without compensation in *Lee* violated the Constitution, the officer in that case was acting without legitimate authority and the suit to regain the property therefore "was not a suit against the sovereign and could be maintained against the defendants as individuals."[541]

The *Larson* Court then concluded that the claim was not properly presented against an officer rather than the federal government, given that there was no assertion that the administrator of the War Assets Administration had violated some statutory limit on his authority or that his actions exceeded constitutional boundaries.[542] The Court concluded there was no suggestion that the administrator acted beyond his delegated authority.[543] Only conduct that exceeds delegated authority—statutory or constitutional—separates an individual officer from the sovereign government.[544]

Finally, the *Larson* Court turned back the defense argument that "the principle of sovereign immunity is an archaic holdover not consonant with modern morality and that it should therefore be limited whenever possible."[545] Although the majority acknowledged that a damage claim may not much interfere with governmental prerogatives and observed that Congress increasingly had authorized such suits, public policy still precluded the government from being subjected to judicial actions for specific relief: "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."[546]

The majority concluded:

> "in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event."[547]

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[540] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 696-98 (1949).

[541] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 697 (1949).

[542] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949).

[543] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949).

[544] *See* Gregory Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, Part II.D, 58 OKLAHOMA L. REV. 439, 452 (2005); text accompanying notes 88-91.

[545] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949).

[546] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

[547] *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

Malone v. Bowdoin[548] reinforced and extended the *Larson* rule and thus further solidified the doctrine of federal sovereign immunity. In *Malone*, plaintiffs claiming proper title to land occupied by the government brought an ejectment action against a Forest Service officer to recover the property.[549] The factual scenario was similar to that of *Lee*, as was the claimants' legal argument that a suit for specific relief against the officer should be permitted, notwithstanding sovereign immunity. However, the legal landscape had changed significantly with consolidation of the federal sovereign immunity doctrine in *Larson* and through the emergence of the FTCA, an alternative means for judicial relief afforded by Congress that was not available to the Court in *Lee*. Accordingly, the Court held that sovereign immunity barred this officer suit.[550]

Justice Stewart, writing for the *Malone* majority, stated that the *Larson* Court had "thoroughly reviewed the many prior decisions, and made an informed and carefully considered choice between the seemingly conflicting precedents."[551] The *Larson* decision, Justice Stewart summarized:

> "expressly postulated the rule that the action of a federal officer . . . can be made the basis of a suit for specific relief . . . only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.'"[552]

While *Larson* did not overrule *Lee*, Justice Stewart acknowledged that the Court had interpreted *Lee* "as simply 'a specific application of the constitutional exception to the doctrine of sovereign immunity.'"[553] Moreover, at the time *Lee* was decided, a citizen who had suffered a seizure of property by the government had no judicial avenue for relief. Congress subsequently authorized compensation for such takings by a special tribunal.[554] In conclusion, Justice Stewart said, no claim of an unconstitutional taking without just compensation was or could be advanced in *Malone*, nor was there any other

[548] *Malone v. Bowdoin*, 369 U.S. 643 (1962).

[549] *Malone v. Bowdoin*, 369 U.S. 643, 643-645 (1962).

[550] *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962).

[551] *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962).

[552] *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962) (quoting *Larson*, 337 U.S. at 702).

[553] *Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962) (quoting *Larson*, 337 U.S. at 696).

[554] *Malone v. Bowdoin*, 369 U.S. 643, 647 & n.8 (1962). For further discussion of this remedy under the Tucker Act, 28 U.S.C. § 1491 (2000), for compensation for a governmental taking, which now is available in the United States Court of Federal Claims, see generally GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 4.09(b), at 327-30 (4th ed., ALI-ABA 2006).

assertion that the government officer "was exceeding his delegated powers as an officer of the United States."[555]

III.D.1.b.iii. Absolute and Qualified Immunity

Allowing certain liability claims against the sovereign state and federal governments may be necessary to protect against arbitrary actions against individuals, but these claims can chill government action if they make government employees fearful of acting. To limit this threat, state and federal law recognize two immunity-based defenses against claims. Absolute immunity relates to a government agent's type of governmental employment. Absolute immunity generally applies only to judges,[556] prosecutors,[557] legislators,[558] and the highest executive officials of all governments when acting within their authority.[559] Usually, this will not include acts committed by the official with malice or corrupt motives.[560]

Qualified immunity is an affirmative defense for public officials being tried for violations of constitutional rights.[561] This defense operates in a similar manner as the discretionary function exception to tort liability.[562] Qualified immunity applies to federal, state, and local officials

[555] *Malone v. Bowdoin*, 369 U.S. 643, 648 (1962).

[556] *Stump v. Sparkman*, 435 U.S. 349 (1978).

[557] *Imbler v. Pachtman*, 424 U.S. 409 (1976). *But see* Malley v. *Briggs*, 475 U.S. 335 (1986) (police officer entitled only to qualified immunity from damages liability under 42 U.S.C. § 1983 even when acting pursuant to an arrest warrant obtained from a magistrate).

[558] *See Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute immunity of state legislators from private damage claims); *see also Spallone v. United States et al.*, 493 U.S. 265 (1990); *but see Gravel v. United States*, 408 U.S. 606 (1972) (Speech or Debate Clause applies not only to a member of Congress but also to their aide, insofar as the aide's conduct would be a protected legislative act if performed by the Member themself, but does not extend immunity to the Senator's aide from testifying before the grand jury about the alleged arrangement for private publication of Pentagon Papers, as publication had no connection with legislative process); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (Senator's "Golden Fleece" awards for "wasteful government-sponsored research" were not "essential to the deliberations of the Senate" and not legislative acts protected from libel action by the Speech or Debate Clause).

[559] *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982); *cf. United States v. Nixon*, 418 U.S. 683, 710-711 (1974) ("[Courts] have traditionally shown the utmost deference to Presidential responsibilities" for foreign policy and military affairs, and claims of privilege in this area would receive a higher degree of deference than invocations of "a President's generalized interest in confidentiality").

[560] *Smith v. Wade*, 461 U.S. 30, 47-48 (1983).

[561] *Hope v. Pelzer*, 536 U.S. 730 (2002) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

[562] *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014) ("In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a federal right." (citing *Saucier v. Katz*, 533 U. S. 194, 201 (2001)). "The second prong of the qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. Governmental

equally.[563] In *Butz v. Economou*[564] **the Court** extended to federal executive officials a qualified "good faith" immunity previously recognized for state executive officials.[565] For federal agency officials performing adjudicatory or prosecutorial functions, however, the Court recognized an "absolute" immunity.[566] Absolute and qualified immunity are both immunity from suit, not just from a finding of liability.[567] If qualified immunity is successfully invoked, a court can dismiss the suit without going through pretrial procedure and discovery.[568]

In *Berkowitz v. United States*,[569] and subsequently in *United States v. Gaubert*,[570] the Court developed a two-step test to determine whether a particular government action constitutes a discretionary action.[571] A trial court must ascertain the precise governmental action at issue and consider whether the action was discretionary, i.e., "a matter of judgment or choice for the acting employee."[572] If a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, and the employee follows it, the action is not discretionary.[573]

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actors are shielded from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The salient question is whether the state of the law at the time of an incident provided "fair warning" to the defendants that their alleged conduct was unconstitutional." (citing *Hope v. Pelzer*, 536 U. S. 730, 739 & 741 (2002)).

[563] *Butz v. Economou*, 438 U.S. 478 (1978).

[564] *Butz v. Economou*, 438 U.S. 478 (1978).

[565] *Butz v. Economou*, 438 U.S. 478, 496-508 (1978); *see also Pierson v. Ray*, 386 U.S. 547 (1967) (qualified good faith immunity for local and state officials); *Scheuer, Administratrix v. Rhodes, Governor of Ohio, et al.*, 416 U.S. 232 (1974) (Governor's immunity is not absolute but qualified and of varying degree, depending upon the scope of discretion, responsibilities, and the temporal circumstances).

[566] *Butz v. Economou*, 438 U.S. 478, 515-17 (1978).

[567] *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

[568] *See Saucier v. Katz*, 533 U.S. 194 (2001) (ruling on qualified immunity defense must be made early in the trial court's proceeding, because qualified immunity is a defense to stand trial, not merely a defense from liability; a 2-part test: first, whether the facts indicate that a constitutional right has been violated; If so, then whether that right was clearly established at time of alleged conduct); *Pearson v. Callahan*, 555 U.S. 223 (2009) (*Saucier* test need not be applied in qualified immunity claims; trial court discretion to apply *Saucier*);

[569] *Berkowitz v. United States*, 486 U.S. 531 (1988).

[570] *United States v. Gaubert*, 499 U.S. 315 (1991).

[571] *United States v. Gaubert*, 499 U.S. 315, 328 (1991) ("We first inquire whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations." (citing *Berkowitz v. United States*, 486 U.S. 531, 536 (1988)); *id* at 332 ("Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield."); *Berkowitz* at 536.

[572] *Lopez v. United States*, 376 F.3d 1055, 1057 (10th Cir. 1057) (citing *Berkowitz v. United States*, 486 U.S. 531, 536 (1988).

[573] *See Berkowitz v. United States*, 486 U.S. 531, 536 (1988).

In many instances, the issue becomes whether the act in question was controlled by mandatory language, e.g., "shall" or "must," and the employee had no rightful option but to follow the law.

If the court determines that the employee's actions were discretionary, the second step is to find whether the discretion required the exercise of judgment based on considerations of public policy.[574] The challenged action must be based on considerations of social, economic, or political policy—the type of judgments the exception was intended to protect.[575] If the actions were "susceptible to policy analysis," regardless of whether the government employee actually made a policy determination, the second part of the test is met.[576] If both elements of the *Berkowitz-Gaubert* test are met, the discretionary function exception to the sovereign immunity waiver applies and the suit will not stand.[577]

In *Cohen v. United States* ,[578] plaintiff property owners residing near the Semmes Lake and Lower Legion Lake Dams at Fort Jackson, South Carolina alleged that the breach of dams resulted in flood damage to their real and personal properties.[579] The dams were breached after a historic storm event saw rainfall totals in the Columbia/Fort Jackson area exceed the 1000-year recurrence intervals as referenced to the point precipitation frequency estimates in a NOAA Atlas.[580] After reviewing the government's motions to dismiss for lack of subject matter jurisdiction and for summary judgment, the *Cohen* court analyzed the parties' arguments, focusing on the FTCA discretionary function exception.[581] Citing *Gaubert*,[582] the government asserted that the actions in question were two-fold:

1. Whether the government's management at Fort Jackson negligently failed to operate and maintain the dams to a certain standard, and
2. Whether the government negligently failed to conduct mandatory maintenance of the dams. [583]

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[574] *See Berkowitz v. United States*, 486 U.S. 531, 536 (1988).

[575] *See Berkowitz v. United States*, 486 U.S. 531, 536 (1988); *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984).

[576] *See United States v. Gaubert*, 499 U.S. 315, 325 (1991)

[577] *Martinez v. Maruszczak*, 168 P.3d 720,727-29 (2007); *see also Berkovitz v. United States*, 486 U.S. 531 (1988); *United States v. Gaubert*, 499 U.S. 315 (1991).

[578] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, 2018 WL 4635961 (S.C.D. 2018) *aff'd* 2018 U.S. App., LEXIS 17462 (4TH Cir. S.C, June 3, 2020).

[579] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *12 (2018).

[580] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *12 (2018).

[581] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *17 (2018).

[582] *United States v. Gaubert*, 499 U.S. 315 (1991).

[583] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *12 (2018).

As to the first point, the government argued that the case should be dismissed because the plaintiffs didn't cite "any mandatory federal statute, regulation, or policy that required Fort Jackson's management to upgrade the [dam]."[584] "Courts have consistently held that a federal agency's decisions regarding whether, when, and how to make repairs and modifications to its infrastructure are grounded in policy considerations and [are] susceptible to policy analysis."[585] As to the second point, the plaintiffs argued that the discretionary function exemption did not apply because 1) mandatory Army regulations required the Army to maintain the dams; and/or 2) the negligent actions were not susceptible to policy analysis.[586]

In their review, the Court analyzed three aspects of the case: the mandatory standard element of the discretionary function exemption as it related to:

1. The design standard,
2. The dam maintenance, and
3. Public policy considerations[587]

"The FTCA excludes discretionary functions from its waiver of sovereign immunity."[588]

> "This discretionary function exception provides that the sovereign immunity waiver 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 failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee or the Government, whether or not the discretion involved be abused."[589]

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[584] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *18 (2018).

[585] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *18-19 (2018) (citing *Baum v. United States*, 986 F.2d 716, 722 (4th Cir. 1993) (observing that "design and construction decisions [are] just the kind of planning-level decisions of which the Court spoke in *Gaubert*.")).

[586] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *21 (2018) (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) ("The discretionary function exception will not apply when a federal statute, regulation, or policy specifically describes a course of action for an employee to follow.")).

[587] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *27-33 (2018); *see also Estate of Gleason v. United States*, 857 F.2d 1208 (8th Cir. 1988 (aspects of project design, e.g., precise location of structure typically considered discretionary); *In re Ohio River Disaster Litigation*, 862 F.2d 1237 (6th Cir. 1988) (ACOE decision to manage water levels and releases is discretionary function).

