

COMMENTS

ELECTRIC UTILITY-CAUSED WILDFIRE DAMAGES: STRICT LIABILITY UNDER ARTICLE I, SECTION 19 OF THE CALIFORNIA CONSTITUTION*

I. INTRODUCTION

On November 8, 2018, at 6:15 a.m., Pacific Gas & Electric (PG&E) experienced an outage on a Butte County, California, electrical transmission line.¹ Approximately fifteen minutes later, PG&E's equipment malfunctioned and the Camp Fire began.² The state's most catastrophic fire burned for seventeen days, spreading over one hundred and fifty thousand acres of the arid foothills of the Sierra Nevada Mountains, killing at least eighty-six individuals, and destroying over eighteen thousand buildings in and around Paradise, California.³

The California Constitution provides an aggrieved Paradise homeowner with a clear avenue for recovery where other causes of action may fail. She could try to assert a tort claim—negligence or trespass, for example—but she would have the burden of demonstrating that the owner of the downed power lines acted either intentionally or unreasonably in starting the fire.⁴ The homeowner would fail to show that her property has been “taken” under the Takings Clause of the Fifth Amendment to the U.S. Constitution, which only recognizes intentional, substantial, and continuous injuries to property.⁵ However, by simply including the words “or damaged” in article I, section 19 of the California Constitution, the state's Takings Clause analog, the framers cleared the homeowner's avenue to recovery, regardless of whether the wildfire was caused intentionally or unreasonably.

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1. Peter Eavis, *PG&E Says It Probably Caused the Fire That Destroyed Paradise, Calif.*, N.Y. TIMES (Feb. 28, 2019), <http://www.nytimes.com/2019/02/28/business/energy-environment/pge-camp-fire.html> [<https://perma.cc/375T-8SJP>].

2. *Id.*

3. Priyanka Boghani, *Camp Fire: By the Numbers*, PBS: FRONTLINE (Oct. 29, 2019), <http://www.pbs.org/wgbh/frontline/article/camp-fire-by-the-numbers/> [<https://perma.cc/2YLT-SMVX>]. A wrongful death suit alleged that the Camp Fire caused the deaths of at least fifty additional people who were not counted in the official death toll. Associated Press, *Death Toll in Camp Fire Probably Includes 50 More People, Report Says*, L.A. TIMES (Feb. 11, 2020, 5:56 PM), <http://www.latimes.com/california/story/2020-02-11/death-toll-in-camp-fire-probably-includes-50-more-people-report-says> [<https://perma.cc/N7RV-VMV4>].

4. See, e.g., *Ralphs Grocery Co. v. Victory Consultants, Inc.*, 225 Cal. Rptr. 3d 305, 317 (Cal. Ct. App. 2017), *as modified* (Nov. 6, 2017); *Johnson v. Prasad*, 168 Cal. Rptr. 3d 196, 199 (Cal. Ct. App. 2014).

5. See *infra* Part II.C for a discussion of the takings-to-tort gap in providing remedies to the owners of property damaged by public infrastructure.

California courts have interpreted article I, section 19 liberally to impose strict liability on public entities through inverse condemnation claims for damages they inflict in the design, construction, operation, or maintenance of public infrastructure.⁶ Fairness drives this interpretation, as article I, section 19 guarantees that negative externalities from public infrastructure do not overburden individual property owners.⁷ Instead, the provision uniquely requires that such burdens be spread broadly throughout the public, which is in a better position to absorb the costs.⁸

California's inverse condemnation law is also unique because California's investor-owned electric utilities are held strictly liable for the wildfire damages that arise from the malfunctioning of their electrical infrastructure.⁹ California courts have found that electric utilities may be held strictly liable under the provision because of their state-protected monopoly status.¹⁰ This liability has left these utilities in a tough spot: they are required to pay just compensation for wildfire damage they cause regardless of whether they complied with state utility-safety regulations and otherwise acted reasonably.¹¹ Further, such utilities cannot distribute this liability to their ratepayers without approval from a state regulatory agency, the California Public Utilities Commission (CPUC).¹² This results in a massive gap of liability that utilities must absorb.

Coupled with the ongoing arid and hot conditions as well as persistent residential development in California's wildland-urban interface (WUI),¹³ this gap of uncovered liability has left such utilities on financially shaky grounds.¹⁴ In recent years, many have sought to abolish strict liability for wildfire damage under article I, section 19 out of concern for the precarious financial footing of PG&E and other investor-owned utilities. Recently, a state "strike force" published a report proposing better wildfire prevention and response tactics, clean energy policies to mitigate climate change, and "[f]air

6. See *Albers v. County of Los Angeles*, 398 P.2d 129, 137 (Cal. 1965) (en banc); see also Steve McNichols, *From Sovereign Immunity to Strict Liability: Using Inverse Condemnation in Water Damage Actions*, 11 J.F.K. U. L. REV. 75, 84–85 (2007). See *infra* Part II.D for a discussion of the development of strict liability and its current application to damages caused by public infrastructure projects.

7. See McNichols, *supra* note 6, at 84.

8. See *Albers*, 398 P.2d at 137.

9. See *Pac. Bell Tel. Co. v. S. Cal. Edison Co.*, 146 Cal. Rptr. 3d 568, 576 (Cal. Ct. App. 2012), *as modified* (Sept. 13, 2012).

10. See *id.* at 572–73; see also *Barham v. S. Cal. Edison Co.*, 88 Cal. Rptr. 2d 424, 430–31 (Cal. Ct. App. 1999).

11. See *Pac. Bell Tel. Co.*, 146 Cal. Rptr. 3d at 574–76.

12. See CAL. PUB. UTIL. CODE § 451.1(b) (West 2019) (requiring a utility to petition CPUC to recover wildfire liability upon a showing that its "conduct . . . related to the ignition was consistent with actions that a reasonable utility would have undertaken").

13. *E.g.*, James B. Meigs, *Living on the Edge*, SLATE (Nov. 20, 2018, 3:40 PM), <http://slate.com/technology/2018/11/camp-fire-disaster-causes-urban-wildland-interface.html> [https://perma.cc/B8K8-KPL3].

14. See, *e.g.*, CAROLYN KOUSKY ET AL., WHARTON RISK MGMT. & DECISION PROCESS CTR., WILDFIRE COSTS IN CALIFORNIA: THE ROLE OF ELECTRIC UTILITIES 8 (2018), <http://riskcenter.wharton.upenn.edu/wp-content/uploads/2018/08/Wildfire-Cost-in-CA-Role-of-Utilities-1.pdf> [https://perma.cc/5QXV-RKJJ]; David R. Baker, *Another Utility Is One Wildfire Away from Ruin, No Fix in Sight*, BLOOMBERG (Feb. 9, 2019, 8:00 AM), <http://www.bloomberg.com/news/articles/2019-02-09/another-utility-is-one-wildfire-away-from-ruin-no-fix-in-sight> [https://perma.cc/4LD6-NC8C].

[a]llocation of [c]atastrophic [w]ildfire [d]amages.”¹⁵ Among the report’s recommendations was the modification of the standard of liability for utilities under article I, section 19—from strict liability to a “fault-based standard.”¹⁶

In July 2019, Governor Gavin Newsom signed Assembly Bill 1054,¹⁷ which established a fund up to \$21 billion to help utilities cover wildfire costs.¹⁸ Half of the fund is financed through an extension of a small fee on statewide electric ratepayers’ bills.¹⁹ The state’s investor-owned electric utilities match the other half.²⁰ A utility must demonstrate its reasonableness to access the fund, but the law affords the utility a presumption of reasonableness if it can demonstrate that it received an annual safety certification from the state.²¹ The regulatory scheme therefore shifts a significant portion of the burden of wildfire damage from reasonable utilities to the state’s ratepayers.²² Yet the legislature again declined to limit the strict liability under article I, section 19 imposed on such utilities.²³

The California wildfire crisis raises the tough question of how the burdens of providing electrical service throughout the state—and particularly to the most wildfire-vulnerable areas of the WUI—should be fairly allocated between property owners, utilities, and ratepayers. This Comment argues that Assembly Bill 1054 optimally distributes the state’s wildfire risk. Section II traces the history and development of article I, section 19 of the California Constitution. Section II further explores the strict liability standard that California courts have adopted for inverse condemnation claims. Section III describes the California wildfire liability crisis and the application of strict liability to electric utility-caused wildfire damages. Section IV

15. GOVERNOR NEWSOM’S STRIKE FORCE, WILDFIRES AND CLIMATE CHANGE: CALIFORNIA’S ENERGY FUTURE 4 (2019) [hereinafter STRIKE FORCE REPORT], <http://www.gov.ca.gov/wp-content/uploads/2019/04/Wildfires-and-Climate-Change-California%E2%80%99s-Energy-Future.pdf> [<https://perma.cc/628V-6TK6>]. Governor Newsom announced the strike force in his 2019 State of the State Address. Gavin Newsom, Governor, State of Cal., State of the State Address, at 17:21 (Feb. 12, 2019), <http://www.c-span.org/video/?457824-1/california-state-state-address&start=145> [<https://perma.cc/SR4T-U6DT>].

16. STRIKE FORCE REPORT, *supra* note 15, at 4, 37.

17. Act of July 12, 2019, ch. 79, 2019 Cal. Legis. Serv. Ch. 79 (West) (codified in scattered sections of the CAL. PUB. UTIL. CODE and CAL. PUB. WATER CODE (West 2019)).

18. *See* Act of July 12, 2019, § 16 (codified at CAL. PUB. UTIL. CODE § 3284) (establishing the Wildfire Fund); Lisa Pickoff-White & Katie Orr, *California Legislature Approves Wildfire Bill, Utility Customers To Pay \$10.5 Billion into Fund*, KQED (July 11, 2019), <http://www.kqed.org/news/11760492/california-legislature-approves-wildfire-bill-utility-customers-to-pay-10-5-billion-into-fund> [<https://perma.cc/C6J8-39FT>].

19. *See* Act of July 12, 2019, § 16 (codified at CAL. PUB. UTIL. CODE §§ 3285, 3288); Pickoff-White & Orr, *supra* note 18.

20. *See* Act of July 12, 2019, § 16 (codified at CAL. PUB. UTIL. CODE §§ 3285, 3288).

21. *Id.* § 6 (codified at CAL. PUB. UTIL. CODE § 451.1(c)).

22. *See* Rob Nikolewski, *Should the Utilities Commission OK California’s Controversial Wildfire Bill?*, SAN DIEGO UNION-TRIB. (Oct. 11, 2019, 1:04 PM), <http://www.sandiegouniontribune.com/business/energy-green/story/2019-10-11/utilities-commission-hears-debate-over-new-wildfire-liability-law> [<https://perma.cc/RC6S-ZT68>].

23. *See* The Times Editorial Board, *Editorial: California Is Inexplicably Racing To Pass a Badly Vetted Wildfire Bill*, L.A. TIMES (July 10, 2019, 3:10 AM), <http://www.latimes.com/opinion/editorials/la-ed-wildfire-fund-rush-20190710-story.html> [<https://perma.cc/97TT-3U7W>].

asserts that Assembly Bill 1054 struck an appropriate balance by retaining the strict liability standard and optimally allocating the burden of electrical service to the WUI .

II. THE DEVELOPMENT OF CALIFORNIA'S STATE CONSTITUTIONAL DAMAGES JURISPRUDENCE

California is among twenty-seven states that provide additional protections to property owners through their own constitutions by requiring that public entities provide just compensation when property is “damaged” or “injured” by “public use.”²⁴ Property owners have relied upon state constitutional damages provisions to seek compensation for damage inflicted by a wide variety of public infrastructure projects, including street construction and regrading,²⁵ subway construction,²⁶ flood water diversion,²⁷ water-main breaks,²⁸ sewage overflow,²⁹ and, recently, wildfire damage from electrical transmission.³⁰ Damagings clauses fill a gap in legal protection: a public entity's mere damaging of property generally does not rise to the requisite level of interference to be deemed a “taking” under the Fifth Amendment, and state sovereign immunity often bars or limits common law tort claims for damages.³¹

Part II.A discusses the underlying policy of ensuring fairness in distributing the burdens of public infrastructure through inverse condemnation claims. Part II.B details the resulting development of state constitutional damages provisions. Part II.C explains the remedy gap that such provisions fill, where tort law and Fifth Amendment takings jurisprudence fall short. Part II.D outlines the doctrinal development of inverse condemnation jurisprudence under article I, section 19 of the California Constitution.

24. See Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 344 & n.6 (2018). The following states have constitutional damaging provisions: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. See ALA. CONST. art. XII, § 235; ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. II, § 22; CAL. CONST. art. I, § 19; COLO. CONST. art. II, § 15; GA. CONST. art. I, § 3, para. 1; HAW. CONST. art. I, § 20; ILL. CONST. art. I, § 15; KY. CONST. § 242; LA. CONST. art. I, § 4(B); MINN. CONST. art. I, § 13; MISS. CONST. art. III, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. II, § 29; NEB. CONST. art. I, § 21; N.M. CONST. art. II, § 20; N.D. CONST. art. I, § 16; OKLA. CONST. art. II, § 24; PA. CONST. art. X, § 4; S.D. CONST. art. VI, § 13; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WYO. CONST. art. I, § 33; see also Brady, *supra*, 344 n.6 (2018). As Professor Maureen E. Brady noted, other states like Kansas and Massachusetts have enacted statutory takings provisions that provide similar protection. *Id.*

25. See, e.g., *Albers v. County of Los Angeles*, 398 P.2d 129, 131–32 (Cal. 1965) (en banc); see also *McLemore v. Miss. Transp. Comm'n*, 992 So. 2d 1107, 1110 (Miss. 2008) (en banc).

26. See, e.g., *Holtz v. Superior Court*, 475 P.2d 441, 442, 451 (Cal. 1970) (en banc).

27. See, e.g., *Arreola v. County of Monterey*, 122 Cal. Rptr. 2d 38, 72 (Cal. Ct. App. 2002), as modified on denial of reh'g (July 23, 2002).

28. See, e.g., *McMahan's of Santa Monica v. City of Santa Monica*, 194 Cal. Rptr. 582, 591 (Cal. Ct. App. 1983), disapproved of on other grounds by *Bunch v. Coachella Valley Water Dist.*, 935 P.2d 796 (Cal. 1997).

