

TAKINGS AND TRESPASS: TRESPASS LIABILITY FOR PRECONDEMNATION ENTRIES

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I. INTRODUCTION

If the government or another entity with the power of eminent domain, such as a utility company or a railroad, takes possession of land before acquiring title to it, what are the owner's rights? The owner has a

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constitutional right to sue for the land's value in an inverse condemnation action.¹ But does the owner also have an action for trespass? The answer to this question varies widely among the states because it involves two fundamental and potentially conflicting legal principles—government sovereignty over land and the protection of private property rights, particularly against abusive government conduct.

The absence of trespass liability in some jurisdictions is in marked contrast to the usual rules. Since common law's earliest age, liability for trespass has been strict. Under the principles of the common law, a trespasser is liable even if its entry onto another's land was unintentional and even if the entry caused no damage.² Moreover, entities with the eminent domain power are liable for trespass in every other context unless sovereign immunity bars the action. Why is precondemnation entry different?

This question has substantial practical, as well as theoretical, importance. For example, in an inverse condemnation action an owner normally cannot recover consequential damages, but they are recoverable in a trespass action.³ Similarly, punitive damages,⁴ statutory damage

1. In Ohio, the landowner has a mandamus action to compel the institution of condemnation proceedings, rather than an inverse condemnation action. *Trafalgar Corp. v. Miami County Bd. of County Comm'rs*, No. 2002-CA-20, 2004 WL 68014, at *3 (Ohio Ct. App. Jan. 16, 2004); *Hardale Inv. Co. v. State*, No. 98-BA-40, 2000 WL 459704, at *7 (Ohio Ct. App. Apr. 14, 2000); *Consol. Rail Corp. v. City of Gahanna*, No. 95APE12-1578, 1996 WL 257457, at *4 (Ohio Ct. App. May 16, 1996). For ease of reference, this Article will include the mandamus action in the term "inverse condemnation."

2. 6A AMERICAN LAW OF PROPERTY § 28.1 (1954); 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 64A.01[3] (2000).

3. *Ossman v. Mountain States Tel. & Tel. Co.*, 520 P.2d 738, 741 (Colo. 1974); *Cohen v. Mayor of Wilmington*, 99 A.2d 393, 395 (Del. Ch. 1953); *Grainland Farms, Inc. v. Ark. La. Gas Co.*, 722 P.2d 1125, 1129 (Kan. Ct. App. 1986); *Balt. & O.R. Co. v. Boyd*, 10 A. 315, 317-18 (Md. 1887); *Huber v. Portland Gas & Coke Co.*, 274 P. 509, 511 (Or. 1929).

4. CAL. CIV. CODE § 3294 (West 1997); NEV. REV. STAT. § 40.170 (2007); N.C. GEN. STAT. § 1D-15 (2005); N.D. CENT. CODE § 32-03.2-11 (Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon Supp. 2007); WIS. STAT. § 895.043 (2006); *Bowman v. Columbia Gas Transmission Corp.*, No. 87-3166, 1988 WL 68890, at *2 (6th Cir. July 6, 1988); *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 747 F. Supp. 401, 403 (N.D. Ohio 1990); *Regan v. Cherry Corp.*, 706 F. Supp. 145, 153 (D.R.I. 1989); *Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315, 1322 (D. Alaska 1985); *Hogan v. Ala. Power Co.*, 351 So. 2d 1378, 1382 (Ala. Civ. App. 1977); *Bridges v. Alaska Hous. Auth.*, 375 P.2d 696, 702 (Alaska 1962); *Gila Water Co. v. Gila Land & Cattle Co.*, 249 P. 751, 753-54 (Ariz. 1926); *Sw. Gas & Elec.*

multipliers,⁵ and criminal liability⁶ may be available for trespass, though

Co. v. Patterson Orchard Co., 20 S.W.2d 636, 639 (Ark. 1929); Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1234 (Colo. 2001); Otley v. McCarthy, No. CV020816358S, 2003 WL 23112729, at *13-14 (Conn. Super. Ct. Dec. 11, 2003); Keller v. Del-Homes, Inc., No. C.A. 97C-02-040, 2000 WL 973080, at *4 (Del. Super. Ct. Mar. 31, 2000); Fla. Power & Light Co. v. Walker, 440 So. 2d 659, 660-61 (Fla. Dist. Ct. App. 1983); Oglethorpe Power Corp. v. Sheriff, 436 S.E.2d 14, 17 (Ga. Ct. App. 1993); Chin Kee v. Kaeleku Sugar Co., 29 Haw. 524, 532 (1926); Cox v. Stolworthy, 496 P.2d 682, 684 (Idaho 1972); Roark v. Musgrave, 355 N.E.2d 91, 96 (Ill. App. Ct. 1976); Anderson, Etc., R.R. Co. v. Kernodle, 54 Ind. 314, 319 (1876); Sigsbee v. Swathwood, 419 N.E.2d 789, 799 (Ind. Ct. App. 1981); Ind. & Mich. Elec. Co. v. Stevenson, 363 N.E.2d 1254, 1262-63 (Ind. Ct. App. 1977); Nemecek v. Santee, No. 05-518, 2006 WL 334298, at *2 (Iowa Ct. App. Feb. 15, 2006); Ultimate Chem. Co. v. Surface Transp. Int'l, Inc., 658 P.2d 1008, 1012 (Kan. 1983); Grainland Farms, Inc. v. Ark. La. Gas Co., 722 P.2d 1125, 1129 (Kan. Ct. App. 1986); Roberie v. VonBokern, No. 2004-SC-000250-DG, 2006 WL 2454647, at *6-7 (Ky. Aug. 24, 2006); Zimmerman v. Helser, 32 Md. 274, 277-78 (1870); Wronski v. Sun Oil Co., 279 N.W.2d 564, 571-72 (Mich. Ct. App. 1979); Brantner Farms, Inc. v. Garner, No. C6-01-1572, 2002 WL 1163559, at *5 (Minn. Ct. App. June 4, 2002); Ill. Cent. R.R. Co. v. Hoskins, 32 So. 150, 151 (Miss. 1902); Hayden v. Grand River Mut. Tel. Corp., 440 S.W.2d 161, 166-67 (Mo. Ct. App. 1969); Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 67-68 (N.H. 1972) (although New Hampshire does not allow punitive damages, the compensatory damage award can be increased if the defendant's conduct was "wanton, malicious, or oppressive"); La Bruno v. Lawrence, 166 A.2d 822, 824-25 (N.J. Super. Ct. App. Div. 1960); Kupersmidt v. N.Y. Tel. Co., 282 N.Y.S.2d 605, 610 (Sup. Ct. 1967); Allen v. Transok Pipe Line Co., 552 P.2d 375, 382 (Okla. 1976); Huber v. Portland Gas & Coke Co., 274 P. 509, 511 (Or. 1929); Katlin v. Tremoglie, 43 Pa. D. & C.4th 373, 398-99 (Pa. Com. Pl. 1999); Erlanger v. Gobern, No. WC 85-348, 1990 WL 10000164, at *8-9 (R.I. Super. Ct. June 5, 1990); Hinson v. A.T. Sistare Constr. Co., 113 S.E.2d 341, 344 (S.C. 1960); Till v. Bennett, 281 N.W.2d 276, 278-79 (S.D. 1979); Meighan v. U.S. Sprint Commc'ns Co., 924 S.W.2d 632, 641 (Tenn. 1996); Powers v. Taylor, 379 P.2d 380, 382 (Utah 1963); Moore v. Duke, 80 A. 194, 197 (Vt. 1911); Hamilton Dev. Co. v. Broad Rock Club, Inc., 445 S.E.2d 140, 143 (Va. 1994); Hall Oil Co. v. Barquin, 237 P. 255, 271, 275 (Wyo. 1925).

5. ALA. CODE § 9-13-62 (LexisNexis 2001); ALASKA STAT. § 09.45.730; ARK. CODE ANN. § 15-32-301 (2003); CAL. CIV. CODE § 3346 (West 1997); CONN. GEN. STAT. ANN. § 52-560 (West 2005 & Supp. 2007); DEL. CODE ANN. tit. 25, § 1401(b) (1989); IDAHO CODE ANN. § 6-202 (2004); 740 ILL. COMP. STAT. ANN. 185/2 (West 2002); IOWA CODE § 658.4 (2007); KY. REV. STAT. ANN. § 364.130(1) (LexisNexis 2002); LA. REV. STAT. ANN. § 3:4278.1(B) (2003); ME. REV. STAT. ANN. tit. 14, § 7552(4) (2003); MD. CODE ANN., NAT. RES. § 5-409 (LexisNexis 2005); MASS. GEN. LAWS ch. 242, § 7 (2004); MICH. COMP. LAWS ANN. § 600.2919(1) (West 2004); MINN. STAT. ANN. § 548.05 (West 2000); MISS. CODE ANN. § 95-5-10(1) (West 2007); NEV. REV. STAT. § 40.160 (2007); N.H. REV. STAT. ANN. § 539:4 (LexisNexis 2006); N.M. STAT. § 30-14-1.1 (2004); N.Y. REAL PROP. ACTS. LAW § 861(2) (McKinney 1979 & Supp. 2008); N.C. GEN. STAT. § 1-539.1 (2005); N.D. CENT. CODE § 32-03-30 (1996); OHIO REV. CODE ANN. § 901.51 (LexisNexis 2005); OKLA. STAT. ANN. tit. 23, § 72 (West 1987 & Supp. 2008); OR. REV. STAT. ANN. §§ 105.810, 105.815 (West 2003); 42

they are unavailable for inverse condemnation. In some jurisdictions, trespass has a longer statute of limitations than inverse condemnation;⁷ in others, the right to a jury trial exists for one action but not for the other.⁸ Courts in some jurisdictions include the value of improvements made by a trespassing condemnor in the just compensation award,⁹ though the result is the opposite if the condemnor is not characterized as a trespasser.¹⁰ An issue of greater importance to many landowners than the amount of

PA. CONS. STAT. ANN. § 8311 (West 2007); R.I. GEN. LAWS § 34-20-1 (1995); S.D. CODIFIED LAWS § 21-3-10 (2004 & Supp. 2007); TENN. CODE ANN. § 43-28-312 (2000); UTAH CODE ANN. § 78-38-3 (2003); VT. STAT. ANN. tit. 13, § 3606 (1998); VA. CODE ANN. § 55-333 (2003); WASH. REV. CODE ANN. § 64.12.030 (West 2005); W. VA. CODE ANN. § 61-3-48a (LexisNexis 2005); WIS. STAT. ANN. §§ 26.09(3), 182.017(5) (West 2004 & Supp. 2007).

6. ALA. CODE § 13A-7-4 (LexisNexis 2005); ALASKA STAT. § 11.46.330 (2006); ARK. CODE ANN. § 5-39-203 (2006); CAL. PENAL CODE § 602 (West 1999); DEL. CODE ANN. tit. 11, § 821 (2001); FLA. STAT. ANN. § 810.09 (West 2007); GA. CODE ANN. § 16-7-21 (West 2003); HAW. REV. STAT. § 708-814 (1993 & Supp. 2006); 720 ILL. COMP. STAT. ANN. 5/21-1 (West 1993 & Supp. 2007); IND. CODE ANN. § 35-43-2-2(a)(4) (LexisNexis 2004); IOWA CODE § 716.8; KAN. STAT. ANN. § 21-3721 (1995); KY. REV. STAT. ANN. § 511.080; LA. REV. STAT. ANN. § 14:63; ME. REV. STAT. ANN. tit. 17A, §§ 402, 404 (2006); MD. CODE ANN., CRIM. LAW § 6-402 (LexisNexis 2002); MICH. COMP. LAWS § 750.552 (2004); MINN. STAT. ANN. § 609.605 (West 2003 & Supp. 2008); MISS. CODE ANN. § 97-17-87 (1999 & Supp. 2007); MO. ANN. STAT. § 569.140 (West 1999); NEB. REV. STAT. ANN. §§ 28-520, 28-521 (LexisNexis 2003); N.H. REV. STAT. ANN. §§ 227-J:8, 539:9, 635:2 (2007); N.J. STAT. ANN. § 2C:18-3 (West 2005); N.Y. PENAL LAW § 140.05 (McKinney 1998); N.C. GEN. STAT. § 14-159.12; N.D. CENT. CODE § 12.1-22-03 (1997 & Supp. 2007); OHIO REV. CODE ANN. § 2911.21 (LexisNexis 2006); OKLA. STAT. ANN. tit. 21, § 1835 (West 2002); OR. REV. STAT. ANN. § 164.245; R.I. GEN. LAWS § 11-44-26 (2002); S.D. CODIFIED LAWS § 22-35-6 (2006); TENN. CODE ANN. § 39-14-405 (2006); TEX. PENAL CODE ANN. § 30.05 (Vernon 2003 & Supp. 2007); UTAH CODE ANN. § 76-6-206 (2003 & Supp. 2007); VT. STAT. ANN. tit. 13, § 3705 (1998); VA. CODE ANN. § 18.2-119 (2004); WASH. REV. CODE ANN. § 9A.52.080 (West 2000); W. VA. CODE ANN. § 61-3B-3 (LexisNexis 2005); WIS. STAT. ANN. § 943.13 (West 2005); WYO. STAT. ANN. § 6-3-303 (2007).

7. ARIZ. REV. STAT. ANN. §§ 12-542(3), 12-821 (2003) (two years for trespass; one year for inverse condemnation); N.C. GEN. STAT. §§ 1-52(3), 40A-51 (2005) (three years for trespass; two years for inverse condemnation); VA. CODE ANN. §§ 8.01-243(B), 8.01-246(4) (2007) (five years for trespass; three years for inverse condemnation);

8. *E.g.*, *Ossman v. Mountain States Tel. & Tel. Co.*, 520 P.2d 738, 742 (Colo. 1974); *State ex rel. Smith v. 0.24148 Acres of Land*, 171 A.2d 228, 231 (Del. 1961); *Childs v. Vill. of Newport*, 39 A. 627, 628 (Vt. 1898).

