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Fear, Filters, and Fidelity: Judicial Elections and the Making of American Tort Law

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Fear, Filters, and Fidelity: Judicial Elections and the Making of American Tort Law

Abstract

The received wisdom is that American judges rejected strict liability through the nineteenth and early twentieth century. In fact, a majority of state courts adopted *Rylands v. Fletcher* and strict liability for hazardous or unnatural activities by the turn of the twentieth century, after a series of flooding tragedies in the late nineteenth century. Federal judges and appointed state judges generally ignored or rejected *Rylands*, while elected state judges overwhelmingly adopted *Rylands* or a similar strict liability rule. Statistical analysis demonstrates counterintuitively that judges elected to relatively long terms were far more likely to adopt strict liability in the wake of disasters (and public fears) than judges elected to shorter terms. Some of these judges never expected to face another election again, but even without direct political pressure, they were the most responsive group of judges in adopting *Rylands* after the floods.

This article suggests that the state bench was less influenced by the pressures of upcoming elections, and more by the selection effect of past elections and their effect on judges' psychology. By using archival evidence, this Article demonstrates that judicial elections were hotly competitive in many states, with some judges campaigned aggressively. First, these elections created a *populist filter*: Some elite professional jurists (who were more formalistic by training and insulated from public opinion) were filtered out of the partisan political process, while lawyer-politicians (who were trained to be responsive to the public, rather than to doctrinal consistency) with party connections were filtered in. Second, elected judges then conceived of their legitimacy as being democratically accountable – even if they never faced another election. I suggest their *role fidelity* as elected judges led them to perceive public opinion as an important factor in their decisions.

Even with the filter effect and the role fidelity, judges elected to short terms would still face the reality of “fear and favor,” due to special interests and partisan renomination politics. On the other hand, elected judges with more job security could be more faithful to role (hence, “role fidelity”) and to public opinion. In the context of strict liability for industrial activities, special interests and partisan deal-making cut strongly in one direction, while public fears after industrial disasters cut the other. Long terms allowed judges to weigh public opinion over special interests.

The article offers some thoughts about this era's chaotic and politicized doctrinal turns and its impact on the shape of American tort law and the direction of American legal thought in the twentieth century, and then concludes with some priorities for judicial reform based upon this historical episode.

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Introduction

“My dear Judge,” wrote Justice Edward Paxson of the Pennsylvania Supreme Court to lower court judge Judge James T. Mitchell in a short letter in 1887. “Our new colleague, Justice Williams, is a very . . . able man, and I would regard his defeat a shock of public calamity. In addition, his defeat would seriously compromise your chances for next year, as he would have a very strong claim

for a re-nomination [in your place]. For both reasons, I sincerely hope that Philadelphia will give him a full vote. And I know you will look after it.”¹

Williams won his election to the Supreme Court. A year later, Paxson congratulated Mitchell on his Republican nomination to the Pennsylvania Supreme Court, and he later won the election.²

In a seemingly unrelated torts case one year before his first letter to Mitchell, Justice Paxson was one of the deciding votes in a key four-to-three ruling rejecting the controversial English case *Fletcher v. Rylands* and its strict liability rule for unnatural activities.³ Three years after that decision, the Johnstown Flood killed 2,000 people, in a mix of natural disaster and man-made disaster. The South Fork Hunting and Fishing Club, composed of Pittsburgh’s wealthiest, including Andrew Carnegie and Andrew Mellon, owned one of the largest artificial reservoirs in the world in the mountains of western Pennsylvania. Due to careless maintenance, the crumbling dam collapsed in the middle of a torrential storm, and wiped out the town of Johnstown below.

The Johnstown Flood was the Hurricane Katrina of the nineteenth century, and it was by far the most fatal flood in American history. Storms and dams no longer looked so innocent to a generation of Americans. The Flood devastated a corner of Pennsylvania, and, less dramatically, it wreaked havoc in a corner of the American tort law: the liability standard for unnatural or hazardous activities.

Less than two years after the flood, Justice Paxson and the Pennsylvania Supreme Court reversed course, and adopted strict liability for unnatural activities. As I have shown elsewhere, only a few years after the Flood, a majority of state courts had adopted *Rylands*, after most courts had

¹ Justice Edward M. Paxson to Judge James T. Mitchell, Oct. 17, 1887, Supreme Court of Pennsylvania Collection, Historical Society of Pennsylvania, Philadelphia, PA.

² Justice Edward M. Paxson to Judge James T. Mitchell, April 25, 1888, Supreme Court of Pennsylvania Collection, Historical Society of Pennsylvania, Philadelphia, PA.

³ 159 Eng. Rep. 737 (Ex. 1865), *rev'd*, 1 L.R.-Ex. 265 (Ex. Ch. 1866), *aff'd*, 3 L.R.-E & I. App. 330 (H.L. 1868). For more on the controversy, see WILLIAM PROSSER, *The Principle of Rylands v. Fletcher*, in *SELECTED TOPICS ON THE LAW OF TORTS* 135, 135 (1953).

rejected or ignored the English strict liability precedent for about two decades.⁴ Meanwhile, federal courts continued to ignore *Rylands* for another generation. Through the 1890s, the Pennsylvania Supreme Court expanded strict liability to more and more industries. The modern American tort doctrine of strict liability for hazardous activities did not emerge in the middle of twentieth century, as the conventional wisdom had held, but rather in the late nineteenth century in the wake of flooding disasters, and mostly in the rulings of elected judges.

Certainly Justice Paxson did not have tort doctrine in mind in his letter to Judge Mitchell pushing for a little judicial get-out-the-vote in Philadelphia. But the letter suggests that nineteenth century state judges concerned themselves directly with campaign politics and local public opinion. Justice Paxson's switch-in-time to strict liability, joined by two other justices reversing course, illustrates the impact of tragic events and public opinion on elected judges. This Article does not document that state judges campaigned explicitly on the issue of strict liability. But by using historical and statistical evidence, this Article does argue that elected judges were much more likely to respond to disasters by adopting strict liability than appointed judges were. In particular, judges who were elected to relatively long terms (ten years or more) and faced elections least frequently were the most likely to adopt *Rylands* and strict liability. Some of these judges never expected to face another election again, but even without direct political pressure, they were the most responsive group of judges in adopting *Rylands* after the floods. Considering this counterintuitive pattern, I suggest that the state bench was not so much influenced by the pressures of upcoming elections as by the selection effect of past elections and their effect on judges' psychology. Judicial elections fundamentally shaped the identity and consciousness of the state bench. Elected judges like Justice Paxson were more likely to be political animals attuned to the politics of the ballot box, and less

⁴ "The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of *Fletcher v. Rylands* in the Gilded Age," 110 *Yale Law Journal* 333 (2000). For full citations of these cases, please see Appendix A. Please see the attached graph at the end of the article charting these adoptions year-by-year.

judicial creatures attuned only to precedent and formalist legal thought. I label this factor the *populist filter* of judicial elections: some elite professionals were filtered out of the partisan political process, while lawyer-politicians with party connections were filtered in. Elite jurists tended to most receptive to formalism and most concerned with doctrinal consistency, and least responsive to public opinion, but they would find the party politics and the sometimes unpleasant campaigns for the bench to be less attractive in the mid- to late-nineteenth century. Elections would attract more populist lawyer-politicians, who were by comparison more comfortable in public campaigns and more comfortable with abandoning precedent in light of recent events and changes in public opinion.

Elected judges then conceived of their legitimacy as democratically accountable – which I suggest altered their *role fidelity*. Elected judges had a role fidelity more similar to legislators than to appointed judges, in that they were entrusted and empowered to incorporate public opinion into the law, even if they never faced another judicial election. The change to judicial elections was a shift from a formalistic approach based on professional training and elite selection to a more democratic approach that elevated the importance of both constituency and conscience. This different self-conception would lead judges to respond to events and to regard public opinion as a legitimate influence on their rulings. The combination of floods, filtering, and fidelity changed tort doctrine at the turn of the last century and shaped the modern doctrine of strict liability for hazardous activities.