29. See, e.g., *AGCS Marine Ins. Co. v. Arlington County*, 800 S.E.2d 159, 163 (Va. 2017).

30. See, e.g., *Pac. Bell Tel. Co. v. S. Cal. Edison Co.*, 146 Cal. Rptr. 3d 568, 570 (Cal. Ct. App. 2012), as modified (Sept. 13, 2012); cf. *Brewer v. State*, 341 P.3d 1107, 1112 (Alaska 2014).

31. See *infra* Part II.D.

A. Fairness in Inverse Condemnation Claims

Inverse condemnation is a cause of action frequently associated with the Fifth Amendment Takings Clause. The Takings Clause acknowledges that the government can appropriate, or “take,” private property through its formal exercise of eminent domain but only if for “public use” and if the property owner is provided with “just compensation.”³² However, when the government takes property without acknowledgment through formal condemnation proceedings, property owners can sue the government to recover just compensation for their property deprivation under a theory of inverse condemnation.³³

Fairness is the underlying principle behind inverse condemnation doctrine.³⁴ The Takings Clause does not affirmatively empower the government to take property, as that power was already vested.³⁵ Rather, the Takings Clause prevents the government from taking property in an unfair way—without providing “just compensation” to the property owner.³⁶ As Justice Black noted in *Armstrong v. United States*,³⁷ the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³⁸ Inverse condemnation actions exist to ensure that private property owners are not saddled with the costs of a public undertaking.³⁹ The principle of distributing burdens through inverse condemnation claims cannot be absolute, however, as governments could hardly enact any regulations if they were required to compensate property owners for *all* resulting diminutions in values.⁴⁰ Therefore, the “government’s well-established power to ‘adju[s]t rights for the public good’”⁴¹ hangs in the balance with an “individual’s right to retain the interests and exercise the freedoms at the core of private property ownership.”⁴²

B. The Spread of State Damagings Clauses

States have historically provided protection against uncompensated takings of property through their own constitutions.⁴³ Even before the Supreme Court incorporated the Fifth Amendment Takings Clause through the Fourteenth Amendment to apply to

32. U.S. CONST. amend. V.

33. *United States v. Clarke*, 445 U.S. 253, 255–57 (1980).

34. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

35. *See* Jadd F. Masso, *Mind the Gap: Expansion of Texas Governmental Immunity Between Takings and Tort*, 36 ST. MARY’S L.J. 265, 270–71 (2005).

36. U.S. CONST. amend. V.

37. 364 U.S. 40 (1960).

38. *Armstrong*, 364 U.S. at 49.

39. *See id.*

40. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

41. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (alteration in original) (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

42. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992)).

43. Brady, *supra* note 24, at 355.

states in 1897,⁴⁴ nearly all state constitutions contained parallel counterparts.⁴⁵ Professor Maureen E. Brady meticulously traced the history of the adoption of state constitutional damagings clauses in her article *The Damagings Clauses*.⁴⁶ Illinois was the first state to adopt such a provision during its constitutional convention of 1870.⁴⁷ During floor debate at the convention, several delegates referenced situations where owners would otherwise be uncompensated for the devaluation of their property due to street regrading and railroad construction.⁴⁸ The Illinois constitutional damagings provision was influential, starting a forty-year period where twenty-four other states incorporated similar provisions in their constitutions.⁴⁹ Like Illinois, many early states contemplated the negative externalities of the rapid development of public infrastructure when adopting damagings clauses, often citing examples of houses that lost street-front access due to street regrading and railroad construction.⁵⁰ Constitutional damagings provisions have been generally met with approval, as all but one of the states that have joined the Union since 1870 have incorporated such a provision.⁵¹

The language of damagings provisions varies slightly from state to state.⁵² Like the Fifth Amendment Takings Clause, they exist within constitutional articles delineating individual rights.⁵³ Most provisions state that property shall not be “taken or damaged” (following Illinois’s language)⁵⁴ or that property shall not be “taken, injured or destroyed” (following Pennsylvania’s language),⁵⁵ with a few exceptions.⁵⁶ Though the particular phrasing has not been shown to affect state court interpretations of such

44. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

45. Brady, *supra* note 24, at 355.

46. *Id.* at 355–60.

47. *Id.* at 356.

48. *Id.*

49. See *id.* at 357–58. West Virginia was the second state to adopt a constitutional damagings provision in 1872. *Id.* at 357. Between 1874 and 1879, damagings provisions spread to nine additional states, starting with Arkansas and Pennsylvania in 1874 and advancing west to Texas and Colorado in 1876 and then California in 1879. *Id.* at 357–58. Constitutional incorporation of damagings clauses continued in the early twentieth century, with states like Oklahoma, Arizona, and New Mexico, adding some variation of the clause. *Id.* at 358. Outside of the approximately forty-year period from 1870 to 1912, only two states have adopted damagings clauses: Alaska in 1959 and Hawaii in 1968. *Id.*

50. See *id.* at 362–63. “Nineteenth century newspapers and court records are filled with individuals trying—and often failing—to receive compensation for having their homes either left in midair or buried by mountains of dirt filling in the streets.” *Id.* at 354.

51. *Id.* at 357–58 (finding evidence of only “a small handful of states debating and rejecting the language”). The single exception is Idaho, which neither considered nor adopted a damagings provision. *Id.* at 358 n.85.

52. *Id.* at 359–60.

53. Of the twenty-seven states with constitutional damagings provisions, such provisions exist within the “Declaration of Rights” section in twenty-five states. See *supra* note 24 for a list of all such provisions. The two exceptions are Pennsylvania, PA. CONST. art. X, § 4, and Alabama, ALA. CONST. art. XII, § 235, in which the damagings provision exists within sections entitled “Private Corporations.”

54. ILL. CONST. art. I, § 15; see also Brady, *supra* note 24, at 359.

55. PA. CONST. art. X, § 4; see also Brady, *supra* note 24, at 359.

56. For example, Minnesota and Texas provide similar variations of the phrase that property shall not be “taken, damaged or destroyed,” MINN. CONST. art. I, § 13; TEX. CONST. art. I, § 17, and Arkansas prohibits property from being “taken, appropriated or damaged,” ARK. CONST. art. II, § 22.

phrases, state courts frequently look to how other states with similar language in their constitutional damagings clauses interpret such provisions as persuasive authority.⁵⁷

C. *The Gap Between Tort Law and Federal Takings Law*

Despite the relative lack of scholarship about state constitutional damagings clauses, such provisions afford legal protection to property owners where a gap would otherwise exist. Without such provisions, claims for publicly inflicted property damages generally fall into the “Takings-to-Tort Gap”; they are not cognizable as takings claims under the Fifth Amendment and are often hampered as common law tort actions by state sovereign immunity.⁵⁸

Though a physical invasion can be something less than a permanent appropriation of property,⁵⁹ courts interpreting the Takings Clause have nonetheless sought to distinguish physical invasions that are “substantial and frequent enough to rise to the level of a taking” from mere actions that resemble torts.⁶⁰ The U.S. Supreme Court recently clarified in *Arkansas Game & Fish Commission v. United States*⁶¹ that temporary physical invasions of a property may be compensable takings but set forth several limiting factors that distinguish torts from takings.⁶² First, although the damage need not constitute a permanent appropriation, the Court limited its holding to recurrent invasions and moreover stated that “time is indeed a factor” in distinguishing a taking from a tort.⁶³ This limitation seems to suggest that a single physical invasion may be insufficient to state a claim.⁶⁴ Second, a property owner must demonstrate that the “invasion [was] intended or . . . the foreseeable result of authorized government action.”⁶⁵ Also relevant to the inquiry is “the character of the land at issue and the owner’s ‘reasonable investment-backed expectations’ regarding the land’s use” as well as the severity of the property damage.⁶⁶

The U.S. Court of Appeals for the Federal Circuit has since held that a property owner must demonstrate that an affirmative government action caused the damage.⁶⁷ In

57. See, e.g., *Bakke v. State*, 744 P.2d 655, 657 (Alaska 1987) (relying on California damaging jurisprudence as persuasive authority); *Henderson v. City of Columbus*, 827 N.W.2d 486, 495 (Neb. 2013) (relying on Texas damaging jurisprudence as persuasive authority).

58. Masso, *supra* note 35, at 269; see also Shelley Ross Saxer, *Paying for Disasters*, 68 U. KAN. L. REV. (forthcoming 2020) (manuscript at 18), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438016 [<https://perma.cc/HP53-YWPT>].

59. See Saxer, *supra* note 58 (manuscript at 18).

60. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355–57 (Fed. Cir. 2003).

61. 568 U.S. 23 (2012).

62. See, e.g., *Ark. Game & Fish Comm’n*, 568 U.S. at 38–39 (finding that courts must consider “the degree to which the invasion is intended or is the foreseeable result of authorized government action”).

63. *Id.* at 38.

64. For example, the Court framed the question as “whether a taking may occur . . . when government-induced flood invasions, although *repetitive*, are temporary.” *Id.* at 26 (emphasis added). Moreover, the flooding in *Arkansas Game & Fish Commission* occurred regularly over the course of seven years. *Id.*

65. *Id.* at 39.

66. *Id.* (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001)).

67. *St. Bernard Par. Gov’t v. United States*, 887 F.3d 1354, 1360 (Fed. Cir. 2018), *cert. denied sub nom.* *St. Bernard Par. v. United States*, 139 S. Ct. 796 (2019).

St. Bernard Parish Government v. United States,⁶⁸ the Federal Circuit declined to award just compensation to New Orleans property owners who suffered flooding damage from Hurricane Katrina as a result of the government's failure to "maintain or to modify" the Mississippi River-Gulf Outlet.⁶⁹ The court explained that "[w]hile the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, it does not state a takings claim."⁷⁰ *St. Bernard Parish* has been criticized,⁷¹ but the Supreme Court declined to review the decision which leaves the state of the law unclear. Together, then, the holdings of *Arkansas Game & Fish Commission* and *St. Bernard Parish* indicate that a property owner cannot recover under the Fifth Amendment Takings Clause from (1) a single, isolated government invasion; (2) an invasion that was not intended nor foreseeable; or (3) an invasion that occurred as a result of government inaction.

On the other end of the gap, state sovereign immunity frequently limits state common law tort claims for damages.⁷² Every state has waived absolute immunity to some extent through tort claims acts,⁷³ but citizens are still hampered by strict procedural requirements⁷⁴ and damage caps on tort claims arising from state-inflicted property damage.⁷⁵ In contrast to tort claims, state courts have widely held that sovereign immunity does not apply to inverse condemnation claims based on state constitutional provisions, as constitutional command supersedes the principle of sovereign immunity.⁷⁶

D. California Damagings Jurisprudence

Article I, section 19 of the California Constitution provides, in part, that "[p]rivate property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."⁷⁷ California courts have interpreted this provision to allow property owners to recover on a theory of strict liability, with narrow exceptions, regardless of whether the public actor intentionally or negligently inflicted the damage.

68. 887 F.3d 1354 (Fed. Cir. 2018).

69. *St. Bernard Par. Gov't*, 887 F.3d at 1357.

70. *Id.* at 1360.

71. See Saxer, *supra* note 58 (manuscript at 16–17).

72. See Masso, *supra* note 35, at 269.

73. See, e.g., MATHIESEN, WICKERT & LEHRER, S.C., STATE SOVEREIGN IMMUNITY AND TORT LIABILITY IN ALL 50 STATES 2 (2019), <http://www.mwl-law.com/wp-content/uploads/2013/03/STATE-GOVERNMENTAL-LIABILITY-IN-ALL-50-STATES-CHART-GLW-00211981.pdf> [<https://perma.cc/E7X7-HPTA>].

74. See, e.g., Stephen P. Pfahler & Robert J. Tyson, *Procedural Issues of the Tort Claims Act*, CAL. LEAGUE CITIES, <http://www.cacities.org/getattachment/724cf4ef-006c-4166-97c5-6e8ecb0e548c/LR-Tort-Claims-Article-REVISED.aspx> [<https://perma.cc/Y8N9-Q3M3>] (last visited Apr. 1, 2020).

75. See MATHIESEN, WICKERT & LEHRER, S.C., *supra* note 73, at 3–4. For example, Utah permits no more than \$233,600 in recovery against the State for property damage, UTAH CODE ANN. § 63G-7-604(1)(c) (West 2019), while Wyoming establishes a paltry cap of \$500, WYO. STAT. ANN. § 1-39-118(f) (West 2019).

76. See Masso, *supra* note 35, at 283–84; see also *Rose v. State*, 123 P.2d 505, 510 (Cal. 1942).

77. CAL. CONST. art. I, § 19(a).

1. Framing California's Damagings Provision

California added the “or damaged” language to article I, section 19 following the California Constitutional Convention of 1878–1879.⁷⁸ There is a sparse record of the framers’ debate about the provision at the convention, but the minutes of the framers’ debate on January 28, 1879, lend some insight into their intentions for including this phrase.⁷⁹ Delegate John Hager introduced the provision, referencing similar provisions in the constitutions of Missouri and Illinois.⁸⁰ Hager cited an instance where property owners went uncompensated after the legislature authorized the cutting of a San Francisco municipal street, which “left the houses on either side high in the air, and wholly inaccessible.”⁸¹ Other delegates reasoned that fairness dictated just compensation in such situations.⁸² As Delegate Estee stated, “[W]hen a man’s property is damaged, it ought to be paid for. . . . I think that is the best we can get.”⁸³

The California damagings provision was not without its critics, however. Several delegates expressed concern that the provision could be construed broadly, hampering the government’s ability to build public infrastructure—that the provision would “open[] up a new question which has no limit,” as one delegate said.⁸⁴ Such objections were ultimately unsuccessful, as the convention approved the provision sixty-two to twenty-eight.⁸⁵

A mere six years later, the Supreme Court of California first considered the scope of its constitutional damagings provision in *Reardon v. City & County of San Francisco*.⁸⁶ In the process of raising the grade of a street and constructing a sewer, the municipal government displaced dirt and damaged the foundations of houses adjoining the street.⁸⁷ The court determined that the constitutional provision provided property owners with a distinct cause of action and was not merely a waiver of sovereign immunity for preexisting common law actions.⁸⁸ Rather, the court explained that the constitutional framers purposefully intended to protect property owners by providing a new constitutional guarantee:

We cannot think that the convention inserting in the constitution of this state the word “damaged” in the connection in which it is found, and the people in ratifying the work of the convention, intended to limit the effect of

78. Arvo Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 771–72 (1967).

79. See 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1153, 1190 (Sacramento, J.D. Young, Supt. State Printing 1881) [hereinafter DEBATES AND PROCEEDINGS]; see also David Ligtenberg, Comment, *Inverse Condemnation: California’s Widening Loophole*, 10 CAL. LEGAL HIST. 209, 215–16 (2015).

