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.