There is a public choice story here, as well. Even if elections had a populist filtering effect and altered the judges' mental approach to law to make them more populist, almost all state judges served for a term of years and would have to face the political process – whether appointment or election – to retain their seats. Special interests and party politics were powerful influences in that political process, and would counterbalance the populist impulse generated by elections. Judges elected to short terms would be more tethered to those special interests and would be relatively less

responsive to changes in public opinion. Elected judges with more job security, by contrast, could be more faithful to role (hence, “role fidelity”) and to public opinion. Thus, the counterintuitive historical pattern demonstrated in this article – that judges elected to long terms were the most responsive -- actually makes sense when we consider the conflicting role of populism and special interests at play in elections. The courts and the literature on judicial independence often refer to these forces and remark that judges must be able to interpret and apply the law “without fear or favor.”⁵ In the case of *Rylands*’s adoptions, judges who had less to fear from electoral politics were more responsive to public fears after tragic disasters.

This Article proceeds in three parts. Part I briefly sets out the background of these cases. Then there are three core arguments of this paper, linked by the role of industrial disasters, judicial elections, and the resulting changes in tort doctrine. In Part II, the first argument is chiefly a quantitative analysis of the patterns in the case law: When tragic events made the risks of industrialization more salient in the late nineteenth century, elected judges were more responsive than appointed judges in adopting strict liability, and judges elected to relatively long terms were the most responsive. Part II offers a second argument to explain this pattern, based on archival evidence that judicial elections were highly competitive and sometimes nasty in this era. From this evidence, I suggest the theory of filtering and fidelity to explain why judges elected to longer terms were most responsive, even if they never faced another judicial election. Part III offers the third argument – or more accurately, some concluding reflections – that these fluid judicial politics and their effect on a rapidly changing state common law may have contributed to the shift from formalist legal thought to American legal realism. In this basic common law question of fault vs. strict liability, the doctrine was so contingently swung by events and politics and was so unstable in the late nineteenth century and early twentieth century. A question for further research is how many

⁵ See, e.g., Judicial Code of Conduct, Canon 1 comment; *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999); Hans A. Linde, *The Judge as Political Candidate*, 40 Clev. St. L. Rev. 1, 1 (1992).

other areas of American law were unstable in this period, and how much legal thinkers were influenced by this fluidity and the effect of state judicial politics in shifting from formalism to realism, which in turn led to the diverging paths of critical legal studies in one direction and law and economics in another.

I. *RYLANDS*: REJECTION AND ADOPTION

A. Fletcher v. Rylands: *The Case*

John Rylands was the leading textile manufacturer in England, and probably the wealthiest industrialist in England.⁶ To provide an additional source of water for a massive steam-powered textile mill, he hired a contractor to dig a large ditch and create a reservoir. In 1860, the reservoir collapsed into an abandoned coal-mining shaft, and that shaft ultimately connected with Thomas Fletcher's active coal mines.⁷ The flooding destroyed the coal mines.⁸

An initial arbitration proceeding (much like a special master) framed one issue for the English courts: could Rylands be held liable without fault?⁹ The Court of the Exchequer ruled against Fletcher's case, because it fit none of the traditional causes of action of trespass, negligence, and nuisance.¹⁰ Trespass required a more direct harm, nuisance required a more continuous, on-going harm, and negligence required negligence, of course. Fletcher then appealed to the Exchequer

6. Simpson, *supra* note 25, at 239 n.117.

7. Fletcher v. Rylands, 159 Eng. Rep. 737, 740 (Ex. 1865).

8. Simpson, *supra* note 25, at 241-42.

⁹ Kenneth Abraham, "Rylands v. Fletcher: Tort Law's Conscience," in TORTS STORIES 211 (2003).

10. *Rylands*, 159 Eng. Rep. at 744-47. At the time of the accident, the doctrine of respondeat superior did not make an employer legally responsible for independent contractors. See WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 70, at 480 (1964). This rule applies today, although there are many exceptions, including one for "inherently dangerous activities." *Id.*; see also JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 666 (10th ed. 2000).

Chamber, where. Justice Blackburn announced a broad statement of liability without fault for risky uses of land:

[T]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.¹¹

Blackburn then qualified this sweeping doctrine of strict liability by focusing on what is “naturally there,” in an apparent defense of traditional uses of land, such as agriculture and mining.¹²

The House of Lords affirmed the Exchequer Chamber and its strict liability rule in 1868. Lord Cairns emphasized the difference between natural use and non-natural use. Such a “non-natural use” must be “likely to do mischief,” rather than a use that would be expected “in the ordinary course of the enjoyment of the land.”¹³ The decision shifted the burden from the plaintiff, who would otherwise have to prove that the defendant was negligent, to the defendant, who would now have to prove that either the plaintiff had “defaulted,” or that the accident was an “act of God.” The effect was liability without fault. English courts would tightly cabin *Rylands* thereafter, so that strict liability was only a narrow area of English tort law.

In America, the initial reception was mixed. Massachusetts and Minnesota immediately adopted *Rylands*¹⁴ and consistently expanded their application of its doctrine,¹⁵ One expansion was a notable opinion by Judge Oliver Wendell Holmes.¹⁶ Then the tide turned against *Rylands*. The New York Court of Appeals rejected *Rylands* in *Losee v. Buchanan*,¹⁷ followed by New Hampshire’s rejection in

11. *Fletcher v. Rylands*, 1 L.R.-Ex. 265, 279 (Ex. Ch. 1866).

12. *Id.* at 280.

13. *Rylands v. Fletcher*, 3 L.R.-E. & I. App. 330, 338-39 (H.L. 1868).

14. *Ball v. Nye*, 99 Mass. 582 (1868). *Cahill v. Eastman*, 18 Minn. 324, 334-37, 344-46 (1872);

15. *ShIPLEY v. Fifty Assocs.*, 101 Mass. 251 (1869), *aff’d*, 106 Mass. 194 (1870). See *infra* Section II.B for other Massachusetts cases.

16. *Davis v. Rich*, 62 N.E. 375 (Mass. 1902).

17. 51 N.Y. 476 (1873).

Brown v. Collins,¹⁸ written by the renowned Judge Doe of New Hampshire. The New Jersey Supreme Court joined in the condemnation of strict liability in *Marshall v. Welwood*,¹⁹ which became the third most widely cited rejection of *Rylands*. Pennsylvania rejected *Rylands* in *Pennsylvania Coal Co. v. Sanderson* in 1886, producing the last of the major *Rylands* rejections of the nineteenth century.²⁰ The Sanderson family had purchased land and a residence outside Scranton, induced in part by a “perfectly pure”²¹ stream running through the tract. After the Sandersons built a dam and cistern to use the stream for fishing, washing and drinking water, the Pennsylvania Coal Company began mining coal along the stream above the Sandersons’ land. The mine-water, both pumped out of the shafts and trickling naturally out of the shafts, ran to the stream, “corrupt[ing] the water of the stream, and . . . render[ing] it worse than worthless for any domestic or household use.”²² After a number of proceedings throughout the state courts, the Pennsylvania Coal Company prevailed in a four-to-three vote.²³

With New York, New Hampshire, and New Jersey rejecting *Rylands*, and with Pennsylvania reversing course to reject it, too, America’s treatise writers wrote off *Rylands*.²⁴ The academics’ dismissal of *Rylands* fit into a larger historical interpretation of American tort law: pro-industry fault liability dominated the nineteenth and early twentieth centuries,²⁵ and the mid-twentieth century

¹⁸ 53 N.H. 442 (1873).

¹⁹ 38 N.J.L. 339 (1876).

²⁰ 6 A. 453 (Pa. 1886) [hereinafter *Sanderson III*].

²¹ *Id.* at 401.

²² *Id.*

²³ *Pennsylvania Coal Co. v. Sanderson*, 6 A. 453, 113 Pa. 126 (1886).