80. DEBATES AND PROCEEDINGS, *supra* note 79, at 1190.

81. *Id.*

82. *See id.*

83. *Id.*

84. *Id.* (remarks of Mr. Wilson).

85. *See id.*

86. 6 P. 317 (Cal. 1885).

87. *Reardon*, 6 P. at 317.

88. *Id.* at 325 (“We are of opinion that the right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law.”).

this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain work. It was intended to give a remedy as well where one existed before as where it did not; to superadd to the guaranty found in the former constitution of this state, and in nearly all of the other states, a guaranty against damage where none previously existed.⁸⁹

Notably, the *Reardon* court held that damages arising from a public use were compensable under the California constitutional damagings clause, regardless of “whether [the work] is done carefully and with skill or not.”⁹⁰

Despite *Reardon*’s liberal interpretation, two cases severely limited its strict liability standard for public damagings in the following several decades. First, in *Gray v. Reclamation District No. 1500*,⁹¹ the court exempted damage inflicted as a part of a necessary exercise of the state’s police powers from constitutional protection.⁹² Later, in *Archer v. City of Los Angeles*,⁹³ the Supreme Court of California carved another major exception into *Reardon* by holding that the government did not owe just compensation for *damnum absque injuria*—damage that a private actor would lawfully be permitted to inflict.⁹⁴ In *Archer*, after the city government widened a creek, water overflowed onto nearby properties in the Venice neighborhood of Los Angeles and flooded them to a depth of at least six feet for four days.⁹⁵

In denying recovery, the *Archer* court found that the California constitutional damagings provision only provided relief where an action would exist at common law, expressly contradicting, though not overruling, *Reardon*.⁹⁶ Because the city would have had the right to inflict the water damage under the “common enemy” rule of surface water disposal,⁹⁷ the court held that the damage was not compensable.⁹⁸ However, several opinions after *Gray* and *Archer* supported *Reardon*’s strict liability standard,⁹⁹ indicating confusion and inconsistency among California courts during this time.¹⁰⁰

89. *Id.* at 325–26.

90. *Id.* at 325.

91. 163 P. 1024 (Cal. 1917).

92. *Gray*, 163 P. at 1032.

93. 119 P.2d 1 (Cal. 1941), *overruling recognized by* *Locklin v. City of Lafayette*, 867 P.2d 724 (Cal. 1994) (en banc).

94. *See Archer*, 119 P.2d at 4.

95. *Id.* at 3.

96. *See id.* at 4.

97. The “common enemy” rule provides, with some qualifications, that “diffused surface water is considered to be the common enemy, and each landowner is deemed to be entitled to protect himself, regardless of the consequences to others.” *See generally* Jill M. Fraley, *Water, Water, Everywhere: Surface Water Liability*, 5 MICH. J. ENVTL. & ADMIN. L. 73, 94 n.123 (2015) (quoting 6 THOMPSON ON REAL PROPERTY § 50.20(g) (David A. Thomas ed., 1994)). For more on the “common enemy” rule, see generally *id.* at 93–97.

98. *Archer*, 119 P.2d at 4–5.

99. *See, e.g.,* *Clement v. State Reclamation Bd.*, 220 P.2d 897, 905 (Cal. 1950) (en banc), *abrogation recognized by* *Belair v. Riverside Cty. Flood Control Dist.*, 764 P.2d 1070 (Cal. 1988) (en banc); *House v. L.A. Cty. Flood Control Dist.*, 153 P.2d 950, 954 (Cal. 1944); *Bacich v. Bd. of Control*, 144 P.2d 818, 824 (Cal. 1943); *Tormey v. Anderson-Cottonwood Irr. Dist.*, 200 P. 814, 817–18 (Cal. Ct. App. 1921).

100. *See McNichols, supra* note 6, at 80–82 (finding that California damagings jurisprudence based on water damage from 1945 to 1961 “lacked uniformity, consistency and predictability”).

2. The *Albers v. County of Los Angeles* Strict Liability Standard

In 1965, the Supreme Court of California clarified the interpretation of the California constitutional damagings provision in favor of the *Reardon* rule, establishing the strict liability standard for California inverse condemnation claims that exists today and narrowing the holdings of *Archer* and *Gray* as exceptions.¹⁰¹ *Albers v. County of Los Angeles*¹⁰² established the modern rule: “[A]ny actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable . . . whether foreseeable or not.”¹⁰³

The *Albers* court explained that its liberal reading of the damagings clause best serves the underlying principles of eminent domain by “distribut[ing] throughout the community the loss inflicted upon the individual by the making of the public improvements.”¹⁰⁴ The court rejected the notion that a compensable damage must be coupled with a public benefit, finding that the focus in inverse condemnation claims lies in the character of the loss to the owner and not the nature of the public benefit derived therefrom.¹⁰⁵ Concerned with “[t]he tendency under our system . . . to sacrifice the individual to the community,”¹⁰⁶ the court noted that the main consideration in such claims should be “whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.”¹⁰⁷ The *Albers* court, however, recognized the potential for a broad strict liability rule to raise costs and deter public entities from carrying out infrastructure improvements.¹⁰⁸

After weighing these conflicting principles, the court provided five reasons why strict liability is appropriate:

First, the damage . . . , if reasonably foreseeable, would have entitled the property owners to compensation. Second, the likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real property is remote. Third, the property owners did suffer direct physical damage to their properties as the proximate result of the work as deliberately planned and carried out. Fourth, the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners Fifth, . . . “the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.”¹⁰⁹

101. See *Albers v. County of Los Angeles*, 398 P.2d 129, 137 (Cal. 1965) (en banc).

102. 398 P.2d 129 (Cal. 1965) (en banc).

103. *Albers*, 398 P.2d at 137.

104. *Id.* at 136–37 (quoting *Bacich*, 144 P.2d at 823).

105. See *id.* at 136 (citing *House v. L.A. Cty. Flood Control Dist.*, 153 P.2d 950, 956 (Cal. 1944) (Traynor, J., concurring)).

106. *Id.* at 137 (quoting *Bacich*, 144 P.2d at 823).

107. *Id.* at 136–37 (quoting *Clement v. State Reclamation Bd.*, 220 P.2d 897, 905 (Cal. 1950) (en banc), abrogation recognized by *Belair v. Riverside Cty. Flood Control Dist.*, 764 P.2d 1070 (Cal. 1988) (en banc)).

108. See *id.* at 136 (acknowledging “fears . . . that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements” (quoting *Bacich*, 144 P.2d at 823)).

109. *Id.* at 137 (quoting *Clement*, 220 P.2d at 905).

Later courts have revisited those reasons—the *Albers* factors—to determine whether a situational exemption, like those discussed below, should be made to the general strict liability rule.¹¹⁰

The *Albers* court did not explicitly refer to the inverse condemnation liability standard under article I, section 19 as strict liability,¹¹¹ but such a standard has been imposed when a public use damages property.¹¹² Article I, section 19 allows property owners to recover just compensation regardless of whether the government intentionally or even negligently inflicted damage.¹¹³ With two exceptions, to prevail on an inverse condemnation claim, a plaintiff need only demonstrate that a public entity deliberately planned, designed, constructed, maintained, or operated public infrastructure in a manner that substantially caused an actual physical injury to the plaintiff's real property.¹¹⁴ Thus, “[t]he concepts of negligence, . . . foreseeability, and predictability . . . have no place in inverse condemnation cases.”¹¹⁵ However, as explained below, the court's recent clarification of the causation element in *City of Oroville v. Superior Court*¹¹⁶ has thrown the future of the strict liability standard into doubt.

Albers recognized two exceptions where governments will not be strictly liable in inverse condemnation claims for damaging private property.¹¹⁷ First, courts will not award just compensation in certain instances when the government acts to carry out its police powers as a matter of urgent public necessity.¹¹⁸ Originating from the *Gray* exception, the government will be immune from inverse condemnation liability when it acts “under the pressure of public necessity and to avert impending peril.”¹¹⁹ For example, in *Customer Co. v. City of Sacramento*,¹²⁰ a convenience store was unable to recover just compensation from damage resulting from a police chase that ended in the store.¹²¹

110. See, e.g., *Locklin v. City of Lafayette*, 867 P.2d 724, 749–50 (Cal. 1994) (en banc) (considering the *Albers* factors in determining whether strict liability or reasonableness should apply to damage caused by a stormwater drainage system).

111. California courts first used the phrase “strict liability” to characterize the level of government culpability under the damagings provision five years later in *Holtz v. Superior Court*, 475 P.2d 441, 446 (Cal. 1970) (en banc).

112. E.g., *Pac. Shores Prop. Owners Ass'n v. Dep't of Fish & Wildlife*, 198 Cal. Rptr. 3d 72, 97–99 (Cal. Ct. App. 2016).

113. See *City of Oroville v. Superior Court*, 446 P.3d 304, 312 (Cal. 2019).

114. *Id.* at 307.

115. *McNichols*, *supra* note 6, at 103 (citing *Albers v. County of Los Angeles*, 398 P.2d 129, 136–37 (Cal. 1965) (en banc)).

116. 446 P.3d 304 (Cal. 2019).

117. E.g., *Bunch v. Coachella Valley Water Dist.*, 935 P.2d 796, 800–01 (Cal. 1997); see also Joyce S. Mendlin & Roger M. Rosen, *Obtaining Recovery for Property Damage Through Inverse Condemnation*, L.A. LAW., Jan. 2011, at 20, 20–21, <http://www.lacba.org/docs/default-source/lal-back-issues/2011-issues/january-2011.pdf> [<https://perma.cc/MUA5-HH39>].

118. *Customer Co. v. City of Sacramento*, 895 P.2d 900, 909–10 (Cal. 1995) (en banc).

119. *Holtz v. Superior Court*, 475 P.2d 441, 446 (Cal. 1970) (en banc) (quoting *House v. L.A. Flood Control Dist.*, 153 P.2d 950, 953 (Cal. 1944)).

120. 895 P.2d 900 (Cal. 1995) (en banc).

121. *Customer Co.*, 895 P.2d at 902–03, 909–10.

Courts have also declined to impose strict liability in certain situations where a government entity inflicts water damage on a property, instead opting for a reasonableness standard.¹²² Flowing from the exception that the *Albers* court carved out,¹²³ California courts will not award just compensation for damage that a reasonable action of a public entity causes under two circumstances:

- (1) where property historically subject to flooding in the absence of the project is damaged by the failure of a public improvement intended to protect the damaged property; and (2) where riparian owners are damaged because a public entity utilizes a natural watercourse—not a public improvement—for drainage of surface water.¹²⁴

Flood-control projects such as dams and stormwater drainage systems are commonly the subject of this second exception.¹²⁵ In the immediate wake of *Albers*, government entities were wholly immune from inverse condemnation liability from such projects, as courts rested their constitutional interpretations on common law riparian rights.¹²⁶ In *Belair v. Riverside County Flood Control District*,¹²⁷ the Supreme Court of California rejected such reliance, finding that, although common law water rights may be instructive, constitutional principles should be the court's focus when considering damage caused by flood-control projects.¹²⁸ However, the *Belair* court feared that imposing strict liability on flood-control projects in areas prone to historic flooding would deter public entities from building them and thus applied a reasonableness standard to such works.¹²⁹ Accordingly, courts will weigh the gravity of the damage against the public need for the flood-control project to determine whether a property owner is due just compensation under article I, section 19.¹³⁰

California courts appear to consider eleven factors derived from two cases in determining reasonableness, of which some factors overlap¹³¹—the five *Albers* factors as well as the following six considerations set forth in *Locklin v. City of Lafayette*¹³²:

- (1) The overall public purpose being served by the improvement project;
- (2) the degree to which the plaintiff's loss is offset by reciprocal benefits;
- (3) the availability to the public entity of feasible alternatives with lower risks;
- (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities;
- (5) the extent to which damage of the kind the plaintiff sustained

122. See, e.g., *Locklin v. City of Lafayette*, 867 P.2d 724, 749–50 (Cal. 1994) (en banc) (finding compensation caused by a stormwater draining system to be necessary “only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners”).

123. See *Albers v. County of Los Angeles*, 398 P.2d 129, 137 (Cal. 1965) (en banc).

124. *McNichols*, *supra* note 6, at 103–04.

125. See *id.* at 79 n.28 (characterizing the situations in which California courts will apply a reasonableness standard to claims of water damage inflicted by public entities under article I, section 19 of the California Constitution).

126. *Id.* at 85–87.

127. 764 P.2d 1070 (Cal. 1988) (en banc).

128. *Belair*, 764 P.2d at 1077–78.

129. *Id.* at 1079 (finding that “a public agency that undertakes to construct or operate a flood control project clearly must not be made the absolute insurer of those lands provided protection”).

130. *Locklin v. City of Lafayette*, 867 P.2d 724, 749–50 (Cal. 1994) (en banc).

131. See *McNichols*, *supra* note 6, at 94–95.

132. 867 P.2d 724 (Cal. 1994) (en banc).

is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over beneficiaries of the project or is peculiar only to the plaintiff.¹³³

Flood-control and water diversion projects are distinguished from other public infrastructure projects, and thus subject to the reasonableness standard, for two reasons. First, such projects present logistical concerns, as they are notably expensive and often must be built in phases, thereby leaving nearby property vulnerable to potentially catastrophic damage while under construction.¹³⁴ Second, such projects typically convey a reciprocal benefit to the owners of property near the projects as they often are able to develop a greater portion of their property that would otherwise be subject to periodic flooding.¹³⁵

California is not alone in imposing strict liability through its state constitutional damagings provision.¹³⁶ Though a significant number of state courts elsewhere have interpreted such provisions to deny just compensation unless the government inflicts property damage intentionally or as a necessarily unavoidable byproduct of a public infrastructure project.¹³⁷

133. *Locklin*, 867 P.2d at 750.

134. *McNichols*, *supra* note 6, at 91.

135. *Id.* at 105.