9. *E.g.*, *Salesian Soc'y, Inc. v. Vill. of Ellenville*, 505 N.Y.S.2d 197, 198 (App. Div. 1986); *Chase v. Sch. Dist. No. 10*, 30 P. 757, 757 (Utah 1892). *Contra Jones v. New Orleans & Selma R.R. Co. & Immigration Ass'n*, 70 Ala. 227, 234 (Dec. 1881).

10. *E.g.*, *Kelly v. City of Waterbury*, 73 A. 136, 137 (Conn. 1909).

damages they can recover is whether they can reclaim their land by ejecting the trespasser and the structures it built, such as utility poles and railroad lines. Ejectment and injunctive relief are unavailable in an inverse condemnation action, though they often are available in a trespass action.¹¹

The importance of a condemnor's trespass liability for precondemnation entry also is demonstrated by the hundreds of published decisions concerning this issue. This Article will first analyze this body of case law and the different analytic approaches that the courts have adopted. This Article will then examine the practical implications of the differences among the jurisdictions. Finally, this Article will recommend that trespass liability always exist for a wrongful precondemnation entry.

II. CASE LAW

Cases concerning wrongful precondemnation entries arise in a variety of factual circumstances. In some cases, the condemnor entered the land with the good faith belief that it had the right to do so. For example, it may have entered based on condemnation proceedings that a court subsequently invalidated.¹² Similarly, the condemnor may have acquired a deed or easement from someone it incorrectly believed to be the owner¹³ or mistakenly may have deviated from the bounds of the land that it did acquire.¹⁴

11. *E.g.*, *Jones*, 70 Ala. at 230; *Chicago, St. L. & W. Ry. Co. v. Gates*, 11 N.E. 527, 528 (Ill. 1887); *Ill. Cent. R.R. Co. v. Hoskins*, 32 So. 150, 151 (Miss. 1902); *Perley v. Town of Effingham*, 48 A.2d 484, 486 (N.H. 1946); *Menge v. Morris & E. R.R. Co.*, 67 A. 1028, 1029 (N.J. Ch. 1907); *Callen v. Columbus Edison Elec. Light Co.*, 64 N.E. 141, 145 (Ohio 1902); JENELLE MIMS MARSH & CHARLES W. GAMBLE, *ALABAMA LAW OF DAMAGES* § 16:59 (5th ed. 2004).

12. *E.g.*, *Sw. Gas & Elec. Co. v. Patterson Orchard Co.*, 20 S.W.2d 636, 637 (Ark. 1929); *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 10 So. 465, 467, 472 (Fla. 1891); *Pettit v. Comm'rs of Wicomico County*, 90 A. 993, 996-97 (Md. 1914); *Balt. & Ohio R.R. Co. v. Boyd*, 63 Md. 325, 331 (1885); *Radway v. Selectmen of Dennis*, 165 N.E. 410, 412 (Mass. 1929); *Lewis v. City of Jeffersonville*, No. 4:02-CV-00221-DFH-WG, 2004 WL 1629741, at *6-9 (S.D. Ind. July 6, 2004); *Matador Pipelines, Inc. v. Watson*, 626 S.W.2d 139, 140-41 (Tex. App. 1981); *Wheeler v. Town of St. Johnsbury*, 87 A. 349, 352 (Vt. 1913).

13. *E.g.*, *Doelle v. Mountain States Tel. & Tel.*, 872 F.2d 942, 943 (10th Cir. 1989); *Mo. & N.A.R. Co. v. Chapman*, 234 S.W. 171, 172 (Ark. 1921); *Buholtz v. Rochester Tel. Corp.*, 339 N.Y.S.2d 775, 776-77 (App. Div. 1973); *Enon Valley Tel. Co. v. Market*, 493 A.2d 800, 802 (Pa. Commw. Ct. 1985); *White v. State Highway Comm'r of Va.*, 114 S.E.2d 614, 615 (Va. 1960).

14. *Wickwire v. City of Juneau*, 557 P.2d 783, 783-84 (Alaska 1976); *Grainland Farms, Inc. v. Ark. La. Gas Co.*, 722 P.2d 1125, 1126 (Kan. Ct. App. 1986);

However, in many other cases the trespass was deliberate,¹⁵ and often so egregious that the landowner recovered punitive damages.¹⁶ For example, in *Williams v. City of Baton Rouge*, the city and parish excavated three wide canals across the plaintiffs' land over their strenuous objections.¹⁷ The work proceeded even though a judge denied permission for the excavations and though the police department's attorney and the assistant parish attorney told the defendants that they did not have

Ladue Group, L.C. v. Level 3 Commc'ns, L.L.C., 111 S.W.3d 492, 493 (Mo. Ct. App. 2003); *Salesian Soc'y, Inc.*, 505 N.Y.S.2d at 198; *Rawlings v. Bucks County Water & Sewer Auth.*, 702 A.2d 583, 584 (Pa. Commw. Ct. 1997); *Deets v. Mountaintop Area Joint Sanitary Auth.*, 479 A.2d 49, 50–51 (Pa. Commw. Ct. 1984); *Lovett v. W. Va. Cent. Gas Co.*, 65 S.E. 196, 197 (W. Va. 1909).

15. *E.g.*, *Bowman v. Columbia Gas Transmission Corp.*, 1988 WL 68890, at *1 (6th Cir. July 6, 1988) (defendant gas company stored gas under owners' land knowing that it did not have the right to do so); *Hayden v. Grand River Mut. Tel. Corp.*, 440 S.W.2d 161, 163 (Mo. Ct. App. 1969) (defendant telephone company knowingly entered without right); *Broome v. N.Y. & N.J. Tel. Co.*, 7 A. 851, 851 (N.J. Ch. 1887) (defendant telephone company erected poles on plaintiff's land before condemnation over owner's "protest and remonstrance, and in disregard of his warning and express prohibition"); *Niagara Mohawk Power Corp. v. Deyle*, 223 N.Y.S.2d 240, 241 (Sup. Ct. 1961) (defendant wrongfully cut trees and laid power line despite owner's objections); *Blodgett v. Utica & Black River R.R. Co.*, 64 Barb. 580, 585 (N.Y. Sup. Ct. 1873) (defendant wrongfully cut timber and laid railroad line one year before beginning condemnation proceedings); *Allen v. Transok Pipe Line Co.*, 552 P.2d 375, 377 (Okla. 1976) (defendant knowingly built pipeline without condemnation, compensation, or consent); *Hinson v. A. T. Sistare Constr. Co.*, 113 S.E.2d 341, 343 (S.C. 1960) (defendant knowingly entered without right); *Russell v. Hooper Irrigation Co.*, 435 P.2d 294, 295 (Utah 1967) (defendant ordered its contractor to enter plaintiff's land and the contractor entered "[o]ver the objection of the [owners,] accompanied by opprobrious epithets and a little unflattering use of the king's English, [and] bulldozed, not only the ire of [the owners], but the ditch and easement themselves"); *Kendall v. Missisquoi & Clyde River R.R. Co.*, 55 Vt. 438, 441–42 (1882) (railroad company built knowing that it did not have the right to do so); *City of Seattle v. Loutsis Inv. Co.*, 554 P.2d 379, 387 (Wash. Ct. App. 1976) (before condemnation, city employee copied landowner's key without permission and illegally entered property); *W. Va. Dep't. of Highways v. Roda*, 352 S.E.2d 134, 136 (W. Va. 1986) (defendant highway department began constructing highway on plaintiff's land and allowed its contractor to take and sell coal from the land knowing it did not have the right to do so); *Brown v. Wis.-Minn. Light & Power Co.*, 174 N.W. 903, 904 (Wis. 1919) (defendant cut down trees on a right of way it purchased from plaintiff knowing it did not have the right to do so).

16. *E.g.*, *O'Neil Corp. v. Perry Gas Transmission, Inc.*, 648 S.W.2d 335, 339–40, 344 (Tex. App. 1983) (jury awarded punitive damages for willful and malicious precondemnation trespass); *Matador Pipelines, Inc. v. Watson*, 626 S.W.2d 139, 140–41 (Tex. App. 1981) (jury awarded punitive damages for willful and malicious precondemnation construction of pipe line on plaintiff's land).

17. *Williams v. City of Baton Rouge*, 731 So. 2d 240, 243–45 (La. 1999).

authority.¹⁸ Armed guards were posted at the site twenty-four hours a day for approximately two months while the work was in progress.¹⁹ In other cases involving wrongful entry over the owner's objections, the condemnor left the property when the owner objected, promising not to return, and then re-entered when the owner left the area.²⁰

In many cases, the condemnor frankly admitted that convenience and cost savings motivated its wrongful actions.²¹ For example, in *Oglethorpe Power Corp. v. Sheriff*, a utility company intentionally cut trees outside its right of way for the stated purpose of deferring maintenance of the right of way "for a long time."²² Perhaps surprisingly in light of these often self-serving motives, bad faith has been irrelevant to the courts' determinations concerning the availability of a trespass action in all but one jurisdiction. Bad faith has been relevant only in determining the appropriate remedies, such as punitive or multiple damages. Instead, courts are often guided by their views concerning the relative importance of government sovereignty and of private property rights.

Despite variations in theory, almost every state can be included in one of the following categories: (1) a trespass action is always available for precondemnation entry; (2) a trespass action is never available; (3) a trespass action is unavailable against a government entity but is available against a private entity; (4) trespass and inverse condemnation are alternative forms of action; and (5) a trespass action is available only in limited circumstances. This Article will examine each of these categories. It will not discuss cases in which an unlawful entry does not constitute a taking because they do not involve conduct that potentially creates liability for both trespass and inverse condemnation.²³ It also will not examine the

18. *Id.* at 244.

19. *Id.* at 245.

20. *E.g.*, *Cohen v. Mayor of Wilmington*, 99 A.2d 393, 394 (Del. Ch. 1953) (state highway department assured plaintiff that none of his land would be taken to widen a road in front of his property; without notice to plaintiff and while he was out of town, highway department ripped up his yard, walk, and front steps); *Moore v. N. & S.C. Ry. Co.*, 77 S.E. 926, 927 (S.C. 1913) (when railroad construction crew came to plaintiff's land, he "forbade their entry; . . . they promised him they would not enter, but left and went to work elsewhere; . . . they returned, when he was at dinner, and, taking advantage of his absence, built the railroad across his land").

21. *E.g.*, *Williams v. Goose Lake Valley Irrigation Co.*, 163 P. 81, 83 (Or. 1917) (defendant trespassed "to finish [a] ditch so as to be able to use it the next year").

22. *Oglethorpe Power Corp. v. Sheriff*, 436 S.E.2d 14, 17 (Ga. Ct. App. 1993).

23. The clearest example is an entry when the right to take by eminent domain did not exist. *See, e.g.*, *Dixon v. City of Phoenix*, 845 P.2d 1107, 1114-15 (Ariz.

cases in the few states in which the authority is so conflicting—in sometimes very striking terms—that accurate categorization is impossible. These states include California,²⁴ Connecticut,²⁵ Kentucky,²⁶ Montana,²⁷

Ct. App. 1992) (no public purpose); *Kennedy v. Yates Petroleum Corp.*, 681 P.2d 53, 56–57 (N.M. 1984) (no public purpose); *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 126 P.3d 16, 28–29 (Wash. 2006) (condemnor exceeded statutory authority). An inverse condemnation action is also unavailable if the entry did not interfere so substantially with the owner's rights that it constituted a taking. *E.g.*, *Frustuck v. City of Fairfax*, 28 Cal. Rptr. 357, 373–74 (Dist. Ct. App. 1963); *Alfieri v. Delaware*, No. CA 841, 1984 WL 478437, *4 (Del. Ch. Aug. 8, 1984); *Poole v. Township of Dist.*, 843 A.2d 422, 425 (Pa. Commw. Ct. 2004).

24. *Compare* *Garden Water Corp. v. Fambrough*, 53 Cal. Rptr. 862, 865 (Dist. Ct. App. 1966) (“[A]cts constituting inverse condemnation amount to more than those of simple trespass.” (quoting *Frustuck v. City of Fairfax*, 28 Cal. Rptr. 357, 375 (Dist. Ct. App. 1963)), *and* *Frustuck v. City of Fairfax*, 28 Cal. Rptr. 357, 364 (Dist. Ct. App. 1963) (“The . . . action based on [the California Constitution’s taking clause] is sometimes designated a proceeding in inverse condemnation . . . and, as such, includes within its purview . . . actions for . . . trespass.” (citations omitted)), *with* *L.A. Brick & Clay Prods. Co. v. City of L.A.*, 141 P.2d 46, 50–51 (Cal. Dist. Ct. App. 1943) (city’s wrongful entry constitutes trespass though it was within city’s eminent domain power).

25. *Compare* *Vincent Bros. v. N.Y., N.H. & H.R.R. Co.*, 59 A. 491, 493 (Conn. 1904) (precondemnation entry by railroad was not a trespass because a real trespasser could not obtain a legal right to be in possession by paying compensation; court states that, if the railroad was characterized as a trespasser, it would have been liable for damages in excess of compensation for the taking), *with* *City of Bristol v. Tilcon Minerals, Inc.*, No. CV970572219, 2004 WL 1462628, at *9 (Conn. Super. Ct. June 9, 2004) (precondemnation taking by a landfill was a trespass because “any intrusion under or over another’s land constitutes a trespass”), *and* *Pinney v. Town of Winchester*, 76 A. 994, 994 (Conn. 1910) (referring to a precompensatory taking as a “trespass”).

