INVERSE CONDEMNATION:

California's Widening Loophole

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INTRODUCTION

In 1789, directly influenced by Thomas Jefferson, France's Declaration of the Rights of Man stated:

> Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights.[1]

Known as the "harm principle" and formalized in 1859 by John Stuart Mill in his seminal work, *On Liberty,* this principle contends that "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[2] Much of civil law, springing from English courts of equity, adheres to this principle: when someone causes another harm, the law should provide a remedy.[3]

It was under color of this principle, in 1879, that California constitutional delegates included a progressive damages clause as a supplement to the takings clause of California's constitution.[4] In the event that a government did not proactively and intentionally "take" private land, but indirectly caused it to be damaged or unusable, the California constitutional delegates felt that

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[1] DECLARATION OF THE RIGHTS OF MAN art. 4 (Fr. 1789); *see also* GREGORY FREMONT-BARNES, ENCYCLOPEDIA OF THE AGE OF POLITICAL REVOLUTIONS AND NEW IDEOLOGIES, 1760–1815, at 190 (2007).

[2] JOHN STUART MILL, ON LIBERTY I.9 (1859), *available at* http://www.econlib.org/library/Mill/mlLbty1.html; *see also* Richard Warner, *Liberalism and the Criminal Law,* 1 S. CAL. INTERDISC. L.J. 39, 39 (1992).

[3] *See* John J. Farley, III, *Robin Hood Jurisprudence: The Triumph of Equity in American Tort Law,* 65 ST. JOHN'S L. REV. 997, 1000–01 (1991).

[4] *See* CAL. CONST. art. I, § 19 (2014).

the interests of private owners warranted a remedy.[5] Perhaps today, this looks like a strange remedy for a situation that appears to fall squarely under the umbrella of tort law. In 1879, however, the doctrine of sovereign immunity shielded the State of California from tort liability — a privilege not waived until 1963 with the enactment of The California Tort Claims Act.[6]

Since its inception, the damages clause has taken on a life of its own through inverse condemnation claims, creating something of a quasi-tort.[7] While possibly appropriate at the time of ratification, such a broad interpretation is inconsistent with California's modern statutory scheme.[8] Furthermore, the modern application of the damages clause has eviscerated what remained of the traditional concept of sovereign immunity doctrine without a clear legislative directive.[9]

If the doctrine of sovereign immunity is to act as a bar for claims against the state, it cannot have the quasi-tort of inverse condemnation drilling a hole directly through its center. When California waived sovereign immunity in 1963 with the passage of the Tort Claims Act, the Legislature struck the proper balance of public accountability and sovereign immunity.[10]

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[5] *See* 3 E.B. Willis & P.K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California 1190 (1881).

[6] California Tort Claims Act, Cal. Gov't Code §§ 810 *et seq.* (Lexis 2014); *see* Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision,* 15 Stan. L. & Pol'y Rev. 267, 281 (2004).

[7] *See, e.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228 (2014) (using language from *Albers, Holz, Customer Co.,* and *Regency* to determine an inverse condemnation claim); Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507 (2006) (holding that damage as part of the construction of a public improvement satisfies an inverse condemnation claim); Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 376–80 (1995) (clarifying that just compensation "encompasses special and direct damage to adjacent property resulting from the construction of public improvements"); Holz v. Superior Court, 3 Cal. 3d 296 (1970) (adequately stating a claim for inverse condemnation for damages from construction of a rapid transit system); Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263 (1965) (defining public use as "improvement as deliberately designed and constructed").

[8] *See generally* California Tort Claims Act (allowing tort claims against the government based on legislature-defined parameters).

[9] *See, e.g., Pasadena,* 228 Cal. App. 4th (allowing the possibility of strict liability against the city for damage from a falling tree); *Albers,* 62 Cal. 2d (finding a county liable for property damage resulting from a landslide caused by the construction of a road).

[10] *See* Parrish, *supra* note 6, at 283–87.

Inverse condemnation, on the other hand, provides a remedy that amounts to strict liability against the government without any benefit of legislative gravity or deliberation.[11] Because of the presumption against the waiver of sovereign immunity, courts must be cautious in extending strict liability without a clear directive from the Legislature.[12]

In *City of Pasadena v. Superior Court*,[13] the extremes of inverse condemnation appear writ large, i.e., full-fledged strict liability against the government.[14] That means liability without any need to prove carelessness or fault, a standard usually reserved for "hazardous" activities.[15] Such an extreme standard is an indication that it is time to end the damages clause experiment[16] and to reformulate an appropriate eminent domain standard.

Part I of this article explores the history of eminent domain and how and why California introduced a damages clause to its constitution.[17] Part II tracks and analyzes the modern case law, showing that the current doctrine of inverse condemnation is exactly what the enactors of the damages clause feared that it would become — broad to the point of excess.[18] Part III contrasts the damages clause with the California Tort Claims Act, which is sufficient to render inverse condemnation no longer necessary.[19] Part IV explores the possible legislative and judicial solutions to remedy the loophole in California's sovereign immunity — abolition of the damages clause, judicial overruling of the overbroad case law, or specifying *intentional* damage in application of the damages clause.[20]

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[11] *See Pasadena,* 228 Cal. App 4th at 1234; *Albers,* 62 Cal. 2d at 262.

[12] *Cf.* Peter M. Gerhart, *The Death of Strict Liability,* 56 Buff. L. Rev. 245, 246 (2008) (arguing that strict liability is a "superfluous doctrinal container for addressing non-intentional harms," and "a doctrinal shadow" that should be done away with).

[13] *See generally Pasadena,* 228 Cal. App. 4th (considering whether a street tree, maintained by the city, that fell on a private house during a windstorm may create an action in inverse condemnation).

[14] *See id.*

[15] *See Strict Liability Definition,* BusinessDictionary.com, http://www.businessdictionary.com/definition/strict-liability.html (last visited Jan. 27, 2015).

[16] *See infra* Part II.B.

[17] *See* discussion *infra* Part I.

[18] *See* discussion *infra* Part II.

[19] *See* discussion *infra* Part III.

[20] *See* discussion *infra* Part IV.