136. The Alaska Supreme Court directly relied on *Albers* in adopting California's view that a property owner asserting an inverse condemnation claim need not demonstrate that the government damaged her property with scienter. *Bakke v. State*, 744 P.2d 655, 657 (Alaska 1987). The North Dakota Supreme Court imposed strict liability through a slightly different approach, interpreting the state's damagings provision to create an implied contract between the state and property owners, thus eliminating the need for property owners to show that the government breached a duty. *Mayer v. Studer & Manion Co.*, 262 N.W. 925, 926–27 (N.D. 1935). Virginia interpreted its constitutional damagings provision to provide a similar implied contract. *AGCS Marine Ins. Co. v. Arlington County*, 800 S.E.2d 159, 163 (Va. 2017). Several other states have adopted similar liberal interpretations. *See, e.g., Wireman v. City of Greenup*, 582 S.W.2d 48, 50 (Ky. Ct. App. 1979) (“[T]here need be no showing of negligence at all”); *McLemore v. Miss. Transp. Comm’n*, 992 So. 2d 1107, 1110 (Miss. 2008) (finding article III, section 17 of the Mississippi Constitution to be “words . . . without limitation,” providing compensation “for all damages to . . . property that may result from works for public use” (quoting *City of Vicksburg v. Herman*, 16 So. 434, 435 (Miss. 1894))); *Krier v. Dell Rapids Twp.*, 709 N.W.2d 841, 847 (S.D. 2006) (stating that article VI, section 13 of the South Dakota Constitution “should be given a liberal construction” to provide “remedy to incidental or consequential injuries to property” (quoting *Searle v. City of Lead*, 73 N.W. 101, 103 (S.D. 1897))).

137. *See, e.g., Robinson v. City of Ashdown*, 783 S.W.2d 53, 56 (Ark. 1990) (holding that the necessary level of government intent in a damagings claim is akin to the intent necessary in a private nuisance action as derived from *Restatement (Second) of Torts*); *Angelle v. State*, 34 So. 2d 321, 323 (La. 1948) (finding that article I, section 4(B) of the Louisiana Constitution only provides protection against damage arising from the “intentional or purposeful expropriation or appropriation of private property for a public use or convenience”); *Henderson v. City of Columbus*, 827 N.W.2d 486, 492–94 (Neb. 2013) (relying on the Fifth Amendment Takings Clause analysis in *Arkansas Game & Fish Commission*, 568 U.S. 23 (2012), for the proposition that government invasions must be intentional and last for a significant duration of time to be actionable under Nebraska's damaging provision); *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004) (requiring that compensable damage be “necessarily an incident to, or necessarily a consequential result of the government's action” (quoting *Tex. Highway Dep't v. Weber*, 219 S.W.2d 70, 71 (Tex. 1949))).

3. The State of Strict Liability After *City of Oroville v. Superior Court*

In its first opportunity to address inverse condemnation liability under article I, section 19 in over twenty years, the Supreme Court of California tightened the element of causation in a way that casts uncertainty on the future of the *Albers* strict liability rule. Prior to *City of Oroville*, a plaintiff could satisfy the causation element by showing that there was a “substantial cause-and-effect relationship” between the government entity’s actions and the damage to their property that “exclud[es] the probability that other forces *alone* produced the injury.”¹³⁸ Moreover, the government had the burden of demonstrating the existence of an intervening act that cut off causation.¹³⁹ Despite considering a narrow question in *City of Oroville*,¹⁴⁰ the Supreme Court of California took the opportunity to clarify that a property owner must demonstrate more than a mere causal connection between the public improvement and the damage; it “must be substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement.”¹⁴¹

Thus, causation in inverse condemnation requires consideration of both “[t]he concepts of ‘inherent risk’ and ‘substantial causation[,]’ . . . somewhat overlapping considerations [that] play distinct roles.”¹⁴² The court explained that such inherent risks may be present when a “public entity[] adopt[s] . . . a comparatively lower cost plan to create the public improvement” or “construct[s] a public improvement and then entirely neglect[s] any kind of preventive monitoring or maintenance for the improvement.”¹⁴³ The inherent risks, moreover, must substantially cause the property damage.¹⁴⁴ The court explained that this element requires a demonstration of “physical, but-for causation . . . to link the public improvement and the damage.”¹⁴⁵ That is, according to the court, “[t]he damage must be the ‘necessary or probable result’ of the improvement, or . . . ‘the immediate, direct, and necessary effect’” of the public improvement’s design, construction, or maintenance.¹⁴⁶

City of Oroville’s impact on California inverse condemnation law has yet to be seen, but it could be significant. Narrowly, *City of Oroville* could be viewed as merely reinforcing the causation requirement. Even if its impact were that narrow, however, the revamped causation test could have a chilling effect on inverse condemnation claims by heightening the pleading requirement for such claims and resting the burden of proof on

138. See *Belair v. Riverside Cty. Flood Control Dist.*, 764 P.2d 1070, 1075 (Cal. 1988) (en banc) (quoting *Souza v. Silver Dev. Co.*, 210 Cal. Rptr. 146, 171 (Cal. Ct. App. 1985)).

139. *Arreola v. County of Monterey*, 122 Cal. Rptr. 2d 38, 68 (Cal. Ct. App. 2002).

140. The court framed the question presented as “whether the City is liable in inverse condemnation where sewage backs up onto private property because of a blockage in the City’s sewer main and the absence of a backwater valve that the affected property owner was legally required to install and maintain.” *City of Oroville v. Superior Court*, 446 P.3d 304, 309 (Cal. 2019).

141. *Id.* at 312.

142. *Id.*

143. *Id.* at 313.

144. *Id.* at 312–13.

145. *Id.* at 314.

146. *Id.* (emphasis omitted).

the plaintiff.¹⁴⁷ And it is possible that the Supreme Court of California in *City of Oroville* signaled a future shift away from strict liability in inverse condemnation claims.¹⁴⁸ For example, the court recognized that its new causation test “avoids treating inverse condemnation as a species of strict or ‘absolute liability’ that would avoid the necessary analysis of inherent risks and substantial causation, frustrating the development of public improvements because of the increased costs to public entities.”¹⁴⁹ The court also ostensibly suggested that the government can now avoid liability by showing a property owner’s comparative negligence.¹⁵⁰ The court further seemed to consider the reasonableness of the city in expecting the property owner to comply with its sewer system design regulation.¹⁵¹ However, the court only overruled two cases insofar as they applied the previously accepted causation standard.¹⁵² So, for the time being, strict liability still appears to be the rule.

III. THE CALIFORNIA WILDFIRE CRISIS

Wildfires caused by California electrical infrastructure malfunctions have devastated the state in recent years. Typically, these wildfires start when high winds cause electrical wires to break, fall, or “slap together,” and the resulting sparks ignite nearby dry vegetation.¹⁵³ The wind, in turn, spreads the wildfire conflagration.¹⁵⁴ Wildfires started this way are therefore particularly difficult to contain, as “the conditions that cause power lines to start wildfires are the exact same conditions that make them spread rapidly.”¹⁵⁵ For example, at its peak the Camp Fire burned at a rate of eighty football fields per minute; firefighters estimated that it destroyed the entire town of Paradise in four hours.¹⁵⁶

Although they represent only five percent of the wildfires in the state, wildfires started by power lines are more frequently catastrophic.¹⁵⁷ The California Department of Forestry and Fire Protection has found that almost all of the ten most destructive wildfires

147. See Gus Sara, *California Clarifies Its Inverse Condemnation Standard*, SUBROGATION STRATEGIST (Oct. 8, 2019), <http://subrogationstrategist.com/2019/10/08/california-clarifies-its-inverse-condemnation-standard/> [https://perma.cc/AKP8-SWUR] (“The *City of Oroville* case establishes that, in California, a mere showing of ordinary negligence is insufficient to prove inverse condemnation against a public entity.”).

148. See, e.g., Bradford B. Kuhn, *California Supreme Court Provides Rare Update on Inverse Condemnation Doctrine*, LEXOLOGY (Aug. 18, 2019), <http://www.lexology.com/library/detail.aspx?g=b65f06b1-71cd-4509-989f-a108bd9b7fdc> [https://perma.cc/VV2M-LZV8].

149. *City of Oroville*, 446 P.3d at 314.

150. See *id.* at 315–16 (explaining that the trial court erred by failing to consider the property owner’s failure to install a legally required backflow preventer); Sara, *supra* note 147.

151. See *City of Oroville*, 446 P.3d at 315–16 (finding no reason to “doubt that the City made reasonable assumptions in reaching its decision for the design, construction or maintenance of the sewer system”); Kuhn, *supra* note 148.

152. *City of Oroville*, 446 P.3d at 315 n.3.

153. See Kendra Atleework, *Power Lines Are Burning the West*, ATLANTIC (May 25, 2018), <http://www.theatlantic.com/technology/archive/2018/05/power-lines-are-burning-the-west/561212/> [https://perma.cc/MH54-3MN9]; see also KOUSKY ET AL., *supra* note 14, at 3.

154. See KOUSKY ET AL., *supra* note 14, at 3; Atleework, *supra* note 153.

155. KOUSKY ET AL., *supra* note 14, at 3.

156. Boghani, *supra* note 3.

157. KOUSKY ET AL., *supra* note 14, at 3.

since 2015 have started this way.¹⁵⁸ The Camp Fire, which started due to a faulty PG&E-operated power line, was the most destructive wildfire in the state, killing at least eighty-six people and destroying the homes of over thirty thousand people in and around the town of Paradise in November 2018.¹⁵⁹

The equipment of Southern California Edison Company (SoCal Edison), another investor-owned electric utility,¹⁶⁰ also caused two massive Southern California wildfires.¹⁶¹ Fire investigators determined that crossed electrical lines operated by SoCal Edison started the 2017 Thomas Fire, which killed two individuals, destroyed over one thousand structures in Ventura and Santa Barbara Counties, and led to mudslides in the area of the burn scar that killed at least twenty people and further damaged more homes.¹⁶² SoCal Edison is also suspected of starting the 2018 Woolsey Fire, which destroyed over one thousand homes in Los Angeles and Ventura Counties.¹⁶³

In addition to the loss of human lives, these fires have caused exorbitant property damage. Under prevailing California inverse condemnation law, a utility whose equipment starts a wildfire is strictly liable to the owners of damaged property.¹⁶⁴ Because utilities are restricted in their ability to raise rates to offset this liability, they are saddled with unsustainable amounts of liability, which forced PG&E, the state's largest investor-owned electric utility, into bankruptcy.¹⁶⁵ The financial vulnerability of the state's investor-owned utilities, coupled with climate conditions and human development patterns that are likely to create more fires, force the state to contend with how the costs of the wildfires should be allocated among the utilities, their ratepayers, and aggrieved property owners.¹⁶⁶

This Section examines the California wildfire liability crisis by focusing on its causes, its effects, and the legislative response. Part III.A explores the causes that have contributed to the increased incidence and severity of utility-caused wildfires. Part III.B traces the California courts' application of strict inverse condemnation liability to the state's investor-owned electric utilities and recent judicial challenges to this standard.

158. See *Top 20 Most Destructive California Wildfires*, CAL FIRE (Aug. 8, 2019), https://www.fire.ca.gov/media/5511/top20_destruction.pdf [https://perma.cc/EQ2J-T59T].

159. See *supra* note 3 and accompanying text.

160. *Our Financial Information*, S. CAL. EDISON, <http://www.sce.com/about-us/who-we-are/financials> [https://perma.cc/3M39-MWH9] (last visited Apr. 1, 2020).

161. Joseph Serna, *Southern California Edison Strikes \$360-Million Settlement over Wildfires and Mudslide*, L.A. TIMES (Nov. 13, 2019, 3:00 PM), <http://www.latimes.com/california/story/2019-11-13/southern-california-edison-settles-public-agencies-wildfires-mudslides> [https://perma.cc/WB2M-7JVS].

162. Joseph Serna, *Southern California Edison Power Lines Sparked Deadly Thomas Fire, Investigators Find*, L.A. TIMES (Mar. 13, 2019, 2:30 PM), <http://www.latimes.com/local/lanow/la-me-ln-thomas-fire-edison-cause-20190313-story.html> [https://perma.cc/N92F-R6SW].

163. Joseph Serna, *Southern California Edison Says Its Lines Likely 'Associated' with Woolsey Fire*, L.A. TIMES (Oct. 29, 2019, 2:38 PM), <http://www.latimes.com/california/story/2019-10-29/edison-power-lines-likely-associated-with-woolsey-fire> [https://perma.cc/P3XG-3QC5].

164. See *infra* Part III.B.

165. See *infra* Part III.C.

166. See, e.g., GABRIEL PETEK, CAL. LEGISLATIVE ANALYST'S OFFICE, ALLOCATING UTILITY WILDFIRE COSTS: OPTIONS AND ISSUES FOR CONSIDERATION 10 (2019), <http://lao.ca.gov/reports/2019/4079/allocating-wildfire-costs-062119.pdf> [https://perma.cc/KCN7-XFQZ] (explaining that the wildfire liability "will ultimately be borne by some combination of utility ratepayers, utility shareholders (as well as bondholders), insurers, property owners, and/or governments (taxpayers)").

Part III.C describes the effects of the increased liability on the state and its utilities. Part III.D then recounts the legislative response to the crisis over the past two years.

A. *The Causes of the California Wildfire Liability Crisis*

Wildfires have always been a natural part of California's ecology, but they have increased in frequency and intensity due to recent climate change and increased development of the WUI—the transition zone between human development and undeveloped wildland, comprised of communities like Paradise that are interspersed within the state's forests, grasslands, and scrublands.¹⁶⁷ There has been an unprecedented amount of wildfire damage in California in recent years: Of the twenty most destructive wildfires in the state's history, fifteen have occurred since 2000 and ten have occurred since 2015.¹⁶⁸ The most destructive wildfire season occurred in 2018, in which over 7,600 wildfires burned over 1.8 million acres of the state.¹⁶⁹

Much of California has a Mediterranean climate, which means it has distinct seasons—hot, dry summers and rainy winters.¹⁷⁰ California's typical wildfire season begins in late summer when strong, dry winds sweep down from the Great Basin Desert and across the Golden State.¹⁷¹ Dry vegetation at the end of California's summer acts as natural fuel that, when combined with the dry winds, leads to regular conflagration in the late summer and early fall.¹⁷² Increasing temperatures,¹⁷³ volatile precipitation amounts,¹⁷⁴ and increased disease and insect infestations in California's forests—conditions attributed to climate change—cause wildfires to start more frequently and spread more quickly.¹⁷⁵ As a result, wildfire season begins earlier each year and lasts longer¹⁷⁶: some counties experience wildfire-prone conditions from

167. See STRIKE FORCE REPORT, *supra* note 15, at 1–2; Meigs, *supra* note 13.

168. See *Top 20 Most Destructive California Wildfires*, *supra* note 158.

169. California Exec. Order N-05-19 (Jan 8, 2019), <http://www.gov.ca.gov/wp-content/uploads/2019/01/1.8.19-EO-N-05-19.pdf> [<https://perma.cc/TBR9-RDVE>].