[588] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *23 (2018) (quoting *Johnson v. United States*, C/A No.: 5:17-cv-00012, 2018 U.S. Dist. LEXIS 148189, 2018 WL 4169141 at *3 (W.D. Va. Aug. 30, 2018) (citing 28 U.S.C. § 2680(a)), *aff'd per curium*, *Johnson v. United States*, No. 18-2048 LEXIS 15894 (4th Cir. Va., May. 29, 2019).

[589] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *23 (2018) (quoting *Johnson v. United States*, C/A No.: 5:17-cv-00012, 2018 U.S. Dist. LEXIS 148189, 2018 WL 4169141 at *3 (W.D. Va.

"The exception exists in order '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.'"[590]

> "[T]he exception is an acknowledgement that an agency, charged with the daunting task of administering a government policy or agenda, cannot be expected to create regulations that serve as a blueprint for all conceivable factual situations arising within the scope of its regulatory authority."[591]

"[W]hen necessary, agencies may enact regulations that empower government decision-makers with the authority to make choices or judgments based on the underlying policy goal of the regulatory regime."[592] "Such decisions are protected from liability by the discretionary function exception when the decision-maker, exercising [their] government-created discretion, bases the decision on the policy concerns of the governing regulatory regime."[593] "To state a claim under the FTCA, a plaintiff has the burden of stating a claim for a state-law tort and establishing that

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Aug. 30, 2018) (quoting 28 U.S.C. § 2680(a)), *aff'd per curium*, *Johnson v. United States*, No. 18-2048 LEXIS 15894 (4th Cir. Va., May. 29, 2019).

[590] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *24 (2018) (quoting *McMellon v. United States*, 395 F. Supp. 2d at 427 (S.D.W. Va. 2005); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)); *see also Judd v. United States*, 650 F. Supp. 1503 (S.D. Cal., 1987) (Forest Service's decision not to post warning signs at waterfall in national forest ¼ mile from campground and not accessible was discretionary); *cf. Mandel v. United States*, 793 F.2d 964 (8th Cir., 1986) (Park Service liable for failure to warn of hidden rocks in stream used for swimming and diving); *Coates v. United States*, 612 F. Supp. 592 (D.C. Ill., 1985) (federal government liable for failure to give adequate flash flood warning to campers in Rocky Mountain National Park and failure to develop adequate emergency management plan); *Oahe Conservancy Sub-District v. Alexander*, 493 F. Supp. 1294, 1297 (D. S.D. 1980); *Ducey v. United States*, 830 F.2d 1071 (9th Cir., 1983) (federal government potentially liable for failure to warn of flash flood where Lake Mead National Recreation Area subject to severe flooding); *Wilson v. Texas Parks and Wildlife Department*, 8 S.W.3d 634 (Tex. 1999) (Parks and Wildlife Department potentially liable for in adequately functioning "flood early warning" system that resulted in deaths although Department did not own river).

[591] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *24 (2018) (quoting *McMellon v. United States*, 395 F. Supp. 2d at 427 (S.D.W. Va. 2005).

[592] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *24 (2018) (quoting *McMellon v. United States*, 395 F. Supp. 2d at 427-28 (S.D.W. Va. 2005).

[593] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *24 (2018) (quoting *McMellon v. United States*, 395 F. Supp. 2d at 428 (S.D.W. Va. 2005). *See also Commonwealth of Pennsylvania v. National Association of Flood Insurance*, 520 F. 2d 11 (3rd Cir. 1975) (federal district court rejected billion dollar claim against the FIA after tropical storm Agnes caused extensive damage from flooding and mudslides; against argument that FIA had not adequately publicized NFIP as required by enabling statute and, therefore, many properties in Pennsylvania were uninsured, denied the claim and held that FIA had distributed brochures and carried out other public information activities and that precise nature of such activities was discretionary), *remanded to* 420 F. Supp. 221 (M.D. Pa. 1976).

the discretionary function exception does not apply."[594] If the exception does apply, the court "must dismiss the affected claims for lack of subject matter jurisdiction."[595]

In *Indemnity Insurance*, the United State Court of Appeals for the Fourth Circuit provided the following summary of the test used to determine the applicability of the discretionary function exception:

> "To determine whether conduct by a federal agency or employee fits within the discretionary function exception, we must first decide whether the challenged conduct 'involves an element of choice.'[596] [T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because "the employee has no rightful option but to adhere to the directive."[597]

If we determine that the challenged "conduct does involve such discretionary judgment, then we must determine 'whether the judgment is of the kind that the discretionary function exception was designed to shield,' i.e., whether the challenged action is 'based on considerations of public policy.'"[598] Critical to proper analysis, this inquiry focuses "not on the agent's subjective intent in exercising the discretion. . ., but on the nature of the actions taken and whether they are susceptible to policy analysis."[599] Thus, "in the usual case" a court should "look to the nature of the challenged decision in an objective, or general sense, and ask whether that decision is one which we would expect inherently to be grounded in a consideration of policy."[600] "Moreover, when a statute, regulation, or agency guideline permits a government agent to exercise

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[594] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *24 (2018) (quoting *Spotts v. United States*, 613 F.3d 559, 569 (5th Cir. 2010).

[595] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352, *24-25 (2018) (quoting *Indemnity Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009) (citing *Williams v. United States*, 50 F.3d 299, 304-305, (4th Cir. 1995)).

[596] *Suter v. United States*, 441 F.3d 306, 310 (4th Cir. 2006) (quoting *Berkowitz v. United States*, 486 U.S. 531, 536 (1988).

[597] *Berkowitz v. United States*, 486 U.S. 531, 536 (1988).

[598] *Suter v United States*, 441 F.3d 306, 311 (4th Cir 2006) (quoting *Berkowitz v. United States*, 486 U.S. 531, 536-37 (1954). Courts consider public policy in deciding whether to hold governments or others liable for flood damage in some circumstances. *See Golding v. Ashley Cent. Irr. Co.*, 902 P.2d 142, 146 (Utah 1995) (governments and landowners maintaining irrigation canals not liable for the drowning of children based upon public policy considerations favoring irrigation in the West); *Butler v. Ads*, 717 N.W.2d 760 (Wisc. 2006) (City of Shell Lake not liable for gradually rising waters in Shell Lake and resulting flood damage as a matter of public policy).

[599] *Gaubert v. United States*, 499 U.S. 315, 325 (1991).

[600] *Baum v. United States*, 986 F.3d 716, 721 (4th Cir. 1993).

discretion, 'it must be presumed that the agents acts are grounded in policy when exercising that discretion.'"[601]

> "Therefore, upon consideration of the foregoing, the court finds that the Government's alleged negligent conduct falls within the discretionary function exception and does not form a proper basis for a lawsuit under the FTCA. Accordingly, the court finds that it lacks subject matter jurisdiction over these actions and must dismiss them."[602]

III.D.2. State *Sovereign* Immunity

III.D.2.a. Introduction

Generally, a state government is immune from tort suits by individuals under the doctrine of sovereign immunity.[603] For over 100 years following the Court's decision in *Chisholm*,[604] states enjoyed protection from lawsuits, and the Court extended Eleventh Amendment protections to prohibit suits against a state by its own citizens. These protections began to weaken in 1908 when the Court decided that state immunity was not without exceptions and that states could be sued for an unconstitutional action by the state.[605] Lawsuits against states, their officers, and employees are frequently asserted under federal law, e.g., 42 U.S.C. § 1983. 42 U.S.C. § 1983 actions are brought against state officials to remedy the violation of a person's constitutional

[601] *Suter v United States*, 441 F.3d 306, 311 (4th Cir 2006) (quoting *Gaubert v. United States*, 499 U.S. 315, 324 (1991)).

[602] *Cohen v. United States*, 2018 U.S. Dist. LEXIS 166352 at *33; *See also Valley Cattle Co. v. United States*, 258 F. Supp. 12 (D. Haw. 1966) (decision to construct culverts capable of accommodating only waters of two-year storms held to be a discretionary act).

[603] As Justice Holmes explained, the doctrine is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). When a state is sued in federal court pursuant to federal law, the federal government, not the defendant state, is "the authority that makes the law" creating the right of action. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 154 (1996) (Souter, J., dissenting). For the history and jurisprudence of federal sovereign immunity, *see* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[604] *Hans v. Louisiana*, 134 U.S. 1 (1890).

[605] *Ex parte Young*, 209 U.S. 123 (1908).

rights, i.e., constitutional torts.[606] Since these violations are not subject to tort claims acts, vicarious liability does not apply, and officials can be held personally liable.[607]

Soon after the federal government passed the FTCA,[608] state legislatures began to enact state tort claims acts.[609] State statutes waiving sovereign immunity are generally of three types: (1) absolute waivers that abolish state immunity with a statement of state liability for the torts of government entities and employees, (2) limited waivers that maintain state sovereign immunity but waive immunity for certain state acts, and (3) general waivers subject to certain specified exceptions.

III.D.2.b. Early Historical Background

In *Chisolm v. Georgia* (1793), the Court accepted original jurisdiction[610] of a suit brought against the State of Georgia to collect a debt under a contract for supplies delivered to Georgia during the Revolutionary War. The State of Georgia never contested the debt but, instead, refused to appear, claiming that the Court had no jurisdiction over such a suit.

After delaying the case for a term so that the State of Georgia might have fair notice of the Court's intention to proceed, the Court heard plaintiff's counsel and reached a decision. Voting four to one (4/1) the Court determined that it had jurisdiction and entered a judgment by

[606] *See Cort v. Ash*, 422 U.S. 66, 78 (1975) (providing the following four-part test for determining whether a claimant has the right to sue under a federal statute: (1) the claimant has membership in the class for whose benefit the statute was enacted (citing *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)}, (2) there is evidence of congressional intent to confer a private remedy (*see*, *e.g.*, *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974)), (3) there is consistency between the right to sue and Congress' statutory intent (*see, e.g.*, *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 423 (1975); *Calhoon v. Harvey*, 379 U.S. 134 (1964)), and (4) The claim involves a cause of action not traditionally relegated to the states (*see Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *cf. J. I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment)). The test has the effect of requiring both a private right and a private remedy.

[607] *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

[608] See the Federal Tort Claims Act ("FTCA") section.

[609] 3 PREMISES LIABILITY--LAW AND PRACTICE § 12.03 (2022). *See id.* note 7 for a list of states.

[610] *See* U.S. Const. art. III, §2, ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . .—to Controversies between two or more States; —*between a State and Citizens of another State*. . . .") (emphasis supplied), *amended by* U.S. Const. amend. XI; Judiciary Act of 1789, ch.20, § 13, 1 Stat. 80 (1789).

default against Georgia.[611] The use of a majority opinion for the Court had not yet been developed and the justices delivered their individual opinions sequentially.[612]

None of the Justices relied on a congressional grant of jurisdiction.[613] The decision rested on a general power under Article III of the Constitution and the concept of states having only limited sovereignty in a federal democracy.[614] In dissent, however, Justice Iredell refused to find any federal court jurisdiction over state governments absent congressional authorization.[615]

III.D.2.c. Eleventh Amendment

The reaction of several states to the Court's decision in *Chisholm* was swift.[616] The Eleventh Amendment was proposed almost immediately.[617] Among the reasons for such a rapid resulting reaction were state fears of suits by Tory creditors.[618] While individual state debts to British citizens and loyalists were not great, increasing tensions with Great Britain created fear of debts arising from a new conflict and animosity toward paying any such claims.[619]

The Eleventh Amendment states:

[611] *Chisolm v. Georgia*, 2 U.S. (2 Dallas) 419, 479 (1793).

[613] 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, §2.12, at 151 (3d ed. 1999).

[614] The opinions are analyzed in Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1433-41 (1975).

[616] *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting).

[617] The amendment was proposed and passed by Congress on March 4, 1794, and ratified by the several states by February 7, 1795, when the twelfth of the then fifteen states in the Union acted to ratify.

[618] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91-99 (1922). Other reasons may have been popular opinion about the meaning of Article III and theoretical problems concerning the available judicial procedures against a sovereign, though subordinate, unit in a federal system. *Id*.

[619] Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1431-33 (1975).

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[620]

The Eleventh Amendment's swift passage and lack of debate leaves its history silent on many issues other than barring federal jurisdiction in suits by non-citizens against a state for the payment of debts and damages for past actions, absent specific congressional authorization of the federal cause of action.[621] "The Eleventh Amendment lies at the heart of the tension between state sovereign immunity and the desire to have in place mechanisms for the effective vindication of federal rights."[622] Through its jurisprudence, the Court has made the Eleventh Amendment far more controversial than its plain language suggests.[623] "The only thing certain about the Eleventh Amendment . . . is that its meaning and application remain entirely unresolved."[624]

III.D.2.d. Post-Eleventh Amendment Jurisprudence

The Court's jurisprudence following the Eleventh Amendment has directed the allocation of power among the sovereign states and the federal government. In *Cohens v. Virginia* (1821),[625] the Court ruled that federal court review of the judgment of a state court, alleged to be in violation of the Constitution or federal law, did not commence or prosecute a suit against the state but was simply a continuation of one commenced by the state, and thus could proceed in federal court.[626] But, in the course of their opinion, the Court attributed the adoption of the Eleventh Amendment not to objections to subjecting states to suits *per se* but to well-founded concerns about creditors being able to maintain suits against states in federal courts for payment.[627] the Court held that the Eleventh Amendment did not bar suits against the states

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[620] U.S. Const. amend. XI.