²⁴ See “Floodgates of Strict Liability,” for a discussion of these treatises.

²⁵ *E.g.*, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 409-27 (1973); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 85-108 (1977); BERNARD SCHWARTZ, *THE LAW IN AMERICA* 55-59 (1974); G. EDWARD WHITE, *TORT LAW IN AMERICA* 3-19 (1980); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 515-17 (1961); Albert A. Ehrenzweig, *Negligence Without Fault*, 54 *CAL. L. REV.* 1422, 1425-43 (1966); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 *VA. L. REV.* 359 (1951); A.W.B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of Rylands v. Fletcher*, 13 *J. LEGAL STUD.* 209, 209, 214-16 (1984); *cf.* Richard A. Posner, *A Theory of Negligence*, 1 *J. LEGAL STUD.* 29 (1972) (examining the era of fault and arguing that fault prevailed as the most economically efficient doctrine). *Contra* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 *GA. L. REV.* 925, 927 (1981); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717, 1720 (1981).

marked the gradual rise of strict liability.²⁶ Many prominent works on American legal history feature this supposed rejection of *Rylands* as a centerpiece for their historical claims about the dominance of the fault rule.

However, a series of tragic disasters in California, Pennsylvania, and Texas disrupted this state of the common law. After a series of powerful floods and a long political and legal battle over destructive hydraulic gold-mining techniques, California adopted *Rylands* in 1886. Texas experienced a series of reservoir failures producing severe damage starting in the late 1890s, and at the same time it wavered on *Rylands*. I provide more detail on Pennsylvania's Johnstown Flood, on California, and on Texas in *The Floodgates of Strict Liability*. I briefly return here to the Johnstown Flood and the resurrection of *Rylands* in America.

B. The Johnstown Flood and the American Adoption of Rylands

In the mountains east of Pittsburgh, the South Fork Fishing and Hunting Club owned a 450-acre artificial recreational lake, one of the largest reservoirs in the country.²⁷ The club was known as “The Bosses Club” because of its titans-of-industry membership, including Andrew Carnegie, Andrew Mellon, and Henry Clay Frick. Despite the dam's history of instability, and despite multiple warnings of structural problems, the club's owners and employees disregarded the dam's leaks and crumbling foundation.²⁸

In a stormy night on May 31, 1889, the dam in the mountains collapsed, unleashing 20 million tons of water into the valley below.²⁹ One of the most deadly disasters in American history, the

26. See Gregory, *supra* note 25; William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1706-11 (1992); Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257 (1987); Rabin, *supra* note 25, at 961.

27. DISASTER, DISASTER, DISASTER 17 (Douglas Newton ed., 1961) [hereinafter DISASTER].

28. DAVID MCCOLLOUGH, THE JOHNSTOWN FLOOD (1968).

29. See DISASTER, *supra* note 27, at 18.

flood completely destroyed Johnstown, killing two thousand people.³⁰ According to historian David McCollough, the Flood turned into “the biggest news story since the murder of Abraham Lincoln,”³¹ and sparked “the greatest outpouring of popular charity the country had ever seen.”³²

As the cause of the dam collapse above Johnstown became clearer, the public focused its anger on the South Fork Club and its wealthy members,³³ and the media called on the club members to compensate the Johnstown victims.³⁴ The club made a modest donation, but some of its incredibly wealthy members donated only trivial amounts to the town, and some tactlessly denied any responsibility to the newspapers. This series of incidents provoked a violent mob’s attack on the club.³⁵ A county commission quickly investigated the dam, and on June 7 it announced that the owners were “culpable in not making [the dam] as secure as it should have been, especially in view of the fact that a population of many thousands were in the valley below; and we hold that the owners are responsible for the fearful loss of life and property.”³⁶ Newspapers around the country condemned the club for being “negligent,” even criminally negligent, or even guilty of manslaughter.³⁷ However, not one victim recovered a penny through the legal system. Several families and businessmen sued the club, but two torts claims failed to produce any damage verdicts and were never appealed.³⁸ Although it is difficult to determine whether the barrier to recovery was

30. *Id.* at 36; MCCULLOUGH, *supra* note 2, at 264.

31. *Id.* at 203.

32. MCCULLOUGH, *supra* note 2, at 224-25; *see also* JOHNSON, *supra* note 10, at 266-80 (noting donations from twenty-five states, and from London, Germany, Belfast, and Turkey). The donations totaled almost \$4 million in cash, plus food and other necessities. MCCULLOUGH, *supra* note 2, at 225.

33. *Id.* at 237.

34. *See id.* at 241.

35. *Id.* at 241-43, 255.

36. *Id.* at 246.

37. See “Floodgates of Strict Liability” for a survey of the media’s outrage. *The Club Is Guilty*, N.Y. WORLD, June 7, 1889; *The Broken Dam*, PITTSBURGH COMMERCIAL GAZETTE, June 4, 1889; *The Dam Defective*, PITTSBURGH COMMERCIAL GAZETTE, June 5, 1889; *That Fatal Dam: An Expert Engineer Says It Was in Every Respect of Very Inferior Construction*, PITTSBURGH COMMERCIAL GAZETTE, June 8, 1889. *From the St. Louis Republic*, PITTSBURGH COMMERCIAL GAZETTE, June 5, 1889.

38. According to David McCollough’s account, one claim was brought by Nancy Little against the club, and another by James and Ann Jenkins against the members. However, while McCollough is one of the most talented historians of his

the fault rule or the club's lack of assets and the difficulty of piercing the corporate veil to claim the members' enormous assets, McCullough's account suggests that the public and the media perceived that the negligence rule had prevented recovery.³⁹

After the Johnstown Flood focused national attention on the faults of the fault doctrine, American courts rapidly adopted *Rylands* and strict liability. In the graph of state adoptions located at the end of this Article, there is a remarkable upswing of adoptions in the late 1880s and the 1890s, coinciding with the flooding disasters in California and Pennsylvania.⁴⁰

Pennsylvania's switch against *Sanderson* and toward *Rylands* provides a good example of this sudden switch. Just two months after the Johnstown Flood, a note in the *American Law Review* described the horrors of the flood and called for courts to adopt *Rylands*..⁴¹ After several pages describing the terrifying power of collected waters, the note author observed that the Johnstown Flood had transformed a vibrant town into a pile of "a great mass of earth, stones, trees, houses, railway locomotives, cars, human bodies, and what not . . . very deep and . . . very solid."⁴² The author then offers *Fletcher v. Rylands* as "[t]he best answer which has ever yet been

generation, he is not a lawyer, and his descriptions of the cases are very short and vague, the procedural history is ambiguous, and it is even unclear who the defendants were. *Id.* at 258. McCullough does explain that the club was insolvent and had no assets, and that "there is no account of how things went in court, as it was not the practice to record the proceedings of damage suits." *Id.*

39. *See id.* at 258-59 (noting how the victims' lawyers and the media stressed the difficulty of proving individual negligence).

⁴⁰ For more on this wave of adoptions, please see "The Floodgates of Strict Liability," 110 *Yale L.J.* 333 (2001).

⁴¹ The *American Law Review* was a bimonthly publication regarded as "the most influential legal periodical of the nineteenth century," THOMAS A. WOXLAND & PATTI J. OGDEN, *LANDMARKS IN AMERICAN LEGAL PUBLISHING* 48 (1989). Its notes were not student pieces, but were legal comments written by perhaps the most "distinguished . . . group of working editors" in the history of legal publishing. ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 192 (1990). In the *Review's* early years, its editorial staff resembled an all-star team of legal scholars and practitioners, including Oliver Wendell Holmes, Arthur Sedgwick, John C. Ropes, and John C. Gray *American Law Periodicals*, 2 *ALBANY L.J.* 445, 449 (1870). For a discussion of the significance of these editors, see SURRENCY, *supra* note at 192. Another publication described this group as "illustrious." WOXLAND & OGDEN, *supra* note, at 48. The *American Law Review* "earned . . . a large measure of influence, and its value to lawyers as an organ worthy to represent them, can hardly be over-estimated." WOXLAND & OGDEN, *supra* note, at 48.