170. *Climate, Fire, and Habitat in Southern California*, U.C. COOPERATIVE EXTENSION: SUSTAINABLE & FIRE SAFE LANDSCAPES, http://ucanr.edu/sites/SAFELandscapes/Fire_in_Southern_California_Ecosystems/# [<https://perma.cc/5Z3X-9ZTQ>] (last visited Apr. 1, 2020).

171. Erik Ortiz, *There's No More Typical California Wildfire Season. It May Be Year-Round, Experts Warn.*, NBC NEWS (Nov. 9, 2018, 2:13 PM), <http://www.nbcnews.com/news/us-news/there-s-no-more-typical-wildfire-season-california-it-may-n934521> [<https://perma.cc/V84T-S4JA>].

172. *Id.*

173. CALIFORNIA'S FOURTH CLIMATE CHANGE ASSESSMENT: STATEWIDE SUMMARY REPORT 23 (2018) [hereinafter CAL. CLIMATE CHANGE ASSESSMENT], <http://www.energy.ca.gov/sites/default/files/2019-07/Statewide%20Reports-%20SUM-CCCA4-2018-013%20Statewide%20Summary%20Report.pdf> [<https://perma.cc/YT55-JBEF>].

174. See *id.* at 24; Melissa Denchak, *Drought: Everything You Need To Know*, NRDC (Sept. 13, 2018), <http://www.nrdc.org/stories/drought-everything-you-need-know> [<https://perma.cc/HA95-SXUF>]; see also Daniel L. Swain et al., *Increasing Precipitation Volatility in Twenty-First-Century California*, 8 NATURE CLIMATE CHANGE 427, 427 (2018); Bettina Boxall, *Climate Change Will Make California's Drought-Flood Cycle More Volatile, Study Finds*, L.A. TIMES (Apr. 23, 2018, 5:35 PM), <http://www.latimes.com/local/lanow/la-me-drought-flood-20180423-story.html> [<https://perma.cc/DL4M-GJ9R>].

175. Julie Cart & Judy Lin, *California's Worsening Wildfires, Explained*, CALMATTERS (Oct. 25, 2019), <http://calmatters.org/explainers/californias-worsening-wildfires-explained/> [<https://perma.cc/7SCM-ELZM>].

176. See *id.*; *2019 Incident Archive*, CAL FIRE, <http://www.fire.ca.gov/incidents/2019/> [<https://perma.cc/B9YY-QW39>] (last visited Apr. 1, 2020).

mid-May through mid-December, while other counties experience wildfire risk year-round.¹⁷⁷ *California's Fourth Climate Change Assessment* predicted that the average area burned each year will increase by seventy-seven percent by 2100, and extreme wildfires will occur fifty percent more often.¹⁷⁸

Increased development in the wildfire-prone areas of California's WUI has further exacerbated the California wildfire crisis.¹⁷⁹ One-quarter of Californians live in high-risk fire areas in or near the WUI—an estimated eleven million people in 4.5 million homes.¹⁸⁰ Homes built in the WUI are at the highest risk for wildfire damage because they are located closest to dry vegetation, which acts as fuel.¹⁸¹ People nonetheless move to these wildfire-prone areas for a variety of reasons including proximity to nature, comparatively lax building codes,¹⁸² and the lack of affordable housing in metropolitan areas such as San Francisco and Los Angeles, which pushes development into cheaper, “peripheral” areas with higher wildfire risk.¹⁸³ Despite the increased wildfire risk, residential development in California's WUI has been persistent; roughly one-half of all homes built in the state between 1990 and 2010 are in the WUI.¹⁸⁴

The lack of readily available, cost-effective, preventative safety solutions further compounds the wildfire crisis. The extensiveness of the network of approximately 176,000 miles of overhead electrical wires required to serve the state makes any systematic preventative safety enhancement cost prohibitive.¹⁸⁵ Burying electrical lines, or “undergrounding” them, is one alternative to overhead electrical lines that could significantly mitigate the risk of wildfires, but undergrounding is fairly cost prohibitive—\$2.3 million per mile of electrical line as opposed to \$800,000 per mile in

177. STRIKE FORCE REPORT, *supra* note 15, at 1; Ortiz, *supra* note 171.

178. CAL. CLIMATE CHANGE ASSESSMENT, *supra* note 173, at 30.

179. See California Proclamation of State of Emergency (Mar. 22, 2019), <http://www.fire.ca.gov/media/5586/32219-wildfire-state-of-emergency.pdf> [<https://perma.cc/KJK2-3GDZ>]. See generally Heather Anu Kramer et al., *High Wildfire Damage in Interface Communities in California*, 28 INT'L J. WILDLAND FIRE 641 (2019) (“Because ignitions are overwhelmingly human-caused, wildfire ignitions are more likely with WUI expansion and even more so as the entire wildfire season lengthens owing to more ignitions and climate change.” (citations omitted)).

180. See STRIKE FORCE REPORT, *supra* note 15, at 5; Joshua Emerson Smith, *California Ignores the Science as It OKs More Homes in Wildfire Zones, Researchers Say*, L.A. TIMES (Oct. 6, 2019, 10:59 PM), <http://www.latimes.com/california/story/2019-10-06/california-ignores-science-homes-wildfire-zones> [<https://perma.cc/NH2J-UWPN>].

181. See California Proclamation of State of Emergency, *supra* note 179.

182. See Jeffrey Ball, *Why Californians Were Drawn Toward the Fire Zones*, WALL STREET J. (Dec. 7, 2018, 12:00 PM), <http://www.wsj.com/articles/why-californians-were-drawn-toward-the-fire-zones-1544202053> [<https://perma.cc/WWM3-3MW7>]; Annie Lowrey, *California Is Becoming Unlivable*, ATLANTIC (Oct. 30, 2019), <http://www.theatlantic.com/ideas/archive/2019/10/can-california-save-itself/601135/> [<https://perma.cc/TG5S-XNSN>]; Kendra Pierre-Louis & Jeremy White, *Americans Are Moving Closer to Nature, and to Fire Danger*, N.Y. TIMES (Nov. 15, 2018), <http://www.nytimes.com/2018/11/15/climate/california-fires-wildland-urban-interface.html> [<https://perma.cc/JN3M-QWPF>].

183. Lowrey, *supra* note 182.

184. *Id.*

185. See Tony Bizjak et al., *Power Lines Keep Sparking Wildfires. Why Don't California Utility Companies Bury Them?*, SACRAMENTO BEE (Nov. 16, 2018, 3:00 AM), <http://www.sacbee.com/news/business/article221707650.html> [<https://perma.cc/HL6G-LAG7>].

overhead electrical wires, as estimated by PG&E.¹⁸⁶ Systematic clearings of vegetation around electrical lines also impose a heavy cost burden on such utilities due to the sheer breadth of the number of miles of lines that they must treat.¹⁸⁷

B. Strict Liability Applied to Electric Utility-Caused Wildfire Liability

In two California Court of Appeal decisions, the *Albers* strict liability standard has been extended to require California's investor-owned electric utilities to provide just compensation to the owners of property damaged by wildfires caused by downed power lines.¹⁸⁸ In *Barham v. Southern California Edison Co.*,¹⁸⁹ the Fourth District of the California Court of Appeal held that investor-owned electric utilities carry out a "public use" within the scope of article I, section 19 by providing electrical service.¹⁹⁰ The *Barham* court reasoned that the utilities are subject to the provision because they are state-sanctioned monopolies and are empowered to exercise eminent domain to take property to erect electrical infrastructure.¹⁹¹ Further, the court reasoned, a "public utility may not properly claim prerogatives of 'private autonomy'" because such investor-owned utilities were carrying out this public function.¹⁹² Therefore, the state "generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation."¹⁹³ California is unique in this regard, as only one other state has applied its constitutional damagings provision to require privately owned utilities to pay just compensation.¹⁹⁴

In *Pacific Bell Telephone Co. v. Southern California Edison Co.*,¹⁹⁵ the Second District Court of Appeal affirmed that the strict liability standard, not the reasonableness standard applied to flood-control projects under *Belair*, should apply to wildfire damage caused by electrical infrastructure.¹⁹⁶ The court noted that the Supreme Court of California had carefully crafted the reasonableness standard for flood-control projects due to the "unique policy concerns relevant to a 'common enemy.'"¹⁹⁷ Flood-control projects are distinguishable from electrical infrastructure, the court explained, because

186. See J.D. Morris, *Put PG&E's Power Lines Underground? It Can Be Done—Expensively and Slowly*, S.F. CHRON. (Oct. 27, 2019), <http://www.sfchronicle.com/california-wildfires/article/Put-PG-E-s-power-lines-underground-It-can-be-14565060.php> [https://perma.cc/9NLD-FPNC].

187. See J.D. Morris, *PG&E: Judge's Wildfire Proposal Could Cost as Much as \$150 Billion*, S.F. CHRON. (Jan. 23, 2019), <http://www.sfchronicle.com/california-wildfires/article/PG-E-Judge-s-wildfire-proposal-could-cost-as-13556257.php> [https://perma.cc/CVF9-5RQ6].

188. *Pac. Bell Tel. Co. v. S. Cal. Edison Co.*, 146 Cal. Rptr. 3d 568, 576 (Cal. Ct. App. 2012); *Barham v. S. Cal. Edison Co.*, 88 Cal. Rptr. 2d 424, 430–31 (Cal. Ct. App. 1999).

189. 88 Cal. Rptr. 2d 424 (Cal. Ct. App. 1999).

190. *Barham*, 88 Cal. Rptr. 2d at 430–31.

191. *Id.* at 429–30 (citing CAL. PUB. UTIL. CODE § 612 (West 1975)).

192. *Id.* at 430 (quoting *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 599 (Cal. 1979)).

193. *Id.* (quoting *Gay Law Students Ass'n*, 595 P.2d at 599).

194. Alabama is the only other state that applies its constitutional damagings provision to privately owned utilities. See *Jefferson County v. S. Nat. Gas Co.*, 621 So. 2d 1282, 1287 (Ala. 1993) (holding that utilities that are statutorily entitled to take property through eminent domain may also be held liable in inverse condemnation claims).

195. 146 Cal. Rptr. 3d 568 (Cal. Ct. App. 2012).

196. *Pac. Bell Tel. Co.*, 146 Cal. Rptr. 3d at 573–74.

197. *Id.* at 575.

the risk of water damage would often exist even without the flood-control project whereas the presence of electrical infrastructure creates the wildfire risk.¹⁹⁸ The court further noted that the Supreme Court of California has not extended the reasonableness standard outside of the narrow context of water damage.¹⁹⁹ Therefore, the court concluded, there was “no indication . . . that the Supreme Court intended to replace the strict liability standard . . . outside the flood control context.”²⁰⁰ The Supreme Court of California has never considered whether electric utilities should be held strictly liable for wildfire damage under article I, section 19.

The application of strict inverse condemnation liability to wildfire damages caused by malfunctioning electrical infrastructure has left California’s investor-owned electric utilities in a tough place because the state restricts their ability to pass the costs of the damage along to their ratepayers.²⁰¹ The California Public Utility Commission (CPUC) must approve any rate increase.²⁰² CPUC has been hesitant to allow utilities to pass along their costs from such fires and has only allowed utilities to pass along costs if they can demonstrate they acted as a “prudent manager” of their equipment—that is, if they acted reasonably.²⁰³ Thus, such privately owned electric utilities are often forced to sustain significant amounts of liability without the ability to seek compensation themselves.²⁰⁴

California investor-owned electric utilities’ recent attempts to challenge applications of strict liability to wildfire damages under article I, section 19 have been unsuccessful. Utilities have argued that the application of strict liability is unfair because, unlike a traditional public use actor such as a government entity, they are restricted in their ability to pass along the costs of their liability to their ratepayers in the form of a rate hike.²⁰⁵ Since *Barham* and *Pacific Bell*, however, utilities have had little luck persuading the Supreme Court of California or lower appellate courts to consider their challenges to the strict liability standard.²⁰⁶ For example, after CPUC declined to allow the utility to pass along \$379 million in liability from the 2007 Witch, Guejito, and Rice Fires to its customers in the form of rate hikes,²⁰⁷ San Diego Gas & Electric appealed the ruling. The utility argued that the strict liability standard, coupled with its inability to freely distribute its costs, amounts to an unconstitutional taking against the utility under the Fifth Amendment of the U.S. Constitution.²⁰⁸ The California Court of Appeal

198. *See id.*

199. *Id.*

200. *Id.*

201. *See* CAL. PUB. UTIL. CODE § 451.1 (West 2019).

202. *See id.*

203. *See, e.g.,* Decision Denying Application, Decision No. 17-11-033, CAL. PUB. UTIL. COMMISSION (Dec. 12, 2017), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M200/K045/200045020.PDF> [<https://perma.cc/M7DZ-RRX4>] (denying an application from San Diego Gas & Electric to raise rates to cover \$379 million in liability from damages caused by a 2007 wildfire).

204. *See* KOUSKY ET AL., *supra* note 14, at 8.

205. *See* Petition for a Writ of Certiorari at 11–12, *San Diego Gas & Elec. Co. v. Cal. Pub. Utils. Comm’n*, 140 S. Ct. 188 (2019) (No. 18-1368), 2019 WL 1953402, at *11–12.

206. *See* Saxer, *supra* note 58 (manuscript at 34–35, 34 n.215); *see also, e.g.,* *San Diego Gas & Elec. Co. v. Pub. Utils. Comm’n*, No. D074417 (Cal. Ct. App. Nov. 13, 2018), *review denied*, No. S252748 (Cal. Jan. 30, 2019).