I. THE "DAMAGES CLAUSE"

Any child can describe the rank unfairness of having something taken away. And we all know that as one matures, "takings" don't get any sweeter, even when provided with some compensation. Perhaps that explains why eminent domain tends to draw public scrutiny and, often, public ire.[21] The furious legislative scrambling after *Kelo v. City of New London,*[22] probably the most attention-grabbing, modern eminent domain case from the U.S. Supreme Court, evinced the population's demand in this area for transparency and protection.[23] *Kelo* held broadly that so long as a government has a legitimate public purpose, it may exercise its eminent domain power.[24] The Court referenced the "hardship that condemnations may entail," but it also recognized that a state's citizens are free to place further restrictions on the power of their state to "take" property.[25]

As recognized in *Kelo,* states can go beyond the protection of the federal constitution by "carefully limit[ing] the grounds upon which takings may be exercised."[26] In 1870, Illinois did exactly that — providing in the Illinois Constitution that "property could not be taken *or damaged* for public use without just compensation."[27] The State of Illinois thereby enacted the nation's first damages clause.[28] California, along with about half of the other states, soon followed suit.[29] Since then, California's damages clause has blazed a trail of case law leading to the vast expansion of inverse condemnation claims and an unjustified and unintended infringement on the State's sovereign immunity.[30]

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[21] *See, e.g.,* Thomas J. Miletic, Comment, *One Step Forward, Two Steps Back: How California's 2008 Constitutional Amendment Changed the State's Eminent Domain Power,* 39 Sw. L. Rev. 209, 211 (2009) (pointing out how an eminent domain case drew anger and political reaction).

[22] Kelo v. City of New London, 545 U.S. 469 (2005).

[23] *See* Miletic, *supra* note 21, at 211.

[24] *See Kelo,* 545 U.S. at 488–89.

[25] *See id.* at 489.

[26] *Id.*

[27] Ill. Const. Art. I § 15 (2014) (emphasis added).

[28] *See* David Schultz, *Taking of Private Property for Public Use, in* 2A Nichols on Eminent Domain § 6.01 (2014); *see also* Ill. Const. art. II, § 13 (1870).

[29] *Id.*

[30] *E.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1234 (2014); Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507, 515–16 (2006);

A. THE HISTORY OF EMINENT DOMAIN

Dutch natural law philosopher Hugo Grotius coined the phrase "eminent domain" in the early 1600s to describe the inherent power of governments to take property.[31] British common law firmly established this power, which immigrated to the United States with the colonists.[32] Well before ratification of the Constitution, colonial governments routinely took private property.[33]

As ratified, the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."[34] This "just compensation requirement," which goes hand in hand with the modern understanding of eminent domain, was practically nonexistent in colonial America.[35] In fact, no state pursued the requirement's inclusion in the ratified Bill of Rights.[36] The just compensation requirement was proposed by James Madison in order to hinder the ability of the national government to take property wantonly, as was routinely done throughout the colonies.[37] "The rights of property," he wrote, "are committed into the same hands with the personal rights. Some attention ought, therefore, to be paid to property in the choice of those hands."[38] Thus, given the common law background, the Fifth Amendment does not create or grant the power of eminent domain — an inherent power of government — but limits such power by requiring just compensation.[39]

In the following century, the courts applied the just compensation clause restrictively and for the most part limited it to straightforward eminent domain proceedings.[40] The concept of inverse condemnation,

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Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 376–77 (1995).

31 Daniel P. Dalton, *A History of Eminent Domain,* Pub. Corp. L.Q., Fall 2006 1, 1.

32 *Id.*

33 *Id.* at 3.

34 U.S. Const. amend. V.

35 *Id.*

36 William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment,* 94 Yale L.J. 694, 708 (1985).

37 *See* Dalton, *supra* note 31, at 4.

38 The Federalist No. 54 (James Madison).

39 *See* Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" — A Proposal to Redefine "Public Use",* 2000 L. Rev. Mich. St. U. Det. C.L. 639, 644 (2000).

40 *See* Jed Rubenfeld, *Usings,* 102 Yale L.J. 1077, 1082 (1993).

however, was created to allow compensation under a unique situation: when the government took property but failed to initiate the proper proceedings.[41] Through the nineteenth century, inverse condemnation suits arose occasionally, but courts decided them narrowly along strict principles, namely limiting a "taking" to "the actual physical appropriation of property or a divesting of title."[42]

B. THE PURPOSE OF THE "DAMAGES CLAUSE"

In 1879, just compensation for the governmental taking of land in California, as at common law, was restricted to a physical invasion of property.[43] The Fourteenth Amendment incorporates the Fifth Amendment protections under the takings clause and applies them to the states.[44] As mentioned, however, states can go beyond the federal protections.[45] The California Constitutional Convention of 1878–1879 did exactly that by broadening the reach of the just compensation clause, enacting article 1 section 19 of the California Constitution which reads in relevant part: "Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid to . . . the owner."[46] The addition is referred to as the "damages clause."[47]

At the time of the damages clause's enactment in 1879, there were concerns among the legislators regarding its potential application.[48] Delegate Samuel M. Wilson of San Francisco pointed out that the Committee of the Whole had thoroughly discussed the question and rejected the addition.[49] Unfortunately, the records of the Committee of the Whole's debate (and

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41 *See id.*

42 *Id.*

43 Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 379 (1995).

44 *See, e.g.,* Agins v. Tiburon, 447 U.S. 255, 257 (1980); Dolan v. City of Tigard, 512 U.S. 374, 406 (1994).

45 *See* Kelo v. City of New London, 545 U.S. 469, 489 (2005).

46 CAL. CONST. art. I § 19 (2014).

47 *See Customer Co.,* 10 Cal. 4th at 379; *see also* Schultz, *supra* note 28.

48 WILLIS & STOCKTON, *supra* note 5, at 1190 (debating the merits of including "or damaged" in the eminent domain provision).