[621] 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, §2.12, at 152 (3d ed. 1999).

[622] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 3D ED., VOL. I, (2000), § 3-25, p. 519.

[623] *See e.g.*, William Burnham, *"'Beam Me Up, There's No Intelligent Life Here': A Dialogue on the Eleventh Amendment with Lawyers from Mars*," 75 NEB. L. REV. 551 (1996); *See generally*, DAVID P. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 433-41, (4th ed. 1990); PETER LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 878 (3d. ed. 1994).

[624] William P. Marshall, *Foreword*, *in* MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY, A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION, REFERENCE GUIDES TO THE UNITED STATES CONSTITUTION, NUMBER 3, p. xii (2002).

[625] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

[626] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 409-10 (1821).

[627] "It is a part of our history that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very

under federal question jurisdiction,[628] and did not in any case reach suits against a state by its own citizens.[629]

This line of jurisprudential thinking generally prevailed until the aftermath the Civil War, when Congress expanded the federal courts' general federal question jurisdiction.[630] A large number of states in the South were defaulting on revenue bonds in violation of the Constitution's Contract Clause.[631] As bondholders sought relief in federal courts, the Court's jurisprudence

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serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406–07.

628 "The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. . . . [A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 382–83.

629 "If this writ of error be a suit, in the sense of the Eleventh amendment, it is not a suit commenced or prosecuted 'by a citizen of another state, or by a citizen or subject of any foreign state.' It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 412.

630 Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

631 *See e.g.*, Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C.L. REV. 747 (1981); Orth, *The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction*, 2 TUL. LAW. 2 (1980); Orth, *The Virginia State Debt and the Judicial Power of the*

evolved to hold that the Eleventh Amendment, or the principles "of which the Amendment is but an exemplification,"[632] bars not only suits against a state by citizens of other states but, expanding the bar in *Cohen*, also suits brought by citizens of a state itself.[633]

This expansion of state immunity was formally upheld in *Hans v. Louisiana* (1890),[634] a suit against Louisiana brought by a resident of that state, alleging violation of the Contract Clause by the state's repudiation of its obligation to pay interest on certain bonds. The Court held that Hans could not sue the state due to Eleventh Amendment immunity.[635] The decision was based on: (1) established Court jurisprudence that a citizen could not sue another state even under federal question jurisdiction,[636] and (2) the fact that even though the plaintiff was not a citizen of another state and therefore not within the language of the Eleventh Amendment, the Amendment still precluded his suit.[637]

In 1908, the *Ex parte Young*[638] Court decided that federal courts could hear a case alleging the State of Minnesota passed a law that violated the federal Constitution. The Court found that the circuit court below had jurisdiction because "it involved the decision of Federal questions under the Constitution of the United States."[639] The Court did not examine whether the Fourteenth Amendment limited the Eleventh Amendment because individuals:

> "who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings either of a civil or criminal nature, to enforce against parties affected [by] an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."[640]

United States, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 106 (D. Bodenhamer & J. Ely eds., 1983).

[632] *Ex Parte New York* (No. 1), 256 U.S. 490, 497 (1921).

[633] *See e.g.*, *In re Ayers*, 123 U.S. 443 (1887); *Hagood v. Southern*, 117 U.S. 52 (1886); *The Virginia Coupon Cases*, 114 U.S. 269 (1885); *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446 (1883); *Louisiana v. Jumel*, 107 U.S. 711 (1882). In *Antoni v. Greenhow*, 107 U.S. 769, 783 (1883), three concurring Justices advanced the broader, prevailing reading of the Amendment; *Zito v. N.C. Coastal Res. Comm'n*, 8 F. 4th 281 (4th Cir. 2021) (Eleventh Amendment barred takings claim of citizens from another state against an arm of State of North Carolina.

[634] *Hans v. Louisiana*, 134 U.S. 1 (1890).

[635] *Hans v. Louisiana*, 134 U.S. 1 (1890).

[636] *Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

[637] *Hans v. Louisiana*, 134 U.S. 1, 18-21 (1890).

[638] *Ex parte Young*, 209 U.S. 123 (1908).

[639] *Ex parte Young*, 209 U.S. 123, 145 (1908).

[640] *Ex parte Young*, 209 U.S. 123, 159 (1908).

In *Edelman v. Jordan*,[641] Illinois officials were alleged to be administering the federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with various federal regulations and the Fourteenth Amendment. The respondent asked for declaratory and injunctive relief, including a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AARB benefits wrongfully withheld. The Court reversed the lower court's award of retrospective benefits.

The *Edelman* Court reviewed and reiterated Eleventh Amendment law as set forth in *Hans* and subsequent cases. First, despite the terms, the Eleventh Amendment nonetheless prevented an unconsenting state from suit in federal courts by the state's own citizens. [642] Second, the Eleventh Amendment precluded suits by citizens in federal courts where the un-consenting state was the real party in interest. Thus, "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[643] Third, *Ex parte Young*[644]--permitting the Civil War Amendments[645] "to serve as a sword rather than merely as a shield, for those whom they were designed to protect," allowed prospective relief only. Even though a 42 U.S.C. § 1983 action might be brought in federal court by an individual, the Eleventh Amendment limited the federal court's remedial power to prospective relief only.[646] Fourth, state participation in a program through which the federal government provides assistance was "not sufficient to establish consent on the part of the State to be sued in the federal courts."[647]

Fitzpatrick v. Bitzer[648] revisited the fourth basis for the *Edelman* decision – did Congress have the power to "authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment." The Court conceded that the "Eleventh Amendment, and the principle of state sovereignty which it embodies" were "limited by the enforcement provisions of § 5 of the Fourteenth Amendment." Therefore,

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[641] *Edelman v. Jordan*, 415 U.S. 651 (1974).

[642] In support of this proposition, the Court referred to the arguments of James Madison and John Marshall in the Virginia ratifying convention, in which they both stated that they did not believe that a controversy between a state and a foreign state could arise in federal court without the consent of the state. Hamilton, in Federalist No. 81, indicated that sovereign immunity would remain with the states unless there was a surrender of this immunity in the plan of the Constitution. *Edelman v. Jordan*, 415 U.S. 651, 662 (1974).

[643] *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

[644] *Ex parte Young*, 209 U.S. 123 (1908).

[645] U.S. Const. amends. XIII, XIV, and XV.

[646] *Edelman v. Jordan*, 415 U.S. 651, 664 (1974).

[647] *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

[648] *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976),

Congress was authorized to provide "for private suits against States or state officials which are constitutionally impermissible in other contexts."[649]

In *Library of Congress v. Shaw* (1986),[650] attorney's fees as well as interest on those fees were awarded to Shaw by the lower court.[651] On review, the Court held that waivers of sovereign immunity were to be strictly construed in favor of the sovereign, and the "no-interest rule"[652] applied to preclude the award of increased compensation to the respondent's counsel for the delay in receiving federal payment for his services.[653] Congress must affirmatively and separately declare liability for interest in order for interest to be available against the federal government.[654] During this period, Justice Brennan argued that *Hans* was wrongly decided, that the Eleventh Amendment was intended to limit jurisdiction against the states only in diversity cases, and that *Hans* and its progeny should be overruled.[655]

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[649] *Fitzpatrick v. Bitzer*, 427 U.S. 456 (1976),

[650] *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

[651] The suit in *Irwin* was brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e et seq.

[652] The Court discussed the long history of the "no-interest rule" and its consistent holding that apart from "constitutional requirements, in the absence of specific provision by contract or statute, or `express consent . . . by Congress,' interest does not run on a claim against the United States." *Shaw*, 478 U.S. 310, 317 (1986) (citing *United States v. Louisiana*, 446 U.S. 253, 264 -265 (1980), quoting *Smyth v. United States*, 302 U.S. 329, 353 (1937) (footnote omitted)). *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 387, n. 17 (1980). *See also Adams v. United States*, 350 F.3d 1216, 1229-30 (Fed. Cir. 2003) (holding federal employees awarded overtime pay could not obtain prejudgment interest); *Smith v. Principi*, 281 F. 3d 1384, 1387 (Fed. Cir. 2002) (veteran successfully challenged disability rating to be awarded past-due compensation could not recover interest); *Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1310-12 (11th Cir. 2001) (prejudgment interest not awardable for flood insurance benefits where insurer was subsidized by FEMA and any interest would be a direct charge on the public treasury). *See generally* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 1.10(c), at 70-72 (4th ed., ALI-ABA 2006).

[653] *Library of Congress v. Shaw*, 478 U.S. 310, 314-323 (1986) (Congress must affirmatively and separately declare liability for interest for that remedy to be available against federal government).

[654] *Library of Congress v. Shaw*, 478 U.S. at 317-19. In the Civil Rights Act of 1991, Pub. L. No. 102-66, § 114, 105 Stat. 1071, 1079, Congress used literal language to expressly allow awards of prejudgment interest in Title VII employment discrimination suits against the federal government, overturning *Shaw* to that extent.

[655] *See e.g.*, *Atascadero St. Hosp. v. Scanlon*, 473 U.S. 234, 246 (Brennan, J., dissenting); *Welch v. Texas Dep't. of Highway & Pub. Transp.*, 483 U.S. 468, 496 (1987) (Brennan, J., dissenting); *Dellmuth v. Muth*, 491 U.S. 223,233 (1989) (Brennan, J., dissenting); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 309 (1990) (Brennan, J., concurring). *See also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring).

In *Pennsylvania v. Union Gas Company*,[656] a fragmented Court held that the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act, permitted a suit for monetary damages against a state in federal court and that Congress had the authority to create such a cause of action and abrogate the states' Eleventh Amendment immunity under the Commerce Clause.

In *Irwin v. Department of Veterans Affairs* (1990),[657] the Court held that the limitation period on claims against the federal government arising under Title VII need not be strictly enforced and that limitations periods were subject to equitable tolling under exceptional circumstances, such as with claims against private parties. [658]

> "[W]e think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver [of immunity]. Such a principle is likely to be a realistic assessment of legislative intent, as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so."[659]

The *Shaw* and *Irwin* dichotomy closed out the decade. Only seven years after a fragmented Court in *Union Gas* ruled that Congress could use its Commerce Clause power to remove a state's Eleventh Amendment immunity, the Court overruled that decision (five to four). In *Seminole Tribe of Florida v. Florida* (1996),[660] petitioners brought suit against the State of Florida and their Governor[661] under the Indian Gaming Regulatory Act[662] that authorizes suits against state governments in federal court to enforce good faith negotiations with tribes attempting to allow gambling on reservations.[663] Florida and its Governor moved to dismiss, alleging that the suit violated Florida's sovereign immunity from suit in federal court.

The Court held that the Indian Commerce Clause did not grant Congress the power to abrogate the state's Eleventh Amendment immunity, and *Ex parte Young*[664] does not permit a native tribe

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[656] *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989).

[657] *Irwin v. Dep't of Vet. Affairs*, 498 U.S. 89 (1990).

[658] *Irwin v. Dep't of Vet. Affairs*, 498 U.S. 89, 93-96 (1990).

[659] *Irwin v. Dep't of Vet. Affairs*, 498 U.S. 89, 95-96 (1990).

[660] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[661] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 51 (1996).

[662] 25 U.S.C. § 2710(d)(1)(C).

[663] 25 U.S.C. § 2710(d)(7).

[664] *Ex parte Young*, 209 U.S. 123 (1908).

to force good faith negotiations by suing a state's Governor. In overruling *Union Gas*,[665] the Court held that the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitation placed upon federal jurisdiction.[666]

The following year, *Idaho v. Coeur d'Alene Tribe of Idaho*[667] held that the Coeur d'Alene Tribe could not maintain an action against the State of Idaho to press its claim to Lake Coeur d'Alene due to the state's Eleventh Amendment immunity from suit, notwithstanding the exception recognized in *Ex parte Young*.[668]

> "It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case."[669]

In a 5–4 decision the *Alden v. Maine*[670] Court concluded that Article I of the Constitution does not provide Congress with the ability to subject a nonconsenting state to private suits for damages in that state's own courts.[671] In addition, the Court held that Maine was not a consenting party to the suit, upholding the ruling of the Supreme Court of Maine dismissing the suit for lack of jurisdiction.[672] *Alden*, along with two other cases regarding Florida pre-paid college accounts,[673] have been characterized by scholars as the *Alden* Trilogy.[674]

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[665] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

[666] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996).

[667] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

[668] *Ex parte Young*, 209 U.S. 123 (1908).