26. *Compare* *Clemmer v. Rowan Water, Inc.*, No. 0:04 CV 165 HRW, 2006 WL 449266, at *4 (E.D. Ky. Feb. 23, 2006) (trespass action unavailable), *and* *Witbeck v. Big Rivers Rural Elec. Coop. Corp.*, 412 S.W.2d 265, 269 (Ky. 1967) (same), *with* *Bushart v. Fulton County*, 209 S.W. 499, 503 (Ky. 1919) (trespass action available), *and* *Waller v. Martin*, 56 Ky. 181, 17 T.B. Mon. 144, 153 (1856) (trespass unavailable against a railroad corporation for precondemnation entry but available against railroad’s president and directors as agents of the corporation).

27. *Compare* *Riddock v. City of Helena*, 687 P.2d 1386, 1388 (Mont. 1984) (“The landowner’s only remedy for the City’s construction of a pipeline on his land without obtaining an easement is an inverse condemnation action for just compensation for the value of the easement on the date of taking This rule allows the public entity to compensate the damaged landowner and keep the property interest taken.”), *with* *City of Three Forks v. State Highway Comm’n*, 480 P.2d 826, 830 (Mont. 1971) (“[A] state agency which takes property in violation of the constitution, without prior judicial authority for the taking, should pay trespass damages in a suit by a landowner to recover for this illegal taking. If in such instance the landowner should receive only the value of the land taken . . . the State is thus liable only for the same

Nevada,²⁸ and Rhode Island.²⁹

A. *Trespass Action Always Available*

Courts that impose trespass liability for a precondemnation entry do so based on the fundamental principle that law limits the eminent domain power.³⁰ These courts permit the taking of private property rights only in

amount as if it had brought a condemnation proceeding in accordance with the law. If that should be the holding, judicial condemnation proceedings required by the Constitution are a useless formality, and at the same time the landowner is deprived of the additional compensation to which he is entitled for the violation of his constitutional property right to be free from unlawful trespasses and takings of his land, whether by the State or by private persons.”).

28. *Compare* County of Clark v. Bonanza No. 1, 615 P.2d 939, 945 (Nev. 1980) (county liable for just compensation but not trespass damages for precondemnation entry), *with* County of Clark v. Powers, 611 P.2d 1072, 1074–75, 1077 (Nev. 1980) (affirming district court’s holding that county is liable for trespass damages and for just compensation for precondemnation entry).

29. *Compare* Harris v. Town of Lincoln, 668 A.2d 321, 327 (R.I. 1995) (“The inverse-condemnation cause of action provides landowners with a means of seeking redress for governmental intrusions that, if performed by private citizens, would warrant analysis under the law of trespass.”), *with* Lonsdale Co. v. City of Woonsocket, 56 A. 448, 452 (R.I. 1903) (“A taking without compensation is a trespass . . .”).

30. *E.g.*, Gully v. Sw. Bell Tel. Co., 774 F.2d 1287, 1293 (5th Cir. 1985); Snowden v. Ft. Lyon Canal Co., 238 F. 495, 500 (8th Cir. 1916); Justus v. Kellogg Brown & Root Servs., Inc., 373 F. Supp. 2d 608, 611 (W.D. Va. 2005); Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement, 747 F. Supp. 401, 404–05 (N.D. Ohio 1990); Ala. Power Co. v. Thompson, 32 So. 2d 795, 801–02 (Ala. 1947); Jefferson County v. Flanagan, 722 So. 2d 763, 765 (Ala. Civ. App. 1998); City of Northglenn v. Grynberg, 846 P.2d 175, 184 n.20 (Colo. 1993); Alfieri v. State, No. CA 841, 1984 WL 478437, at *4 (Del. Ch. Aug. 8, 1984); Wehrum v. Vill. of Lincolnwood, 235 N.E.2d 343, 346 (Ill. App. Ct. 1968); Calumet Nat’l Bank v. Am. Tel. & Tel. Co., 682 N.E.2d 785, 791–92 (Ind. 1997); Ind. & Mich. Elec. Co. v. Whitley County Rural Elec. Membership Corp., 312 N.E.2d 503, 505, 508 (Ind. Ct. App. 1974); Athison, Topeka & Santa Fe R.R. Co. v. Weaver, 10 Kan. 344, 350–52 (1872); Grainland Farms, Inc. v. Ark. La. Gas Co., 722 P.2d 1125, 1127–29 (Kan. Ct. App. 1986); Williams v. City of Baton Rouge, 731 So. 2d 240, 247–49 (La. 1999); Belgarde v. City of Natchitoches, 156 So. 2d 132, 135–36 (La. Ct. App. 1963); Mullan v. Belbin, 100 A. 384, 389–90 (Md. 1917); Radway v. Selectmen of Dennis, 165 N.E. 410, 411–12 (Mass. 1929); Grand Rapids, L. & D. R. Co. v. Chesebro, 42 N.W. 66, 67 (Mich. 1889); Berry v. United Gas Pipe Line Co., 370 So. 2d 235, 237 (Miss. 1979); Powers v. Hurmert, 51 Mo. 136, 137–38 (1872); Harris v. L. P. & H. Constr. Co., 441 S.W.2d 377, 384 (Mo. Ct. App. 1969); W. A. Manda, Inc., v. City of Orange, 75 A. 741, 742 (N.J. 1910); City of Worthington v. Carskadon, 249 N.E.2d 38, 39 (Ohio 1969); Yoder v. Columbus & S. Ohio Elec. Co., 316 N.E.2d 477, 479 (Ohio Ct. App. 1974); Kerns v. Couch, 12 P.2d 1011, 1012 (Or. 1932); Hinson v. A. T. Sistare Constr. Co., 113 S.E.2d 341, 343 (S.C. 1960); Walker v. Hilltop Irrigation, Inc., 440 N.W.2d 521, 523–24 (S.D. 1989); Alexander v. City of San

accordance with the dictates of law. Therefore, if the state constitution requires payment of compensation before a taking, the condemnor is a trespasser if it enters before paying.³¹ Even without a prior compensation requirement, a condemnor is liable for trespass if it enters land before completing all the condemnation requirements, including exhausting all appeals.³² In these jurisdictions, failing to satisfy the legal prerequisites to a taking is such a serious violation of private property rights that the condemnor is liable for trespass even if it has sovereign immunity from trespass claims in other contexts.³³

Antonio, 468 S.W.2d 797, 799–800 (Tex. 1971); *Matador Pipelines, Inc. v. Watson*, 626 S.W.2d 139, 140–41 (Tex. App. 1981); *Russell v. Hooper Irrigation Co.*, 435 P.2d 294, 295 (Utah 1967); *Chaffinch v. Chesapeake & Potomac Tel. Co. of Va., Inc.*, 313 S.E.2d 376, 378–79 (Va. 1984); *Handley v. Cook*, 252 S.E.2d 147, 148 n.1 (W. Va. 1979); MARSH & GAMBLE, *supra* note 11, § 16:59; 1 S.C. LITIGATION FORMS AND ANALYSIS § 3:41 (2007); 32 TEX. JUR. 3D *Eminent Domain* §§ 120 & 196 (2006).

31. *Chi., St. L. & W. Ry. Co. v. Gates*, 11 N.E. 527, 528 (Ill. 1887) (“It is a plain proposition that the railroad company had no right to the possession of the property until the damages for taking have been assessed and paid, and, when it went into the possession, it was a trespasser . . .”); *Meeker v. City of Chi.*, 96 Ill. App. 23, 24 (1900); *Mullan v. Belbin*, 100 A. 384, 389 (Md. 1917); *Harris v. L. P. & H. Constr. Co.*, 441 S.W.2d 377, 384 (Mo. Ct. App. 1969) (“Under the Missouri law the date of lawful appropriation is the date upon which the [condemnor] pays the amount of damages assessed by the commissioners.”); *Menge v. Morris & E. R. Co.*, 67 A. 1028, 1029 (N.J. Ch. 1907); *Yoder*, 316 N.E.2d at 479 (“To hold that the existence of the remedy for damages for such unconstitutional appropriation precludes injunctive relief renders nugatory the constitutional requirement that the compensation be first made in money.”).

32. *Thompson*, 32 So. 2d at 801–02; *Jefferson County*, 722 So. 2d at 765; *Larimer County Canal No. 2 Irrigating Co. v. Larimer & Weld Reservoir Co.*, 143 P. 270, 272 (Colo. Ct. App. 1914); *Pettit v. Comm’rs of Wicomico County*, 90 A. 993, 996–97 (Md. 1914); *Radway*, 165 N.E. at 412; *Lexington Print Works v. Town of Canton*, 50 N.E. 931, 932 (Mass. 1898); *Wilson v. City of Lynn*, 119 Mass. 174, 179 (1875); *Grand Rapids, L. & D. R.R. Co.*, 42 N.W. at 67; *Beck v. Louisville, N. O. & T. Ry. Co.*, 3 So. 252, 253 (Miss. 1887) (“If a company desires the right of way, it must take steps to secure it. If it does not, it must answer for every invasion of the rights of the landowner.”); *Perley v. Town of Effingham*, 48 A.2d 484, 486 (N.H. 1946); *Brackett v. Bellows Falls Hydroelectric Corp.*, 175 A. 822, 823 (N.H. 1934); *Newmarket Elec. Co. v. Chase*, 108 A. 382, 384 (N.H. 1919); *Menge v. Morris & E. R. Co.*, 67 A. 1028, 1029 (N.J. Ch. 1907) (granting an injunction to keep condemnors “within the strict limits of their statutory powers, and prevent them from deviating in the smallest degree from the terms prescribed by the statute which gives them authority” (quoting WILLIAM KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 295 (1880))); *Norfolk & W. Ry. Co. v. A. C. Allen & Sons*, 95 S.E. 406, 408 (Va. 1918).

33. *Nika Corp. v. City of Kansas City*, 582 F. Supp. 343, 355–56 (W.D. Mo. 1983); *Robinson v. City of Ashdown*, 783 S.W.2d 53, 56–57 (Ark. 1990); *State ex rel. Smith v. 0.24148 Acres of Land*, 171 A.2d 228, 231 (Del. 1961); *Town of S. Bethany v.*

This judicial insistence on compliance with the legal prerequisites to a taking is not based on an inflexible interpretation or application of the law. Rather, courts are concerned with abuses of the taking power:

[A] municipality which appropriates property in violation of the constitution, without prior judicial authority for the taking, should pay such trespass damages in a suit by the landowner to recover for this illegal taking. If in such an instance the landowner should receive only the value of the land taken, the municipality thus is liable only for the same amount as if it had expropriated in accordance with law—indicating, should that be the holding, that the judicial expropriation proceedings required by the constitution are a useless formality, while at the same time depriving the landowner of the additional compensation to which he is entitled as compensatory damages for the violation of his constitutional property right to be free of unlawful trespasses upon and takings of his land, whether by the municipality or by private persons.³⁴

Often, the courts in these jurisdictions also focus on the inequality of power between a condemnor and a private landowner. For example, in *Menge v. Morris & E. R.R. Co.*, a New Jersey court enjoined a railroad's trespass to prevent "dangerous aggression" by "powerful bodies, which have often large sums of money at their disposal and are often too prone to act in an arbitrary and oppressive manner"³⁵ Similarly, in *Powers v. Hurmert*, the Missouri Supreme Court held that an owner could sue for a precondemnation trespass even after accepting compensation for the taking because:

[T]he taking of private property for public use is in the nature of a forced sale. The owner is compelled to part with his property at the price assessed So in accepting the price which is forced on him he agrees to nothing, and waives no previous right that may have accrued

Cat Hill Water Co., No. 93C-04-004, 1997 WL 27108, at *2 (Del. Super. Ct. Jan. 7, 1997); Crescenzo v. Newcastle County, 1988 WL 67836, at *4 (Del. Super. Ct. June 7, 1988); Seitz v. A-Del Constr. Co., 1987 WL 16711, at *2 (Del. Super. Ct. Aug. 13, 1987); Duffield v. DeKalb County, 249 S.E.2d 235, 236 (Ga. 1978); *Belgarde*, 156 So. 2d at 134–35; Foss v. Me. Tpk. Auth., 309 A.2d 339, 343–44 (Me. 1973); Johnson v. Steele County, 60 N.W.2d 32, 38 (Minn. 1953); Newman v. St. Louis County, 176 N.W. 191, 191–92 (Minn. 1920); Langdon v. Me.-N.H. Interstate Bridge Auth., 33 A.2d 739, 740–41 (N.H. 1943).

34. *Belgarde*, 156 So. 2d at 135–36.

35. *Menge v. Morris & E. R.R. Co.*, 67 A. 1028, 1029 (N.J. Ch. 1907) (quoting KERR, *supra* note 32, at 295).

to him³⁶

Concerned with this type of abuse, one court took the rather extreme step of holding that a public utility's wrongful taking of the plaintiff's property revoked the utility's statutory authority to enter.³⁷

B. *Trespass Action Never Available*

In marked contrast, courts in several states hold that a trespass action is unavailable even when the condemnor knowingly violated the taking requirements.³⁸ In some of these jurisdictions, sovereign immunity bars the trespass action without particular reference to the precondemnation entry context.³⁹ However, courts in other jurisdictions do not permit a trespass action even though sovereign immunity is not a bar. These courts have adopted one of two lines of reasoning: (1) state sovereignty over property or (2) preemption of trespass liability.