49 *Id.; see generally Inventory of the Working Papers of the 1878–1879 Constitutional Convention,* CAL. STATE ARCHIVES 53 app. (1993), https://www.sos.ca.gov/archives/collections/1879/archive/1879-finding-aid.pdf (listing the full names of the constitutional delegates).

therefore the exact rationale for that conclusion) do not exist, as the Constitutional Convention voted on the sixth day of the convention against employing a shorthand reporter.[50]

Some of the indicated reasons for enacting a damages clause included protecting citizens against situations where state action might damage a home by public use or economic change rather than physical damage.[51] Delegate Wilson recognized the danger of a broad interpretation of the damages clause:

> Now, to add this element of damage is to enter into a new subject. It is opening up a new question which has no limit. You take the case of street improvement, and this question of damage will open up a very wide field for discussion. . . . I regard it as very dangerous to undertake to enter into a new field.[52]

These delegates clearly recognized that inclusion of a damages clause could open up a new and sweeping area of law far beyond the justice that they could hope to bring about.[53]

Delegate John S. Hager, a proponent of the damages clause, cited a particular situation in San Francisco where the Legislature authorized the cutting of a street immediately adjacent to and between houses.[54] The construction project left houses on either side of the street high above the street level and in danger of sliding off those newly made cliffs.[55] Delegate Morris M. Estee further explained that the houses were "absolutely destroyed, and yet not a foot taken."[56] In light of this example, Delegate Estee concluded: "when a

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[50] *See Constitutional Convention: Sixth Day,* The Sacramento Bee, Oct. 4, 1878, (Second Edition) (While some delegates stood up "manfully" for the reporters and printers, others refused to "rob the people by having a mass of useless trash written and printed." Delegate Dowling of San Francisco, "in a fiery, energetic manner," added that he would not want to "fan[] the vanity of some long-winded and eloquent members by having their speeches printed.")

[51] Willis & Stockton, *supra* note 5, at 1190.

[52] *Id.*

[53] *See id.*

[54] *Id.; see generally Inventory of the Working Papers, supra* note 49 (listing the full names of the constitutional delegates).

[55] Willis & Stockton, *supra* note 5, at 1190.

[56] *Id.; see generally Inventory of the Working Papers, supra* note 49 (listing the full names of the constitutional delegates).

man's property is damaged it ought to be paid for. . . . I think it is the best we can get."[57] At a time when no other options for compensation existed, that might very well have been true. Hence, the amendment passed 62 to 28.[58]

In opposition, Delegate Wilson pointed out that the proponents' intentions were totally unfounded on any hard evidence and their damages clause would be little more than an experiment,[59] an experiment that other states were already trying with, as yet, no conclusive results.[60] It would take time to see whether such an addition brought about the justice hoped for or whether it opened the doors for something totally unintended.[61] Delegate Wilson concluded ominously, "In twenty years from now our children can refer to them and if they have worked well, that will be an argument."[62]

As the damages clause's effect on inverse condemnation actions has grown, it is time to consider which side was correct in 1879. As Justice Brandeis stated in 1932, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[63] As far as the coupling of inverse condemnation and the damages clause, it is time to end the experiment.

II. GROWTH OF A LOOPHOLE: THE CURRENT STATE OF INVERSE CONDEMNATION IN CALIFORNIA

Six years after the ratification of the damages clause, the Supreme Court of California considered it for the first time in *Reardon v. San Francisco*.[64] The court began by considering the case's outcome without applying the new constitutional amendment.[65] They remarked that the law was "well settled,"

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[57] Willis & Stockton, *supra* note 5, at 1190.

[58] *Id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *Id.*

[63] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[64] Reardon v. San Francisco, 66 Cal. 492, 501 (1885).

[65] *Id.* at 497–98.

and that municipal work done lawfully incurs no liability.[66] The Court posited that the traditional doctrine, while appearing unjust, "rests upon the soundest legal reason."[67] While improvements are ultimately the responsibility of the state when made for the public trust, "it is the prerogative of the state to be exempt from coercion by suit, except by its own consent."[68] *Reardon* recognized that any recovery in such a situation would be, by definition, a direct contradiction of sovereign immunity.[69] In sum, the Court determined that the new damages clause presented such a waiver.[70]

The Court then shifted focus to determine what exactly the delegates intended the new "damages" to include.[71] After all, it must mean something more than what the takings clause had already protected: "it will occur to any one reflecting on the import of the clause, that if it is not an additional guaranty to the common and usual one, its insertion was idle and unmeaning."[72] At common law, there was a high burden on the complaining party because the property owner yields his right "to the promotion and advancement of the public good."[73] California's damages clause, however, failed to define the causal requirement.[74] In addition, if the standard were to mirror that of recovery from private parties at common law, it would only allow recovery for negligence — damage done with "usual care and skill" being "*damnum absque injuria*," or damage that does not violate a legal right.[75] The court determined that the damages clause does not simply mirror private rights of recovery at common law.[76] It found that the clause provides compensation for an owner "where the damage is directly inflicted, or inflicted by want of care and skill, as where the damages

66 *Id.* at 497.
67 *Id.* at 498.
68 *Id.*
69 *See id.*
70 *See id.* at 500–01.
71 *Id.* at 501.
72 *Id.* at 502.
73 *Id.* at 504.
74 *See id.*
75 *Id.; see Damnum Absque Injuria Definition,* Merriam–Webster, http://www.merriam-webster.com/dictionary/damnum%20absque%20injuria (last visited Oct. 19, 2014).
76 *Reardon,* 66 Cal. at 501.

are consequential, and for which damages he had no right of recovery at the common law."[77]

The rule set forth in *Reardon* proved the most prolific interpretation of the new damages provision in the following years.[78] In 1965, *Albers v. County of Los Angeles*[79] cited *Reardon* in a holding that would affect inverse condemnation suits in California to the present day.[80] Discussing the construction of public improvements, the Court held that any physical injury to real property "proximately caused by the improvement as deliberately designed and constructed" warranted liability, no matter whether it was foreseeable.[81] The Court minimized reasons for opposing this formulation and decided that our system does not give enough deference to individuals as opposed to communities.[82] For their sake, the government should pay for property "which it destroys or impairs the value."[83] Thus, *Albers* created a general rule of strict liability that continues to persist for inverse condemnation damages.[84] Interestingly, while *Albers* provides the applicable rule, the case itself never rises to naming it "strict liability."[85] Rather, in *Akins v. State,*[86] the court introduces the term by closely analyzing the rule set forth in *Albers* and referring to it as "a general rule of strict liability."[87]

In 1941, an important and controversial exception to this strict liability rule originated in *Archer v. Los Angeles*.[88] *Archer* narrowed the *Reardon* rule, finding that the damages clause did not create an open bill to recover

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77 *Id.* at 505.

78 *See* Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 257 (1965). For cases between *Reardon* and *Albers* that followed *Reardon's* rule, see also, e.g., *Youngblood v. Los Angeles Cnty. Flood Control Dist.,* 56 Cal. 2d 603, 608 (1961); *People v. Symons,* 54 Cal. 2d 855, 862 (1960); *Bauer v. Cnty. of Ventura,* 45 Cal. 2d 276, 283 (1955); *Clement v. State Reclamation Bd.,* 35 Cal. 2d 628, 636 (1950).