[669] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, (1997) (citing *Utah Div. of State Lands* v. *United States,* 482 U. S. 193, 195 (1987), the Court found an "essential attribute of sovereignty" preclusion to the *Young* exception). *Coeur d'Alene*, 521 U.S 261, 283 (1997).

[670] *Alden v. Maine*, 527 U.S. 706 (1999).

[671] *Alden v. Maine*, 527 U.S. 706, 754 (1999).

[672] *Alden v. Maine*, 527 U.S. 706, 759-60 (1999).

[673] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999).

[674] Roger C. Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323 (2000); Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631 (2000); Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the* Alden *Trilogy*, 109 YALE L.J. 1927 (2000).

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[675] the Court held the Patent and Plant Variety Protection Remedy Clarification Act's abrogation of states' sovereign immunity[676] was invalid because it cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause.

> "The historical record and the scope of coverage therefore make it clear that the Patent [and Plant Variety Protection] Remedy [Clarification] Act cannot be sustained under §5 of the Fourteenth Amendment. . . . The statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*."[677]

Florida Prepaid was a companion case to the similarly named *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board.*[678] In *College Savings*, the Court held that sovereign immunity precluded a private action brought under the Lanham Act.[679] For such an action to be sustained, the Court explained, the state must either consent to the suit or have had its sovereign immunity waived by Congress.[680] Dismissed for lack of jurisdiction because the Trademark Remedy Clarification Act did not abrogate state sovereign immunity for the purposes of the case, the state did not expressly waive sovereign immunity, and the doctrine of constructive waiver was no longer good law.[681]

In *Verizon Maryland., Inc. v. Public Service Comm'n of Maryland,* [682] the Court held that to determine whether *Ex parte Young* applies to avoid an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry" into whether the complaint alleges an ongoing violation of federal law and seeks prospective relief; "prayer for injunctive relief—that state

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[675] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999).

[676] 35 U. S. C. §§271(h), 296(a).

[677] *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 647-48 (1999) (footnotes omitted).

[678] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (overruling *Parden v. Terminal Railway of the Alabama State Department*, 377 U.S. 184 (1964)).

[679] § 43(a) Lanham Act 15 U.S.C.S. § 1125(a); *see College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 691 (1999).

[680] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 670 (1999).

[681] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680 (1999).

[682] *Verizon Md., Inc. v. Public Service Comm'n of Md.*, 535 U.S. 635 (2002).

officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfied our 'straightforward inquiry.'"[683])

In *Virginia Office for Protection and Advocacy v. Stewart*,[684] the Court noted that the protection of state dignity under *Seminole Tribe* and its progeny has limits. The Court determined that *Ex parte Young* allowed a federal court to hear a lawsuit for prospective relief against state officials brought by another agency of the same state.[685] The *Ex parte Young* exception to sovereign immunity applied because, *inter alia*: (1) the state agency's suit satisfied the straightforward inquiry by alleging that respondents' refusal to produce the requested records violated federal law; and by seeking prospective relief,[686] (2) Virginia law created the agency and gave it the power to sue state officials,[687] (3) the respondents' asserted dignitary harm was simply unconnected to the sovereign-immunity interest,[688] and (4) the apparent novelty of this sort of suit did not at all suggest its unconstitutionality.[689]

[683] *Verizon Md., Inc. v. Public Service Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting Idaho v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in judgment)).

[684] *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247 (2011).

[685] *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 261 (2011).

[686] *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

[687] *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011).

[688] *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 258-59 (2011).

[689] *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 260-61 (2011).

Even if "the doctrine of sovereign immunity is founded upon an anachronistic fiction"[690]—that "the King can do no wrong"[691]—*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe* noted that sovereign immunity "is an established part of our law"[692] whose narrowing might well disrupt settled doctrinal expectations, dozens of judicial and legislative decisions, and all of the plans made in reliance on this large corpus of law.[693]

[690] *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (Stevens, J., concurring); *see also Nevada v. Hall*, 440 U.S. 410, 415 (1979) (the fiction that the King could do no wrong "was rejected by the colonists when they declared their independence from the Crown"); *Langford v. United States*, 101 U.S. 341, 343 (1880) ("We do not understand that . . . the English maxim [that the King can do no wrong] has an existence in this country"); Rodolphe J. A. de Seife*, The King Is Dead, Long Live the King! The Court-created American Concept of Immunity: the Negation of Equality and Accountability under Law*, 24 HOFSTRA L. REV. 981, 986 (1996) ("The notion that sovereign immunity and judicial immunity are grounded in the common law may have been correct insofar as the English King's immunity extending to his judges was concerned. . . . [I]t is fallacious and arrogant to extend this concept to the United States where the people are the sovereign and have entered into a contract between themselves and the government they created. American political thought promotes that the agents of government are 'servants' of the people, yet recent developments seem to depart increasingly from this principle to rejoin the royal prerogatives which the American Revolution abolished to gain independence from the English King.").

Justice Souter identified two (2) distinct rules: "that the King or the Crown, as the font of law, is not bound by the law's provisions," and "that the King or Crown, as the font of law, is not subject to suit in its own courts." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 101 (1996) (dissenting opinion). The first has no application in this country. *See Clinton v. Jones*, 520 U.S. 681, 697 n.24 (1997). The second has an uncertain foundation; the scope, and even the existence, of this kind of immunity in pre-Revolutionary America remains disputed. *See* John Gibbons, *"The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,"* 83 COLUM. L. REV. 1889, 1895-99 (1983).

[691] 1 W. BLACKSTONE, COMMENTARIES *244. Professor Jaffe has contended that this maxim "originally meant precisely the contrary of what it later came to mean"—i.e., "it meant that the king must not, was not allowed, not entitled, to do wrong." Louis L. Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4 (1963) (citation omitted). *See also* 1 BLACKSTONE, at*246 ("the prerogative of the crown extends not to do any injury"). Pollock and Maitland found sovereign immunity in England to be an historical "accident" caused by the pyramidal structure of the feudal courts; not implicit in the concept of sovereignty. *See* 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW 518 (2d ed. 1898).

[692] *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (Stevens, J., concurring) (citing *Nevada v. Hall*, 440 U.S. 410, 414-416 (1979)).

[693] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 3D ED., VOL. I, (2000), § 3-25, p. 520.

III.D.3. Local *Government* Immunity

III.D.3.a. Introduction

Excluded from the doctrine of *sovereign* immunity are local governments and political subdivisions of the state that are creatures of the legislature. They exercise delegated power within the limitations prescribed by the legislature, and are liable for their actions unless shielded from tort suits by virtue of *governmental* immunity, i.e., because the state grants them immunity, usually via state constitution or state law. The local government can waive this governmental immunity by contract and purchase insurance to cover any resulting liability.

Some scholars posit that a form of sovereign immunity protects local governments from federal constitutional suits.[694] Federal courts have drawn on principles of sovereignty and federalism to provide broad protection to local governments and their agents.[695] Those agents acting in judicial,[696] legislative, [697] and prosecutorial[698] functions have "absolute" immunity from suit in their individual capacities.[699] Other local government actors often have "qualified" immunity from suit as long as they do not violate clearly established law that a reasonable person would have known about at the time of the violation.[700] Absolute and qualified immunity are central components of a *de facto* form of local *governmental* immunity.[701]

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[694] Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409 (2016) (arguing for permitting suits against local governments when no other federal remedy is available and placing restrictions on the execution of judgments instead of restricting the availability of suits).

[695] *See e.g.*, *Connick v. Thompson*, 563 U.S. 51 (2011); Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 411 (2016).

[696] *See Stump v. Sparkman*, 435 U.S. 349, 356 (1978) (holding judge entitled to absolute immunity for authorizing sterilization of high school student without her knowledge or consent; *Pierson v. Ray*, 386 U.S. 547 (1967).

[697] *See Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (local legislatures—and mayors under certain circumstances—entitled to absolute legislative immunity).

[698] *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (concluding prosecutor entitled to "same absolute immunity under § 1983 that prosecutor enjoys at common law").

[699] *See generally Scheuer v. Rhodes*, 416 U.S. 232, 239-42 (1974) (discussing the connection between individual immunities and principles of sovereign immunity); abrogated on other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

[700] *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (holding local school officials were entitled to qualified immunity for strip searching a middle-school student thought to have unauthorized ibuprofen on campus).

[701] Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 443 (2016).

III.D.3.b. Historical Background

The various aspects of sovereign immunity were established over time. In the United States, sovereign immunity typically applies to the federal and state governments, though states have extended governmental immunity to agents and subdivisions of the state, e.g., government agencies, employees, local governments, special districts, etc. Precedent for extending the immunity to local government is also derived from English common law. In 1788, an English court extended sovereign immunity to a municipality, holding that municipalities would not be liable for tort claims resulting from the municipality's negligence.[702]

In *Russell v. The Men of Devon*, Russell sued all of the male inhabitants of the unincorporated County of Devon for damage to his wagon resulting from a bridge being out of repair. It was undisputed that the County had the duty to maintain such structures. *The Men of Devon* court held that the plaintiff's action would not lie because to permit it would lead to an "infinity of actions,"[703] because there was no fund to satisfy the claim, and because only the legislature should impose such liability. *The Men of Devon* court noted the equitable principle that permits a remedy for every injury resulting from the neglect of another, but stated that the more applicable principle is "that it is better that an individual should sustain an injury, than that the public should suffer an inconvenience."[704]

III.D.3.c. U.S. Supreme Court Jurisprudence

On the same day the Court decided *Hans*, it decided in *Lincoln County v. Luning*[705] that a state's Eleventh Amendment sovereign immunity did not extend to its political subdivisions.[706] Individuals could therefore sue cities, counties, school boards, etc., in federal court for whatever relief was appropriate, including money damages susceptible to payment from the local treasury.[707] In *Lincoln County*, Luning held coupon bonds issued by the County upon which the

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[702] *Russell v. The Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 (1788) ("*The Men of Devon*").

[703] *Russell v. The Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359, 362 (1788).

[704] *Russell v. The Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359, 362 (1788); *see also Cauley v. City of Jacksonville*, 403 So. 2d 379, 381-82 (Fla. 1981) (citing *The Men of Devon* as "the standard for local-government sovereign immunity"); https://corporate.findlaw.com/law-library/development-of-common-law-governmental-immunity-and-overview-of.html.

[705] *Lincoln County v. Luning*, 133 U.S. 529 (1890).

[706] *Lincoln County v. Luning*, 133 U.S. 529, 530-31 (1890); *Jinks v. Richland Cnty.*, 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit.").

[707] *See generally* Melvyn R. Durchslag, *Should Political Subdivisions be Accorded Eleventh Amendment Immunity*, 43 DEPAUL L. R. 577, 588 (1994); William A. Fletcher, *A Historical*

County defaulted. Luning sued the County in federal circuit court. Citing *Osborn*,[708] the Court held that Eleventh Amendment immunity applied only when the state itself is a party.[709] The argument that the state was a real party of interest whenever one of its political subdivisions is a defendant failed to persuade the Court.[710] Noting the slight broadening of *Osborn* by *In re Ayers*,[711] the Court stated, "while the county is territorially a part of the State, yet politically it is also a corporation created by, and with such powers as are given to it by, the State." The Court held the county was as any other corporation created by the state, and thus not entitled to claim the state's Eleventh Amendment immunity. The *Lincoln County* Court reserved judgment on whether the state could explicitly confer Eleventh Amendment immunity on its political subdivisions by expressly limiting jurisdiction over them only to state courts.

Lincoln County held that federal jurisdiction is available when the defendant is one of the state's political subdivisions.[712] Over 70 years later, in *Mt. Healthy City Board of Education v. Doyle*,[713] the Court decided to tackle "whether such an entity had any Eleventh Amendment immunity. . ."[714] holding that a school board had no such immunity.[715]

III.D.4. Generally

Most states have two parallel systems and bodies of law for state sovereign tort immunity and governmental tort immunity for political subdivisions created by the state (e.g., city, county, district, town, etc.). Although the law involving local government immunity varies from state to state, it generally focuses on:

1. whether the government actor who caused the injury was acting within the scope of their governmental duties, and
2. whether the government actor's action is the type that public policy deems worthy of immunity.

Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant Rather Than a Prohibition of Jurisdiction, 35 STANFORD L. REV. 1033 (1996).

[708] *Osborn v. Bank of the United States*, 22 U.S. 738 (1822).

[709] *Lincoln County v. Luning*, 133 U.S. 529, 532 (1890).

[710] *Lincoln County v. Luning*, 133 U.S. 529, 532 (1890).

[711] *In re Ayers*, 123 U.S. 443 (1887).

[712] *Lincoln County v. Luning*, 133 U.S. 529 (1890).

[713] *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).

[714] *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977).

[715] *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 281 (1977).