⁴² *Id.* at 646.

given,” and which had been “adopted by several American courts, though denied by some.”⁴³ He explains how *Rylands* places the burden on the defendant and shifts the question more to causation:

It is good enough for the practical purpose of charging with damages a company of gentlemen who have maintained a vast reservoir of water behind a rotten dam, for the mere pleasure of using it for a fishing pond, to the peril of thousands of honest people dwelling in the valley below. It is enough that they are *prima facie* answerable. That takes the question to the jury. The jury will do the rest. They can be safely trusted to say whether or not it was the plaintiff's default, that is the fault of some poor widow in Johnstown, whose husband and children were drowned while she was cast ashore and suffered to live.⁴⁴

We have no record of a Pennsylvania court applying *Rylands* against the South Fork Fishing Club. However, courts in Pennsylvania and around the United States began applying *Rylands* to a wide range of other cases. While the Pennsylvania courts never explicitly adopted *Rylands*, they adopted its rule on unnatural use very soon after the Johnstown Flood, and continued to expand the rule to new “unnatural” activities over the next three decades.⁴⁵ Three years before the flood, the Pennsylvania Supreme Court went out of its way to repudiate *Rylands* in *Sanderson*.⁴⁶ The court referred to mine-water runoff or to mining in general as “natural” twenty-six times,⁴⁷ a mantra used to distinguish Sanderson’s case from *Rylands*, though it ignored the role of powerful engines and “an artificial water-course” in creating the runoff.⁴⁸ Even though the court ruled that *Rylands* was inapplicable to such “natural” activities, it still took the opportunity to attack *Rylands*, declaring that *Rylands* had been rejected in America and that its rule was “arbitrary.”⁴⁹ Before the Flood, the court emphasized the “great public interest” of industry’s unfettered development, and denigrated the “mere personal [and] trifling inconveniences” that were caused by industrial damage, and which must “give way to the necessities of a great community.”

⁴³ *Id.* at 647.

⁴⁴ *Id.*

⁴⁵ See Note, *The Absolute Nuisance Theory in Pennsylvania*, 95 U. PA. L. REV. 781, 783-85 (1947).

⁴⁶ *Sanderson III*, 6 A. 453 (Pa. 1886).

⁴⁷ *Id.* at 456.

⁴⁸ *Id.* at 454.

⁴⁹ *Id.* at 462-63.

The Johnstown Flood swept in a new attitude toward big industry and liability. In *Robb v. Carnegie Bros.*,⁵⁰ an 1891 case involving Andrew Carnegie, the most prominent figure connected to the Flood, the Pennsylvania Supreme Court applied strict liability to a basic and necessary function in the manufacturing of coal. The plaintiff's counsel cited *Fletcher v. Rylands* and argued that this damage, unlike the mine-water in *Sanderson*, was not from a "natural product," but rather was "brought" to the defendants' property.⁵¹ The case was first argued on October 5, 1889, just five months after the Johnstown Flood.

The court applied strict liability in a unanimous decision, with three of the *Sanderson* judges changing their pre-Flood stance.⁵² One of these judges was Judge Silas Clark, the author of *Sanderson* who had been so solicitous of industry.⁵³ The *Robb* ruling limited "natural activities" to the natural "develop[ment of] the resources of his property," which sharply distinguished *Sanderson*.⁵⁴ The key distinction between *Sanderson* and *Robb* rested on the natural/unnatural dichotomy: Coal mining itself was natural, but any further development or manufacturing of the coal was not natural.⁵⁵ Again, this dispute over naturalness and non-naturalness was an implicit reference to *Rylands*.

Robb further eviscerated *Sanderson* in rejecting *Sanderson's* reasoning about the supreme importance of industrial development. *Robb* first asserted, "It is a fundamental principle of our system of government that the interest of the public is higher than that of the individual."⁵⁶ Then the opinion moved on to the point that industry is private, not public, like roads, rails, highways, and canals.

50. 22 A. 649 (Pa. 1891).

51. *Robb v. Carnegie Bros. & Co.*, 145 Pa. 324, 336 (1891).

52. *Id.* The reversing judges were Clark, Green, and Paxson.

53. See SMULL'S LEGISLATIVE HANDBOOK 351 (Thomas B. Cochran ed., Harrisburg, E.K. Meyers 1887).

54. *Robb*, 22 A. at 650-51.

55. *Id.* ("But the defendants are not developing the minerals in their land or cultivating its surface. . . . The injury, if any, resulting from the manufacture of coke at this site, is in no sense the natural and necessary consequence of the exercise of the legal rights of the owner to develop the resources of his property . . .").

56. *Id.* at 651.

[T]he production of iron or steel or glass or coke, while of great public importance, stands on no different ground from any other branch of manufacturing, or from the cultivation of agricultural products. They are needed for use and consumption by the public, but they are the results of private enterprise, conducted for private profit and under the absolute control of the producer. He may increase his business at will, or diminish it. He may transfer it to another person, or place, or state, or abandon it. He may sell to whom he pleases, at such price as he pleases, or he may hoard his productions, and refuse to sell to any person or at any price. He is serving himself in his own way, and has no right to claim exemption from the natural consequences of his own act. The interests in conflict in this case are therefore not those of the public and of an individual, but those of two private owners who stand on equal ground as engaged in their own private business.⁵⁷

The language here emphasizes the private and self-interested choices of the industrialist. The most apparent cause for the sudden change in the justices' suppositions about industry and the individual homeowner was the Johnstown Flood.

Three months later, in *Lentz v. Carnegie Bros.*,⁵⁸ the Pennsylvania Supreme Court again ruled unanimously against the Carnegie Company, holding it liable without fault for damages caused by the same coke works. In 1893, the court similarly distinguished *Sanderson* by unanimously finding the storage of oil unnatural and subject to strict liability.⁵⁹ The author of this opinion had been one of the *Sanderson* majority, but now he sharply limited *Sanderson* to the “necessary” and “essential” development of “the land itself.”⁶⁰ Throughout the next few three decades, Pennsylvania courts in more than a dozen cases continued to expand strict liability for more activities, based primarily on the natural vs. non-natural use distinction.⁶¹

57. *Id.* at 651.

58. 23 A. 219 (Pa. 1892).

59. *Hauck v. Tide Water Pipe-Line Co.*, 26 A. 644, 644-45 (Pa. 1893); *see also Gavigan v. Atl. Ref. Co.*, 40 A. 834, 835 (Pa. 1898).

60. *Commonwealth ex rel. Attorney General v. Russell*, 33 A. 709, 711 (Pa. 1896).

61. *See Evans v. Reading Chem. Fertilizing Co.*, 28 A. 702 (Pa. 1894) (per curiam); *Good v. City of Altoona*, 29 A. 741 (Pa. 1894); *Hindson v. Markle*, 33 A. 74, 76 (Pa. 1895); *Commonwealth v. Russell*, 33 A. 709 (Pa. 1896); *Robertson v. Youghiogheny River Coal Co.*, 33 A. 706 (Pa. 1896); *Gavigan*, 40 A. 834; *Keppel v. Lehigh Coal & Navigation Co.*, 50 A. 302 (Pa. 1901); *Campbell v. Bessemer Coke Co.*, 23 Pa. Super. 374, 380 (1903); *Sullivan v. Jones & Laughlin Steel Co.*, 57 A. 1065 (Pa. 1904); *Green v. Sun Co.*, 32 Pa. Super. 521 (1907); *Vautier v. Atl. Ref. Co.*, 79 A. 814 (Pa. 1911); *Welsh v. Kerr Coal Co.*, 82 A. 495 (Pa. 1912); *Mulchanock v. Whitehall Cement Mfg.*, 98 A. 554 (Pa. 1916).