79 *Albers,* 62 Cal. 2d. 250.

80 *Id.* at 257.

81 *Id.* at 263–64.

82 *See id.* at 263.

83 *Id.*

84 *See* Akins v. State, 61 Cal. App. 4th 1, 20 (1998).

85 *See generally Albers,* 62 Cal. 2d (abstaining from use of the term "strict liability" in the entirety of the opinion).

86 61 Cal. App. 4th 1.

87 *Id.* at 20.

88 19 Cal. 2d 19 (1941).

from the government.[89] The Court reasoned that the damages clause did not create a new cause of action "but [gave] a remedy for a cause of action that would otherwise exist,"[90] meaning, the Court would assess the state's liability in the same manner as the liability of a similarly situated private person.[91] Thus, under *Archer,* parties suing government entities "have no right to compensation under article I, section 14, if the injury is one that a private party would have the right to inflict without incurring liability."[92] Later, *Belair v. Riverside County Flood Control Dist.* pointed out that *Archer* was little more than a narrow exception to the *Albers* rule.[93] The Court recognized that "different policy considerations . . . inform the public and the private spheres."[94] It held that within *Archer*'s exception for "privileged activity," the government entity "must at least act reasonably and non-negligently" to avoid liability — seemingly disregarding the strict liability standard.[95]

Modern cases have further broadened the recovery rights under the doctrine of inverse condemnation. Considering the judicial history of the damages clause in inverse condemnation actions, courts have summarized that it "encompasses special and direct damage to adjacent property resulting from the construction of public improvements."[96] When the incidental consequence of deliberate government action is physical injury, the damaged or destroyed property can be considered "appropriated for 'public use.'"[97] In order to recover in such a situation, the defendant government must have participated in "planning, approval, construction, or operation of a *public project or improvement* which proximately caused injury to plaintiff's property."[98]

This standard presents a substantial open issue in modern inverse condemnation proceedings: What exactly is a "public project"?[99] In 2006, in

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89 *See id.* at 24.

90 *Id.*

91 *See id.*

92 *Id.*

93 *See* Belair v. Riverside Cnty. Flood Control Dist., 47 Cal. 3d 550, 563 (1988).

94 *Id.* at 565.

95 *Id.*

96 Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 380 (1995).

97 *Id.* at 415 n.7 (Baxter, J., dissenting) (emphasis added).

98 Wildensten v. E. Bay Reg'l Park Dist. 231 Cal. App. 3d 976, 979–80 (1991) (emphasis added).

99 *E.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014); Regency Outdoor Adver., Inc. v. City of Los Angeles, 39 Cal. 4th 507, 522 (2006).

Regency Outdoor Advertising, Inc. v. City of Los Angeles,[100] the Court's ruling depended on whether trees planted by the city along a public road were a "public Project."[101] Regency, an owner of roadside billboards, brought an inverse condemnation action against Los Angeles after the city planted palm trees that blocked the view of some of its billboards.[102] The Ccourt found that "[i]f [a] street is improved so as to be more useful, or ornamented so as to be more beautiful, the public is benefited generally."[103] Further, it found that "[t]he planting of trees along a road is, in general, fully 'consistent with [the road's] use as an open public street,' and in fact may enhance both travel and commerce along the street."[104] The Court concluded that the city was not liable because Regency had no right to visibility, but it found that the planting of trees still amounted to a public work.[105]

As mentioned, *City of Pasadena v. Superior Court* demonstrates what has become a broad and problematic interpretation of the damages clause.[106] In *Pasadena,* a severe windstorm toppled a tree lining a public street, damaging the home of James O'Halloran.[107] His insurance company brought an inverse condemnation action, requiring proof that the tree was part of a public improvement and that it proximately caused the damage.[108] *Pasadena* relied heavily on those statements in *Regency* where the Court found that city-planted trees were part of a public improvement.[109] In light of *Regency,* the *Pasadena* court concluded that whether trees are a public improvement was a triable issue of fact.[110]

After determining that the tree could amount to a public improvement, the court turned its attention to proximate cause and decided that it was not relevant to their review because the appellant failed to preserve the issue.[111]

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100 *Regency,* 39 Cal. 4th 507.
101 *Id.* at 522.
102 *Id.* at 512.
103 *Id.* at 522.
104 *Id.*
105 *See id.*
106 *See supra* notes 13–14 and accompanying text.
107 *Id.* at 1231.
108 *Id.* at 1236.
109 City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014).
110 *Id.* at 1232, 1235.
111 *Id.*

Nonetheless, the court took the opportunity to clarify the *Albers* test, stating that "injury . . . proximately caused by the improvement as deliberately designed and constructed" is sufficient for recovery.[112] Under the test, if a public improvement is "deliberately designed," it is the proximate cause of all damage incident to its existence.[113]

Through this progression of the case law, inverse condemnation has grown to strict liability against government entities for any damage caused by a public work.[114] Society should encourage cities to make safe and non-negligent public improvements; currently the law is doing otherwise. In sum, under the current law, cities should think twice before planting reasonably safe trees.

III. INVERSE CONDEMNATION VERSUS THE CALIFORNIA GOVERNMENT TORT CLAIMS ACT

The enactment of the damages clause clearly indicates the value that the delegates of the 1878–79 California Constitutional Convention attached to private property.[115] Because there was no possibility for a tort claim at the time, this seemed an appropriate and narrow way to mete out justice.[116] Since *Albers,* however, far from simply providing landowners the right to recover for governmentally damaged property (as Delegate Hager's San Francisco example suggested), the damages clause has reached beyond the traditional bounds of tort law.[117] The negligence principle dominates tort law and does the work of asking questions of reasonability.[118] Those questions function as a safeguard for defendants — after all, it makes sense that a person should not be liable in a situation in which

112 *Id.* (quoting Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263 (1965)).

113 *Id.*

114 *See id.;* Akins v. State, 61 Cal. App. 4th 1, 20 (1998); *Albers,* 62 Cal. 2d at 263.

115 *See supra* Part I.B.

116 *See* Willis & Stockton, *supra* note 5, at 1190.

117 *See generally supra* notes 54–55 and accompanying text (summarizing Delegate Hager's point); *Albers,* 62 Cal. 2d (broadening inverse condemnation claims to strict liability).