Creating standards and tests to separate the activities that should be protected from those activities that should create tort liability has been a complicated and imperfect jurisprudential effort.[716] There is much blurring and conflating of concepts used to categorize and describe local government actions from state to state, but the concepts and terminology employed generally have distinct differences.[717]

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[716] *See Owen v. City of Independence, Missouri, et al.*, 445 U.S. 622, 644 n.26 (1980) ("A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound.") (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (*on reh'g*). As recently as *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 142 S. Ct. 2228, 213 L. Ed. 2d 545, 2022 U.S. LEXIS 3057, 29 Fla. L. Weekly Fed. S 486, 2022 WL 2276808 (2022) (holding *inter alia* that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), were overruled as Constitution did not reference abortion, and right to abortion was neither implicitly protected by a constitutional provision, deeply rooted in nation's history and tradition, implicit in ordered liberty concept, nor justified as component of broader entrenched right), the dissent created an Appendix, *id.* at 2350-54 (analyzing the 28 cases the majority relied on to overrule *Roe* and *Casey*, explaining that the Court in each case relied on traditional *stare decisis* factors in those decisions), referenced *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (1996) (holding that Congress cannot abrogate state-sovereign immunity under its Article I commerce power, and rejecting the result in *Pennsylvania v. Union Gas Co.*, 491 U. S. 1 (1989), seven years later, noting the decision in *Union Gas* never garnered a majority), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985) (holding that local governments are not constitutionally immune from federal employment laws, and overruling *National League of Cities v. Usery*, 426 U. S. 833 (1976), after "eight years" of experience under that regime showed *Usery's* standard was unworkable and, in practice, undermined the federalism principles the decision sought to protect), underscoring the Court's own complicated and imperfect jurisprudential efforts in the immunity arena.

[717] *See Owen v. City of Independence, Missouri, et al.*, 445 U.S. 622, 644-50 (1980) ("[Prior to the enactment of 42 U.S.C. § 1983], there were two [common law] doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality's 'governmental' and 'proprietary' functions; as to the former, the city was held immune, whereas in its exercise of the latter, the city was held to the same standards of liability as any private corporation. The second doctrine immunized a municipality for its 'discretionary' or 'legislative' activities, but not for those [that] were 'ministerial' in nature. A brief examination of the application and the rationale underlying each of these doctrines demonstrates that Congress could not have intended them to limit a municipality's liability under § 1983.

"The governmental-proprietary distinction owed its existence to the dual nature of the municipal corporation. On the one hand, the municipality was a corporate body, capable of performing the same "proprietary" functions as any private corporation, and liable for its torts in the same manner and to the same extent, as well. On the other hand, the municipality was an arm of the State, and when acting in that "governmental" or "public" capacity, it shared the immunity traditionally accorded the sovereign. But the principle of sovereign immunity—itself a somewhat arid fountainhead for municipal immunity—is necessarily nullified when the State expressly or impliedly allows itself, or its creation, to be sued. Municipalities were therefore liable not only for their "proprietary" acts, but also for those "governmental" functions as to which the State had withdrawn their immunity. And, by the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city's immunity from liability for the nonperformance

or misperformance of its obligation. See, e. g., *Weightman v. The Corporation of Washington*, 1 Black 39, 50-52 (1862); *Providence v. Clapp*, 17 How. 161, 167-169 (1855). *See generally* T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 120, p. 139 (1869); Note, *Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents*, 30 Am. St. Rep. 376, 385 (1893). Thus, despite the nominal existence of an immunity for "governmental" functions, municipalities were found liable in damages in a multitude of cases involving such activities.

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"The critical issue is whether injury occurred while the city was exercising governmental, as opposed to proprietary, powers or obligations—not whether its agents reasonably believed they were acting lawfully in so conducting themselves. More fundamentally, however, the municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed.

"The second common-law distinction between municipal functions—that protecting the city from suits challenging "discretionary" decisions—was grounded not on the principle of sovereign immunity, but on a concern for separation of powers. A large part of the municipality's responsibilities involved broad discretionary decisions on issues of public policy—decisions that affected large numbers of persons and called for a delicate balancing of competing considerations. For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government. *See Johnson v. State*, 69 Cal. 2d 782, 794, n. 8, 447 P. 2d 352, 361, n. 8 (1968) (*en banc*) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government"). In order to ensure against any invasion into the legitimate sphere of the municipality's policymaking processes, courts therefore refused to entertain suits against the city "either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character." 2 J. DILLON, LAW OF MUNICIPAL CORPORATIONS § 753, at 862.

"Although many, if not all, of a municipality's activities would seem to involve at least some measure of discretion, the influence of this doctrine on the city's liability was not as significant as might be expected. For just as the courts implied an exception to the municipality's immunity for its "governmental" functions, here, too, a distinction was made that had the effect of subjecting the city to liability for much of its tortious conduct. While the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment. *See*, *e. g.*, *Hill v. Boston*, 122 Mass. 344, 358-359 (1877) (dicta) (municipality would be immune from liability for damages resulting from its decision where to construct sewers, since that involved a discretionary judgment as to the general public interest; but city would be liable for neglect in the construction or repair of any particular sewer, as such activity is ministerial in nature). *See generally* C. RHYNE, MUNICIPAL LAW § 30.4, pp. 736-737 (1957); W. WILLIAMS, LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT § 7. Thus municipalities remained liable in damages for a broad range of conduct implementing their discretionary decisions.").

III.D.4.a. Governmental vs. Proprietary Actions

At common law, the sovereign state enjoyed absolute immunity while local governments did not.[718] There are certain variations from state to state but, generally, local governments are only immune for *governmental* actions, i.e., those inherent state police powers that embody the government's fundamental legal obligation to preserve the general public health, safety, and welfare.[719] Local governments are generally not immune from liability for *proprietary* actions, i.e., when acting like a private business on their own behalf or for the benefit of their own citizens.[720] When injuries arise from a proprietary action, local governments can be held liable like a private individual for negligence.[721]

For years, local governments were liable only for proprietary actions and not governmental actions.[722] The attempted distinction classified various local government activities—e.g., education, fire protection, garbage collection, hospitals, streets and sidewalk maintenance, sewage, provision of electricity, transportation, water, stormwater, etc.—as either inherently public in nature ("governmental") or more akin to private sector ("proprietary") functions. Once classified as governmental, governmental immunity applied at all levels of activity.

Governmental functions are generally those activities that are discretionary, legislative, political, or public in nature and performed for benefit of the general public good on behalf of the

[718] *See Owen v. Independence*, 445 U.S. 622, 638 (1980).

[719] 3 Premises Liability--Law and Practice § 12.04 (2022); *see*, *e.g.*, *Murphy v. Muskegon County*, 413 N.W.2d 73 (Mich. Ct. App. 1987); *see Margate Cmty. Redevelopment Agency v. New Urban Cmtys., LLC*, 318 So. 3d 576 (Fla. Dist. Ct. App. 2021) (tort claims barred by sovereign immunity; denial of land use plan amendment is "discretionary governmental function").

[720] *See e.g.*, W. E. Shipley, Annotation, *State's immunity from tort liability as dependent on governmental or proprietary nature of function*, 40 A.L.R.2D 927 (xxxx); 38 AM. JUR. *Municipal Corporations* §§ 572 et seq.

[721] *See Owen v. Independence*, 445 U.S. 622, 638-640 (1980); Negligence in the Torts Section of this Guide.

[722] *See generally*, W. WILLIAMS, LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT § 4, at 9, 16 (1901); 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.02 (3d rev. ed. 1977); W. PROSSER, LAW OF TORTS (4th ed. 1971) § 131, at 977-983; Fleming James, Jr., *Tort Liability of Governmental Units and Their Officers*, 22 U. Chi. L. Rev. 610, 611-612, 622-629 (1955).

state.[723] Courts have had difficulty applying these inexact standards to specific activities, causing confusion and irreconciled splits of authority.[724]

Proprietary functions are those activities that are chiefly commercial or for the private advantage of the community. A proprietary function is one that a private entity can perform and that is not uniquely for the benefit of the general public. Yet there are gray areas where states reach inapposite results.[725]

The distinction between actions deemed governmental (immune) from proprietary (not immune) often focuses its analysis on the level at which the decision to act is made. Eventually, and jurisprudentially, this basic distinction lost effective rationale for the immunity privilege.[726] Inconsistencies evolved regarding whether activities were governmental or proprietary. The simple test failed to account for the *nature* of the activity.[727] The Court expressed dissatisfaction with this standard, but inadequate test.[728]

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[723] *See e.g.*, *Millar v. Town of Wilson*, 23 S.E. 2d 340 (N.C. 1942); *Central Nat. Ins. Co. v. City of Kansas City, Mo.*, 546 F. Supp. 1237 (Mo. 1982) (City had no liability for failing to regulate development that may have exacerbated flooding because regulation is a government function); *True v. Mayor & Commissioners of Westernport*, 76 A.2d 135 (Md. 1950) (City liable for negligence in failing to keep sewer in proper repair).

[724] *See Rhodes v. City of Asheville*, 52 S.E.2d 371 (N.C. 1949).

[725] *See Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) ("A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound.") & n.1.

[726] *See e.g., Vanderpool v. State*, 672 P.2d 1153 (Okla. 1983). *Cf. Brand v. Hartman,* 332 N.W.2d 479 (Mich. 1983) (negligent performance of housing inspection pursuant to ordinance requiring certificate of approval for which fee charged by City was not governmental function that would render City immune from liability); *Brown v. Synson*, 663 P.2d 251 (Ariz. 1983) (home purchaser's action against City for negligent inspection of home for violations of building codes was not barred by doctrine of sovereign immunity and public duty doctrine).

[727] *See Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) ("Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. The privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.'") (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)) (internal quotation marks deleted).

[728] *See Indian Towing Co. v. United States*, 350 U.S. 61, 65-68 (1955); *Owen v. City of Independence*, 445 U.S. 622, 644 n.26 (1980); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 297 n.11 (1973) (Marshall, J., concurring); 3 Kenneth Davis, ADMINISTRATIVE LAW TREATISE § 25.07, at 460 (1958); Lawrence Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1072 n.34 (1977); David Currie, FEDERAL COURTS, CASES AND MATERIALS (2d ed. 1975); Geoffrey Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter*

III.D.4.b. Discretionary versus Ministerial Actions

The concept of immunity – supporting the efficiency and quality of government by shielding governmental discretion in the formulation of policy from tort liability – evolved,[729] such that any local government function (governmental or proprietary) may now come within a "discretionary function exception."[730] Over time this standard test narrowed to distinguish between *ministerial* versus *discretionary* functions.[731] Rather than local government enjoying automatic immunity from suit whenever a *governmental* act was involved, state law borrowed the *discretionary* function distinction from the FTCA, exempting from liability any act based on the exercise or performance—or failure to exercise or perform—whether or not the discretion was abused.[732] Generally, only discretion and judgment at the highest levels warrant the recognition of *governmental* immunity. The standards for determining discretionary functions remain unclear.[733] State legislatures have done little to clearly define this terminology. State

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Restrictions, 46 U. CHI. L. REV. 81, 91 (1978); Geoffrey Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 276 n.161; Michael Wells and Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073-75 (1980).

[729] *See Owen v. City of Independence*, 445 U.S. 622, 644-650 (1980)

[730] *See e.g.*, *Dalehite v. United States*, 346 U.S. 15, 34-36 (1953); *Laird v. Nelms*, 406 U.S. 797, 798-803 (1972).

[731] *See Dalehite v. United States*, 346 U.S. 15, 59 (1953) (Jackson, J. dissenting) (citing Edwin W. Patterson, *Ministerial and Discretionary Official Acts*, 20 MICH. L. REV. 848 (1922)).

[732] *See Dalehite v. United States*, 346 U.S. 15, 29-30 (1953) (discussing the FTCA and the legislative history of 28 USCS § 2680(a)); *Youngblood v. Village of Cazenovia*, 462 N.Y.S.2d 526 (N.Y., 1982) (emergency evacuations and certain fire and police activities are typically exempt from such suits by state statute).

In Nylund v. Carson City, 34 P.3d 578, 581 (Nev. 2001) flooding damaged plaintiff's condominium unit during the winter of 1996-97. Plaintiff claimed that Carson City was liable for this flood damage because the City had routed floodwaters down a street right-of-way. The City claimed it was not liable because its activities were exempted from liability by the state emergency management statute. The court held that the emergency management statute covered "not only negligent emergency management, but also any previous negligence that contributed to the damage caused by the emergency management activities." The City was not liable because flooding of the condominium unit was due to emergency measures and not due to design defects in the storm drainage system. *See also Pinter v. Village of Stetsonville*, 929 N.W.2d 547 (Wisc. 2019) (summary judgment to the village in the homeowner's action for negligence arising from wastewater backup into their home during flooding event; village had governmental immunity under Wis. Stat. § 893.80 where municipal sewer employees' actions during the flooding were discretionary and the village's oral policy "rule of thumb" for handling floods did not rise to the level of a ministerial duty); *Rose v. City of Coalinga*, 190 Cal. App. 3d 1627, 236 Cal. Rptr. 124 (Cal., 1987) (governments have the power to damage or destroy private property in emergency situations (here, earthquake), but the power may be exercised only when such destruction is proven necessary)

[733] Successful suits have involved egregious situations and not mistakes, lack of expertise, or lack of overall competence. *See Wedgeworth V. Hams*, 592 F. Supp. 155 (D. Wis., 1984) (42 U.S.C. § 1983

claim based on allegedly inadequate screening, training, and supervision rejected; City and agents' actions were quasi-judicial and discretionary); Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 52 & n.15 (2000) (citing Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636 (1971); *but cf. Canton v. Harris*, 489 U.S. 378 (1989) (Court recognized inadequate police training as basis for 42 U.S.C. § 1983 civil rights liability where inadequate training amounts to "deliberate indifference" to Constitutional rights; inadequacy of training may serve as the basis for municipal liability).

courts' approaches can be divided into three categories: (1) *Literal definition*;[734] (2) *Operations/Planning distinction*;[735] and (3) *Flexible*.[736] None of these approaches adequately identifies the actions for which a local government is liable.