36. Powers v. Hurmert, 51 Mo. 136, 137–38 (1872); accord Alexander v. City of San Antonio, 468 S.W.2d 797, 800 (Tex. 1971) (“The law offers no . . . rewards for wrong-doing.” (quoting Tex. W. Ry. Co. v. Cave, 15 S.W. 786, 787 (Tex. 1891))); Lovett v. W. Va. Cent. Gas Co., 65 S.E. 196, 198 (W. Va. 1909) (“It is most essential to the preservation of the rights of private property, to the protection of the citizen, and to the preservation of the best interests of the community, that all who are invested with the right of eminent domain, with the extraordinary power of depriving persons . . . without their consent, of their property, and its possession and enjoyment, should be kept in strict line of the authority with which they are clothed, and compelled to implicit obedience to the mandates of the Constitution.”) (quoting E. & W. R.R. Co. v. E. Tenn., Va. & Ga. R.R. Co., 75 Ala. 275, 281 (1883)).

37. Ind. & Mich. Elec. Co. v. Stevenson, 363 N.E.2d 1254, 1260 (Ind. Ct. App. 1977).

38. Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223, 1226 (W.D.N.C. 1993); Mo. & N.A.R. Co. v. Chapman, 234 S.W. 171, 172 (Ark. 1921); DeBoer v. Entergy Ark., Inc., 109 S.W.3d 142, 145 (Ark. Ct. App. 2003); Townsend v. State ex rel. State Highway Dep't, 871 P.2d 958, 959–60 (N.M. 1994); T-Wol Acquisition Co. v. Hous. Auth. of Durham, No. COA05-143, 2006 WL 387955, at *3 (N.C. Ct. App. Feb. 21, 2006); Wagner v. Borough of Rainsburg, 714 A.2d 1164, 1166–67 (Pa. Commw. Ct. 1998); Brazil v. City of Auburn, 610 P.2d 909, 916 (Wash. 1980); Benka v. Consol. Water Power Co., 224 N.W. 718, 719–20 (Wis. 1929); Price v. Marinette & Menominee Paper Co., 221 N.W. 381, 381–82 (Wis. 1928); Negus v. Madison Gas & Elec. Co., 331 N.W.2d 658, 664–65 (Wis. Ct. App. 1983).

39. Robinson v. City of Ashdown, 783 S.W.2d 53, 56–57 (Ark. 1990); Dayton v. City of Asheville, 115 S.E. 827, 828–29 (N.C. 1923); McAdoo v. City of Greensboro, 372 S.E.2d 742, 744 (N.C. Ct. App. 1988).

1. *State Sovereignty*

Washington courts deny trespass liability on the basis that the state government has sovereignty over the property within its borders: “The constitution does not give the right to take; that is inherent in the state.”⁴⁰ Based on this rationale, the courts reject both reasons upon which the courts in the previous section relied to impose liability. First, the Washington courts hold that a condemnor acquires title upon entry even if it has not complied with the legal requirements, including the constitutionally mandated obligation to pay compensation before taking.⁴¹

Second, Washington courts dismiss the concern that a condemnor will abuse the taking power. They assume that the sovereign will act only in good faith.

When taking private property for a public use the state acts in its sovereign capacity. It goes not as a trespasser inspired by selfish or unlawful motive, but as one taking without malice or intent to do wrong, and presumptively for the public good. It cannot put on the cloak of a tort-feasor under the statute if it would.⁴²

These justifications for refusing to impose trespass liability are inadequate. Even accepting that government is not bound by legal preconditions on taking property, this proposition does not explain why private condemnors, such as utility companies, are also exempt from trespass liability. Moreover, the large number of cases in which public and private condemnors have taken property in bad faith seriously undercuts the Washington courts’ presumption of good faith.⁴³ And, in any event, good faith is not a defense to trespass in any other context.⁴⁴

2. *Preemption*

New Mexico, Pennsylvania, and Wisconsin each allowed a trespass

40. *Brazil*, 610 P.2d at 911 (quoting *Kincaid v. City of Seattle*, 134 P. 504, 506 (Wash. 1913)).

41. WASH. CONST. art. I, § 16; *Aylmore v. City of Seattle*, 171 P. 659, 660 (Wash. 1918) (“We have repeatedly held that a municipality, in taking private property for public use, acts in its sovereign capacity and not as a trespasser. Having the right to take, whatever its procedure or lack of procedure, it is not a wrongdoer.”).

42. *Kincaid*, 134 P. at 506 (“[W]e know of no law that will impute to the city, when exercising the sovereign power of the state, a willful intention to disregard the right of a citizen.”) (citation omitted).

43. *See supra* note 15.

44. *See supra* text accompanying note 2.

action for wrongful precondemnation entry until state legislation authorized an inverse condemnation action. Although none of these statutes expressly preempted trespass liability,⁴⁵ the courts in each state held that the legislation had that effect.⁴⁶ Therefore, inverse condemnation became the landowner's exclusive remedy. The Minnesota courts, which had also allowed a trespass action, reached a similar conclusion based on an amendment to the state constitution's taking clause. The Minnesota and Pennsylvania preemption decisions are clearly incorrect, though for opposite reasons.

The Minnesota decisions are incorrect because the state constitutional amendment does not preempt trespass liability for a precondemnation entry. The Minnesota Constitution originally required that compensation be paid before property could be "taken."⁴⁷ Courts interpreted this provision to mean that a condemner could acquire title only in valid condemnation proceedings.⁴⁸ Any entry before the condemnation proceedings constituted trespass,⁴⁹ and the owner could recover trespass damages—including consequential damages, punitive damages,⁵⁰ and statutory damage multipliers⁵¹—as well as the land's value on the date of the condemnation proceedings.⁵²

In 1896, the constitution was amended to require compensation when the land was "taken, destroyed or damaged."⁵³ This amendment was intended to protect landowners by providing compensation for injuries to

45. N.M. STAT. § 42A-1-29(A) (1994); 26 PA. CONS. STAT. § 1-303 (1997), amended by 26 PA. CONS. STAT. § 1-102 (2006); WIS. STAT. § 32.10 (2006).

46. Landavazo v. Sanchez, 802 P.2d 1283, 1286 (N.M. 1990); Garver v. Pub. Serv. Co. of N.M., 421 P.2d 788, 792-94 (N.M. 1966); Fulmer v. White Oak Borough, 606 A.2d 589, 593-94 (Pa. Commw. Ct. 1992); Grunwaldt v. Modern Wrecking Co., 118 N.W.2d 188, 191 (Wis. 1962); Price v. Marinette & Menominee Paper Co., 221 N.W. 381, 381 (Wis. 1928).

47. MINN. CONST. art. I, § 13 (amended 1896).

48. Fish v. Chi., St. P. & K. C. Ry. Co., 87 N.W. 606, 607-08 (Minn. 1901).

49. *Id.* at 608; Lamm v. Chi., St. P., M. & O. Ry. Co., 47 N.W. 455, 457 (Minn. 1890); Mathews v. St. Paul & Sioux City R.R. Co., 18 Minn. 434, 440 (1872); Adams v. Hastings & Dakota R.R. Co., 18 Minn. 260, 265 (1872); Harrington v. St. Paul & Sioux City R.R. Co., 17 Minn. 215, 220 (1871).

50. Brantner Farms, Inc. v. Garner, No. C6-01-1572, 2002 WL 1163559, at *2-5 (Minn. Ct. App. June 4, 2002).

51. MINN. STAT. ANN. § 548.05 (West 2000).

52. Brooks Inv. Co. v. City of Bloomington, 232 N.W.2d 911, 916 (Minn. 1975).

53. MINN. CONST. art. I, § 13.

land that had not been appropriated in condemnation proceedings. For example, land adjoining a highway might be flooded periodically after the government changed the highway's grade. Before the amendment, this type of injury was noncompensable because the land had not been "taken."⁵⁴

Despite the limited legislative intent to protect adjoining landowners, the Minnesota Supreme Court interpreted the amendment more broadly to diminish the rights of owners whose land was taken. Based on the new constitutional language, the Minnesota Supreme Court held that a condemnor acquired title when it entered the land, rather than in the subsequent condemnation proceedings, and that the property should be valued as of the date of entry.⁵⁵ With this holding, the court eliminated condemnors' trespass liability and changed the date of valuation in a manner that harms many landowners.

The court reasoned that, by valuing the property on the date of entry, the condemnor would be required to compensate the owner for any property damage that it caused before initiating condemnation proceedings.⁵⁶ However, requiring compensation for precondemnation damage did not benefit landowners, because they formerly could recover those damages in a trespass action, as well as recovering the other types of damages that are available in a trespass action but not in a condemnation action. Moreover, owners no longer are compensated for increases in the land's value from the date of entry to the date of the condemnation, though the period of time between them can be substantial. In light of the legislative intent to provide greater protection for landowners, the holding that the constitutional amendment preempted trespass liability is incorrect.

The Pennsylvania decisions concerning preemption of trespass actions are also incorrect, though for a different reason. When the Pennsylvania courts determined that the inverse condemnation statute preempted trespass actions, they created a test for distinguishing between entries that constitute a taking and those that constitute only a trespass. In the seminal case on this issue, *Fulmer v. White Oak Borough*, the court stated that trespass is the appropriate cause of action if the wrongful entry occurred as

54. See Henry H. Foster, Jr., *Tort Liability Under Damage Clauses*, 5 OKLA. L. REV. 1, 6 (1952); Daniel R. Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 18.

55. *Brooks Inv. Co.*, 232 N.W.2d at 920–21.

56. *Id.* at 916.

a result of negligence.⁵⁷ If the entry was not negligent, inverse condemnation is the correct action.

By focusing on negligence, rather than on the condemnor's wrongful possession of private land, and by creating a rigid dichotomy between actions for trespass and inverse condemnation, Pennsylvania courts have improperly characterized several cases involving a permanent physical occupation as a trespass and not as a taking.⁵⁸ For example, in *Enon Valley Telephone Co. v. Market*, the defendant telephone company installed underground phone cable and telephone poles and lines on the plaintiffs' land based on an easement document signed by someone other than the owners.⁵⁹ After discovering the error, the defendant did not remove its equipment or compensate the landowners.⁶⁰ Despite the defendant's continuing occupation of the land, the court held the plaintiffs' only cause of action was for trespass because the defendant had been negligent in its attempt to acquire an easement.⁶¹

Similarly, in *Rawlings v. Bucks County Water and Sewer Authority*, the Authority condemned a portion of the plaintiffs' land for a pumping station.⁶² The Authority's contractor negligently built part of the station on an uncondemned portion of the plaintiffs' land.⁶³ The encroachment destroyed access to the plaintiffs' remaining property and its intended residential use.⁶⁴ Although the Authority occupied the entire station, including the part on the uncondemned land, the court held that the plaintiffs did not have an inverse condemnation action because the Authority's occupation of the uncondemned land was attributable to the contractor's negligence.⁶⁵

57. *Fulmer v. White Oak Borough*, 606 A.2d 589, 590 (Pa. Commw. Ct. 1992).

58. *Deets v. Mountaintop Area Joint Sanitary Auth.*, 479 A.2d 49, 50–52 (Pa. Commw. Ct. 1984) (holding that when sanitary authority's contractor negligently located sewer line outside easement area, authority was not liable for inverse condemnation though the public owned and used the sewer line); *Lutzko v. Mikris, Inc.*, 410 A.2d 370, 372–73 (Pa. Commw. Ct. 1979); *Steckley v. Commonwealth*, 407 A.2d 79, 80 (Pa. Commw. Ct. 1979).

59. *Enon Valley Tel. Co. v. Market*, 493 A.2d 800, 801 (Pa. Commw. Ct. 1985).

60. *Id.* at 801.

61. *Id.* at 802.

62. *Rawlings v. Bucks County Water & Sewer Auth.*, 702 A.2d 583, 584 (Pa. Commw. Ct. 1997).

63. *Id.* at 584.

64. *Id.*

65. *Id.* at 586.

These characterizations of a permanent physical occupation as a trespass, rather than as a taking, violate both the U.S. and Pennsylvania Constitutions. The U.S. Supreme Court has consistently held that a permanent physical occupation constitutes a per se taking under the federal Constitution.⁶⁶ The issue of negligence is irrelevant. The Pennsylvania Constitution requires prior compensation for a taking.⁶⁷ By treating the wrongful possession as a trespass, rather than as a taking, the Pennsylvania courts have enabled condemnors to avoid this constitutional requirement. In this way, the courts have far exceeded the scope of the preemption doctrine.

C. Trespass Liability for Private Entities but not for Government

In five states, courts distinguish between government and private entities on the issue of trespass liability for precondemnation entry. These courts hold that the government is liable only for inverse condemnation but that a private condemnor is also liable for trespass.⁶⁸ In Georgia and in Iowa, the difference is based on the government's immunity from tort liability.⁶⁹ In the other jurisdictions—Alaska, New York, and North Dakota—the difference is based on the source of the entity's eminent domain powers. The government's power is inherent; a private entity's power is delegated.

66. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

67. PA. CONST. art. I, § 10.

68. *Fletcher v. Del., L. & W. R.R. Co.*, 79 F.2d 306, 310 (2d Cir. 1935) (private entity); *Gache v. Town of Harrison*, 813 F. Supp. 1037, 1049–50 (S.D.N.Y. 1993) (government); *Ostrem v. Alyeska Pipeline Serv. Co.*, 648 P.2d 986, 989 (Alaska 1982) (private entity); *Wickwire v. City of Juneau*, 557 P.2d 783, 784 (Alaska 1976) (government); *Doe v. Ga. R.R. & Banking Co.*, 1 Ga. 524, 533–37 (1846) (private entity); *Shealy v. Unified Gov't of Athens-Clarke County*, 537 S.E.2d 105, 109–10 (Ga. Ct. App. 2000) (government); *Hagenson v. United Tel. Co. of Iowa*, 164 N.W.2d 853, 856–57 (Iowa 1969) (private entity); *Gibson v. Union County*, 223 N.W. 111, 114 (Iowa 1929) (government); *Drady v. Des Moines & Fort Dodge R.R. Co.*, 10 N.W. 754, 762 (Iowa 1881) (private entity); *Feder v. Vill. of Monroe*, 725 N.Y.S.2d 75, 76 (App. Div. 2001) (government); *Buholtz v. Rochester Tel. Corp.*, 339 N.Y.S.2d 775, 779–80 (App. Div. 1973) (private entity); *Adams v. Canterra Petroleum, Inc.*, 439 N.W.2d 540, 545–46 (N.D. 1989) (private entity); *Jacobson v. State*, 278 N.W. 652, 653 (N.D. 1938) (government).