118 *See* Gerhart, *supra* note 12, at 246.

they acted without malice or without carelessness.[119] Within the realm of inverse condemnation, strict liability robs governmental defendants of those safeguards.[120]

Even more glaring is the issue of justice. While justice demanded a remedy for property owners in 1879, this was largely because no other option existed and the value of personal property was great enough to create one.[121] Today, another remedy does exist, and its contours are more reasonably measured (by standard negligence principles) to ensure just recovery.[122]

A. SOVEREIGN IMMUNITY

Whether recovery comes by tort or by inverse condemnation, the traditional obstacle for such claims was the state's sovereign immunity. The doctrine of sovereign immunity derives from the British prohibition on suits against the crown.[123] While the colonies differed in their adoption of the doctrine, the issue was of enough concern that it sparked extensive debate concerning its inclusion in the Constitution.[124] At the framing, the degree to which the Constitution, specifically article III, acknowledged sovereign immunity remained uncertain.[125] The Supreme Court's 1793 decision in *Chisholm v. Georgia*[126] resolved some of the uncertainty.[127] In *Chisholm,* drawing from language of article III, the Court allowed a South Carolina citizen to file suit against the State of Georgia.[128] The decision provoked outrage in Congress — it overturned the result with passage of the Eleventh Amendment less than three weeks later.[129]

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119 *See generally* William L. Prosser, Handbook of the Law of Torts 4 (1941) (pointing out that torts include direct interferences with the person and various forms of negligence).

120 *See supra* Part II.

121 *See* Willis & Stockton, *supra* note 5, at 1190.

122 *See* California Tort Claims Act, Cal. Gov't. Code § 810 (2014).

123 *See* William Blackstone, Commentaries *244.

124 Katherine Florey, *Insufficiently Jurisdictional: The Case Against Treating State Sovereign Immunity as an Article III Doctrine,* 92 Calif. L. Rev. 1375, 1385–86 (2004) [hereinafter *Insufficiently Jurisdictional*].

125 *See id.* at 1386.

126 2 U.S. 419 (1793).

127 *See* Florey, *Insufficiently Jurisdictional, supra* note 124, at 1386.

128 *See id.*

129 *See id.* at 1386–87.

The Supreme Court had little occasion to consider the Eleventh Amendment's language, "that no state shall be liable to be made a party defendant in any of the judicial courts . . . at the suit of any person or persons," until the late nineteenth century.[130] In the definitive case of the time, and since, *Hans v. Louisiana*[131] held in 1890 that the doctrine of sovereign immunity completely barred suits by private citizens against states.[132] While some authority has eroded the absolute nature of the *Hans* decision,[133] *Seminole Tribe v. Florida* reaffirmed its formulation of state sovereign immunity in 1996.[134] The Supreme Court has thus repeatedly affirmed, in some form or another since the adoption of the Constitution, that states have inherent immunity from suit by private citizens.[135] In a situation where the government damaged the property of a private owner, sovereign immunity would allow absolutely no recourse.[136]

The ideals of democracy do not seem to fit well with that exclusion, based heavily on the conception that the state, like the British king, was technically incapable of doing any wrong.[137] Called the "sovereign-essentialist" view of sovereign immunity, this is an open admission that this doctrine, in many respects, is basically equivalent to the conceit that the sovereign is above the law.[138] While this axiom as a historical justification

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130 *See id*. at 1387 (quoting U.S. Const. amend. XI).

131 Hans v. Louisiana 134 U.S. 1 (1890).

132 *See* Florey, *Insufficiently Jurisdictional, supra* note 124, at 1388–89.

133 *See generally* Ex parte Young, 209 U.S. 123 (1908) (holding that state officials may be sued in federal court for injunctive relief in order to prevent a continuing violation of federal law).

134 *See* Florey, *Insufficiently Jurisdictional, supra* note 124, at 1389 (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996)).

135 *E.g., Seminole Tribe,* 517 U.S. at 54; *Hans,* 134 U.S. at 10; Chisholm v. Georgia, 2 U.S. 419, 452 (1793) (holding that states have such immunity but have waived it as a concession to the federal government).

136 *See, e.g.,* U.S. Const. amend. XI ("no state shall be liable . . . at the suit of any person or persons"; *Seminole Tribe,* 517 U.S. (affirming that suits against unconsenting states are barred by the Constitution); *Hans,* 134 U.S. (holding that the Supreme Court cannot exercise jurisdiction over any case in which a state is sued).

137 *See* William Blackstone, Commentaries *237; Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine,* 43 Wake Forest L. Rev. 765, 785 (2008) [hereinafter *Penumbras*].

138 *See* Florey, *Penumbras, supra* note 137, at 786.

for sovereign immunity seems to have been generally accepted, its transition from king's prerogative to the American state is without "adequate explanation."[139]

A second explanation for the necessity of state sovereign immunity is that the state, the authority that creates the law, cannot be subject to that same law.[140] This theory is attributed to Justice Holmes who advocated its practical rationale.[141] However, commentators have claimed that the rationale is "legally and historically unsound," not to mention inappropriate "when every civilized community . . . should by statute consent to be sued and to admit its pecuniary responsibility for the torts of its agents."[142]

In that vein, while "[t]he Government is not liable to suit unless it consents thereto,"[143] the ideals of justice and democracy allow (and possibly encourage) government consent. For example, people will want a possibility of recovery if the government damages their property and are therefore more likely to vote in favor of candidates and measures that allow that recovery. As the logic goes, government exists for the benefit of the whole public and it is reasonable to expect that the whole public bear some of the burden of the injuries wrongly inflicted by the government.[144] Thus, it might be reasonable to expect the government to waive its sovereign immunity in situations of great public interest — like the damage of private property.[145] Of course, like much of the law, the manner in which this is accomplished spans a broad spectrum of possibilities, some more problematic and unjust than others.

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139 Edwin M. Borchard, *Governmental Responsibility in Tort, IV,* 36 Yale L.J. 1, 33 (1926).

140 *See id.* at 17.

141 *See* Edwin M. Borchard, *Governmental Responsibility in Tort, V,* 36 Yale L.J. 757, 757 (1927).

142 *Id.* at 757–58.