[734] *See* Mark C. Niles, *"Nothing But Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1319-20 & n.175 (2002) (quoting Daniel E. Matthews, *Federal Tort Claims Act—The Proper Scope of the Discretionary Function Exception*, 6 AM. U. L. REV. 22, 22 (1957) (noting the *Dalehite* court's failure to clarify the scope of the discretionary function exception)).

[735] *See Risk v. Halvorsen*, 936 F.2d 393, 396 (9th Cir. 1991) (noting that the 9th Cir. abandoned the "planning/ operations" distinction in conducting discretionary function analysis pursuant to *United States v. Varig*, 467 U.S. 797 (1984) (citing, *e.g.*, *Mitchell v. United States*, 787 F.2d 466, 468 (9th Cir. 1986) (planning-operational distinction has been abandoned), cert. denied, 484 U.S. 856 (1987); *Chamberlin v. Isen*, 779 F.2d 522, 524 (9th Cir. 1986); and *Begay v. United States*, 768 F.2d 1059, 1062-63 n.2 (9th Cir. 1985)); *Andrus v. State*, 541 P.2d 1117 (Utah 1975) (preparation of plans and specifications for highway and supervising work was nondiscretionary where highway caused flooding); *Arkansas River Corp. v. United States*, 947 F. Supp. 941 (D. Miss., 1996) (federal government not generally responsible for flood losses, and federal agencies may be liable in specific case for structures with incidental flood control benefits but designed and operated primarily for navigation, recreation, or other purposes; immunity did not apply to operation of lock and dam for navigation purposes); *Denham v. United States*, 646 F. Supp. 1021 (D. Tex., 1986) (federal government not generally responsible for flood losses, and agencies may be liable where structures with incidental flood control benefits are designed and operated primarily for navigation, recreation, or other purposes; immunity did not apply to management of recreational facilities in park); *Florida East Coast Railway Company v. United States*, 519 F.2d 1184 (5th Cir., 1975) (flood control district liable for damage to railroad due to improper maintenance of federal flood control levee; flood control district worked with ACOE planning project, reviewed plans, responsible for project alignment, and provided construction advice and assistance to ACOE); *cf. Brown v. United States*, 790 F.2d 199 (1st Cir., 1986) (National Oceanic and Atmospheric Administration (NOAA) not susceptible to suit for failure to predict hurricane on Outer Banks with resulting loss of life where lack of operating weather buoy may have contributed to lack of predictive capability; "discretionary" exemption applied because predicting storms requires great deal of discretion and interpretation and plaintiff did not show prediction would have been different had buoy been operating). Courts have not held government units liable for errors in prediction, per se, due in part to the discretionary exceptions to negligence in the FTCA and similar state tort claims acts, due in large amount to the discretion that must be exercised in making predictions. *See National Manufacturing Co. v. United States*, 210 F.2d 263 (8th Cir., 1954) cert. denied, 347 U.S. 967 (1954) (National Weather Bureau could not be sued for inadequate predictions and for disseminating erroneous flood and weather information; based on, e.g., FTCA's "discretionary" function exemption, the "misrepresentation" exemption, and section 702c of the Flood Control Act of 1928).

The nature of the warning needed in a particular instance depends on the circumstances, type of hazard, seriousness of the hazard, status of users (e.g., children or adults), and other factors. *See Piggott v. United States*, 480 F.2d 138 (4th Cir., 1973) (federal government potentially liable for two children drowning at historical beach park despite two signs warning swimming dangerous due to strong undercurrents and deep holes; but no lifeguard, tow line, depth marker, safety line or other safety equipment).

A ministerial act is one performed under a given set of facts and in a prescribed manner furthering the mandate of legal authority without regard to the individual judgment of the government actor as to the propriety of the action. The government actor is compelled by law to act and to act in a particular manner.[737] Examples include issuing a building or floodplain

[736] *See Garcia v. United States*, 2010 U.S. Dist. LEXIS 158690 at *12(C.D. Cal. Oct. 12, 2010) (citing *Pearson v. Callahan*, 555 U.S. 223, 241-42 (2009)

[737] *Ministerial*, BLACK'S LAW DICTIONARY (7th ed. 1999).

development permit,[738] approving a real estate subdivision[739] and construction,[740] and determining the existence of facts and applying them as required by law, without any discretion.[741]

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[738] *Columbus, Ga. v. Smith*, 316 S.E.2d 761 (Ga. 1984) (City liable for failing to put limits on the increased amount of water developers were allowed to run-off into creek after complaints from landowners about periodic flooding and erosion of their properties); *Radach v. Gunderson*, 695 P. 2d 128 (Wash. 1985) (City liable for expense of moving house that did not meet zoning setback requirements constructed pursuant to a permit issued by city).

But cf. Lindquist v. Omaha Realty, Inc., 247 N.W.2d 684 (S.D. 1976) (resolution of city council prohibiting issuance of building permits for one block on either side of creek after devastating flood found valid exercise of police powers); *Okie v. Village of Hamburg*, 609 N.Y.S.2d 986 (N.Y., 1994) (village not liable for mistakenly issuing building permit and certificate of occupancy for structure in floodplain because no special relationship existed between city and landowner and only a "public duty" existed between the village and the landowner).

[739] *See e.g.*, *County of Clark v. Powers*, 611 P.2d 1072 (Nev., l980) (City liable for increased flooding due to urbanization and city's flood control activities, applying a "reasonable use" rule for surface waters); *Eschete v. City of New Orleans*, 245 So.2d 383 (La. 1971) (City could be held liable for approving subdivision that overtaxed drainage system and caused flooding); *Harris Cty. F. Con. v. Adam*, 56 S.W.3d 665 (Tex. 2001) (flood control district was potentially liable for approval of a highway project that flooded private property); *Kite v. City of Westworth Village*, 853 S.W.2d 200 (Tex. 1993) ("taking" without just compensation potentially occurred where City approved plat resulting in diversion of water from natural course and resulting damage); *Pennebaker v. Parish of Jefferson*, 383 So.2d 484 (La. 1980) (parish could be liable for increased flooding by allowing street improvements, building construction, and street drainage without taking steps to prevent flooding); *McCloud v. Jefferson Parish*, 383 So. 2d 477 (La. App. 1st Cir. 1980) (where plaintiffs alleged parish approved new subdivisions with full knowledge through its agents and employees the subdivisions would overtax the drainage system and cause flooding; tort claim was valid against parish—judgment for plaintiff); *Pickle v. Board of County Comm'r of County of Platte*, 764 P.2d 262 (Wyo. 1988) (county had duty to exercise reasonable care in reviewing subdivision plan and was potentially liable in negligence for flooding and problems with waste disposal because of failure to use such care); *Sheffet v. County of Los Angeles*, 84 Cal. Rptr. 11 (Cal., 1970) (county liable when it approved subdivision and accepted dedication of road facilities that resulted in flood and erosion damage); *Yue v. City of Auburn*, 4 Cal. Rptr. 2d 653 (Cal. 1992) (City was potentially liable for approving subdivision that increased impervious surfaces without upgrading downstream stormwater facilities to convey increased flows); Mitter v. St. John the Baptist Parish, 920 So. 263 (La App 5th Cir 2005) (parish liable when neighboring new development was graded at higher elevation than plaintiff's property and the existing drainage servitude). *But cf. Pinkowski v. Town of Montclair*, 691 A.2d 837 (N.J. 1997) (town subdivision approval for lot with underground cement pipe or culvert created no liability because state tort claims act barred claims based on issuance of permits); *Bargmann v. State*, 600 N.W.2d 797 (Neb. 1999) (approval of plat and failure to enforce floodplain ordinance was not regulatory taking; City had not been involved with the construction, development, or maintenance of subdivision); *Cootey v. Sun Investment, Inc.*, 718 P.2d 1086 (Haw. 1986) (county not liable for having approved subdivision plans including drainage plans where flooding resulted; no breach of duty of care); *Johnson v. County of Essex*, 538 A.2d 448 (N.J. 1987) (township not liability for approving plats and building permits that increased flow of water under pipe due to statutory design immunity and discretionary immunity); *Kemper v. Don Coleman, Jr. Builder, Inc.*, 746 So. 2d 11 (La. 1999) (parish not liable for approving subdivision subject to flooding where subdivision was in compliance with floodplain

Immune discretionary actions include governing and supervisory decisions, e.g., the enforcement of ordinances and codes is prioritized and resources are allocated, the number of staff assigned to a project, and how laws are enforced.[742] "Proprietary" actions, on the other

regulations); *Yox v. City of Whittier*, 227 Cal. Rptr. 311 (Calif. 1986) (no City liability for surface runoff caused by private development where city had issued permits and approved subdivision, and construction on a private street was private). *See also* JON KUSLER, GOVERNMENT LIABILITY FOR FLOOD HAZARDS 35 et seq.; Steven Frederic Lachman, *Should Municipalities Be Liable for Development-Related Flooding?* 41 Nat. Res. J. 945 (2001).

[740] Construction is usually considered a ministerial, nondiscretionary task and governments may be held liable for negligence of employees in actual construction or the negligence of contractors who have not been properly supervised. *See e.g.*, *Galluzzi v. Beverly*, 34 N.E.2d 492 (Mass. 1941) (City liable for water damage due to inadequate construction procedures for sewer); *McNeill v. A. Teichert and Son, Inc.*, 289 P.2d 595 (Cal. 1955) (City liable for inadequate construction procedures for stormwater system); *Jennings v. Wessel Const. Co., Inc.*, 428 N.E.2d 646 (Ill. 1981) (City was not liable for accepting defective sewer system).

[741] *See Martinez v. United States*, 997 F.3d 867, 881 (2012); *Smith v. Wash. Metro. Area Transit Auth.*, 290 F.3d 201, 206-08 (4th Cir. 2002) (citing *Dalehite v. United States*, 346 U.S. 15, 28 (1953)). Courts in most jurisdictions have held that governments are immune from liability for issuance or denial of building and other types of permits because issuance is a discretionary function. *See Wilcox Assoc. v. Fairbanks North Star Borough*, 603 P.2d 903 (Alaska 1979). B*ut c.f. Hutcheson v. City of Keizer*, 8 P.3d 1010 (Ore., 2000) (City liable for approving subdivision plans that led to extensive flooding); *Kite v. City of Westworth Village*, 853 S.W.2d 200 (Tex., 1993) (City liable for approving subdivision plat and acquiring easement that increased flood damage on other property); *Peterson v. Oxford*, 459 A.2d 100 (Conn. 1983) (town liable for having accepted roads and drainage system including drainage easement in subdivision with resulting flooding); *City of Keller v. Wilson*, 86 S.W.3d 693 (Tex. 2002) (City liable for approving subdivisions based upon City's drainage plan but then failing to acquire 2.8 acres to implement City's plan); *Columbus Ga. V. Smith*, 316 S.E.2d 761 (Ga. 1984) (County had duty to exercise reasonable care in reviewing subdivision plan and was potentially liable in negligence for flooding and problems with waste disposal because of a failure to use such care); *Frustuck v. City of Fairfax*, 28 Cal. Rptr. 357 (Cal. 1963) (City liable in inverse condemnation for having approved subdivisions and accepted drainage easements and having diverted increased waters onto private property); *Docheff v. Broomfield*, 623 P.2d 69 (Colo. 1980) (City liable for flooding due to accepting streets and storm drains and approving subdivision and drainage plans). Some states have adopted statutes partially or wholly exempting government design decisions from liability under certain circumstances. For example, Cal. Govt. C. Sec. 830.6 provides that damage from design features of public improvements are not the basis for legal action if the design feature was approved in advance by the public entity exercising its discretionary authority in some explicit manner, and the choice of the design feature is supported by "substantial evidence." However, the California courts have created an exception to design immunity where "changed conditions" after the original design approval create a dangerous condition and the public entity has constructive or actual notice of the condition. *See e.g.*, *Baldwin v. State*, 491 P.2d 1121 (Cal. 1972).