69. *Stanfield v. Glynn County*, 631 S.E.2d 374, 377 (Ga. 2006); *City of Atlanta v. Minder*, 63 S.E.2d 420, 422 (Ga. Ct. App. 1951) (municipalities are liable for trespass, but only if the wrongful conduct constitutes a nuisance or taking, both of which require a substantial interference with the owner's property rights); *Gibson*, 223 N.W. at 114; *Brown v. Davis County*, 195 N.W. 363, 366 (Iowa 1923).

The North Dakota decisions present the clearest example of this dichotomy. As in Washington, the North Dakota Constitution requires payment of compensation before a taking, and the courts hold that government takes land in its sovereign capacity.⁷⁰ In holding that a township was not liable in trespass for building a road across the plaintiff's land without paying for it, the North Dakota Supreme Court used language that is strikingly similar to that of the Washington Supreme Court:

An instrumentality of the state, exercising its right to condemn property for public use, cannot be said to be a trespasser in the same sense in which a private corporation entitled to exercise the right of eminent domain would be a trespasser when the latter goes upon the land of another and attempts to exercise dominion over it without compliance with law, even though the township may not have followed the statutory procedure. "The original and ultimate title to all property, real or personal, within the limits of this state is in the state."⁷¹

However, unlike the Washington Supreme Court, the North Dakota Supreme Court has properly applied trespass liability doctrine by not extending government sovereignty to insulate private condemners from trespass liability. In marked contrast to its treatment of government condemners, the North Dakota courts have dealt quite strictly with private condemners. For example, in *Donovan v. Allert*, the court enjoined a telephone company from using two poles it had erected on the plaintiff's land before condemnation despite the harm to the public and the "insignificant" harm to the plaintiff.⁷²

Though their analysis is more opaque, Alaska and New York courts essentially adhere to the same theory as North Dakota courts. Unlike North Dakota courts, Alaska and New York courts do not refer to government "sovereignty."⁷³ Instead, they reason that a government

70. N.D. CONST. art. I, § 16; *Johnson v. Wells County Water Res. Bd.*, 410 N.W.2d 525, 527 (N.D. 1987).

71. *Schilling v. Carl Twp.*, 235 N.W. 126, 129 (N.D. 1931) (quoting Section 8 COMP. LAWS 1913 POL. CODE); accord *Jacobson*, 278 N.W. at 653 (holding government is not liable for trespass for a precondemnation entry because, when it entered, it was acting "in its sovereign capacity, and not as a trespasser"). *Contra Williams v. City of Fargo*, 247 N.W. 46, 52 (N.D. 1933) (stating that plaintiff "is entitled to recover . . . any and all damages" associated with private property taken for public use "as when caused by trespass or physical invasion of the property").

72. *Donovan v. Allert*, 91 N.W. 441, 446-47 (N.D. 1902).

73. See *infra* notes 75-81 and accompanying text.

entity's precondemnation entry constitutes an exercise of its eminent domain power, rather than a trespass.⁷⁴ As the Alaska Supreme Court explained in *State v. Crosby*:

When the state appropriated appellees' land for the construction of a highway, it was exercising the power of eminent domain. It is true that the state did not utilize condemnation proceedings prescribed by law and by rule. . . . Such action was still the exercise of the power of eminent domain because private property was being taken by the state for a public use.⁷⁵

In a number of cases, New York courts also cite the government's eminent domain power when holding that government condemners are not liable for trespass: "Inverse condemnation, rather than trespass, is the appropriate theory for granting damages to an injured landowner where the trespasser is cloaked with the power of eminent domain."⁷⁶ In other cases involving a government condemner, New York courts have used the circular logic that "[a]n entry cannot be both a trespass and a taking because, in the latter instance, the condemner acquires ownership."⁷⁷ In one particularly unvarnished opinion, a New York court stated that courts have denied trespass actions against government condemners as a "procedural vehicle" to avoid granting injunctive relief when the wrongful possession provides a public good, such as sewer service.⁷⁸

A substantial problem with the Alaska and New York courts' rationales is that they apply with equal force to private condemners. When a private condemner enters another's land, it enters pursuant to its eminent domain power. When it permanently occupies land, such as with a railroad line, it effectively has taken the land. Refusing to enjoin a wrongful entry by a private condemner, such as a utility company, often serves the public interest.

What is the basis then for the Alaska and New York courts' distinction between public and private condemners? The answer lies in the respective sources of their eminent domain powers. The Alaska and New

74. See *infra* notes 75–81 and accompanying text.

75. *State v. Crosby*, 410 P.2d 724, 728 (Alaska 1966) (footnote omitted).

76. *Clempner v. Town of Southold*, 546 N.Y.S.2d 101, 105 (App. Div. 1989) (quoting *Tuffley v. City of Syracuse*, 442 N.Y.S.2d 326, 330 (App. Div. 1981)).

77. *Gache v. Town of Harrison*, 813 F. Supp. 1037, 1050 (S.D.N.Y. 1993) (quoting *Carr v. Town of Fleming*, 504 N.Y.S.2d 904, 906 (App. Div. 1986)); see also *Feder v. Vill. of Monroe*, 725 N.Y.S.2d 75, 76 (App. Div. 2001).

78. *Evans v. City of Johnstown*, 410 N.Y.S.2d 199, 200–01 (Sup. Ct. 1978).

York courts hold that a private condemnor is liable for trespass when it violates the scope of its delegated eminent domain power.⁷⁹ By failing to follow the prescribed procedures, such as initiating a condemnation proceeding, the entity exceeded its authority and was a wrongdoer—a trespasser.⁸⁰ As stated by a New York court in a case involving a railroad's precondemnation entry:

If a railroad company, impelled by its interests or exigencies, sees fit to enter upon and take possession of, and use and appropriate, the lands and growing crops and timber, of a citizen, against his consent, and before having acquired the right to do so by the exercise of the delegated right of eminent domain, they do so under the same liabilities and responsibility for their acts which would be incurred by any private individual who should do the same acts.⁸¹

By negative implication, the government's eminent domain power is not delegated to it but is an inherent power. Thus, the New York and Alaska decisions are based on the same government sovereignty rationale as the North Dakota decisions. The government is not bound by the eminent domain laws because it is the ultimate owner of the land within its borders. However, this distinction undoubtedly provides little comfort to a landowner who has been denied trespass damages because the condemnor was a government, rather than a private, entity.

D. *Alternative Causes of Action*

A landowner can sue for trespass or for inverse condemnation but not for both in Idaho,⁸² Nebraska,⁸³ and Tennessee.⁸⁴ Courts in these states

79. *Ostrem v. Alyeska Pipeline Serv. Co.*, 648 P.2d 986, 989 (Alaska 1982) (pipeline company's "statutory authority does not extend so far as to immunize it from liability for trespass if it has not initiated eminent domain proceedings"); *Blodgett v. Utica & Black River R.R. Co.*, 64 Barb. 580, 582 (N.Y. Gen. Term 1873) (plaintiff has a trespass action if company enters property prior to payment); *Griswold v. Minneapolis, Saint P. & S. S. M. Ry. Co.*, 97 N.W. 538, 540–41 (N.D. 1903) (defendant declined to use eminent domain power and, therefore, was liable for trespass); *Donovan v. Allert*, 91 N.W. 441, 445–46 (N.D. 1902) (payment must precede taking or damaging, otherwise plaintiff has a cause of action).

80. *E.g.*, *Salesian Soc'y, Inc. v. Vill. of Ellenville*, 505 N.Y.S.2d 197, 198–99 (App. Div. 1986) (holding defendant liable for trespass even though it occupied plaintiff's property as the result of a good faith mistake); *Kupersmidt v. N.Y. Tel. Co.*, 282 N.Y.S.2d 605, 610 (Sup. Ct. 1967) (awarding \$100 damages for the defendants' trespass, which was the result of "good, if misdirected, faith").

81. *Blodgett*, 64 Barb. at 588–89.

82. *Boise Valley Constr. Co. v. Kroeger*, 105 P. 1070, 1073–74 (Idaho 1909).

allow a trespass action for precondemnation entry for the same reason that other jurisdictions allow it—to protect private property rights from abuses of the taking power:

We have endeavored in a long line of cases in this state to make it so plain that every one may know and understand that property rights in Idaho are sacred, and that it does not make a particle of difference whether it be of the value of a dollar or a million; it must, in the ultimate judgment of the court, all amount to the same thing in the matter of its protection and preservation to its owner.⁸⁵

However, these states differ in their reasons for treating trespass and inverse condemnation as alternative actions. In Tennessee, a statute expressly provides that they are alternative.⁸⁶ Nebraska has a similar statute,⁸⁷ but its courts had treated the actions as being alternative even before the statute's enactment. The courts' rationale was to give landowners the option of avoiding the burden of pursuing an inverse condemnation action.⁸⁸

Unlike Tennessee and Nebraska, the Idaho rule is not unique to precondemnation entries. The Idaho courts rely on the usual rule concerning an injured party's right to choose its remedy. For example, in a case involving a railroad that built its line on the plaintiff's land before condemning it, the Idaho Supreme Court analogized the case to an action for conversion of personal property:

If A. steals B.'s horse, B. may pursue the property in claim and delivery, or he may waive the tort and sue as upon contract for the

83. Dishman v. Neb. Pub. Power Dist., 482 N.W.2d 580, 582 (Neb. 1992) (citing Slusarski v. County of Platte, 416 N.W.2d 213 (Neb. 1987)); Parriott v. Drainage Dist. No. 6 of Peru, 410 N.W.2d 97, 100 (Neb. 1987) (citing City of Omaha v. Matthews, 248 N.W.2d 761 (Neb. 1977)).

84. Meighan v. U.S. Sprint Commc'ns Co., 924 S.W.2d 632, 640–41 (Tenn. 1996); Betty v. Metro. Gov't of Nashville & Davidson County, 835 S.W.2d 1, 8 (Tenn. Ct. App. 1992).

85. Ryan v. Weiser Valley Land & Water Co., 118 P. 769, 772 (Idaho 1911); see also Blackwell Lumber Co. v. Empire Mill Co., 160 P. 265, 268–69 (Idaho 1916) (defendant is “a naked trespasser”); Republican Valley R.R. Co. v. Fink, 24 N.W. 439, 441 (Neb. 1885) (“The corporation must see to it . . . before it enters upon the land of another . . . that it has so far complied with the [condemnation] statute as to possess the authority. If it has not, it is, like any other trespasser, liable in damages.”).

86. TENN. CODE ANN. § 29-16-123 (2000).

87. NEB. REV. STAT. ANN. § 76-705 (LexisNexis 2004).

88. Fink, 24 N.W. at 441.

reasonable value of the animal, and A. will not be heard, in a court of justice, to answer and deny the contract and set up as a defense that he stole the animal. So, in a case of this kind, if A. should seize and appropriate B.'s real estate for an easement authorized under the Constitution and statute of the state, B. may maintain his action to oust and eject the trespasser, or he may enjoin him from using and occupying the land, or he may waive both such remedies and sue upon an implied contract to pay reasonable compensation for the property taken.⁸⁹

The election between trespass and inverse condemnation would be primarily of academic interest if the courts in these three states employed the usual measure of damages for these causes of action. Normally, the plaintiff in either type of action can recover the difference in the land's fair market value before and after entry.⁹⁰ But Tennessee, Nebraska, and Idaho each have different remedies for trespass and inverse condemnation.

In Nebraska, owners bringing a trespass action can recover damages only for the injuries caused by the trespass. To recover the land's value, the owner must bring an inverse condemnation action⁹¹ or wait for a condemnation action. However, a court will enjoin the condemnor's use of the land until it pays compensation.⁹²

In contrast, a Tennessee court will not eject the condemnor.⁹³ The owner can only recover damages, and the amounts differ between the two causes of action.⁹⁴ In a trespass action, the damages are the difference in the land's value before and after the entry, consequential damages,⁹⁵ and punitive damages.⁹⁶ In an inverse condemnation action, the owner can only recover the difference of the land's value before and after entry.⁹⁷ Although the trespass action appears to be a better option for the owner,

89. Boise Valley Constr. Co. v. Kroeger, 105 P. 1070, 1074 (Idaho 1909).

90. POWELL, *supra* note 2, § 64A.05.

91. *Fink*, 24 N.W. at 442.

92. *Id.* at 441 (citing *Ray v. Atchison & Neb. R.R. Co.*, 4 Neb. 439 (1876); *Omaha & N.W. R.R. Co. v. Menk*, 4 Neb. 21 (1875)).

93. *Zirkle v. City of Kingston*, 396 S.W.2d 356, 362 (Tenn. 1965); *Tenn. Coal, Iron & R.R. Co. v. Paint Rock Flume & Transp. Co.*, 160 S.W. 522, 523-24 (Tenn. 1913).

94. *Zirkle*, 396 S.W.2d at 362-63.

95. *Betty v. Metro. Gov't of Nashville & Davidson County*, 835 S.W.2d 1, 6-7 (Tenn. Ct. App. 1992).