143 Price v. United States, 174 U.S. 373, 375–76 (1899).

144 *See* Parrish, *supra* note 6, at 282. Ironically, *Pasadena v. Superior Court*'s original plaintiff was the insurance company covering the damaged home. *See* 228 Cal. App. 4th 1228, 1228 (2014). So the argument for the spreading of the burden of the injuries is something of a moot point when insurance exists to cover them. While this argument would carry more weight for an uninsured homeowner, the reality that the insurance company can wield this strict liability against governments is significantly more ominous.

145 *E.g.,* California Tort Claims Act, Cal. Gov't. Code §§ 810 *et seq.* (Lexis 2014).

B. CALIFORNIA GOVERNMENT TORT CLAIMS ACT

The California delegates clearly considered private property important enough in 1879 for California to waive sovereign immunity in favor of recovery for intentional takings and damage.[146] Other types of injuries were not within the waiver; for example, personal injuries caused by the state such as medical negligence in a state hospital or defamation by public school district employees.[147] It was not until 1963 that the state formally recognized that other harms caused by the government merited similar protections to property.[148]

Two separate California Supreme Court decisions in 1961 paved the way for this change by effectively abolishing sovereign immunity by judicial decision.[149] *Muskopf v. Corning Hospital District*[150] addressed the question of sovereign immunity head-on when the plaintiff argued that the doctrine should be discarded.[151] The plaintiff filed suit against the hospital district, claiming that the hospital's negligence resulted in further injury of her already injured hip.[152] The hospital district demurred on the ground that it was immune as a state agency exercising a governmental function.[153] The trial court sustained the demurrer.[154] Finding injustice, the California Supreme Court discarded the traditional sovereign immunity doctrine, calling it "an anachronism, without rational basis, [that] has existed only by the force of inertia."[155]

In *Lipman v. Brisbane Elementary School District,*[156] the Court made a similar holding.[157] Following *Lipman,* the California Legislature enacted a moratorium statute suspending the effects of both decisions while they

146 *See* Willis & Stockton, *supra* note 5, at 1190.

147 *See* Lipman v. Brisbane Elementary Sch. Dist., 11 Cal. Rptr. 97, 98 (1961); Muskopf v. Corning Hosp. Dist., 11 Cal. Rptr. 89, 90 (1961).

148 *See* Parrish, *supra* note 6, at 281.

149 *See id.* at 281–82.

150 *Muskopf*, 11 Cal. Rptr. 89.

151 *See id.* at 90.

152 *See id.*

153 *See id.*

154 *See id.*

155 *Id.* at 92.

156 11 Cal. Rptr. 97, 98 (1961).

157 *See id.* at 101.

studied whether the government should indeed waive sovereign immunity in the context of valid tortious injury caused by the state.[158] The Legislature appointed a Law Revision Commission and, while the Commission acknowledged the need to limit governmental liability, it recognized the harshness and injustice of absolute immunity.[159] It offered that justice demanded compensation for injuries that were the result of wrongful or negligent acts or omissions, regardless of whether the government was responsible for such actions.[160] Accordingly, they recommended the Legislature follow the lead of the California Supreme Court in *Muskopf* and *Lipman* and abolish sovereign immunity.[161]

The abolition and resulting structural change of this decree stirred up significant policy debates.[162] Arguments against liability for tort focused on separation of powers and the handicapping of governmental actors for fear of liability.[163] On the other side, liability could also deter negligent activity and "manifestly" create fairness by eliminating a governmental "license to harm."[164] The Legislature balanced these considerations with the passage of the California Tort Claims Act,[165] though favoring liability over immunity.[166] The Act provides that "liability for resulting harm is the rule, and immunity is the exception,"[167] and it advances two theories of liability.[168] Government actors may be either directly liable for failing to discharge a mandatory duty or derivatively liable for the acts or omissions of their employees.[169]

Recalling the initial question — to what extent does the California Tort Claims Act provide relief for damage to private property? — The government entity does not damage property by failing to discharge a mandatory

158 *See* Parrish, *supra* note 6, at 282.
159 *See id.*
160 *See id.*
161 *See id.* at 282–83.
162 *See id.* at 283.
163 *See id.* at 285–86.
164 *See id.* at 286–87.
165 Cal. Gov't Code §§ 810 *et seq.* (Lexis 2014).
166 *See id.* at 287.
167 *Id.* (quoting Scott v. Cnty. of Los Angeles, 32 Cal. Rptr. 2d 643, 652 (1994))
168 *Id.* at 288.
169 *Id.*

duty, and one cannot assert a negligence cause of action directly against a government entity.[170] Instead, one can only sue the government by way of the negligent acts or omissions of governmental employees.[171] The Act provides that their government employers are liable under the doctrine of *respondeat superior* for negligent action within the scope of their employment.[172] Thus, general tort law considerations such as the duty of care — which contains the requirement of foreseeability — define liability under the California Tort Claims Act.[173]

C. COMPARISON OF INVERSE CONDEMNATION AND GOVERNMENT TORT CLAIMS

Liability differs under the laws of inverse condemnation and Government Tort Claims. The first difference comes in the form of governmental protections in the California Tort Claims Act.[174] After weighing the policy concerns surrounding the waiver of sovereign immunity, the Legislature allowed suit against the government for tortious acts but reserved certain immunities and protections for the state.[175] In this way, maintaining some thoughtful immunity seeks to protect government's ability to pursue public works without the chilling effect of possible strict liability.[176] Comparatively, courts ruling on inverse condemnation actions need not consider such immunities because it supersedes them.[177]

A second difference comes from the fact that one remedy is grounded in a statute and the other in the California Constitution. Addressing the Constitutional right directly, *Rose v. State* points out that it is "elementary that the legislature by statutory enactment may not abrogate or deny

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170 *See* Arvo Van Alstyne updated by John P. Devine, *General Principles of Public Entity and Public Employee Liability, in* California Government Tort Liability § 9.50 (4th ed. 2014) [hereinafter *Public Liability*].

171 *See id.*

172 *See id.* at § 9.7; *see also* Gov't § 815.2(a).

173 *See* Van Alstyne, *Public Liability, supra* note 170,at § 9.50.

174 *See* Van Alstyne updated by John P. Devine, *General Immunities of Public Entities and Employees, in* California Government Tort Liability § 10.1 (4th ed. 2014).

175 *See, e.g.,* Parrish, *supra* note 6, at 287–88 (mentioning public employee discretionary immunity and alluding to other "strictly construed" governmental immunities).