207. Decision Denying Application, *supra* note 203.

208. Petition for a Writ of Certiorari, *supra* note 205, at 11–14.

declined to consider the merits of the utility's federal constitutional claim,²⁰⁹ the Supreme Court of California summarily denied review,²¹⁰ and the U.S. Supreme Court ultimately denied the utility's petition for certiorari in October 2019.²¹¹

PG&E recently had its day in court by taking the unusual step of attempting to challenge the application of strict inverse condemnation liability in U.S. Bankruptcy Court.²¹² In its pending bankruptcy proceedings,²¹³ the utility sought to discharge liability from any inverse condemnation claims against it for recent wildfire damages it caused by arguing, among other things, that the Supreme Court of California would not apply strict liability to them in this scenario, and so the bankruptcy court should not either.²¹⁴ The bankruptcy court denied relief, reasoning that the Supreme Court of California would not be likely to deviate from the application of strict inverse condemnation liability in *Barham* and *Pacific Bell*, especially since the high court would consider that the legislature had considered but later declined to enact legislation to alter the inverse condemnation standard during the 2019 summer.²¹⁵

C. Effects of the California Wildfire Liability Crisis

The state's investor-owned utilities are potentially liable for enormous amounts of wildfire damage from the past several years. PG&E has estimated its liability from recent fires, including the Camp Fire, to be around \$30 billion, so much that it filed for bankruptcy in January 2019.²¹⁶ The utility's bankruptcy has led to a contentious fight between the utility and the state over how the company should reorganize.²¹⁷ The Bankruptcy Court for the Northern District of California approved a proposed settlement over PG&E's wildfire liability from the Camp Fire and other fires it caused in 2017 and 2018, including \$13.5 billion to property owners and \$11 billion to insurance providers.²¹⁸ PG&E's bankruptcy is contingent on the state's approval, however, because PG&E must rely on the wildfire insurance fund that Assembly Bill 1054 created, which in turn requires that CPUC approve the company's reorganization plan. This has set up a standoff between the state and its largest investor-owned electric utility. Governor Newsom has rebuked the company's reorganization plans for their failure to prioritize

209. San Diego Gas & Elec. Co. v. Pub. Utils. Comm'n, No. D074417 (Cal. Ct. App. Nov. 13, 2018).

210. San Diego Gas & Elec. Co. v. Pub. Utils. Comm'n, No. S252748 (Cal. Jan. 31, 2019).

211. San Diego Gas & Elec. Co. v. Cal. Pub. Utils. Comm'n, 140 S. Ct. 188 (2019).

212. See *In re PG&E Corp.*, No. 19-30088, slip op. at 2 (Bankr. N.D. Cal. Nov. 27, 2019).

213. See *infra* Part III.C for a discussion of PG&E's January 2019 bankruptcy and pending reorganization efforts.

214. See *In re PG&E Corp.*, slip op. at 6–8.

215. See *id.* at 11.

216. See Saxer, *supra* note 58 (manuscript at 32).

217. See Tom Hals & Steve Gorman, *California Governor Rejects PG&E Bankruptcy Reorganization Plan*, REUTERS (Dec. 13, 2019, 10:00 PM), <http://www.reuters.com/article/us-california-wildfires-pg-e/california-governor-rejects-pge-bankruptcy-reorganization-plan-idUSKCN1YI038> [<https://perma.cc/F7NG-4KCA>].

218. Richard Gonzales, *Judge Approves PG&E \$24.5 Billion Plan for Wildfire Victims and Insurance Companies*, NPR (Dec. 17, 2019, 11:28 PM), <http://www.npr.org/2019/12/17/789181882/judge-approves-pg-e-24-5-billion-plan-for-wildfire-victims-and-insurance-compani> [<https://perma.cc/44SB-23US>].

safety measures to hold itself accountable.²¹⁹ The governor has further mused, as many have argued, that in light of PG&E's recent troubles, the state should take it over.²²⁰

California's other large investor-owned electric utilities, San Diego Gas & Electric and SoCal Edison, are likewise on precarious financial footing.²²¹ Losses from the Woolsey Fire, which is speculated to have been caused by SoCal Edison's electrical lines, are estimated to be well over \$4 billion.²²² Victims have also filed \$1.7 billion in insurance claims arising from the Thomas Fire and the subsequent mudslide, which was linked to SoCal Edison's equipment.²²³ And both companies serve millions of customers in the WUI, so one major fire incident could likewise be devastating.²²⁴

Recently, utilities have preemptively de-energized their electrical lines during conditions with high wildfire threats in attempts to prevent wildfires from igniting due to downed wires. While utilities occasionally used public safety power shutoffs before 2018 when a utility deemed it necessary, these outages have been occurring more often and with an unprecedented scope²²⁵: PG&E initiated five rounds of shutoffs across Central and Northern California in October 2019, at one point shutting off the power of nearly 2.5 million people.²²⁶ The shutoffs have been criticized for their impact on elderly and disabled residents whose medical care depends on refrigerated medications and electrically powered medical equipment.²²⁷ The shutoffs have also caused widespread

219. See Braktkton Booker, *California Rejects State's Largest Utility's Bankruptcy Plan*, NPR (Dec. 14, 2019, 1:49 PM), <http://www.npr.org/2019/12/14/788097046/california-rejects-states-largest-utility-s-bankruptcy-plan> [https://perma.cc/Z2VA-SMBX].

220. See Richard Gonzales, *Calif. Governor Seeks To 'Jumpstart' PG&E Bankruptcy Talks; Threatens State Takeover*, NPR (Nov. 1, 2019, 9:13 PM), <http://www.npr.org/2019/11/01/775621356/calif-governor-seeks-to-jumpstart-pg-e-bankruptcy-talks-threatens-state-takeover> [https://perma.cc/46AH-428S].

221. See Judy Lin, *What Could Be Worse than the Next Big Fire? The Next Big Fire Caused by PG&E*, KQED (Feb. 18, 2019), <http://www.kqed.org/news/11727130/what-could-be-worse-than-the-next-big-fire-the-next-big-fire-caused-by-pge> [https://perma.cc/M9VU-UDH8]. On January 21, 2019, S&P Global Ratings downgraded the credit rating of California's two other large investor-owned utilities, San Diego Gas & Electric and SoCal Edison, and threatened to lower them to junk bond status due to future potential wildfire liability. Rebecca Choong Wilkins & Molly Smith, *California Utilities May Risk Junk-Debt Status as PG&E Unravels*, BLOOMBERG (Jan. 24, 2019, 6:00 AM), <http://www.bloomberg.com/news/articles/2019-01-24/california-utilities-may-risk-junk-debt-status-as-pg-e-unravels> [https://perma.cc/GV96-AFCZ].

222. Edvard Pettersson, *Edison Once Again Seeks To Limit Liability from California Fires*, BLOOMBERG (Nov. 3, 2019, 6:00 AM), <http://www.bloomberg.com/news/articles/2019-11-03/edison-once-again-seeks-to-limit-liability-from-california-fires> [https://perma.cc/SK46-H4GE].

223. Serna, *supra* note 162.

224. See Lin, *supra* note 221.

225. See J.D. Morris, *PG&E Outages: Historic Blackout Under Way, 1.3 Million in Bay Area Without Power*, S.F. CHRON. (Oct. 28, 2019), <http://www.sfchronicle.com/california-wildfires/article/PG-E-outages-Over-3-million-people-blacked-out-14566085.php> [https://perma.cc/E6US-XP49]; Katie Worth & Karen Pinchin, *After Deadly Fire, Regulators and Consumers Question PG&E Blackouts*, PBS: FRONTLINE (Nov. 15, 2019), <http://www.pbs.org/wgbh/frontline/article/deadly-paradise-fire-regulators-consumers-pge-blackouts-pge-outage/> [https://perma.cc/N4SN-A52N].

226. Janie Har, *California Regulators Open Inquiry into Power PG&E Outages*, L.A. TIMES (Nov. 13, 2019, 3:51 PM), <http://www.latimes.com/business/story/2019-11-13/california-investigation-into-pge-power-outages> [https://perma.cc/MV3U-PZHL].

227. See Janie Har, *Seniors at California Complex 'Abandoned' During Blackout*, AP NEWS (Oct. 31, 2019), <http://apnews.com/0d32cb3d9d1c4d83976d7b167f38dd72> [https://perma.cc/4F8S-U6RT]; Taryn Luna, *PG&E Power Outage Was 'A Big Screw You' to California, Lawmaker Says*, L.A. TIMES (Nov. 18, 2019, 9:18

economic losses for which, unlike liability from wildfire damage, PG&E is not responsible financially.²²⁸

PG&E's October 2019 shutoffs have drawn public ire for the lack of notice provided to affected residents²²⁹ and scrutiny over whether the utility preemptively shut off its power solely to protect its financial wellbeing.²³⁰ As CPUC reiterated in a recent ruling, a utility is only permitted to shut off power to customers "as a measure of last resort," and shutoffs are not permissible when used "as a means of reducing [a utility's] own liability risk."²³¹ Accordingly, the agency announced that it was investigating PG&E's October 2019 shutoffs to scrutinize the utility's shutoff breadth and notification processes as well as to "ensure that utility decisions to shut off power to prevent wildfires are only made when absolutely necessary and are based on actual and substantiated conditions."²³² Despite the public scrutiny, PG&E has projected that such shutoffs will be necessary for another decade while it attempts to rebuild its infrastructure.²³³

D. Legislative Responses to the California Wildfire Crisis

Wildfire liability allocation has dominated California public policy debate in recent years. Electric utilities have lobbied the legislature to supplant strict liability with a reasonableness standard, while homeowner groups, insurance companies, and ratepayer advocacy groups have opposed any changes.²³⁴ As this Part explains, legislative efforts to change the strict liability standard by which property owners recover failed in the last two years. Instead, in 2019, the California legislature created a wildfire insurance fund

PM), <http://www.latimes.com/california/story/2019-11-18/california-lawmakers-blast-pge-wildfire-power-shutoffs> [<https://perma.cc/BNE5-SDSV>].

228. See, e.g., Bill Swindell, *Survey: Early October PG&E Outage Resulted in \$50 Million to \$70 Million in Losses for Sonoma County*, PRESS DEMOCRAT (Nov. 21, 2019), <http://www.pressdemocrat.com/business/10346651-181/survey-early-october-pge-outage> [<https://perma.cc/3AQL-ZPFZ>]; Worth & Pinchin, *supra* note 225 ("Just the first few days of power outages cost \$400 million and \$600 million in lost economic output, according to an estimate by Moody's Analytics."); see also Saxer, *supra* note 58 (manuscript at 68) (arguing that an electric utility should consider the "cost to customers in terms of loss of productivity, damaged goods, and health and safety considerations" before shutting off its electrical grid).

229. See, e.g., Har, *supra* note 227.

230. See Worth & Pinchin, *supra* note 225 ("[M]any of the company's customers, watchdogs, and regulators have expressed skepticism around the company's motives [for initiating shutoffs]. . . . Analysts have noted that in addition to safety concerns, PG&E also has a financial incentive to cut power."); see also Luna, *supra* note 227.

231. Decision Adopting De-Energization (Public Safety Power Shut-Off) Guidelines (Phase 1 Guidelines), Decision No. 19-05-042, CAL. PUB. UTIL. COMMISSION (May 30, 2019), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M296/K598/296598822.PDF> [<https://perma.cc/QQ55-GL45>]; see also Worth & Pinchin, *supra* note 225.

232. Order Instituting Investigation on the Commission's Own Motion on the Late 2019 Public Safety Power Shutoff Events, No. I. 19-11-013, CAL. PUB. UTIL. COMMISSION (Nov. 13, 2019), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M319/K821/319821875.PDF> [<https://perma.cc/W2HD-8QQL>].

233. Dustin Gardiner, *California Lawmakers Lambaste PG&E During Hearing on Mass Blackouts*, S.F. CHRON. (Nov. 21, 2019), <http://www.sfchronicle.com/california-wildfires/article/State-lawmakers-lambaste-PG-E-during-hearing-on-14844283.php> [<https://perma.cc/GXN4-37AG>].

234. See *infra* Part III.D.1.

and eased utilities' ability to distribute their liability to their ratepayers through rate hikes while still retaining the strict liability standard.²³⁵

1. The Public Policy Debate over Modifying the Strict Liability Standard

Many argue that it is unfair to hold a privately owned electric utility liable that complied with CPUC regulations and otherwise acted reasonably, especially because such utilities do not have control over many factors that contribute to wildfire-prone conditions, such as climate conditions, land use regulations, property maintenance, and building codes.²³⁶ Further, critics argue, the underlying policies of imposing strict liability on government actors do not necessarily apply to privately owned electric utilities.²³⁷ Imposing strict liability on an actor is generally premised on its ability to spread its costs broadly among the beneficiaries of its activities.²³⁸ Unlike government entities, privately owned electric utilities cannot spread the costs of wildfire damage to their customers through rate hikes without CPUC approval, thus leaving them solely responsible for significant amounts of liability.²³⁹ Critics of the strict liability standard also argue that imposing strict liability on a utility is unfair when the utility otherwise acted reasonably and push to have liability determined on a reasonableness standard.²⁴⁰ Opponents, however, argue that strict liability is preferable to reasonableness because it ensures that injured property owners are made whole after sustaining wildfire damage.²⁴¹ Critics of proposals to alter the strict liability standard also contend that a reasonableness standard would decrease electric utilities' pecuniary incentive to engage in safer practices.²⁴²

Wildfire liability had been dominating California's legislative debate well before the Camp Fire. Electric utilities seeking relief from strict inverse condemnation liability lobbied the California legislature heavily.²⁴³ PG&E led the way, spending over \$11

235. See *infra* Part III.D.3.

236. See, e.g., KOUSKY ET AL., *supra* note 14, at 9–10.

237. See, e.g., *id.* at 9; Peter Bradford, *Making PG&E Pay More than Its Fair Share of Fire Damage Could Backfire on the State*, SACRAMENTO BEE (May 31, 2018, 8:00 PM), <http://www.sacbee.com/opinion/california-forum/article212316269.html> [https://perma.cc/DJ2N-G648].

238. See *Belair v. Riverside Cty. Flood Control Dist.*, 764 P.2d 1070, 1085 (Cal. 1988) (en banc) (Mosk, J., dissenting); *Albers v. County of Los Angeles*, 398 P.2d 129, 136–37 (Cal. 1965) (en banc).

239. See Ivan Penn et al., *PG&E Bankruptcy Tests Who Will Pay for California Wildfires*, N.Y. TIMES (Jan. 14, 2019), <http://www.nytimes.com/2019/01/14/business/energy-environment/pgc-bankruptcy-california.html> [https://perma.cc/8ZYR-6W99].