[742] *See*, *e.g., Tebbets v. Oliver Grp., LLC*, 2013 Conn. Super. LEXIS 587, at *8-15; *City of Albany v. Stanford*, 347 Ga. App. 95, 815 S.E.2d 322 (2018); *Dept. of Envt'l. Protection v. Hardy*, 907 So.2d 655 (Fla. 2005) (identifying regulated wetlands and enforcing wetland regulations' discretionary functions not subject to suit); *Patterson v. City of Bellevue*, 681 P.2d 266 (Wash. 1984) (City not liable for increased flow due to urbanization despite adoption by City of stormwater ordinance).

hand, include the method of performing government functions.[743] The waiver of local government immunity only opens the door to litigation; it does not change burdens of proof or elements of a tort.[744] To prevail in a tort suit, a plaintiff must still demonstrate all of the necessary elements of a tort, i.e., duty, breach, causation, and damages.[745]

III.D.5. Public Duty Doctrine

Distinct from sovereign and governmental immunity is the public duty doctrine adopted in some states.[746] The public duty doctrine generally provides that a government actor is not civilly liable to an individual for a breach of their governmental duty to the general public,[747] based on an absence of governmental duty to the individual contrasted to a duty to the general public.[748]

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in *Hurst v. United States,* 739 F. Supp. 1377 (D.S.D, 1990), The ACOE was held liable for issuing a Section 404 permit for construction of jetties where jetties were not constructed according to permit and blocked flows in the river, severely flooding another landowner. ACOE knew the permit violations, and violated its own regulations by failing to issue an order prohibiting further work despite many requests by the landowner who suffered damage. The district court initially held that the landowner could not sue the Corps pursuant to the FTCA. On appeal, the Eighth Circuit reversed the dismissal and remanded the case for findings on the claim that the ACOE caused landowner's damage by negligently failing to issue a prohibitory order. On remand, the district court observed that "the Corps' regulations governing issuance of permits for projects in navigable waterways also indicates that the Corps should be concerned with minimizing the risks of flooding on surrounding property." The court found: Because the landowner was included in the class of persons meant to be offered some protection from flooding under the federal regulations governing the ACOE, the ACOE's failure to enforce its own regulations amounts to negligence *per se* under South Dakota law. *Id*. at 1380-81.

[743] *See Owen v. Independence*, 445 U.S. 622, 644-47 (1980).

[744] *See* 28 U.S.C. § 1346(b); *see also Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) (citation omitted), *cert. denied*, 466 U.S. 958 (1984); *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987), *cert. denied*, 487 U.S. 1204 (1988): *West v. Federal Aviation Administration*, 830 F.2d 1044, 1046 (9th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988).

[745] See the Torts Section.

[746] *See generally*, *South v. Maryland*, 59 U.S. (18 How.) 396 (1856)

[747] *See*, *e.g.*, *Bassett v. Lamantia*, 858 F.3d 1201, 1203 (9th Cir. 2017) (quoting Gatlin-Johnson v. City of Miles City, 367 Mont. 414, 418, 291 P.3d 1129 (2012).

[748] *See*, *e.g.*, *Estate of Snyder v. Julian*, 789 F.3d 883 887-88, (8th Cir. 2015) (citing *Southers v. City of Farmington*, 263 S.W.3d 603, 611 (Mo. 2008); *Brown v. Synson*, 663 P.2d 251 (Ariz. 1983) (home purchaser's action against City for negligent inspection of home for violations of building codes was not barred by doctrine of sovereign immunity and public duty doctrine). *But cf. Dinsky v. Framingham*, 438 N.E.2d 51 (Mass. 1982) (City was not liable under the "public duty" doctrine for negligent inspections); Okie v. Village of Hamburg, 609 N.Y.S.2d 986 (N.Y., 1994) (village not liable for mistakenly issuing building permit and certificate of occupancy for structure in the floodplain because no special relationship existed between City and landowner and only a "public duty" existed between the village and landowner); *Pierce v. Spokane County*, 730 P.2d 82 (Wash. 1986) (City was not liable under the "public duty"

The public duty doctrine does not insulate a government actor from all liability. They could still be found liable for a breach of a *ministerial* duty where an injured party has a direct, distinctive, and special interest.[749] Application of the public duty doctrine negates the duty element required to prove negligence, eliminating the potential cause of action for injuries sustained as a result of an alleged breach of duty to the community.[750]

III.D.6. Federal Civil Rights Liability (42 U.S.C. § 1983)

The Federal Civil Rights Statute provides the basis by which a state or local government employee can assert a civil rights claim. 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."[751]

Most claims brought under 42 U.S.C. § 1983 are for violations of constitutional rights.[752] "Any citizen" is a person who, while acting "under color of law," deprives the plaintiff of a

doctrine for negligent inspections); *Westbrooks v. State*, 219 Cal. Rptr. 674 (Cal. 1985) (county not liable for death that occurred when heavy rains and flooding caused highway bridge to collapse and county sheriff set up traffic control point 1.3 miles from the bridge, but the deceased drove through control point and plunged into river; no proof that county's action increased actual risk of harm or deceased had relied on county's action, creating "special relationship").

[749] *See*, *e.g.*, *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. 2008); *but cf. Walker v. Los Angeles County*, 192 Cal. App. 3d 1393 (Cal., 1987) (when a governmental official requests assistance of a private citizen in performance of the official's duties, they owe the citizen due care).

[750] *See*, *e.g.*, *Estate of Snyder v. Julian*, 789 F.3d 883, 888 (8th Cir. 2015) (quoting *Southers v. City of Farmington*, 263 S.W.3d 603, 612 (Mo. 2008); *Friedman v. State of New York*, 67 N.Y.2d 271, 283 (N.Y. 1986) (in New York, a municipality "owes to the public the absolute duty of keeping its streets in a reasonably safe condition," addressing the role of transportation planning).

[751] 42 U.S.C. § 1983.

[752] *See e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

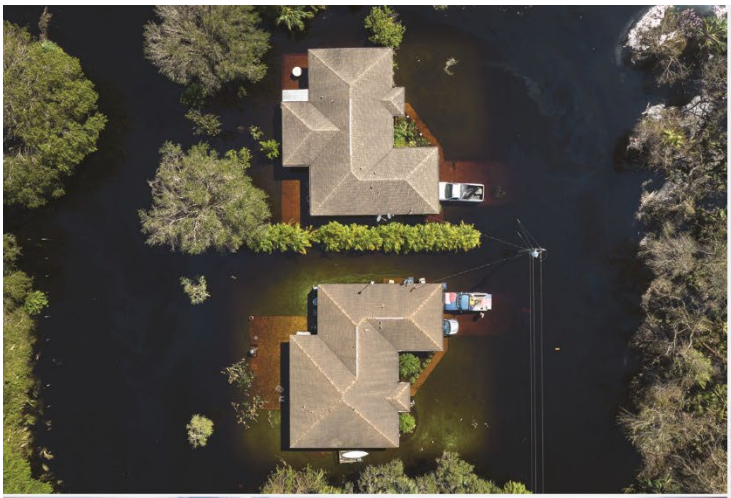
constitutional right, and the challenged conduct causes a constitutional violation.[753] The "color of law" element is established where a public employee acts pursuant to their office or in their official capacity.[754]

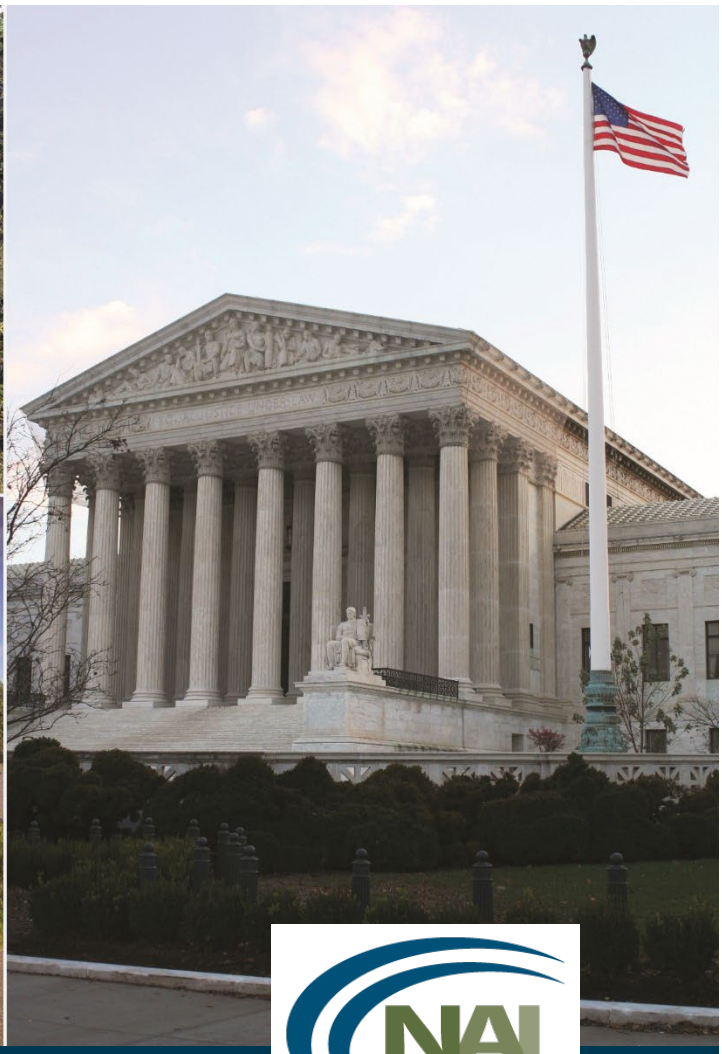
III.D.7. Summary

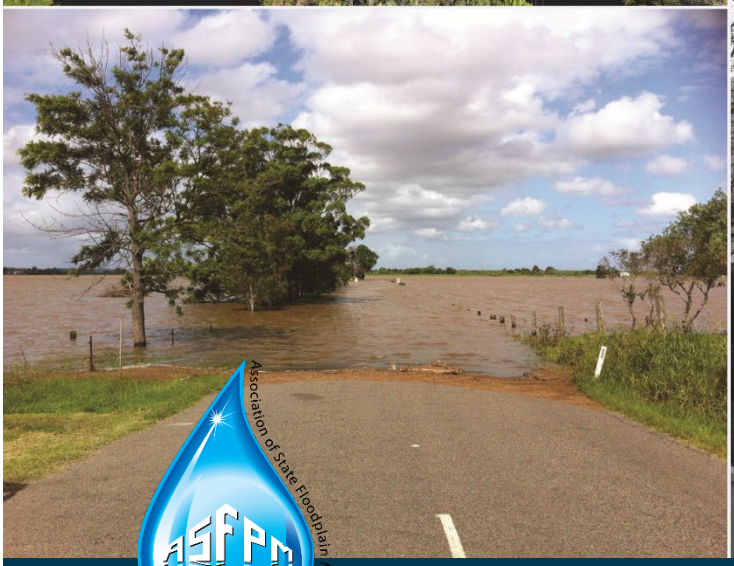
Governmental and sovereign immunity jurisprudence has evolved from attempts to create a precise, predictable standard within flexible—if unpredictable—guidance. There is rarely an easy answer to whether a particular governmental act is immune; that is why these cases are so frequently litigated. In most states, if an action constitutes *governing* (high-level policy decisions for which coordinate branches of government are responsible), immunity will apply. This is most often referred to as the "discretionary function exception." Most states have abandoned a simple formula and gone with "planning-level function" (*discretionary*) actions being immune and "operational-level function" (*ministerial*) actions being subject to tort liability. Generally, the terms "proprietary," "ministerial," and "operational-level" usually describe functions for which immunity has been waived and for which government may be liable. The terms "governmental," "discretionary," and "planning-level" usually describe functions from which the government is immune from liability.

[753] *See e.g.*, *Owen v. Independence*, 445 U.S. 622 (1980). *Monroe v. Pape*, 365 U.S. 167 (1961), limited, *Carter v. Carlson*, 447 F.2d 358, 144 U.S. App. D.C. 388 (D.C. Cir. 1971), overruled in part, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[754] *See Polk County v. Dodson*, 454 U.S. 312, 329 (1981); *see also United States v. Classic*, 313 U.S. 299, 325-26 (1941); *Screws v. United States*, 325 U.S. 91, 110 (1945) (plurality opinion).







No Adverse Impact Legal Guide for Flood Risk Management

June 2023

no.floods.org/LegalGuide

Cover Photos (clockwise from top left):
Hurricane Ian flooded houses in Florida residential area;[1] U.S. Supreme Court;[2] Untitled image of road inundated with floodwater.[3]

No Adverse Impact Legal Guide for Flood Risk Management

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The Association of State Floodplain Managers Inc. (ASFPM) published this *Guide* as part of its mission to promote education, policies and activities that mitigate current and future losses, costs and human suffering caused by flooding. Founded in 1977, the organization had over 19,000 members as of 2023, including members in 38 state chapters. ASFPM supports professionals involved in floodplain management, flood hazard mitigation, flood preparedness and flood warning and recovery. Members represent local, state and federal government agencies, citizen groups, private consulting firms, academia, the insurance industry and lenders.

[1] Bilanol. Accessed May 2023. Hurricane Ian flooded houses in Florida residential area. https://www.canva.com/photos/MAFOfc76ibY-hurricane-ian-flooded-houses-in-florida-residential-area-natural-disaster-and-its-consequences/. Used under Canva Pro Content License.

[2] OZinOH. Accessed May 2023. Supreme Court IMG_2952. https://www.flickr.com/photos/75905404@N00/3049421552/. Used under Creative Commons Attribution-NonCommercial 2.0 License.