176 *See id.* at 285.

177 *See* Van Alstyne, *Public Liability, supra* note 170, at § 9.62.

a right granted by the Constitution."[178] In that vein, "the framers of the Constitution did not intend to grant a right which the legislature by its refusal or neglect to enact proper remedial machinery therefor might take away or deny."[179]

As far as similarities, both causes of action require "proximate causation" as one of their elements.[180] However, inverse condemnation has no requirement for breach of a standard of care or foreseeability.[181] "Thus *any* actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable [in inverse condemnation]."[182]

Inverse condemnation actions apply to considerably more specific situations than Government Tort Claims, yet policy considerations behind them are practically indistinguishable.[183] Nevertheless, courts are careful to distinguish between them in their decisions. *Pac. Bell v. City of San Diego*[184] points out the "public use" language in the Constitution as the major difference,[185] that is, "if the injury is a result of dangers *inherent in the construction of the public improvement* as distinguished from dangers *arising from the negligent operation of the improvement*."[186] The Court provides an example from a case involving flooded property.[187] If an act like forgetting to close a sluice gate damaged the property, that act would amount to negligence.[188] If a deliberate act carried out with the purpose of fulfilling a public object or project, like raising a ditch bank, caused

178 123 P.2d 505, 513 (1942).

179 *Id.*

180 Van Alstyne, *Public Liability, supra* note 170, at § 9.62.

181 *See* Aetna Life & Cas. Co. v. City of Los Angeles, 216 Cal. Rptr. 831, 835 (1985) (citing *Albers*).

182 *Id.*

183 *See, e.g.,* Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263–64 (1965) (applying inverse condemnation analysis to public works as deliberately designed and constructed); Van Alstyne, *Public Liability, supra* note 170, at § 9.50 (indicating that the Act applies to situations of governmental employee negligence).

184 96 Cal. Rptr. 2d 897 (Cal. Ct. App. 2000).

185 *Id.* at 905.

186 *Id.* (quoting *House v. L.A. Cnty. Flood Control Dist.,* 153 P.2d 950, 956 (Cal. 1944) (Traynor, J., concurring) (italics in original)).

187 *Id.*

188 *Id.*

the damage, that act would fit the scope of inverse condemnation.[189] "The damage to property [in the flood scenario] resulted not from immediate carelessness but from a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property."[190] In other words, inverse condemnation only applies to situations where public works damage private property without any negligence.

1. Discarding Mens Rea

A fair counterargument points out that these two legal avenues necessarily address distinct legal situations. If inverse condemnation and Government Tort Claims actually perform two distinct functions, it still begs the question whether the older protection (inverse condemnation) is still necessary in a society that allows tort claims against the government. Even if these two methods for recovery occupy their own unique situations, the problem is that inverse condemnation has run amok with strict liability. *Pac. Bell's* reasoning points to inverse condemnation's appropriateness because it functions in situations of "a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property."[191] According to the Court, damage resulting from negligence has no place in an inverse condemnation proceeding.[192]

This distinction only makes sense as long as the inverse condemnation occurs as "a deliberate act."[193] The government must have intended to do or create something and then gone about its implementation, thus fulfilling both "deliberate" and "act." Similarly, the 1879 delegates referenced a deliberate act — the grading of a street that rendered adjacent property worthless — as impetus for the damages clause in the first place.[194] However, in inverse condemnation, this deliberate act is not the same as a *mens rea* —

189 *See id.*

190 *Id.* (italics omitted).

191 *Id.* (quoting *Customer Co. v. City of Sacramento,* 10 Cal. 4th 368, 382 (1995)).

192 *See id.*

193 *See id.*

194 *See* Willis & Stockton, *supra* note 5, at 1190.

the intention to do wrong or to knowingly cause harm.[195] In contrast, some courts find that the *mens rea* required for a valid inverse condemnation action is "a failure to appreciate the probability that [the action] would result in some damage."[196] Thus, whenever the government acts intentionally, although non-negligently, it runs the risk of incurring strict liability under inverse condemnation.

Interpreting the cause of action to dispense with a *mens rea* requirement runs contrary to much of the legal system.[197] "[*Mens rea*] is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[198] Courts should dispense with the requirement of *mens rea* only when there is "a clear legislative intention to do so."[199]

Such disregard of any *mens rea* requirement remains problematic in an inverse condemnation setting because, while those interpretive standards apply specifically to situations of strict liability, they also confine themselves to criminal law.[200] Not to mention, while exceptions are rare, they are restricted to " 'public welfare offenses', i.e., statutes whose purpose is regulation of 'industries, trades, properties or activities that affect public health, safety or welfare.' "[201] Thus, while inverse condemnation now amounts to strict liability, its being a civil cause of action means that *mens rea* is not necessarily an assumption of its construction. Even if that were the case, it would likely fall under the exception of "public welfare offenses," considering its strong public motive to protect private property.

2. The Effect of Strict Liability

Another counterargument reasons that the delegates intended whatever strong and broad protection for private property that arose from the damages clause. Whether or not the framers intended strict liability with no *mens rea* is a hard argument to make, given the little history left to attest

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195 *See Mens Rea Definition,* Merriam–Webster, http://www.merriam-webster.com/dictionary/mens%20rea (last visited Dec. 17, 2014).

196 *Pac. Bell,* 96 Cal. Rptr. 2d at 905 (quoting *Customer Co.,* 10 Cal. 4th at 382).

197 *See* United States v. Launder, 743 F.2d 686, 689 (9th Cir. 1984).

198 Morissette v. United States, 342 U.S. 246, 250 (1952).

199 *Launder,* 743 F.2d at 689.