240. See KOUSKY ET AL., *supra* note 14, at 10.

241. See Guy Kovner, *California Panel Begins Deliberations over Utilities' Wildfire Liability*, PRESS DEMOCRAT (July 25, 2018), <http://www.pressdemocrat.com/news/8553170-181/california-panel-begins-deliberations-over> [https://perma.cc/YF3R-4Z8U].

242. See, e.g., Letter from Graham Knaus, Exec. Dir., Cal. State Ass'n of Counties, et al., to Edmund G. Brown, Jr., Governor, State of Cal., and Co-Chairs of the Cal. Conference Comm. on Wildfire Preparedness & Response (July 10, 2018) [hereinafter CSAC Letter], http://www.counties.org/sites/main/files/file-attachments/final_press_packet_local_govt_conf_com_letter_packet_071018.pdf [https://perma.cc/B95Q-DYQG].

243. Ivan Penn, *As Fires Ravaged California, Utilities Lobbied Lawmakers for Protection*, N.Y. TIMES (Jan. 5, 2019), <http://www.nytimes.com/2019/01/05/business/energy-environment/california-wildfire-electric.html> [https://perma.cc/PJE8-HH2X].

million in political contributions during the 2017–2018 legislative session.²⁴⁴ PG&E, along with SoCal Edison and San Diego Gas & Electric joined forces with various labor, business, and energy sector groups to form the Building Resilient Infrastructure for Tomorrow's Economy Coalition,²⁴⁵ which spent over \$2 million to run television commercials²⁴⁶ to sway public opinion in favor of limiting wildfire liability for utilities.²⁴⁷ Up from the Ashes, an advocacy group that trial lawyers and aggrieved homeowners formed, and Stop the Utility Bailout, a group that insurance companies formed, joined forces with the California State Association of Counties to oppose legislative changes to the standard of liability.²⁴⁸ These groups argued that the strict liability standard is necessary to ensure that aggrieved homeowners receive just compensation after suffering wildfire damages²⁴⁹ and the proposed legislation to alter the standard would be a “bailout” for the state’s investor-owned electric utilities.²⁵⁰

2. Governor Brown’s 2018 Proposed Reasonableness Standard

Legislative attempts to supplant the strict liability standard imposed on electric utilities with a reasonableness standard have fallen flat in recent years. First, in July 2018, then-Governor Jerry Brown advocated for legislation that would have eased the standard applied to electric utilities in a letter to the Conference Committee on Wildfire Preparedness and Response.²⁵¹ The proposal required that electric utilities formulate and implement plans to prevent future wildfire damages, subject to CPUC’s approval and oversight.²⁵² Most controversially, the proposed legislation would have instructed California courts to decline to hold a utility liable upon a showing that the utility acted

244. Wes Venteicher & Sophia Bollag, *As California Wildfires Grew, so Did PG&E Lobbying Spending*, SAN LUIS OBISPO TRIB. (Feb. 2, 2019, 12:00 AM), <http://www.sanluisobispo.com/news/state/california/article225422540.html> [https://perma.cc/9ZQ9-ZFMW].

245. See Press Release, IBEW 1245, BRITE Coalition Launches To Support Building Resilient Infrastructure for Tomorrow’s Economy (May 15, 2018), <http://ibew1245.com/2018/05/15/press-release-brite-coalition-launches-to-support-building-resilient-infrastructure-for-tomorrows-economy/> [https://perma.cc/4NLL-LFSU]; Phil Matier & Andy Ross, *Capitol Debate on Utilities’ Fire Liability Sparks a Lobbying Frenzy*, S.F. CHRON. (Aug. 15, 2018), <http://www.sfchronicle.com/bayarea/matier-ross/article/Capitol-debate-on-utilities-fire-liability-13156339.php> [https://perma.cc/VZ6H-CWKK].

246. See, e.g., The BRITE Coalition, *Voices of BRITE*, YOUTUBE (July 27, 2018), http://www.youtube.com/watch?v=FE3Gm_32w40 [https://perma.cc/XZQ2-QHL7].

247. David R. Baker, *TV’s New Wildfire Commercials Quietly Brought to You by PG&E*, S.F. CHRON. (Aug. 14, 2018), <http://www.sfchronicle.com/business/article/Those-new-wildfire-TV-ads-are-backed-by-PG-E-13156273.php> [https://perma.cc/UNL6-8XUK].

248. See *id.*

249. See, e.g., Guy Kovner, *Gov. Jerry Brown Proposes Changes in Utilities’ Wildfire Liability*, PRESS DEMOCRAT (July 24, 2018), <http://www.pressdemocrat.com/news/8564494-181/gov-jerry-brown-proposes-changes> [https://perma.cc/H2CN-7CU4].

250. Jeff Daniels, *California Gov. Jerry Brown Could Sign Wildfire Bill Critics Have Dubbed as a ‘Bailout.’* CNBC (Sept. 11, 2018, 9:43 PM), <http://www.cnbc.com/2018/09/12/california-governor-could-sign-bill-critics-have-dubbed-pge-bailout.html> [https://perma.cc/25CL-LGV6].

251. Letter from Jerry Brown, Governor, State of Cal., to Bill Dodd and Chris Holden, Co-Chairs, Cal. Conference Comm. on Wildfire Preparedness and Response (July 24, 2018), http://focus.senate.ca.gov/sites/focus.senate.ca.gov/themes/wildfirecommittee/files/Governor-Brown-Proposal_072418.pdf [https://perma.cc/7VDC-6HWW].

252. *Id.*

reasonably by weighing a series of factors that “balance the public benefit of the electrical infrastructure with the harm caused to private property.”²⁵³

Ironically, then-Governor Brown’s proposal made its rounds in Sacramento while a wildfire burned nearby, causing a thick haze to surround the state house.²⁵⁴ Legislators largely panned his proposal, finding modifications to the strict liability standard by which their constituents would recover potential wildfire damages particularly unpalatable given damage caused by recent fires.²⁵⁵ Instead, the California legislature enacted Senate Bill 901 in September 2018, which created a regulatory scheme that allows electric utilities more liberty to raise their rates to offset liability.²⁵⁶ Specifically, the legislation created a requirement for electric utilities to submit wildfire safety plans to CPUC for review and approval.²⁵⁷ Upon a showing to CPUC that it did not act unreasonably in causing the fires, an electric utility can enact rate hikes to offset the costs of such wildfire damage.²⁵⁸

Under Senate Bill 901, CPUC considers a series of factors, including an electric utility’s compliance with its approved wildfire safety plan, in determining whether it acted reasonably and could pass along the liability from the wildfire.²⁵⁹ However, many argued that the legislation did not sufficiently alleviate the financial squeeze that an electric utility that CPUC deems to have acted unreasonably could face in future fires.²⁶⁰

253. *Id.* The legislation would have created five factors by which the reasonableness of a utility’s conduct would be measured:

- (1) Nature of the utility’s conduct.
- (2) Nature of the harm to private property.
- (3) Compliance with regulations, laws, Public Utilities Commission orders, and the utility’s fire mitigation plans
- (4) Nature of the system that caused the harm and whether alternatives or mitigation measures are available.
- (5) Other circumstances that contributed to the fire or the extent of harm caused by the fire.

Id.

254. See Scott Wilson, *As Wildfires Rage, California Frets over a Future of Greater Perils and Higher Costs*, WASH. POST (Aug. 4, 2018, 5:40 PM), http://www.washingtonpost.com/national/as-wildfires-rage-california-frets-over-a-future-of-greater-perils-and-higher-costs/2018/08/04/c2663022-96a4-11e8-810c-5fa705927d54_story.html [https://perma.cc/KTQ4-YWUU].

255. See Taryn Luna, *Plan To Lessen PG&E’s Liability for Wildfires Is Dead for the Year, Lawmaker Says*, SACRAMENTO BEE (Aug. 18, 2018, 1:27 PM), <http://www.sacbee.com/news/state/california/fires/article216958390.html> [https://perma.cc/5BYJ-QJXL].

256. See John Myers, *As Climate Change Worsens Wildfires, California Will Spend \$1 Billion and Give Utilities New Ways To Shrink Their Fire Expenses*, L.A. TIMES (Sept. 21, 2018, 11:20 AM), <http://www.latimes.com/politics/la-pol-ca-wildfire-prevention-law-signed-20180921-story.html> [https://perma.cc/XM6K-7KY3].

257. Act of Sept. 21, 2018, ch. 626, § 38, 2018 Cal. Stat. 4203, 4251 (codified at CAL. PUB. UTIL. CODE § 8386 (West 2019)).

258. *Id.* § 26, 2018 Cal. Stat. at 4235–36 (codified at CAL. PUB. UTIL. CODE § 451.1).

259. *Id.*

260. See, e.g., Corky Siemaszko, *Eyed in California Fires, Pacific Gas & Electric Utility Has Pushed for Lighter Penalties*, NBC NEWS (Nov. 13, 2018, 7:19 PM), <http://www.nbcnews.com/news/us-news/eyed-california-fires-pacific-gas-electric-utility-has-pushed-lighter-n935941> [https://perma.cc/KF9G-HV3K].

Unsatisfied with the legislation, PG&E's lobbying efforts for a reasonableness standard continued after the legislative session ended, well into the 2018 wildfire season.²⁶¹

3. Assembly Bill 1054

The Camp Fire, and PG&E's subsequent bankruptcy, followed shortly thereafter, reinvigorating the debate of how the state will pay for wildfire damages. Recently elected Governor Newsom featured the issue prominently in his first State of the State Address, announcing the creation of a strike force to find solutions to the state's wildfire crisis.²⁶² In April 2019, the strike force published its report that proposed, among other things, better wildfire prevention and response tactics, clean energy policies to mitigate climate change, and "[f]air [a]llocation of [c]atastrophic [w]ildfire [d]amages."²⁶³ The report recommended modifying the standard of liability for utilities under article I, section 19 from strict liability to a "fault-based standard" but also advanced two proposals to establish publicly financed funds that utilities faced with wildfire liability could access.²⁶⁴

In July 2019, Governor Newsom signed Assembly Bill 1054, the culmination of the strike force's report. The bill established a \$21 billion fund to help the state's investor-owned electric utilities cover wildfire costs.²⁶⁵ Half of the fund is bankrolled through a bond that will be financed by a fifteen-year extension of a \$2.50 fee in electric customers' monthly bills statewide.²⁶⁶ The utilities match the other half and will be able to recoup liability from the damage their infrastructure causes, so long as they meet certain conditions.²⁶⁷ The utilities need to commit \$5 billion towards "hardening" their electrical infrastructure pursuant to safety plans submitted to CPUC.²⁶⁸ Moreover, to recover from the fund, PG&E must exit bankruptcy before June 2020.²⁶⁹

Under the new law, a utility may still only recover for wildfire damage if it demonstrates by a preponderance of the evidence that it acted reasonably.²⁷⁰ However, the bill afforded the utility a presumption of reasonableness if it can demonstrate that it complied with the bill's increased safety standards and received an annual safety certification from the state.²⁷¹ Only if a party to the proceeding "creates a serious doubt

261. *See id.*

262. *See* Gavin Newsom, *supra* note 15.

263. STRIKE FORCE REPORT, *supra* note 15, at 4, 17, 27.

264. *Id.* at 37–38.

265. *See* Act of July 12, 2019, ch. 79, § 16, 2019 Cal. Legis. Serv. Ch. 79 (West) (codified at CAL. PUB. UTIL. CODE §§ 3280–89 (West 2019)).

266. *See id.* (codified at CAL. PUB. UTIL. CODE §§ 3285, 3288); Rob Nikolewski, *Legislature Passes Wildfire Liability Bill in Sacramento, Legislation Heads to Newsom's Desk*, SAN DIEGO UNION-TRIB. (July 11, 2019, 11:00 AM), <http://www.sandiegouniontribune.com/business/energy-green/story/2019-07-11/wildfire-bill-floor-vote> [<https://perma.cc/V5PS-RSK6>]; Pickoff-White & Orr, *supra* note 18.

267. *See* Act of July 12, 2019, § 16 (codified at CAL. PUB. UTIL. CODE §§ 3285, 3288); *see also* Pickoff-White & Orr, *supra* note 18.

268. *See* Pickoff-White & Orr, *supra* note 18.

269. Act of July 12, 2019, § 6 (codified at CAL. PUB. UTIL. CODE § 3291); *see also* Pickoff-White & Orr, *supra* note 18.

270. Act of July 12, 2019, § 16 (codified at CAL. PUB. UTIL. CODE § 451.1(c)).

271. *Id.*

as to the reasonableness of the electrical [utility's] conduct" will the utility have the burden of demonstrating its reasonableness.²⁷² The regulatory scheme therefore shifts the burden of wildfire damage from a reasonable utility to ratepayers throughout the state.²⁷³ Because of this aspect of the law, some legislators and advocates have criticized the bill as a "bailout" for the utilities.²⁷⁴ However, the legislature yet again declined to limit strict liability under article I, section 19 imposed on such utilities.²⁷⁵

IV. DISCUSSION

Despite recent criticism that strict liability is "arcane" and impractical,²⁷⁶ the standard promotes fairness in distributing the burdens of electrical infrastructure and efficiency in the predictable resolution of claims.²⁷⁷ Part IV.A argues that strict liability is the appropriate standard of liability for inverse condemnation claims arising from electric utility-caused wildfire damage under article I, section 19 of the California Constitution. However, it is financially unsustainable to wholly prevent California's privately owned electric utilities from distributing those burdens throughout the public.²⁷⁸ Accordingly, Part IV.B concludes that the California legislature struck the appropriate balance with Assembly Bill 1054 by retaining the strict liability standard while allocating the burdens between the state's property owners, utilities, and ratepayers.