Through the 1890s, a wave of states from every region in the country joined Pennsylvania in adopting *Rylands* or its rule of strict liability for unnatural, artificial, or “mischievous” activities: Maryland, Vermont, South Carolina, New Jersey, New York, Ohio, Oregon, Missouri, Colorado, Wyoming, Kansas, Utah, and Tennessee. Together with the states that had already adopted *Rylands*, this wave of adoptions produced a majority of state courts favoring *Rylands* or *Rylands*-style strict liability at the turn of the twentieth century.⁶² Against this larger pro-*Rylands* tide in state courts, federal courts ignored it, and a majority of appointed state courts ignored it or rejected it.

II. EXPLAINING THE PATTERNS OF ACCEPTANCE

State courts, as I noted above, initially had a mixed reaction to *Rylands*, but then a sizable majority of them adopted it or its rule by the turn of the century.⁶³ However, federal courts ignored it and legal academics dismissed it until around the time of the New Deal. What accounts for these starkly different patterns?

A. *Caseload: Torts in Federal Courts*

To explain why federal courts stayed out of the *Rylands* debate almost entirely, one might suggest that plaintiffs brought their torts claims in state court and not federal courts. While state courts undoubtedly adjudicated the overwhelming portion of tort actions, federal courts were increasingly active in tort law over the nineteenth century. G. Edward White observed a growing role for federal courts in tort law in the nineteenth century, and attributed it to three factors: 1) an increasing number of railroad accidents opened the federal courts to torts through diversity jurisdiction; 2) the low required minimum in damages (\$500) for federal jurisdiction that barred few of these actions;

⁶² Again, see the graph of adoptions, the appendix, and “The Floodgates of Strict Liability.”

⁶³ A few states split on the validity of *Rylands* in the 1870s, but a wave of states from the mid-1880s to the early 1910s adopted *Rylands*, with fifteen states and the District of Columbia solidly accepting *Rylands*, nine more leaning toward *Rylands* or its rule, five states wavering, and only three states consistently rejecting it. The federal courts generally ignored *Rylands* over this period. From 1890 to 1910, only the Seventh Circuit and the federal Circuit Court of California recognized *Rylands*, and the District of Tennessee rejected it. In the 1910s and 1920s, the Fourth and Sixth Circuits adopted *Rylands*, the Third Circuit voiced mild approval, and the Second Circuit temporarily rejected it.

and 3) under *Swift v. Tyson*, federal courts tailored their own federal common law, unbound by state court precedent.⁶⁴ Edward Purcell similarly noted an increasingly active role of federal courts in torts in the late nineteenth century, especially in the 1890s.⁶⁵ In my own database searches for torts cases in lower federal courts in the 1890s, the number varied widely by circuit. For example, the First, Second, and Third Circuits and their district courts each seem to have ruled in only a handful accidental torts cases in the 1890s, while a search of the Seventh Circuit and its district courts yielded hundreds of such cases. The Fourth, Fifth, and Sixth Circuits and their district courts also ruled in very large numbers of accidental tort claims, many of which involved the kinds of unnatural or hazardous industries that might have invited some discussion of *Rylands*. The federal courts certainly had their opportunity to weigh in on *Rylands*, but chose to ignore it.

B. *Timing and Prestige*

A more likely factor was the timing, the geography, and the prestige of certain decisions. *Rylands* was decided in the House of Lords in 1868, and within five years, two states had adopted it (Massachusetts and Minnesota), and two had rejected it (New York and New Hampshire). While the Massachusetts and Minnesota opinions spent little time justifying their support for *Rylands*, Judge Earl of New York and Judge Doe of New Hampshire engaged in lengthy analysis and offered multiple arguments against *Rylands*.⁶⁶ The early verdict leaned against *Rylands*. New York and Massachusetts were equally prestigious, and balanced each other out. New Hampshire's supreme court was, at the time, one of the most respected courts in country, particularly with Judge Doe on the bench, and thus it had much more national respect than Minnesota, a hinterlands state in the legal world. In the next five years, two more prestigious eastern courts entered the fray: New Jersey against, and Pennsylvania for. The split was thus more even for the next ten years, until

⁶⁴ WHITE, *supra* note __, at 51-52.

⁶⁵ EDWARD PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 49, 52.

⁶⁶ Losee, 51 N.Y. 476 (1873); *Brown v. Collins*, 53 N.H. 422 (1873).

Pennsylvania reversed itself in 1886, and attacked *Rylands*. It appears that this reversal may have been the knock-out punch, as treatise writers and eastern judges relied upon this set of decisions to conclude that *Rylands* had been knocked out. Treatise writing had become significant in the mid-nineteenth century, and then it boomed soon after the Civil War, just when *Rylands* faced its stiffest resistance. Treatise writers ignored the handful of midwestern and western states that very quietly started citing *Rylands*, and eastern states, aside from Massachusetts, did not start citing *Rylands* until the 1890s. Once the treatises in the 1870s and 1880s buried and eulogized *Rylands*, these conclusions perpetuated themselves, and judges and academics who relied on treatises had to look no further. One might have expected federal judges in pro-*Rylands* states (mostly outside the Northeast) to have paid some attention to what those state judges were doing. However, *Swift v. Tyson*, which empowered federal judges to create federal common law detached from state law, perhaps created a legal culture that led federal judges to be dismissive of local state precedent. Instead, federal judges sought a more national pro-commercial common law, drawn primarily from treatises and the more established commercial states in the east, and more likely to pay attention to other federal courts rather than to their companion state courts. Meanwhile, many other state court judges did not rely solely on these treatises, and began citing the adoptions of *Rylands* in Ohio, Maryland, California, and other states. The reliance on particular authorities was another distinction between the pro-fault and the pro-strict liability decisions, which I discuss in Part V in the section on dissonance.

C. Judicial Elections and Political Culture

1. The Historical Evidence of Hotly Competitive (even Fierce) Judicial Elections

Perhaps the best explanation for why state courts adopted *Rylands* relatively suddenly, while federal courts and academics resisted it for an additional generation or two, is that a vast majority of

states elected their judges. Federal judges with life tenure were more resistant to public outcry, while generally the judges of state courts were elected and more attuned to the public and its fears. Before 1846, only Mississippi adopted judicial elections, but between 1846 and 1860, nineteen of twenty-one state constitutional conventions adopted judicial elections.⁶⁷ Every state that entered the Union between 1846 and 1911 established at least a partially elective judiciary.⁶⁸ By the Civil War, two-thirds of the states elected most of their judges, and that transformation has held firm, with thirty-eight states continuing to elect their supreme court judges and most other judges today.

Judicial elections served new political issues and public opinion better than appointments, particularly as a check on legal elites. Just as “jury nullification” was a popular check against legislation and prosecution, judicial elections strengthened an unstated power of “judicial nullification” for public opinion to shape law, or even trump law. Many judicial elections were hotly contested and were dramatically politicized in much of the nineteenth century. According to one study of judicial elections in California, Ohio, Tennessee, and Texas from 1850 to 1920, judicial elections were remarkably in states with two-party systems.⁶⁹ In California, the winning candidate garnered less than 55% of the vote in 74% of judicial elections in that period. Only 4% of California judicial elections were uncontested. In Ohio, the victor won less than 55% of the vote in 81% of the judicial elections in that period, and no races were uncontested in that seventy year span. Tennessee and Texas were one-party states for most of this era, and yet the winners of judicial elections commanded less than 55% of the vote surprisingly often given the one-party rule (20% and 15%, respectively), and the races were rarely uncontested (20% and 19%). Thus, it appears that in

⁶⁷ For a comprehensive table of adoptions, see Evan Haynes, *The Selection and Tenure of Judges* (1944). Between 1846 and 1860, twenty-one states revised their constitutions, and nineteen adopted an elective judiciary. Kermit Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elective Judiciary, 1846-1860*, 46 HISTORIAN 337, 337-38 (1983); see also Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993).