200 *See id.*

201 *Id.*

to their intentions. That still leaves the question of whether a negligence regime would better support the justice they had in mind.[202] After all, the only intention that remaining history leaves for certain is that delegates seemed to find the social value of private property high enough to suspend sovereign immunity to protect it.[203]

Strict liability casts a wider net than ordinary negligence because it makes the actor responsible for all harm it proximately causes.[204] Even when the actor achieves a reasonable amount of care in the action, resulting damage falls within the scope of liability.[205] The goal in administering this type of liability is to impose an economic incentive to encourage safety through responsibility.[206] For the most part, the law confines strict liability torts to "ultrahazardous activities."[207]

Similarly, under the current law, inverse condemnation protects citizens of the state from property damage caused by non-negligent government actions.[208] Granted, if the government is engaging in inherently dangerous activities, perhaps it should be subject to a strict liability standard — but inverse condemnation proceedings can result for liability far beyond actions that are inherently dangerous.[209]

Even avoiding that implication, strict liability applies to situations where the risks created are so great that no reasonable care could make them unavoidable.[210] In such cases, residual risk amounts to little more than bad luck and lacks a clear rationale for why the cost of damage should fall on the injurer rather than the victim.[211] "If we are to give human agency a central role in our theory of torts . . . then we would want to think carefully about how we allocate the losses from risk that is beyond human agency."[212] Further, strict

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202 *See* Gerhart, *supra* note 12, at 246 (arguing that a negligence regime sufficiently accomplishes all the legitimate "work" that might be attributed to strict liability).

203 *See supra* Part I.B.

204 *See* Gerhart, *supra* note 12, at 251.

205 *See id.*

206 *See id.*

207 *Id.* at 247.

208 *See supra* Part III.C.1.

209 *E.g.,* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014); Regency Outdoor Adver. Inc. v. City of Los Angeles, 39 Cal. 4th 507, 522 (2006).

210 *See* Gerhart, *supra* note 12, at 264.

211 *See id.*

212 *Id.* at 269.

liability applies even in situations where an actor has made reasonable non-negligent decisions.[213] This is dangerous because it is "impossible to force people to make more than reasonable decisions."[214] Thus, the rule imposes a cost for activity but cannot make actors behave more than reasonably.[215] "[O]nce a reasonableness decision is made the expected harm is less than the cost of more precautions. To penalize the reasonable act runs the risk of losing the benefits of action without reducing the cost of the action."[216] In other words, applying this to inverse condemnation, strict liability could actually incentivize governments to provide less care in the construction of public works than under a standard of reasonableness.

IV. SOLUTIONS

One solution to the impropriety of strict liability inverse condemnation is to abolish it and allow property owners to recover as best they can with a government tort claim. The negligence standard rather than strict liability and the remnant possibilities of immunity would limit its application.[217] Additionally, it would avoid all the policy pitfalls and absurd incentives that the current strict liability scheme produces.[218] Cities could once again plant trees and build bridges without the concerns of strict liability.

Alternatively, the damages clause could operate under a modified negligence standard, either by some clarification to the amendment or by judicial ruling overturning *Albers* (which introduced strict liability to inverse condemnation).[219] If, indeed, the sanctity of private property remains a valid rationale for the damages clause, then a modified negligence standard would keep its constitutional status (avoiding the potential for legislative change[220]) while dealing with it more specifically than the broader California Tort

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213 *Id.* at 271.

214 *Id.* at 272.

215 *See id.*

216 *Id.* at 272–73.

217 *See* Van Alstyne, *Public Liability, supra* note 170,at § 9.50; *see, e.g.,* Parrish, *supra* note 6, at 287–88 (mentioning public employee discretionary immunity and alluding to other "strictly construed" governmental immunities).

218 *See supra* Part III.C.2.

219 *See supra* notes 79–87 and accompanying text.

220 *See supra* Part III.C.

Claims Act could. Such a standard, as advocated by Professor Gerhart, would not only consider traditional reasonableness but also activity-based reasonableness.[221] That additional consideration would ask "whether the defendant's activity-based decisions were reasonable."[222] Such a question could avoid the problem in the Tort Claims Act of no direct liability for government agencies.[223] By not simply confining recovery to injurious actions but broadening it to governmental decisions that brought those actions about, governments could be held liable for decisions that proximately damaged private property — so long as their reasonableness was weighed.[224]

A third option, and the one that seemingly conforms to the intent of the creators of the damages clause, is that only intentional damage be covered.[225] The example discussed by the 1879 delegates supports such an interpretation. There, as discussed above, the city cut a road between two rows of houses, suddenly setting them on ad hoc cliffs and destroying their utility and value.[226] The harm in their example was not attenuated — they based the damages clause on a situation foreseeable to the point of being intentional.[227] The courts have long recognized that such a high degree of certainty is equivalent to intentionality.[228] Based on the example and the presumption against the waiver of sovereign immunity, it is likely that the delegates only intended liability for governmental actions that knowingly caused harm to private property. Accordingly, limiting inverse condemnation to intentional or highly foreseeable damage would also effectively fix the problem.

V. CONCLUSION

California enacted a damages clause in order to fulfill a major function of the law — to prevent harm. However, years of inverse condemnation lawsuits and occasional overzealous judicial legislation have created a loophole in sovereign immunity. Inside that loophole, actions in inverse

221 *See* Gerhart, *supra* note 12, at 246.
222 *Id.*
223 *See id.*
224 *See supra* Part II.
225 *See* Willis & Stockton, *supra* note 5, at 1190.
226 *See supra* notes 54–58 and accompanying text.
227 *See supra* notes 54–58 and accompanying text.
228 *See* Model Penal Code § 2.02(2)(b)(ii) (2015).

condemnation are subject to a regime of strict liability with little functional rationale for its severity. The definition of "public work" applies so broadly that roadside trees falling can trigger this strict liability. Observers are left to wonder how far this ability to recover will extend. With no negligence at all, could governments be strictly liable for freak city bus accidents or levee breaks? For a bridge collapse during an earthquake? Without the traditional standards for negligence guiding these cases, governments could easily be on the hook for ever more outlandish damages, simply because damage was "proximately caused" by a public work.[229] A more appropriate way around the shield of sovereign immunity exists in modern law with the benefits of legislative gravity, standards of reasonableness, and occasional well-considered immunities.[230]

While the damages clause sought to protect the sanctity of private property, as an experiment in justice it went awry when it grew to liability on any government act that might damage property, whether foreseen or unforeseen, negligent or reasonable. Delegate Wilson argued that only time would be able to tell if the damages clause would grow into something unintended. Now, with the benefit of that time and hindsight, we see that it outgrew the intentions of the 1878–1879 delegates. It is time to close the loophole.

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229 *See* City of Pasadena v. Superior Court, 228 Cal. App. 4th 1228, 1235 (2014); Akins v. State, 61 Cal. App. 4th 2, 20 (1998); Albers v. Cnty. of Los Angeles, 62 Cal. 2d 250, 263 (1965).

230 California Tort Claims Act, Cal. Gov't. Code §§ 810 *et seq.* (Lexis 2014).