96. *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 642 (Tenn. 1996).

97. *Betty*, 835 S.W.2d at 7.

Tennessee courts have indicated that, in some circumstances, the owner could receive less in a trespass action: “Property owners may recover for the diminished value of their property or for the cost of repairs, whichever is less.”⁹⁸

In light of the different remedies these jurisdictions offer for trespass and for inverse condemnation, why do courts require an owner to choose between them? Normally, an injured party has to choose because the remedies are inconsistent. For example, in the Idaho Supreme Court’s analogy concerning the stolen horse, the owner could recover the horse or its value but not both.⁹⁹ However, the remedies for trespass and for inverse condemnation in these jurisdictions are not inconsistent; rather, they compensate owners for different aspects of the injury caused by the precondemnation entry. Therefore, courts in these states should allow an injured owner to bring both claims in the same lawsuit in order to adjudicate the entire controversy.

E. Trespass Action Available in Limited Circumstances

In two jurisdictions, a trespass action is available for a precondemnation entry only in limited circumstances.¹⁰⁰ In Oklahoma, the determinative factor is whether the wrongful entry occurred in good faith.¹⁰¹ In Florida, it is whether the trespass claim is asserted in a condemnation action or in an inverse condemnation action.¹⁰² The focus on good faith has intuitive appeal, and the focus on the form of action has

98. *Id.* (citing *Killian v. Campbell*, 760 S.W.2d 218, 222 (Tenn. Ct. App. 1988); *Fuller v. Orkin Exterminating Co.*, 545 S.W.2d 103, 108 (Tenn. Ct. App. 1975)).

99. *Boise Valley Constr. v. Kroeger*, 105 P. 1070, 1074 (Idaho 1909).

100. In Florida, trespass claims are unavailable in inverse condemnation actions but are available as a sole cause of action or in a condemnation action. *See, e.g.*, *S. Fla. Water Mgmt. Dist. v. Stahl*, 558 So. 2d 1087, 1088 (Fla. Dist. Ct. App. 1990) (inverse condemnation); *City of Miami v. Osborne*, 55 So. 2d 120, 121 (Fla. 1951) (trespass only); *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 10 So. 465, 467–68 (Fla. 1891) (condemnation). In Oklahoma, trespass actions are unavailable if entry was made in good faith and under color of authority or when a taking effectively takes adjoining property. *See Root v. Kamo Elec. Coop., Inc.*, 699 P.2d 1083, 1090–91 (Okla. 1985); *Allen v. Transok Pipe Line Co.*, 552 P.2d 375, 379 (Okla. 1976); *Cox Enters., Ltd. v. Phillips Petroleum Co.*, 550 P.2d 1324, 1326–27 (Okla. 1976).

101. *See Root*, 699 P.2d at 1090 (indicating that a trespass action may only be maintained in limited circumstances, such as when an entry is willful and wanton).

102. *See Fla. Power & Light Co. v. Walker*, 440 So. 2d 659, 660 (Fla. Dist. Ct. App. 1983) (a trespass counterclaim was available to appellees in a condemnation action); *Stahl*, 558 So. 2d at 1088 (a trespass claim can be brought with an inverse condemnation claim, but each will be examined separately under the evidence given).

theoretical appeal. However, both approaches are unsatisfactory responses to the trespass liability issue.

1. *Good Faith Entry*

In Oklahoma, a condemnor is liable for trespass only if it knew that it did not have the right to enter.¹⁰³ The courts have not articulated a clear reason for limiting the trespass action in this way. Although the notion of imposing tort liability only on an intentional wrongdoer is appealing, trespass liability has never been limited in this way. Moreover, a landowner probably does not care about the trespasser's state of mind. The landowner's injuries are the same.

The seminal Oklahoma case on this issue is *Allen v. Transok Pipe Line Co.*, in which the defendant laid a pipe line across the plaintiff's property without condemning it.¹⁰⁴ The plaintiff sued for trespass and sought compensatory and punitive damages and the removal of the line.¹⁰⁵ The defendant argued that the plaintiff's sole remedy was compensation for inverse condemnation.¹⁰⁶ Its argument was based on a state statutory provision that, in a case of precondemnation entry, "the damage thereby inflicted upon the owner of such land shall be determined in the manner provided . . . for condemnation proceedings."¹⁰⁷

Contrary to holdings of courts in other jurisdictions that had interpreted similar language, the Oklahoma Supreme Court held that this provision did not preclude a trespass action.¹⁰⁸ The court stated that, because the Oklahoma Constitution requires payment of compensation before a taking, entry before payment is without right and, therefore, constitutes trespass.¹⁰⁹ The court then said that interpreting the statute to preclude a trespass action would render the statute unconstitutional.¹¹⁰ The court supported its holding by citing concerns that a contrary ruling would encourage unlawful entries and would shift the burden of litigation

103. *See Root*, 699 P.2d at 1090 (indicating that a trespass action may only be maintained in limited circumstances, such as when an entry is willful and wanton).

104. *Allen v. Transok Pipe Line Co.*, 552 P.2d 375, 377 (Okla. 1976).

105. *Id.*

106. *Id.*

107. OKLA. STAT. ANN. tit. 66, § 57 (West 1995).

108. *Allen*, 552 P.2d at 379–80.

109. *Id.* at 381–82.

110. *Id.* at 379.

to the landowner.¹¹¹ The court opined that the legislature intended the statutory damages provision to apply only when those damages would compensate the landowner for all its injuries.¹¹²

Unfortunately, the court did not stop there. Although it characterized the defendant's entry as willful and wanton, it stated in dictum that a trespass action is unavailable when "the entry is unknowing, is under a mistaken belief of authority, or where the effect of taking other property has in effect taken adjoining property."¹¹³ This statement squarely conflicts with the court's earlier categorical statement that an entry before payment constitutes trespass. Despite this evident conflict, the court does not explain its rationale for creating these exceptions to trespass liability.

Subsequent Oklahoma Supreme Court decisions have exacerbated the problem by expanding the scope of this dictum. Oklahoma courts now routinely hold that a trespass action is available only if "the entry was willful and wanton and without color of authority."¹¹⁴ In this way, the Oklahoma case law has strayed a long way from the original—and correct—proposition in the *Allen* decision that precondemnation entry constitutes a trespass regardless of the condemnor's good or bad faith.

2. *Trespass Claim Available Only in Condemnation Action*

In Florida, the courts have allowed recovery of trespass damages in condemnation actions but not in inverse condemnation actions. The courts have not articulated this distinction as the reason for allowing trespass damages in some cases but not in others, but the outcomes in the cases are consistent with it. For example, in *County of Volusia v. Pickens*, the landowner brought a successful inverse condemnation case against the

111. *Id.* ("To hold otherwise would give this Court's stamp of approval to [the pipeline company's] position that it could take whatever land it desired for pipeline purposes, and regardless of its failure or refusal to follow the procedural steps required by law, the only sanction permitted, regardless of its contempt for the rights of the landowner, is that it might ultimately have to pay the fair market value of the land taken—assuming the landowner undertakes the burden of prosecuting a reverse condemnation action.").

112. *Id.* (stating that the intent of the reverse condemnation statute is "to provide a remedy in those cases where the remedy provided by reverse condemnation is adequate").

113. *Id.*

114. *Root v. Kamo Elec. Coop., Inc.*, 699 P.2d 1083, 1090 (Okla. 1985); *see also Cox Enters., Ltd. v. Phillips Petroleum Co.*, 550 P.2d 1324, 1327 (Okla. 1976).

county.¹¹⁵ The court denied the owner's claim for trespass damages from the date of entry until the date of the inverse condemnation action because the owner "suffered his loss of the property [upon entry], and thereafter it belonged (albeit wrongfully appropriated) to the county."¹¹⁶ In marked contrast, the Florida courts have consistently awarded trespass damages for precondemnation entry when the landowner counterclaimed for them in a condemnation action.¹¹⁷

This distinction is consistent with the underlying legal differences between inverse condemnation and condemnation actions. In an inverse condemnation action, the landowner is claiming that the condemnor took the property when it entered and is suing for compensation for the property. In contrast, in a condemnation action, the condemnor is suing to acquire title. Therefore, if the condemnor is already in possession of the property, it is doing so without legal right—it is a trespasser.

Although this distinction may be satisfactory as a matter of legal theory, it does not address the underlying reality of precondemnation entry. The entry was wrongful whether the subsequent judicial action is for inverse condemnation or for condemnation. Moreover, this distinction creates the perverse incentive of discouraging the condemnor from filing a condemnation action. If the condemnor waits for an inverse condemnation suit, rather than filing a condemnation action as it is required to do, the landowner's recovery will often be less. Furthermore, the possibility exists that the landowner will not undertake the burden of filing an action, meaning the condemnor never has to pay for the land. For these reasons, trespass damages should be available in both types of actions.

III. PRACTICAL IMPLICATIONS

A court's decision concerning the availability of a trespass action for precondemnation entry has substantial practical implications for the

115. County of Volusia v. Pickens, 439 So. 2d 276, 277 (Fla. Dist. Ct. App. 1983).

116. *Id.* at 278; accord S. Fla. Water Mgmt. Dist. v. Steadman Stahl, P.A. Pension Fund, 558 So. 2d 1087, 1087–88 (Fla. Dist. Ct. App. 1990) (landowners successfully sued District for inverse condemnation; court denied trespass damages because District acquired title upon entry).

117. City of Miami v. Osborne, 55 So. 2d 120, 122 (Fla. 1951) (rent for precondemnation entry included in condemnation award); Jacksonville, T. & K. W. Ry. Co. v. Adams, 10 So. 465, 472 (Fla. 1891); Fla. Power & Light Co. v. Walker, 440 So. 2d 659, 660 (Fla. Dist. Ct. App. 1983); Fla. Power Corp. v. Scudder, 350 So. 2d 106, 110 (Fla. Dist. Ct. App. 1977).

parties. That decision determines a variety of significant remedy issues including the valuation date for determining just compensation, the ability to recover interest on the compensation award or the property's rental value, and the availability of ejectment and injunctive relief. In deciding these issues, the key consideration for a court usually is the date on which it treats the condemnor as acquiring title—upon entry or in the condemnation proceedings. Put differently, the issue is whether the court treats the condemnor who enters before condemnation as a purchaser that is in default on its obligation to pay the purchase price or as a possessor that has not yet acquired title. Like the case law concerning the possible causes of action for precondemnation entry, the judicial decisions concerning these remedies often conflict even within a jurisdiction.

A. *Valuation Date*

The most controversial remedy issue is the property's valuation date to determine the amount of compensation for the taking. Each jurisdiction generally chooses one of two dates—the date of the condemnor's entry or the date of the condemnation proceedings.¹¹⁸ Although exceptions exist, courts in jurisdictions that treat the condemnor as acquiring title upon entry usually value the property as of that date.¹¹⁹ Conversely, if the court holds that the condemnor did not acquire title until the condemnation proceedings, the court values the property as of that date.¹²⁰ In the latter jurisdictions, a court usually ignores the effects of the condemnor's precondemnation activities in determining the land's value—the condemnor's improvements do not increase the property's value and the

118. A few courts use the date of entry when the condemnor is a public entity and the date of the condemnation action when it is private. *Compare* ARK. CODE ANN. § 18-15-410 (2003) (public), *with* *Mo. & N.A.R. Co. v. Chapman*, 234 S.W. 171, 173 (Ark. 1921) (private); *compare* *Hurley v. State*, 134 N.W.2d 782, 784–85 (S.D. 1965) (public), *with* *Johnson v. Hawthorne Ditch Co.*, 143 N.W. 959, 963 (S.D. 1913) (private).

119. N.M. STAT. § 42A-1-29 (1994); *Wickwire v. City & Borough of Juneau*, 557 P.2d 783, 784–85 (Alaska 1976); *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 919 (Minn. 1975); *Olympic Pipe Line Co. v. Thoeny*, 101 P.3d 430, 438–40 (Wash. Ct. App. 2004).

120. *Gully v. Sw. Bell Tel. Co.*, 774 F.2d 1287, 1291–92 (5th Cir. 1985); *Shealy v. Unified Gov't of Athens-Clarke County*, 537 S.E.2d 105, 107 (Ga. Ct. App. 2000); *Wehrum v. Vill. of Lincolnwood*, 235 N.E.2d 343, 344 (Ill. App. Ct. 1968); *County of Clark v. Alper*, 685 P.2d 943, 949 (Nev. 1984); *Johnson*, 143 N.W. at 963–64; *Alexander v. City of San Antonio*, 468 S.W.2d 797, 799–800 (Tex. 1971); *White v. State Highway Comm'r*, 114 S.E.2d 614, 616–17 (Va. 1960); *W. Va. Dept. of Highways v. Roda*, 352 S.E.2d 134, 139–40 (W. Va. 1986).

damages it caused do not decrease the value.¹²¹

Courts that value land as of the date of the condemnation proceeding often emphasize that a taking cannot occur until then and that the condemnor has a duty to comply with the legal requirements. The decision in *West Virginia Department of Highways v. Roda*¹²² represents an extreme example of this approach. In *Roda*, the State Department of Highways, knowing that it did not have title to the plaintiffs' land, authorized a contractor to excavate and sell coal from the land.¹²³ In a subsequent condemnation action, the court valued the excavated coal as personal property as of the date of the action.¹²⁴ The court did not allow an offset for the costs of mining, excavating, removing, and marketing the coal.¹²⁵ In adopting this approach, the court strongly affirmed the condemnor's constitutional duty to comply with the taking laws:

The Department of Highways contends that the landowners have unjustly benefited by a valuation date [based on the filing of the condemnation action]. Where do the equities lie? The Department of Highways could have adhered to the statutory mandates of [the Eminent Domain Code] by condemning the coal prior to its appropriation and thus fixing its value prior to the actual removal. The entire conflict could have been avoided had the Department of Highways adhered to the statutory mandates by condemning the coal before appropriating it.¹²⁶

For these same reasons, some courts hold that the landowner owns improvements that the condemnor made to the land before acquiring it and is entitled to compensation for them.¹²⁷ For example, in *Village of St. Johnsville v. Smith*, the court held that the landowner had title to waterworks that the Village installed on his property without condemning it:

121. *E.g.*, *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 10 So. 465, 467-68 (Fla. 1891); *Berry v. United Gas Pipe Line Co.*, 370 So. 2d 235, 236-37 (Miss. 1979); *Chase v. Sch. Dist. No. 10*, 30 P. 757, 757-58 (Utah 1892).