⁶⁸ FRIEDMAN, *supra* note ___ at 323.

⁶⁹ Kermit Hall, “Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920,” 9 American Bar Foundation Research Journal 345, 355 (1984).

the ex-Confederate states, judicial races were as likely to be very close as they were to be uncontested, but in either case, the winners were almost always Democrats. Voter turn-out was slightly lower in judicial elections than in other elections (in many states for parts of this era, they were scheduled on different dates), and the mean turnout ranged from 62% in Ohio to 42% in Tennessee – a high level of turn-out compared to today.⁷⁰

Pennsylvania records show that races were highly competitive in this era. The election returns for Pennsylvania elections in the late nineteenth century no longer exist, but the state published a handbook recording the vote totals of seven state supreme court elections between 1881 and 1901.⁷¹ In only one election (1899) did the winning candidate prevail with more than 52 per cent of the state vote.⁷² In five of the other six elections, the winning candidate garnered between 51 and 52 per cent of the vote,⁷³ and in the last remaining election (in 1882), the victor won a plurality of the vote with 48 per cent.⁷⁴ The elections had multiple candidates, but they were partisan elections that had one Republican candidate, one Democratic candidate, and then more minor third party candidates who drew small numbers of votes. Republicans prevailed in all seven races (just as Republicans won most state-wide races in this era), but the judges' margin of victory was almost always less than five percentage points – much closer than modern Congressional elections and modern judicial elections. The Pennsylvania reversal on this doctrine between 1886 and 1891 was due to three judges “switching in time” after the Johnstown Flood: Judge Silas M. Clark (the author of *Sanderson III*, the 1886 rejection of *Rylands*); Judge Edward M. Paxson; and Judge Henry Green. Two of these three had their election results recorded. Justice Green won his seat in 1880 by a 51%-

⁷⁰ Id. at 357

⁷¹ SMULL'S LEGISLATIVE HANDBOOK AND MANUAL OF THE STATE PENNSYLVANIA, 1882-1902 (archived at Harvard University, Yale University, the University of Pennsylvania and the State Library of Pennsylvania in Harrisburg).

⁷² SMULL'S LEGISLATIVE HANDBOOK (1900) at 618-19.

⁷³ Those five were the elections of 1880, 1887, 1888, 1892 and 1901. See SMULL'S LEGISLATIVE HANDBOOK (1881) at 271-72; Id. (1888) at 401-02; Id. (1889) at 410-11; Id. (1893) at 490-91; Id. (1902) at 624-25.

⁷⁴ Id. (1883) at 693-94.

47% margin,⁷⁵ and Justice Silas Clark won his in 1882 with a 48% plurality.⁷⁶ Pennsylvania judicial elections in the late nineteenth century were no mere formalities, but were actually tight races, and as Judge Paxson's letters suggest, the judges were deeply involved in the campaign process.

Judicial elections perhaps attracted more politicians willing to play hardball with morality and character attacks in order to win. Nineteenth-century Pennsylvania newspapers reveal some nasty and brutish campaigns for the state bench. In the fall 1889 elections for seven lower court seats, five were contested by both parties, and three were toss-ups. In one of those races, the Democratic candidate, L.W. Doty, accused the Republican candidate, A.D. McConnell, of infidelity. Doty warned that McConnell would bar liquor licensed, and he promised to grant liquor licenses "liberal[ly]." The Republican Pittsburgh newspaper angrily denounced his "bribes" and his "bitter" campaign.⁷⁷ Another Pennsylvania race also turned into a "bitter personal fight" with "a guerilla newspapers war waged in a way that has a tendency to lessen respect for the judiciary."⁷⁸ A judicial election in New York in the 1894 was "fierce," with partisan thugs and "gangs of rowdies" beating each other senseless in "free for all scuffle" at the ballot box. One newspaper titled its article on the election "Disgraceful Scene."⁷⁹ The *New York Times*, an explicitly Republican newspaper at the time, criticized the Republican victor in the race, William Werner (later the author of *Ives v. South Buffalo Railway*), writing that "[t]he popular impression is that questionable methods were used in aiding Werner's canvass. [His] reputation as a politician [is] higher than his standing as a lawyer."⁸⁰

And recall Justice Edward Paxson, the Pennsylvania Supreme Court judge who was one of three "switches in time" from *Sanderson* to *Robb v. Carnegie* and the adoption of strict liability after the

⁷⁵ SMULL'S LEGISLATIVE HANDBOOK (1881) at 271-72.

⁷⁶ SMULL'S LEGISLATIVE HANDBOOK (1883), at 693-94.

⁷⁷ "The Westmoreland Judgeship," PITTSBURGH COMMERCIAL GAZETTE, Oct. 24, 1889.

⁷⁸ "The Thirty-Fifth Judicial District," PITTSBURGH COMMERCIAL GAZETTE, Oct. 30, 1889.

⁷⁹ JOHN WITT, THE ACCIDENTAL REPUBLIC 157 (2004) (citing New York Herald, June 12, 1894; "Disgraceful Scene," Rochester Union and Advertiser, June 12, 1894; scrapbook, Box 3, Werner Papers, Rhees Library, University of Rochester).

⁸⁰ *Id.* (citing "Seventh Judicial District," *New York Times*, Sept. 15, 1894).

Johnstown Flood. In the introduction to this Article, he shamelessly pressured other judges to get out the popular vote and help get his own preferred judges elected. He eventually maneuvered to become Chief Justice. In a speech in 1900, after his retirement focusing on judicial elections, he claimed that he had never participated in politics, and claimed that judicial elections had “worked fairly well” in the past, but warned of a new generation of judges that had ascended to the bench:⁸¹

“We have instances where candidates for judicial position do not hesitate to go round with their caps in their hand to solicit support, both for nomination and election, after the manner of the politician. They appear to perceive no difference in the dignity of a judicial office from that of a constable. . . . [W]hen the judiciary comes under the influence of politicians; when the candidate has to solicit their support, the judiciary will have seen its best days, and ‘Ichabod’ will be found written over the portals. We have judges now in Pennsylvania who take an active position in politics. Some of them do not hesitate to attend political conventions and take a conspicuous part in active politics, even to the ‘running’ of the local politics in their district. . . . A man will submit to the decision of a judge when his property, or even his life, is involved, without doubting his integrity and impartiality, but let the smallest question of politics intervene and the confidence ceases.”⁸²

Justice Paxson observed that most judges were not yet this type of political hack, but “the evil is increasing,” and it was staining the popular perception of the courts. He concluded this section by proclaiming that he had never participated, “in any way, in politics beyond casting my vote . . . I am only trying to show you that I practiced what I preach.”⁸³ Indeed. Paxson instead showed that Pennsylvania had a tradition of judges practicing politics, albeit with less candor about that fact.

2. *Patterns and Statistics*

There is little other archival material or biographical information for the pivotal judges in this story of *Rylands*’s adoption. Instead, in this article I rely on the striking correlation between judicial elections and the adoption of *Rylands*, contrasting federal courts, elected state courts, and

⁸¹ Edward Paxson, Address Delivered Before the New Jersey Bar Association in Atlantic City, June 16, 1900, Edward Paxson file, Pennsylvania Supreme Court collection, Historical Society of Pennsylvania .

⁸² Id.

⁸³ Id.

unelected state courts. Second, I examine the role of term length, and then use statistical analysis to test whether appointment method and term length were significant factors. The adoption of *Rylands* seems not to have been the result direct of political pressure produced by a future election, but rather of the political culture shaped by the experience of elections, plus job security.