[3] bohemianbikini from Pixabay. Accessed May 2023. Untitled. https://www.canva.com/photos/MAEF8PqH24s/. Used under Canva Free to Use License.

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Introduction to This *Guide*

This *No Adverse Impact Legal Guide for Flood Risk Management* (a.k.a., the *NAI Legal Guide)* provides legal resources to inform the decisions of community representatives and municipal attorneys who design, implement, and defend NAI programs. It includes:

- Detailed resources for legal professionals, and
- Legal essentials for floodplain managers and community officials.

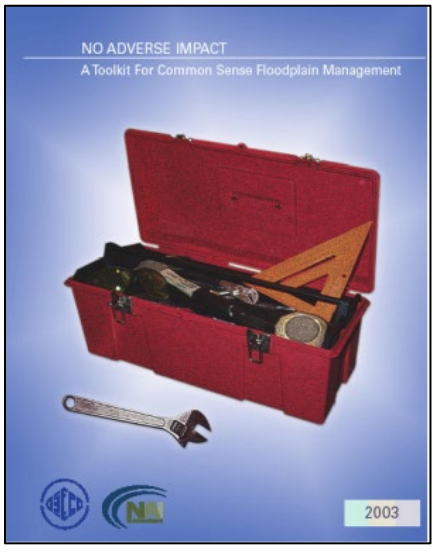
This Guide supplements other NAI documents that present tools and guidance for integrating NAI principles into local regulations, policies, and programs. It will help readers to understand, anticipate, and manage legal issues that may arise when a community implements activities that enhance flood resilience, especially when those activities exceed state and federal requirements for floodplain management.

This *Guide* is divided into five sections:

Section I – Introduction to No Adverse Impact
Section II – Introduction to Legal Concepts for No Adverse Impact
Section III – Torts
Section IV – The Constitution and Its Protection of Property Rights
Section V – Federal Laws

Section One is an introduction to the concept of No Adverse Impact for those not familiar with its application to flood risk reduction. Section Two focuses on introducing common legal concepts, which is then followed by the detailed legal memos found in Sections Three, Four and Five.

After reviewing this *Guide*, it is recommended that a community conduct an assessment of its flood risk management activities to see if those activities are legally sound, and where they can be improved by using NAI techniques to better protect its population and natural floodplain functions.



No Adverse Impact Toolkit, prepared by the Association of State Floodplain Managers, identifies tools for implementing NAI.

NAI How-to Guides

A series of How-to Guides provide usable information to help communities implement NAI practices:

- Hazard Identification and Floodplain Mapping
- Regulations and Development Standards
- Education and Outreach
- Emergency Services
- Planning
- Mitigation
- Infrastructure

Common Terminology

Many of the following definitions are derived from NFIP floodplain management; others are specific legal definitions; and yet others relate to NAI tools and approaches. This section is not all-inclusive of the flood risk management and legal terms used in this *Guide;* additional definitions may be provided elsewhere for ease of reference.

Base flood: The flood having a one percent probability of being equaled or exceeded in any given year (previously called the 100-year flood). This is the design flood for the NFIP and is used to map Special Flood Hazard Areas and to determine Base Flood Elevations. Modeling of the base flood uses historic flood data.

Base Flood Elevation (BFE): The modeled elevation of floodwater during the base flood. The BFE determines the level of flood protection required by NFIP floodplain development standards.

Building (structure): A walled and roofed building with two or more outside rigid walls and a fully secured roof that is affixed to a permanent site, as well as a manufactured home on a permanent foundation. The terms "structure" and "building" are sometimes used interchangeably in the NFIP. However, for NFIP floodplain management purposes, the term "structure" also includes a gas or liquid storage tank that is principally above ground.

Within the NFIP, residential and non-residential structures are treated differently. A residential structure built in a Special Flood Hazard Area must be elevated above the Base Flood Elevation. A non-residential structure may be elevated or dry floodproofed so that the structure is watertight to prevent the entry of water.

Climate change: Climate change refers to long-term shifts in temperatures and weather patterns. These shifts may be natural, such as through variations in the solar cycle. But since the 1800s, human activities have been the main driver of climate change, primarily due to the burning of fossil fuels like coal, oil and gas.[5]

Community: The NFIP definition of a community is a political subdivision that has the authority to adopt and enforce floodplain management regulations for the areas within its jurisdiction. The term usually means cities, villages, townships, counties, and Indian tribal governments. For the purposes of this *Guide*, a "community" also includes a neighborhood, unincorporated settlement, or other non-governmental subdivision where people live or work together.

Conservation Zone: An area indicated on a map or plan adopted by a local jurisdiction, municipality, or other governing body within which development is governed by special regulations in order to protect and preserve the quality and function of its natural environment.

Community Rating System (CRS): The NFIP Community Rating System is a program that provides reduced flood insurance premiums for policyholders in communities that go above and beyond the minimum NFIP criteria. For more information see https://www.fema.gov/floodplain-management/community-rating-system.

Federal Emergency Management Agency (FEMA): The federal agency under which the NFIP is administered.

Flood: A community may adopt a more expansive definition of "flood" than is used by the NFIP in order to include additional sources of water damage, such as groundwater flooding of basements or local washouts associated with a drainage ditch. The NFIP definition of a flood is:

> (a) A general and temporary condition of partial or complete inundation of normally dry land areas from:
>
> (1) The overflow of inland or tidal waters.
>
> (2) The unusual and rapid accumulation or runoff of surface waters from any source.
>
> (3) Mudslides (i.e., mudflows) which are proximately caused by flooding as defined in paragraph (a)(2) of this definition and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current.
>
> (b) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water

[5] Source: United Nations, "What is Climate Change?" webpage, accessed March 2023, https://www.un.org/en/climatechange/what-is-climate-change.

> exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (a)(1) of this definition.

For NFIP flood insurance claims, a flood must inundate two or more acres of normally dry land area or two or more properties.

Flood Insurance Rate Map (FIRM): An official map of a community on which the Federal Emergency Management Agency has delineated the boundaries of Special Flood Hazard Areas. In some areas, FIRMS (with associated maps and studies) may also indicate Base Flood Elevations and regulatory floodways. FIRMs and other mapping products can be viewed and downloaded at FEMA's Map Service Center – https://msc.fema.gov/portal/home.

Floodplain: Nature's floodplain is the land area susceptible to being inundated by water from any source. This includes:

- Special Flood Hazard Areas (SFHAs) mapped by FEMA for the NFIP program;
- Flood-prone areas near waterbodies for which SFHAs have not been mapped;
- Areas outside of the SFHA that are subject to inundation by larger flood events or floods that are altered by debris or other blockages;
- Areas subject to smaller, more frequent, or repetitive flooding;
- Areas subject to shallow flooding, stormwater flooding, or drainage problems that do not meet the NFIP mapping criteria;
- Areas affected by flood-related hazards, such as coastal and riverine erosion, mudflows, or subsidence; and
- Areas that will be flooded when future conditions are accounted for, such as climate-related issues, sea-level rise, and upstream watershed development.

The Special Flood Hazard Area mapped for the NFIP is only part of a community's flood risk area, with 40 percent of flood insurance claims occurring outside of the SFHA.[6] To represent a community's true flood risk, the term "floodplain" is used in this *Guide* instead of "SFHA."

Floodplain stewardship: Caring for and protecting the beneficial biologic and hydrologic functions of areas where the risk of flooding is expected, while managing human uses to minimize the potential for adverse impacts and flood damage.

Floodproof: Floodproofing means any combination of structural and non-structural additions, changes, or adjustments to buildings or other structures that reduce or eliminate flood damage to real estate or improved real property, water and sanitary facilities, structures, and their contents. This term includes dry floodproofing, in which a structure is watertight, with walls

[6] Federal Emergency Management Agency, 2021, "Myths and Facts About Flood Insurance," https://www.fema.gov/fact-sheet/myths-and-facts-about-flood-insurance-1.

substantially impermeable to the passage of water. NFIP development standards allow dry floodproofing of non-residential structures in lieu of elevating the lowest floor.

Freeboard: A factor of safety, usually expressed in feet above the Base Flood Elevation, that determines the required level of flood protection.

Future conditions flood: The flood having a one percent probability of being equaled or exceeded in any given year based on future-conditions hydrology. Also known as the "1%-annual-chance future conditions" flood.

Liability: A party is liable when they are held legally responsible for something. Unlike in criminal cases, where a defendant could be found guilty, a defendant in a civil case risks only liability.[7]

Mitigation: Hazard mitigation is any sustained action taken to reduce or eliminate any long-term risk to life or property from a hazard event. Mitigation is most often thought of as being applied to existing at-risk development. Examples of flood mitigation activities include: floodproofing, elevating, relocating or demolishing at-risk structures; retrofitting existing infrastructure to make it more flood resilient; developing and implementing Continuity of Operations Plans; structural mitigation measures such as levees, floodwalls and flood control reservoirs; detention/retention basins; and beach, dune, and floodplain restoration.

National Flood Insurance Program (NFIP): Federal program that maps flood hazard areas and provides flood insurance in participating communities that agree to regulate new construction in mapped high flood hazard areas. Most community floodplain maps and floodplain management standards have been adopted to meet the NFIP's criteria. Learn more at www.fema.gov.

Natural floodplain functions: The functions associated with the natural or relatively undisturbed floodplain that moderate flooding, maintain water quality, recharge groundwater, reduce erosion, redistribute sand and sediment, and provide fish and wildlife habitat. One goal of NAI floodplain stewardship is to preserve and protect these functions, in addition to protecting human development.

Police powers: Police powers are the fundamental ability of a government to enact laws to coerce its citizenry for the public good, although the term eludes an exact definition. The term does not directly relate to the common connotation of police as officers charged with maintaining public order, but rather to broad governmental regulatory power. *Berman v. Parker*, a 1954 U.S. Supreme Court case, stated that "[p]ublic safety, public health, morality, peace and quiet, law and order. . . are some of the more conspicuous examples of the traditional

[7] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/liability. Liability is "[t]he quality or state of being legally obligated or responsible." BLACK'S LAW DICTIONARY: NEW POCKET EDITION (1996).

application of the police power;" while recognizing that "[a]n attempt to define [police power's] reach or trace its outer limits is fruitless."[8]

Regulatory floodway: The channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood (with a 1% annual probability) without cumulatively increasing the water surface elevation more than a designated height.

Resilience: "The ability to prepare for and adapt to changing conditions and withstand and rapidly recover from disruptions," as defined in FEMA's *National Disaster Recovery Framework*.

Riparian buffer: Zone of variable width along the banks of a stream, river, lake, or wetland that provides a protective natural area adjacent to the waterbody.

Sovereign immunity: Sovereign immunity refers to the fact that the government cannot be sued without its consent.[9]

Special Flood Hazard Area (SFHA): An area mapped on the NFIP FIRM that shows the area subject to inundation by the base flood (with a one percent or greater probability of flooding in any given year). SFHAs have been mapped for flooding caused by rivers, lakes, oceans, and other larger sources of flooding.

Standard of care: The watchfulness, attention, caution, and prudence that a reasonable person in the circumstances would exercise. If a person's actions do not meet this standard of care, then their acts fail to meet the duty of care, which all people (supposedly) have toward others.[10]

Substantial damage: Damage of any origin sustained by a structure (building) whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

Substantial improvement: Any reconstruction, rehabilitation, addition, or other improvement of a structure (building), the cost of which equals or exceeds 50 percent of the market value of the structure before the start of construction for the improvement. This term includes structures that have incurred substantial damage, regardless of the actual repair work performed. NFIP

[8] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/police_powers. Police power has also been defined as "1. [a] state's Tenth Amendment right, subject to due process and other limitations, to establish and enforce laws protecting the public's health, safety, and general welfare, or to delegate this right to local governments. 2. Loosely, the power of the government to intervene in privately owned property, as by subjecting it to eminent domain." BLACK'S LAW DICTIONARY: NEW POCKET EDITION (1996).

[9] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/sovereign_immunity.

[10] Source: Law.com Dictionary, https://dictionary.law.com/Default.aspx?selected=2002.

development standards require that a substantially improved building be regulated as new construction.

Sustainable: Able to "meet the needs of the present without compromising the ability of future generations to meet their own needs," as defined by the United Nations.

Takings: A taking is when the government seizes private property for public use. A taking can come in two forms. The taking may be physical, meaning the government physically interferes with private property; or the taking may be constructive (also called a regulatory taking), meaning that the government restricts the owner's rights to such an extent that the governmental action becomes the functional equivalent of a physical seizure.[11]

Tort: A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. In the context of torts, "injury" describes the invasion of any legal right, whereas "harm" describes a loss or detriment in fact that an individual suffers.[12]

Watershed: The land area that channels rainfall and snowmelt to creeks, streams, and rivers, and eventually to outflow points, such as reservoirs, bays, and the ocean. Also known as a basin or catchment area.

[11] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/takings. A taking may also be defined as "[t]he government's actual or effective acquisition of private property either by ousting the owner and claiming title or by destroying the property or severely impairing its utility." BLACK'S LAW DICTIONARY: NEW POCKET EDITION (1996).

[12] Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/tort.