122. *W. Va. Dept. of Highways v. Roda*, 352 S.E.2d 134 (W. Va. 1986).

123. *Id.* at 136.

124. *Id.* at 136-37.

125. *Id.* at 139.

126. *Id.* at 141.

127. *E.g.*, *Salesian Soc'y, Inc. v. Vill. of Ellenville*, 505 N.Y.S.2d 197, 198 (App. Div. 1986) (citations omitted). *Contra* *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 10 So. 465, 467 (Fla. 1891); *Berry v. United Gas Pipe Line Co.*, 370 So. 2d 235, 237 (Miss. 1979); *Chase v. Sch. Dist. No. 10*, 30 P. 757, 757-58 (Utah 1892).

If you invade land without legal right and place structures of a permanent character thereon, those structures belong to the landowner. There is no more harshness in applying the rule to one class of trespassers than to the other. In both cases its application tends to prevent the perpetration of a wrong. Its operation in this state has been, and will undoubtedly continue to be, most salutary in constraining those municipal and other corporations which the state has authorized to exercise the power of eminent domain not to assume the possession of lands in advance of any right so to do, and thus practically nullify, during the period of unlawful possession, that provision of the Constitution which guarantees the citizen against being deprived of his property for public use without just compensation.¹²⁸

In marked contrast to *Roda* and *Smith*, some courts that treat title as transferring only upon condemnation nevertheless value the property as of the date of entry. Some of these courts chose that date because the owner's inverse condemnation action accrued then.¹²⁹ Other courts have adopted the more comprehensive analysis of the Oregon Supreme Court in *State v. Stumbo*.¹³⁰

In *Stumbo*, the State Highway Commission built a highway across the Stumbos' land, but neither the Commission nor the Stumbos were aware that the highway was located on the Stumbos' land.¹³¹ Ten years later, when the Stumbos discovered the trespass and asserted their ownership rights, the Commission unsuccessfully negotiated with them to acquire the property.¹³² The Stumbos then subdivided the land on which the highway was located into four-inch-square parcels and offered them for sale.¹³³ Strangely, they were able to sell about 290 of them.¹³⁴ In the subsequent condemnation action, the Stumbos argued that their land should be valued as of the date of the action based on the sales prices for the "lots in their

128. *Vill. of St. Johnsville v. Smith*, 77 N.E. 617, 620 (N.Y. 1906).

129. *E.g.*, *Jones v. New Orleans & Selma R.R. Co. & Immigration Ass'n*, 70 Ala. 227, 233-34 (1881); *Delmarva Power & Light Co. v. City of Seaford*, 523 A.2d 973, 975 (Del. Super. Ct. 1987) (citing *United States v. Miller*, 317 U.S. 369 (1943)); *Grainland Farms, Inc. v. Ark. La. Gas Co.*, 722 P.2d 1125, 1129 (Kan. Ct. App. 1986) (citing K.S.A. 26-513(b), (c)).

130. *State v. Stumbo*, 352 P.2d 478 (Or. 1960).

131. *Id.* at 479.

132. *Id.*

133. *Id.*

134. *Id.*

subdivision.”¹³⁵

Under Oregon law, the Commission had been a trespasser during the years before the condemnation action—it could acquire title only by bringing a condemnation action and by depositing the required compensation into court.¹³⁶ Nevertheless, the court held that the land should be valued as of the date of entry.¹³⁷ To support its holding, the court made a number of arguments that fall into two categories. Neither set of arguments justifies the holding.

The first category concerns a condemnor’s and an owner’s respective rights in the land before condemnation. Although a taking requires a condemnation proceeding and payment of compensation, the court said that, “[i]n a practical sense,” the taking occurs when the condemnor enters.¹³⁸ The court supported this conclusion by stating that, after entry, the owner can no longer use the property and cannot enjoin or eject the condemnor if it is willing to condemn the property.¹³⁹

This reasoning is circular. As a matter of law, the owner is unable to reclaim possession only if the court holds that it is unable to reclaim possession. In many other jurisdictions, courts eject or enjoin a trespassing condemnor. Some courts even order a condemnor, such as a utility or a railroad, to remove its improvements, even if the landowner cannot prove any significant harm and the public will suffer substantial harm. Some of these courts reason that refusing to grant ejectment would be unconstitutional.¹⁴⁰ Thus, a court has the power—and perhaps the constitutional obligation—to order the trespasser to leave the property.

The *Stumbo* court’s second category of arguments is even less persuasive. These arguments concern the inverse condemnation process. The court first correctly noted that land values can increase or decrease

135. *Id.*

136. *Id.* at 480–81.

137. *Id.* at 485.

138. *Id.* at 483.

139. *Id.*

140. *See, e.g., Dulin v. Ohio River R.R. Co.*, 80 S.E. 145, 145 (W. Va. 1913) (“[C]ounsel for defendants insist that, after a railroad company has entered upon land, under a claim of right, and constructed its road, and is operating it, ejectment does not lie. But we do not assent to this broad proposition. That is not the law of this state. Such a rule would be contrary to the landowner’s constitutional right. It would be taking a man’s land, not only without his consent, but also without due process; in fact, without any legal process whatever.”).

over time.¹⁴¹ Therefore, neither valuation date inherently favors the owner or the condemnor. The court then stated that, because the date of entry is a fixed date, “[t]here will be no motive on either side to drag out negotiations in the hope of a favorable moment to demand condemnation; and settlement of claims rather than litigation will be encouraged.”¹⁴²

By choosing the date of entry as the valuation date, the court created a perverse incentive of a different sort for the condemnor. Because the compensation amount will not vary, the condemnor’s economic incentive also will not vary. When the amount of the condemnor’s liability is established as of the date of its entry, it has little motivation to commence condemnation proceedings and pay the compensation, particularly because the court will not eject it from the land. Therefore, to recover the compensation it is due, the landowner will have to commence an inverse condemnation action.

This result is contrary to the usual judicial principle that a landowner should not have to bear the burden of initiating an inverse condemnation action.¹⁴³ As the Nebraska Supreme Court stated:

The law does not require the citizen to institute proceedings to protect his rights, but merely permits him to do so. Constitutional guaranties of the rights of property would be of very little value if a corporation could seize the property of an individual and say to the owner, “If you want compensation for this property, institute proceedings to condemn it, and after we think the proper amount is awarded we will pay you.”¹⁴⁴

Courts have expressed particular concern about the legal fees that an owner will incur in an inverse condemnation action. If the condemnor initiates the process to acquire the property by negotiation or by

141. *Stumbo*, 352 P.2d at 483.

142. *Id.*

143. *Beck v. Louisville, N. O. & T. Ry. Co.*, 3 So. 252, 253 (Miss. 1887) (“The fact that the [railroad] charter authorizes either the land-owner or the company to institute proceedings for condemnation does not in any manner abridge the rights of the land-owner. He is not bound to take the initiative as to such proceedings.”); Steven D. McGrew, Note, *Selected Issues in Federal Condemnations for Underground Natural Gas Storage Rights: Valuation Methods, Inverse Condemnation, and Trespass*, 51 CASE W. RES. L. REV. 131, 174 (2000) (“The burden of moving the process forward should be on the storage operator, not the landowner. A property owner does not need to earn the right to be justly compensated for the taking of his property—that right is guaranteed by the Constitution.”).

144. *Republican Valley R.R. Co. v. Fink*, 24 N.W. 439, 441 (Neb. 1885).

condemnation, the landowner would not require legal representation, though it would be prudent. In contrast, the landowner will normally need an attorney's services to bring an inverse condemnation action.¹⁴⁵ In the worst-case scenario, this burden will prevent the landowner from bringing an action, and the condemnor will get the land without paying any compensation.¹⁴⁶ To avoid this result, some courts award attorney's fees to a landowner in an inverse condemnation action, though they are unavailable in a condemnation action.¹⁴⁷

The court in *Stumbo* turned this judicial principle on its head. The court said a landowner who fails to bring an inverse condemnation action "is hardly less at fault than the trespasser" who failed to bring a condemnation action and that "[o]ne who has suffered substantial loss will not suffer in silence."¹⁴⁸ Therefore, the court treats an owner who does not bring an inverse condemnation action as being "at fault" and recognizes the potential for the owner's "substantial loss."¹⁴⁹

Contrary to the *Stumbo* court's holding, valuing property as of the date of the condemnation proceeding better satisfies the practical and theoretical reasons for recognizing a trespass action for precondemnation entry. Regardless of whether land values are increasing or decreasing, the condemnor will have a substantial economic incentive to bring a condemnation proceeding before entering. When values are increasing, which is more usual, the condemnor will want to bring condemnation proceedings as soon as possible. Even if land values are decreasing, the condemnor will be motivated to bring a timely condemnation action to avoid paying rent for the period of precondemnation trespass, as described in the next section.

B. *Interest v. Rental Value*

When a condemnor possesses land before paying for it, courts often order compensation for more than just the land's value. The condemnor may have to pay interest on the compensation award from the date of entry. Alternatively, it may have to pay the property's rental value for that period.

145. See *Landavazo v. Sanchez*, 802 P.2d 1283, 1287–88 (N.M. 1990) (Montgomery, J., concurring).

146. *Allen v. Transok Pipe Line Co.*, 552 P.2d 375, 379 (Okla. 1976).

147. See *Landavazo*, 802 P.2d at 1287–89 (Montgomery, J., concurring).

148. *State v. Stumbo*, 352 P.2d 478, 483 (Or. 1960).

149. *Id.*

The court's decision whether to award interest or rent is normally based on the same consideration as its decision concerning the property's valuation date—the time when the condemnor acquired title. Courts that treat the condemnor as acquiring title upon entry often award interest¹⁵⁰ but not rent.¹⁵¹ Essentially, the court is holding the condemnor liable for interest on its deferred payment of the land's purchase price. Conversely, if the condemnor does not acquire title until the condemnation proceedings, courts may require payment of rent for the period of the condemnor's precondemnation possession.¹⁵²

Despite the logical consistency of these holdings, some courts have adopted a different rule. Though they hold that the condemnor was a trespasser before the condemnation proceedings, they award interest, rather than rent. Some of these courts characterize the interest as a substitute for rent.¹⁵³ Others characterize it as compensation for the time value of the money the condemnor should have paid before entry.¹⁵⁴ Both rationales are flawed.

The long established measure of damages for a trespasser's possession is the land's rental value, rather than interest on the compensation award.¹⁵⁵ Even when a court characterizes the interest as a rent substitute, it is an inadequate substitute. A substantial likelihood exists that the interest amount will bear little, if any, relation to the land's rental value. Therefore, it will not constitute just compensation for the precondemnation possession.

150. *E.g.*, N.M. STAT. § 42A-1-29 (1994); N.Y. EM. DOM. PROC. LAW § 514(A) (McKinney 2003); *Lea Co. v. N.C. Bd. of Transp.*, 345 S.E.2d 355, 359 (N.C. 1986); *Okla. City v. Wells*, 91 P.2d 1077, 1085 (Okla. 1939); *Olympic Pipe Line Co. v. Thoeny*, 101 P.3d 430, 439–40 (Wash. Ct. App. 2004).

151. *E.g.*, *County of Volusia v. Pickens*, 439 So. 2d 276, 278 (Fla. Dist. Ct. App. 1983); *Lea Co. v. N.C. Bd. of Transp.*, 304 S.E.2d 164, 176–77 (N.C. 1983); *Brazil v. City of Auburn*, 610 P.2d 909, 914 (Wash. 1980).

152. *E.g.*, *Salesian Soc'y, Inc. v. Vill. of Ellenville*, 505 N.Y.S.2d 197, 199 (App. Div. 1986).

153. *E.g.*, *Calmat of Ariz. v. State ex rel. Miller*, 859 P.2d 1323, 1328 (Ariz. 1993); *Garden Water Corp. v. Fambrough*, 53 Cal. Rptr. 862, 865 (Dist. Ct. App. 1966); *Stumbo*, 352 P.2d at 483.

154. *E.g.*, *Jones v. New Orleans & Selma R.R. Co. & Immigration Ass'n*, 70 Ala. 227, 234 (1881); *Orono-Veazie Water Dist. v. Penobscot County Water Co.*, 348 A.2d 249, 257–58 (Me. 1975); *County of Clark v. Alper*, 685 P.2d 943, 949–50 (Nev. 1984); *Wright v. Pemigewasset Power Co.*, 70 A. 290, 291–92 (N.H. 1908); *Wells*, 91 P.2d at 1086.

155. *See, e.g.*, *Salesian Soc'y, Inc.*, 505 N.Y.S.2d at 199.

Moreover, the statutorily prescribed interest rate on the compensation award may be inappropriate as a measure of damages even when interest, rather than rent, is the proper damage award.¹⁵⁶ With fluctuations in market interest rates, the statutory rate may vary substantially from the current rate. Therefore, to guarantee that an owner receives its constitutionally mandated just compensation, courts should award interest at the current market rate, rather than at the statutory rate.