A. Strict Liability Is the Best Interpretation of Article I, Section 19

Strict liability is necessary to ensure that the burdens of electrical infrastructure are distributed fairly and not borne by the owners of property that wildfires damaged. Fairness is the foregoing principle of inverse condemnation jurisprudence.²⁷⁹ The strict liability imposed on public utilities under article I, section 19 best serves this principle by ensuring that an award turns not on the character of the government action but rather the nature and extent of the damage the property owner suffered.²⁸⁰ If the owners of

272. *Id.*

273. See Nikolewski, *supra* note 22.

274. Daniels, *supra* note 250; see also Nikolewski, *supra* note 22.

275. See The Times Editorial Board, *supra* note 23; see also Pickoff-White & Orr, *supra* note 18.

276. See, e.g., Sharon Bernstein, *PG&E Files for Bankruptcy as California Wildfire Liabilities Loom*, YAHOO FIN. (Jan. 29, 2019), <http://finance.yahoo.com/news/pg-e-corp-files-chapter-11-bankruptcy-protection-082001142--finance.html> [<https://perma.cc/2S3Q-LF3Y>]; Jessica DiNapoli et al., *PG&E Restructuring Highlights Arcane California Legal Rule*, REUTERS (Jan. 15, 2019, 7:05 AM), <http://www.reuters.com/article/us-pg-e-us-bankruptcy-law/pge-restructuring-highlights-arcane-california-legal-rule-idUSKCN1P91BY> [<https://perma.cc/A9NJ-V3X7>]; Carolyn Kousky, Opinion, *Op-Ed: To Make Sure Its Utilities Survive Climate Change, California Needs Liability Law Reform*, L.A. TIMES (Feb. 25, 2019, 3:05 AM), <http://www.latimes.com/opinion/op-ed/la-oc-kousky-pge-bankruptcy-climate-change-california-liability-law-20190225-story.html> [<https://perma.cc/HSK6-ZG6T>].

277. See *infra* Part IV.A.

278. See *supra* Part III.C for a discussion of the overwhelming amount of liability from wildfires incurred by investor-owned electric utilities.

279. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960); see also *supra* Part II.A.

280. See Saxer, *supra* note 58 (manuscript at 74).

property damaged by a public use went uncompensated, they would be unfairly burdened as they would contribute far more than their fair share to the public undertaking.²⁸¹

California courts avoid this outcome by spreading “the cost of such damage[, which] can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged.”²⁸² Withholding just compensation upon a property owner’s inability to demonstrate an electric utility’s unreasonableness frustrates the underlying policies of protecting individual rights through eminent domain law. Strict liability therefore further promotes fairness by alleviating the practical burdens of pleading an inverse condemnation claim,²⁸³ since a property owner need not establish with her own evidence the electric utility’s unreasonableness. Instead, such property owners must merely establish “substantial causation” between the damage to their properties and the government action.²⁸⁴

As a judicial standard, applying strict liability to public entities under state constitutional damagings provisions is straightforward and simple, promoting efficiency and predictability. In contrast, imposing a requirement that injured property owners demonstrate a public entity’s unreasonableness would necessitate longer and more extensive adjudication, as it would require significantly more factfinding on the intent or reasonableness of a public entity.²⁸⁵ Strict liability is also more predictable because it does not require an opaque balancing of factors.²⁸⁶ Determining reasonableness often requires courts to employ a more fluid multifactor standard.²⁸⁷ When applying the flood-control project exception to the general rule of strict liability, California courts employ a murky reasonableness standard in which courts consider eleven somewhat overlapping factors.²⁸⁸ Or take, for example, former Governor Brown’s proposed reasonableness standard and its accompanying factors: What weight should be placed on the “nature of the utility’s conduct” as compared to the “nature of the harm” to the

281. See *Albers v. County of Los Angeles*, 398 P.2d 129, 136 (Cal. 1965) (en banc) (considering whether “the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking” (quoting *Clement v. State Reclamation Bd.*, 220 P.2d 897, 905 (Cal. 1950), *abrogation recognized by Belair v. Riverside Cty. Flood Control Dist.*, 764 P.2d 1070 (Cal. 1988) (en banc))).

282. *Id.* at 137.

283. See *McNichols*, *supra* note 6, at 77; see also CSAC Letter, *supra* note 242.

284. See *City of Oroville v. Superior Court*, 446 P.3d 304, 311 (Cal. 2019).

285. See *Myths and Facts About Utility Liability & Inverse Condemnation*, CAL. ST. ASS’N COUNTIES (Aug. 8, 2018), http://www.counties.org/sites/main/files/file-attachments/myths_facts_localgov_8.8.18.pdf [<https://perma.cc/5VZW-F6Y3>] (“Changes to inverse condemnation laws will result in additional lawsuits, invite more complex and longer trials against more parties, and expose state and local government to new costs and liability.”).

286. See *McNichols*, *supra* note 6, at 77. Using multifactor tests to determine reasonableness in damaging claims can lead to less predictable results:

The benefit of this large number of factors [in determining the reasonableness of a flood-control project] is that the trial courts have wide discretion in deciding the question of reasonableness. However, the severe disadvantage is that they might cast the net too wide, undermining consistency and predictability. Reducing the number of factors, or at least clarifying the weight to be given various factors, would likely increase the predictability of the results in these cases.

Id. at 95 (footnote omitted).

287. See *id.*

288. See *id.*

property owner? What “other circumstances” must a court consider?²⁸⁹ Strict liability avoids this amorphous balancing in favor of a bright-line rule. Thus, under a strict liability scheme, if an electric utility’s infrastructure causes a wildfire, the utility would be able to more accurately predict its liability and incorporate that liability more effectively into its budget.

Imposing strict liability on investor-owned electric utilities for wildfire damage caused by their infrastructure is doctrinally sound when considered against the backdrop of the state’s prior article I, section 19 jurisprudence. As the California Court of Appeal noted in *Pacific Bell*, the Supreme Court of California has largely declined to employ a reasonableness standard in determining whether just compensation is due under this provision outside of the context of flood-control and water diversion infrastructure.²⁹⁰ Further, the unique theoretical and pragmatic justifications for the reasonableness standard for flood-control and water diversion projects do not exist with electrical infrastructure.²⁹¹ As the *Pacific Bell* court acknowledged, the risk of wildfire would not exist but for the presence of the public entity’s electrical lines, whereas the risk of natural water damage to private property already exists without public improvement.²⁹²

Strict inverse condemnation liability is necessary for electric-utility caused wildfire damage claims because denying just compensation to the impacted property owners would ignore the “fiscal illusion” problem—electric service in California is a greater public burden than is currently reflected in ratepayers’ bills.²⁹³ It is more appropriate to view the strict inverse condemnation liability imposed on investor-owned electric utilities as a realization of the true cost of developing infrastructure in the WUI as opposed to additional liability attributable to the utility or a property owner.²⁹⁴ Strict inverse condemnation liability simply reflects that the burden of public infrastructure includes both budgetary costs as well as the burden of negative externalities of public infrastructure in decisionmaking.²⁹⁵ In this sense, strict liability alleviates the fiscal illusion problem—that governments “ignore costs not reflected in budgets.”²⁹⁶ Strict inverse condemnation liability is essentially an unbudgeted cost of public infrastructure that is imposed on a few individuals. As such, “the net social expense of a liability scheme in which the public is liable for unintentional property damage caused by the

289. See *supra* notes 251–253 and accompanying text for an explanation of then-Governor Brown’s proposed 2018 legislation that would have supplanted the strict liability standard under article I, section 19 of the California Constitution as applied to electric utility-caused wildfire damage with a reasonableness standard.

290. *Pac. Bell Tel. Co. v. S. Cal. Edison Co.*, 146 Cal. Rptr. 3d 568, 574–76 (Cal. Ct. App. 2012).

291. See *id.* For further discussion of the unique factual circumstances of flood-control and stormwater diversion projects necessitating a reasonableness standard, see McNichols, *supra* note 6, at 104–05.

292. See *Pac. Bell Tel. Co.*, 146 Cal. Rptr. 3d at 576 (distinguishing electrical infrastructure from flood control projects, in which a landowner is exposed to a risk that would not exist absent the public improvement).

293. See Brady, *supra* note 24, at 403.

294. See *Customer Co. v. City of Sacramento*, 895 P.2d 900, 935 (Cal. 1995) (en banc) (Baxter, J., dissenting) (finding that public entities that are strictly liable for damaging private property are “simply being assessed for the true cost of the public enterprise in which, by its own choice, it was originally engaged”); see also Brady, *supra* note 24, at 403; Masso, *supra* note 35, at 291.

295. See Brady, *supra* note 24, at 403 (“If compensation is required . . . then government will only engage in a confiscatory act when it is truly beneficial, since it will bear more of the costs of its decisions.”).

296. *Id.*

government would, at worst, be zero.”²⁹⁷ Inverse condemnation claims arising from public utility-caused wildfire damage therefore should not be viewed as adding additional cost burdens on the public; strict liability merely impresses upon the public the true cost of the planning, construction, operation, and maintenance of electrical service in the WUI.

B. Assembly Bill 1054 Optimally Allocates the Wildfire Liability Burden

By leaving the strict inverse condemnation liability standard in place while broadening the avenue for investor-owned electric utilities to recover wildfire costs, Assembly Bill 1054 struck the appropriate balance between ensuring fairness to the owners of wildfire-damaged property and spreading the burden throughout the state. Allowing a utility to pass along the costs of its wildfire liability when it acts reasonably comports with the burden-spreading policies underlying inverse condemnation doctrine.²⁹⁸ An extension of a monthly fee of a few dollars “can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole” as compared to the few owners of homes destroyed by wildfires.²⁹⁹

Strict liability, and the financial incentive therewith, also prevents the state from treating wildfire liability as a fiscal illusion and instead forces the state to proactively address its wildfire crisis. Assembly Bill 1054 left the state ample opportunities to encourage the development of safer electrical infrastructure and hold the state’s investor-owned electric utilities accountable.³⁰⁰ The California legislature has broad authority to mandate more rigorous electric utility preventative safety measures, such as cutting back vegetation, monitoring conditions near power lines, or undergrounding power lines, where feasible.³⁰¹ The legislature could mitigate the inherent risks of human development in the WUI that contribute to wildfires. For example, the legislature could enact tighter building-safety and land-use standards and limit human development in some of the most wildfire-prone areas of the WUI. By ensuring that this burden is distributed throughout the state, Assembly Bill 1054 places the political pressure to address these issues and make tough decisions on the California legislature, which often has a broader perspective on the wildfire crisis than the state’s local government bodies.³⁰²

297. Masso, *supra* note 35, at 291.

298. See Saxer, *supra* note 58 (manuscript at 74) (“Ratepayers and taxpayers will need to bear much of the cost for receiving public benefits. Just as with insurance policy costs, utility rates and taxes should reflect the increased risk of living in disaster-prone areas.”).

299. See *Albers v. County of Los Angeles*, 398 P.2d 129, 137 (Cal. 1965) (en banc).

300. See The Times Editorial Board, *Editorial: California Has Power over PG&E. Use It*, L.A. TIMES (Dec. 18, 2019, 3:00 AM), <http://www.latimes.com/opinion/story/2019-12-18/california-pg-e-power-wildfire-blackout> [<https://perma.cc/AXE8-R43Q>].

301. See *supra* Part III.A for a brief discussion of potential wildfire mitigation tactics that California investor-owned electric utilities could utilize.

302. See, e.g., Ball, *supra* note 182 (“Even in the wake of the most recent fires, some local California jurisdictions are streamlining the issuance of permits to rebuild to help homeowners, though wildfires often return to the same places, suggesting the spots that have burned before may burn again.”); Lowrey, *supra* note 182 (reporting that a retired Sonoma County planner could not recall an instance in which approval for a residential development had been denied because of the project’s potential wildfire risk); Smith, *supra* note 180

Though outside the scope of this Comment, it is worth noting that legislatively altering the standard of liability for inverse condemnation claims under article I, section 19 would frustrate separation of powers principles.³⁰³ The Supreme Court of California has long determined that article I, section 19 is a self-executing provision, and, therefore, the California Constitution restricts the legislature's ability to regulate within its domain.³⁰⁴ While the legislature may enact reasonable regulations to facilitate the enforcement of the provision, such as allocating the burden of proof or imposing a statute of limitations,³⁰⁵ the California courts have exclusive authority to determine the substantive scope of the right conferred by article I, section 19.³⁰⁶ Because the legislature may not limit the scope of article I, section 19's protection, it therefore may not dictate the standard of liability that California courts must apply to claims brought under that provision³⁰⁷—especially since California appellate courts have considered and rejected creating a categorical exception for electric utility-caused wildfire damage.³⁰⁸ Rather, to alter the scope of strict liability under article I, section 19, the state must amend its constitution.³⁰⁹

V. CONCLUSION

In passing Assembly Bill 1054, the California legislature properly addressed *how* Californians must pay for wildfire damages, not *whether* aggrieved property owners should be denied just compensation altogether. Strict liability ensures that courts give full force to the protection that article I, section 19 of the California Constitution has historically provided property owners. This approach is far more equitable, both substantively and procedurally, than a reasonableness standard and ensures swifter, more predictable resolutions of wildfire damages caused by investor-owned electric utilities. With over a quarter of the population living in the wildfire-prone WUI, compensating homeowners for wildfire damage—and preventing future wildfires from occurring—will

(explaining how, for example, “[w]ithout California-wide standards, local elected officials have broad discretion when it comes to approving the location of new developments”).

303. See Memorandum from Cal. State Ass'n of Counties et al. to Members of the Cal. State Senate & Assembly (Aug. 6, 2018) [hereinafter CSAC Memo], http://www.counties.org/sites/main/files/file-attachments/memo_re_gov_proposal_on_utility_liability_for_wildfires.pdf [<https://perma.cc/X354-JGNK>] (arguing that the then-Governor Brown's proposal to direct courts to impose a reasonableness standard is unconstitutional).

304. See *Rose v. State*, 123 P.2d 505, 513 (Cal. 1942) (“[T]he legislature by statutory enactment may not abrogate or deny a right granted by the Constitution.”); see also Van Alstyne, *supra* note 78, at 784.

305. See Van Alstyne, *supra* note 78, at 784.

306. See *Rose*, 123 P.2d at 513; cf. *Midway Orchards v. County of Butte*, 269 Cal. Rptr. 796, 803 (Cal. Ct. App. 1990) (“It is not within the legislative power . . . to modify, curtail, or abridge a self-executing grant of constitutional power.”).

307. See *Rose*, 123 P.2d at 513; see also Van Alstyne, *supra* note 78, at 784.

308. See *supra* Part III.B for a discussion of two California appellate court decisions that established the strict liability standard imposed on privately owned electric utility-caused wildfire damage under article I, section 19 of the California Constitution.

309. See CSAC Memo, *supra* note 303.

be increasingly expensive for Californians. Imposing strict liability on electric utilities for wildfire damages merely forces the public to account for this.