As I noted before, almost all federal judges ignored *Rylands* until the twentieth century – and mostly long into the twentieth century. Federal judges and English judges shared life tenure, and even though English courts created *Rylands* in response to flooding disasters, they subsequently applied *Rylands* very narrowly, so that it applied solely to reservoir accidents.⁸⁴ English judges may have been moved by flooding tragedies, but they tightly cabined their response to apply only to bursting reservoirs. Thus, the behavior of life tenured judges in England arguably was more similar to the behavior of the life tenured judges on this side of the Atlantic who ignored *Rylands* than to the state judges that adopted their ruling in *Rylands* so expansively. By contrast, an overwhelming majority of the states that adopted an elective judiciary in this period from the Civil War through the Progressive Era also adopted *Rylands*.⁸⁵ Twenty-two of the twenty-six state courts adopting or leaning towards *Rylands* were elected, and of the thirty-one states with elected judiciaries at the time of the Johnstown Flood, twenty-two would adopt or lean by 1920, and with a total of twenty-six when including the ones that wavered toward *Rylands*.⁸⁶ Only three elected courts rejected *Rylands*.⁸⁷

⁸⁴ See *supra* (discussing A.W.B. Simpson’s “new working hypothesis” that *Rylands* was about the unique features of bursting reservoirs). The Lord Chancellor, who heads the judiciary in England and Wales, recommends the highest judicial appointments to the Prime Minister, and lower judicial appointments to the Crown. He also appoints magistrates directly, not subject to ministerial direction or control.

⁸⁵ The period is the Gilded Age and Progressive Era, standardly defined as 1876 to 1914, ending with the start of World War I. Gould Lewis L. *America in the Progressive Era, 1890-1914* (2000); Buenker, John D. *The Progressive Era, 1893-1914* (1998). This Article also provides data for the period through 1900, a different cut-off date for the era. Different periodizations (i.e., different cut-off dates) do not change the overall patterns.

⁸⁶ Minnesota, Illinois, Iowa, California, Maryland, Ohio, Oregon, Wyoming, Kansas, Tennessee, Montana, Indiana, Idaho, and Nebraska adopted. Georgia, Wisconsin, Michigan, Nevada, Colorado, Alabama, Pennsylvania, and Utah leaned toward *Rylands*. The appointed courts that adopted were Massachusetts, Vermont, and South Carolina

⁸⁷ Washington, Kentucky, and North Dakota rejected.

See the appendix for a state-by-state list, along with explanations for how the states are considered for the statistical analysis.

The only two states that convened constitutional conventions between 1846 and 1860 and retained an appointed judiciary were Massachusetts and New Hampshire. Intriguingly, Massachusetts was the first state to adopt *Rylands* and never wavered after 1868, while New Hampshire was the most consistent rejecting state. These appointed courts were the most decisive and the least swayed by political trends and disasters. The other common law states to retain an appointed judiciary in this period were: Connecticut, Delaware, Maine, Mississippi, New Jersey, South Carolina, Rhode Island, Vermont, and Virginia.⁸⁸ Of those nine states, only two (Vermont and South Carolina) adopted *Rylands* in the nineteenth century, and one (New Jersey) wavered six years after the Flood, and returned to rejecting *Rylands* in 1903. The rest of the states ignored the English precedent and resisted heightened liability in this era.

However, it is vitally important not to push this argument on judicial elections too far. Painting with too broad a brush, one might argue based upon the pattern I've described that upcoming elections forced judges to change doctrine based on public opinion, especially in the 1890s. That argument would overlook a very important distinction: political pressure is not an automatic result from elections, because the length of the judge's term is perhaps a better indicator of job security and the influence of politics. It also overlooks how even life-tenure judges face political pressure, because they may have ambitions to win elevation to a higher court, or face political/social pressure to maintain their prestige and the good will of their social circle. With these points in mind, I break down the states into two subgroups: state courts with elections to long terms

⁸⁸ Florida adopted judicial elections in 1887, two decades after the *Rylands* ruling, but two years before the Johnstown Flood. It did not adopt *Rylands* in this period. Because of its ambiguity, I do not count it in either group. I excluded Louisiana from this group because it is based on French civil law and is not a common law state.

(giving judges more job security, despite elections); and state courts with appointments to short terms (giving judges less job security, regardless of avoiding elections).

Eight states in the late nineteenth century elected their judges to terms of ten years or more: Pennsylvania (21 years, beginning in 1874); New York (14 years, beginning in 1876); California (12 years, beginning in 1879); Georgia (12 years through 1877); Maryland (10 years, beginning in 1864); Missouri (10 years, beginning in 1872); West Virginia (12 years, beginning in 1862); Colorado (10 years) and Wisconsin (10 years, beginning in 1877). All nine states adopted *Rylands* in this era (although New York and West Virginia wavered at different times). Pennsylvania, New York, Maryland, and Missouri adopted *Rylands* soon after the Johnstown Flood, and California adopted it in the wake of severe floods and reservoir collapses in the 1870s and 1880s.⁸⁹ The three Pennsylvania “switch in time judges – Henry Green, Silas Clark, and Edward Paxson -- were serving full twenty-one-year terms, which in practice was a single term expiring around retirement age. Clark and Green had nine years left in their terms after their 1891 pro-strict liability ruling. Paxson had five more years, and as a sixty-seven year old, he probably could not imagine holding another term at the time of the decision, and died two years later.⁹⁰ Thus, even though these state judges had little to fear from elections for their job security, they were very responsive to events in reshaping doctrine.

Unfortunately, these judges have left little archival material and no biographical records.⁹¹ As an alternative to archival or documentary evidence for elected judges’ behavior, I turn here to a more quantitative statistical approach. Upon re-examining the appointed states, a pattern emerges. Eight common law states appointed judges to limited terms in this period: Connecticut (eight years);

⁸⁹ See *The Floodgates of Strict Liability*, 110 YALE L.J. 333, 356-58 (2000).

⁹⁰ THE PHILADELPHIA PRESS ALMANAC FOR 1897, at 34 (1897); <http://www.rootsweb.com/~pabucks/edwardmpaxson.html>

⁹¹ Digging further into the Pennsylvania story is an enormous challenge. The judges in the Pennsylvania cases have few remaining archival records, and whereas some state reporters printed memorials for deceased judges, I have not been able to locate memorials for these judges in the Pennsylvania Reports. I have not found obituaries for the judges, and finding articles about these judges in the state’s daily newspapers is searching for the proverbial needle in a blurry haystack of microfilm.

Delaware (twelve years); Maine (seven years); Mississippi (nine years); New Jersey (seven years); South Carolina (seven years); Vermont (two years); and Virginia (twelve years).⁹² Rhode Island judges served only at the “pleasure” of the assembly. This group of state judges enjoyed the same or less job security than the judges of Pennsylvania, New York, etc., but it was far less open to *Rylands* and far less responsive to events. Five of the eight states (Mississippi, Virginia, Connecticut, Delaware and Maine) ignored *Rylands* through the Progressive Era, just as the federal courts had. Two states, Vermont and South Carolina, quickly adopted *Rylands* after the Johnstown flood. As noted before, New Jersey wavered six years after the flood. It based its adoption on the shift of legal authority in favor of *Rylands* in other states, and soon rejected *Rylands* again a few years later. I include New Jersey as a “wavering towards *Rylands*” state, even though this interpretation makes my case more challenging. Still, one might look at the list of states that appoint judges and note that many are New England states, and one might think that New England states – with strong industrial and textile interests -- would also be more likely to reject *Rylands*. Does New England skew the results by being more likely to reject *Rylands* for reasons other than judicial selection? In fact, New England states were split on *Rylands*: Massachusetts and Vermont adopted *Rylands*, while New Hampshire rejected it, and Maine, Rhode Island and Connecticut were silent on the matter in this era. Even if we set aside New England, the appointed judiciaries were still more resistant to *Rylands*: South Carolina adopted *Rylands*, New Jersey wavered towards it, and Delaware, Mississippi, and Virginia ignored it through this era. Virginia and Connecticut would eventually adopt *Rylands* soon after this period, but long after the Johnstown Flood.