C. Ejectment and Injunctive Relief

Rather than recovering damages, many owners would prefer to regain exclusive possession of their land. The owner's ability to do so depends on whether a trespass action is available. In jurisdictions where inverse condemnation is the sole remedy, ejectment is unavailable if the condemnor has already entered.¹⁵⁷ However, if the condemnor has not yet entered, courts in these jurisdictions will enjoin it from doing so until it pays for the land.¹⁵⁸

In marked contrast, courts that allow a trespass action often grant ejectment or injunctive relief and are far more liberal in doing so than they are in other contexts.¹⁵⁹ Despite the usual legal prerequisites, many courts have granted these remedies though the owner had an adequate remedy at law¹⁶⁰ and could not demonstrate that it would suffer irreparable harm otherwise.¹⁶¹ For example, in *Lovett v. West Virginia Central Gas Co.*, a gas company condemned an eighteen-inch strip of the plaintiff's land to lay

156. *Lea Co.*, 345 S.E.2d at 358–59 (“[C]ompensation for delay in payment is a part of just compensation Several jurisdictions have applied an interest rate set by statute if that interest rate satisfies the requirement that just compensation be paid for a taking The statutory rate is presumptively reasonable, but the landowner may rebut the rate's reasonableness by introducing evidence of prevailing market rates.”).

157. *Landavazo v. Sanchez*, 802 P.2d 1283, 1287 (N.M. 1990) (Montgomery, J., concurring).

158. *Austin v. Ark. State Highway Comm'n*, 895 S.W.2d 941, 942 (Ark. 1995); *Olympic Pipe Line Co. v. Thoeny*, 101 P.3d 430, 436 (Wash. Ct. App. 2004).

159. However, the court may stay the remedy to allow the trespasser time to condemn the land. *E.g.*, *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 10 So. 465, 472 (Fla. 1891); *Griswold v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 97 N.W. 538, 541 (N.D. 1903); *Johnson v. Hawthorne Ditch Co.*, 143 N.W. 959, 964 (S.D. 1913).

160. *E.g.*, *Nelson v. N.J. Short Line R.R. Co.*, 67 A. 1032, 1032 (N.J. Ch. 1907); *Menge v. Morris & E. R.R. Co.*, 67 A. 1028, 1029 (N.J. Ch. 1907); *Yoder v. Columbus & S. Ohio Elec. Co.*, 316 N.E.2d 477, 479 (Ohio Ct. App. 1974). *Contra Zirkle v. City of Kingston*, 396 S.W.2d 356, 361–62 (Tenn. 1965); *Tenn. Coal, Iron & Ry. Co. v. Paint Rock Flume & Transp. Co.*, 160 S.W. 522, 523–24 (Tenn. 1913).

161. *E.g.*, *Menge*, 67 A. at 1029.

pipe lines but mistakenly laid the lines on a nearby strip on the same parcel.¹⁶² The court required the gas company to move its lines even though the plaintiff suffered no injury and the public might suffer substantial harm:

[T]he facts that the parcels of land used lie very near those condemned, and that the use of them injures [the landowner] no more than would the use of the lands actually condemned, do not change the mandate that his property cannot be taken for public use except in the manner provided by law.

....

It is insisted that the removal of the pipe lines will, for a time, take from the public in various cities and towns the use of gas; that a removal of the lines will be a great hardship upon the company and its patrons, the public. But [the owner's] right to the undisturbed use of his property is as fixed and as sacred as are the rights of the public.¹⁶³

In other cases of precondemnation entry, courts that allow a trespass action have required the removal of railroad tracks,¹⁶⁴ utility poles and lines,¹⁶⁵ and other substantial improvements.¹⁶⁶ One court even upheld a landowner's right to remove earth that the city had placed on his land in connection with a street widening though the removal caused the street and the adjoining sidewalk to subside.¹⁶⁷

162. Lovett v. W. Va. Cent. Gas Co., 65 S.E. 196, 197 (W. Va. 1909).

163. *Id.* at 198, 200.

164. *E.g.*, Denver & S. F. Ry. Co. v. Sch.-Dist. No. 22 in Arapahoe County, 23 P. 978, 980 (Colo. 1890); *Adams*, 10 So. at 472; *Daniels v. Chicago & N. W. R. R. Co.*, 35 Iowa 129, 136–37 (1872); *Ill. Cent. R. Co. v. Hoskins*, 32 So. 150, 151 (Miss. 1902); *Menge*, 67 A. at 1030; *Griswold*, 97 N.W. at 541; *Lewis v. St. Paul, M. & M. Ry. Co.*, 58 N.W. 580, 584–85 (S.D. 1894); *Dulin v. Ohio River R.R. Co.*, 80 S.E. 145, 145–46 (W. Va. 1913). *Contra Chicago, B. & Q. R.R. Co. v. Englehart*, 77 N.W. 1092, 1093–94 (Neb. 1899); *Hyde v. Minn., D. & P. Ry. Co.*, 123 N.W. 849, 852 (S.D. 1909).

165. *E.g.*, *Broome v. N.Y. & N.J. Tel. Co.*, 7 A. 851, 852 (N.J. Ch. 1887); *Callen v. Columbus Edison Elec. Light Co.*, 64 N.E. 141, 145 (Ohio 1902).

166. *E.g.*, *Ryan v. Weiser Valley Land & Water Co.*, 118 P. 769, 773 (Idaho 1911) (suspending company's right to flood property owner's land); *Ladue Group, L.C. v. Level 3 Commc'ns, L.L.C.*, 111 S.W.3d 492, 493–94 (Mo. Ct. App. 2003) (ordering removal of underground conduit). *Contra Werninger v. City of Huntington*, 88 S.E. 655, 657 (W. Va. 1916) (focusing on property owner's knowledge of entry and failure to object).

167. *Mayo v. City of Springfield*, 136 Mass. 10, 14–15 (1883).

Courts grant these broad remedies for the same reason that they allow a trespass action—to protect property rights from abuses of the condemnation power.¹⁶⁸ Ejectment and injunctive relief are very effective tools for accomplishing that goal. The prospect of those forms of relief undoubtedly provides a powerful disincentive for precondemnation entries.

IV. RECOMMENDATION

To protect private property rights, to prevent abuses of the condemnation power, and to preserve public support for the government and for the legal system, a trespass action should always be available for precondemnation entry, whether the condemnor is public or private and whether it entered in good or bad faith. In many cases, an inverse condemnation action will fully compensate the owner so that only nominal damages are available in the trespass action. Though the damages may be nominal, the underlying principles for allowing the action are not.

Immunitizing condemnors from trespass liability is particularly harmful because of the eminent domain context. The aftermath of the U.S. Supreme Court's decision in *Kelo v. City of New London*¹⁶⁹ clearly demonstrates the hostility that many Americans harbor toward government takings. Since the Court's holding in *Kelo* that a city could condemn land for economic redevelopment, including by private entities, forty-two states have enacted constitutional amendments or legislation to provide greater protection for private property rights than the Supreme

168. *Beetschen v. Shell Pipe Line Corp.*, 248 S.W.2d 66, 70 (Mo. Ct. App. 1952) (“[A] private corporation, invested by law with a portion of the sovereignty of the state in its grant of the power to exercise the right of eminent domain, is not thereby clothed with an immunity not possessed by others who trespass upon the property or rights of private citizens, and must answer for its trespasses in the same manner as any other trespasser.”); *Yoder v. Columbus & S. Ohio Elec. Co.*, 316 N.E.2d 477, 479 (Ohio Ct. App. 1974) (“Although plaintiff may have an action at law for damages because of trespass, such a remedy is not an adequate remedy which would preclude injunctive relief to prevent the taking of the property of plaintiff by defendant for its use without first paying compensation to plaintiff. . . . To hold that the existence of the remedy for damages for such unconstitutional appropriation precludes injunctive relief renders nugatory the constitutional requirement that the compensation be first made in money.”); *Dulin v. Ohio River R.R. Co.*, 80 S.E. 145, 145 (W. Va. 1913) (“[Denying ejectment] would be contrary to the landowner's constitutional right. It would be taking a man's land, not only without his consent, but also without due process; in fact, without any legal process whatever. Because a railroad company is clothed with the right of eminent domain gives it no excuse to proceed arbitrarily to take an owner's land.”).

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

Court found in the federal Constitution.¹⁷⁰

Precondemnation entry cases are even more troublesome than *Kelo* because they involve a condemnor that failed to comply with the eminent domain laws and violated one of the most important aspects of land ownership, the right to exclude. In his seminal article on takings law, Professor Frank Michelman vividly described the importance of this right:

Physical possession doubtless is the most cherished prerogative, and the most dramatic index, of ownership of tangible things. Sophisticated rationalizations and assurances of overall evenness which may stand up as long as one's possessions are unmolested may wilt before the stark spectacle of an alien, uninvited presence in one's territory. The psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader.¹⁷¹

When this right is wrongfully invaded, many owners will not believe that they have been fully compensated by receiving just the value of the land. They also want compensation for the wrong they have suffered. In recognition of the sense of violation that a landowner can feel in this situation, courts that allow a trespass action for a precondemnation entry have often awarded damages for emotional distress.

The condemnor's failure to comply with the eminent domain laws is especially harmful to public support for the legal system because landowners do not have a choice about whether to sell. The taking is a forced sale and often involves property that is particularly meaningful to the owner, such as a home or farm. Without prior condemnation proceedings, the owner does not have an opportunity to challenge the condemnor's power to take the land before it enters and may not even have notice that the taking will occur.

The injury is further compounded because the owner will have to accept a price for the land that it normally views as being too low. Due to the "endowment effect," owners generally value their property at

170. *Id.* at 488–90; *see also* National Conference of State Legislatures, Eminent Domain, <http://www.ncsl.org/programs/natres/EMINDOMAIN.htm> (last visited Mar. 14, 2008).

171. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1228 (1967) (footnote omitted).

significantly more than its economic value.¹⁷² In one study, owners valued their property at twice what buyers were willing to pay.¹⁷³ Therefore, even when the condemnor pays the land's fair market value after entering, owners may feel that they have received less than the amount to which they are entitled.

The proffered rationales for protecting condemnors from trespass liability are unconvincing and do not outweigh these harmful effects. As described above, some courts deny a trespass action on the basis that the government has sovereign rights to land and, therefore, need not comply with constitutional or other legal limits on the right to take it.¹⁷⁴ However, a constitution is intended to protect the individual from the government. Not even the sovereign immunity doctrine can shield the government from claims grounded in the constitution. Moreover, the sovereignty rationale does not explain why private condemnors are not liable for trespass.

Other courts reason that a condemnor that wrongfully enters another's land should not be included in the same category as other types of trespassers for liability purposes.¹⁷⁵ These courts acknowledge that the condemnor's entry violated the law but hold that it should not be liable for trespass because, unlike other trespassers, it can acquire title to the land in subsequent condemnation proceedings. Based on this reasoning, a shoplifter should be exempt from liability if it subsequently pays the store for the stolen object.

By denying trespass liability, these courts create substantial incentives for condemnors to ignore the eminent domain laws. By doing so, condemnors can acquire possession of land more quickly and can defer payment of compensation or even avoid it completely if the owner does not bring an inverse condemnation action. The substantial number of cases involving bad faith entries by condemnors demonstrates the power of these incentives and strongly belies the presumption of good faith that some courts cite as justification for denying a trespass action.

172. Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW & ECONOMICS* 13, 19 (Cass R. Sunstein ed., 2000).

173. *Id.* at 18–19. *Contra* Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay-Willingness to Accept Gap, the "Endowment Effect," Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 *AM. ECON. REV.* 530, 531 (2005).

174. *See supra* Part II.B.1.

175. *See supra* Part II.C.

Absent sovereign immunity, trespass actions are available against public and private entities with the power of eminent domain in every situation except precondemnation entry. This exception is particularly inappropriate because property takings, even those conducted according to law, are extremely intrusive. When these takings are conducted in violation of the law, the owner suffers more than just the loss of land. The owner is also the victim of wrongful government-authorized conduct. Unless the law provides recourse for this injury, it loses its legitimacy and instead serves as a tool of the government against its citizens.

V. CONCLUSION

When a public or private entity with the power of eminent domain enters land before acquiring title to it, courts vary tremendously on the issue of trespass liability. The variations among the courts are attributable to the different balances that they strike between two fundamental principles of our legal system—government sovereignty over land and protection of private property rights. At one end of the spectrum, some courts hold that a trespass action is always available.¹⁷⁶ At the opposite end, other courts hold that a trespass action is never available.¹⁷⁷ Courts in the remaining jurisdictions have adopted a variety of intermediate rules that permit a trespass action in some situations but not in others.¹⁷⁸

A court's decision on this issue has tremendous practical importance. When a trespass action is available, a landowner has a far broader range of available remedies than it does in an inverse condemnation action. For example, the owner may be able to recover consequential and punitive damages, as well as ejectment and injunctive relief. Additionally, in the subsequent condemnation proceedings, a court that allows a trespass action will value the property as of the date of the proceedings, rather than the date of the wrongful entry, and it may award the landowner the land's rental value for the period between those dates. Finally, in some states, the statute of limitations for trespass is longer than for inverse condemnation, and the right to a jury trial may exist for one action but not for the other.

As important as the trespass action may be to the injured landowner, it is at least as valuable to the community as a whole. The action's availability establishes that every person, including the government, acts wrongfully by trespassing on another's land. To excuse government and

176. *See supra* Part II.A.

177. *See supra* Part II.B.

178. *See supra* Part II.C–E.

private condemners from this liability puts them above the law and decreases public support for the government and for the legal system. Therefore, a condempnor that takes another's land before condemning it should always be liable for trespass, as well as for inverse condemnation.