The following chart clarifies the sharp distinction between these categories of courts. The list of states and other details are provided in the appendix. The numbers below reflect the time

⁹² This list does not include Louisiana, which appointed its judges, but Louisiana’s French-based civil law system makes it a unique case and outside the orbit of English common law. Louisiana had adopted a rule similar to *Rylands* in 1860, before the English courts decided *Rylands* itself.

period through 1914, one standard way of interpreting the end point of the Gilded Age and Progressive Era. Further below, I also provide the data for another common-sense cutoff date, 1900, a round number that also measure the decade after the Johnstown Flood. See Appendix A for the list of states and Appendix B for the numbers according to different ways of categorizing the states and time periods.

Elected courts adopted *Rylands* at a much higher rate than appointed courts:

Through 1914, of the **25** states adopting or leaning towards *Rylands*, **21** had elected supreme courts. If including states wavering towards *Rylands*, **23** of those **28** states had elected judiciaries.

Of the **32** established states with judicial elections around the time of the Johnstown Flood: **21** adopt or lean; **23** when including states wavering towards *Rylands*; **3** reject *Rylands* consistently.

Subgroups:

1. State courts with supreme court elections to terms of ten years or more:
8 of 9 adopted through 1900, **9 of 9** adopted as of 1914⁹³
2. States with supreme court elections to terms of less than ten years:
13 of 24 adopted or leaned towards *Rylands* as of 1900;
15 of 24 adopted or leaned towards *Rylands* as of 1914.
3. States with appointed supreme courts **without life tenure** (averaging 8 years), both as of 1900 and 1914:
3 of 9 adopt *Rylands*
4 of 11 when including the life-tenure states (Mass. and N.H.)

Is the link between selection method and strict liability in this era statistically significant? And is the link between term length and strict liability statistically significant? The sample sizes are unavoidably small. We can't replicate late nineteenth century America and recreate a horrible

⁹³ West Virginia was silent through 1900, and had adopted *Rylands* as of 1914. Even though a good case can be made for adding it to the "adopting" category as of 1914, its mixed decisions against *Rylands* in 1902 and adopting *Rylands* in 1911 make West Virginia too mixed a state, and I leave it out of the 1914 set for statistical analysis.

flooding disaster – or at least my research funding does not cover such a project. Alternatively, the Fisher Exact Method is a test designed for samples as small as these to find statistical significance. Sir R.A. Fisher, born just seven months after the Johnston Flood, was an English eugenicist, and originally designed the test for agricultural planning based upon small samples of farm production.

First, a comparison of elected judges to appointed judges:

	Adopting	Rejecting/silent	total
Elected Judges	23	9	32
Appointed Judges	4	7	11
Totals	27	16	43

The p value is .04, a 4% chance that the pattern of elected judges being more likely to adopt *Rylands* was a random result. This result meets the standard 95% confidence level recognized by statisticians for declaring “statistical significance.” When using 1900 as opposed to 1914 as the cut-off date, the p-value is .11 (11% chance of being random).

Second, the states are divided not by selection method, but only by length of term (ten years or more, or less than ten).

	adopting	Rejecting/silent	total
Term 10+ 9	3		12
Term <10 18	13		31
Totals	27	16	43

The p value is .25, which means that there is a 25% chance that correlation between longer terms and strict liability is random. For 1900, the p value is .23 (23%). These p values weakly suggests a connection on the sole basis of term length, and thus, the selection method of election vs. appointment seems more pivotal. We shall see that, when the states are divided by selections method, the term length becomes more salient.

Third, among all elected judges, a comparison of judges with terms ten years or longer to judges with terms shorter than ten years:

	adopting	Rejecting/silent	total
Elected, 10 + year terms	8	0	8
Elected, Less than ten years	15	9	24
Totals	23	9	32

The p value is .047, which means that there is a 4.7% chance that the pattern of longer-term elected judges being more likely to adopt *Rylands* was chance. Again, this p value reaches the 95% confidence. For the states through 1900, the p value is .07 (7%).

Fourth, how salient is selection method within the types of term length? Among all the courts with terms shorter than 10 years:

	Adopting	Rejecting/silent	total
Elected <10	15	9	24
Appointed <10	3	4	7
Totals	18	13	31

The p value is .22, or a 22% chance that this pattern of elected judges serving short terms being more likely to adopt *Rylands* was random. Through 1900, the p value is .46 (46%), a very high chance of randomness (but it decreases to 28% when one excludes the recently admitted western states). Judges elected to short terms were only slightly more likely to adopt strict liability than judges appointed to short terms.

Among all the courts with terms ten years or longer:

	Adopting	Rejecting/silent	total
Elected 10+	8	0	8
Appointed 10+	1	3	4
Totals	9	3	12

The p value is .02, or an 2% chance of being random. As of 1900, the p value is .05. Term length makes a big difference between elected and appointed courts.

For one more grouping, I compare judges elected to terms ten years or longer to judges appointed to terms shorter than ten years. For this group, the p value of .026, a 2.6% chance of being random. Through 1900, the p value is .07.

	adopting	Rejecting/silent	total
Elected, 10 or more	8	0	8
Appointed, <10	3	4	7
Totals	11	4	15

Another statistical method is the comparison of three groups at the same time: appointed judges, judges elected to short terms, and judges elected to long terms. Using the Cochran-Armitage trend test, I organize the three groups by trends: that appointed judges would be least responsive,

short-term elected judges more so, and then long-term elected judges even more so.⁹⁴ Because the number of appointments to long terms is so small, and because the effect of appointment seems to be highly salient (generally producing resistance to *Rylands*) regardless of term length, one category can include all appointed judges.

	adopting	Rejecting/silent
Appointed	4	7
Elected, short term	15	9
Elected, long term	8	0

From this data in the three-group trend test, the two-sided p-value is .02 (a 2% chance of being random), below the standard .05 test for significance. The trend test also allows us to eliminate groups of states from the study that are closer calls, such as the “wavering” states, and the resulting p-values are similar. We can also eliminate New England (two states adopting *Rylands*, four not) and produce the following table:

	adopting	Rejecting/silent
Appointed	2	3
Elected, short term	15	9
Elected, long term	8	0

The p-value is .04, a 4% chance of being random, and still below the .05 test for significance.

Even when the periodization changes to 1865-1900 (and thus West Virginia becomes a silent state and counts as “against *Rylands*” in this study), and even when wavering states, recently admitted

⁹⁴ I thank Professor Joseph Gastwirth of George Washington University for his suggestion and his help with the Cochran-Armitage trend test. See also JOSEPH GASTWIRTH, STATISTICAL REASONING IN LAW AND PUBLIC POLICY 437-41 (1988). This method is complicated at this stage, because we are interpreting trends after the data has been collected, and our interpretation of the tendencies and trends is shaped by the data after the fact. See Federal Judicial Manual on Scientific Evidence. However, we can produce a reasonable account ex ante for why appointed judges would be least responsive, short-term elected judges more so, and then long-term elected judges even more so. Again, the explanation is that elections have the filter effect and fidelity effect, and then longer term length frees judges from special interests and party politics to be more responsive to events and public values.

western states, and/or New England states are excluded, these patterns remain consistent. See the additional charts in Appendix B at the end of the article.

3. *Filters and Fidelity, Fear and Favor*

What do we make of these patterns? Being elected makes judges more responsive to events and/or public opinion than being appointed – not a shocking result. The term length is not as salient as selection method, but nevertheless, the patterns illustrate a counterintuitive conclusion: judges elected to longer terms are more responsive to events and/or public opinion than judges elected to shorter terms. The most distinct contrast (the last group) was that judges who won election to long terms on the bench were more likely to adopt *Rylands* than judges who were appointed to terms of the same length or shorter, but even within the groups of elected and appointed courts, term length mattered.

One factor is that judges with longer terms were insulated from party machines and special interests, regardless of selection, allowing them to vote their conscience and/or legal principle. But the conscience or legal interpretations of the elected judges were distinctly more pro-strict liability. I suggest that something more than “political pressure” and “job security” shaped this story. Judicial elections themselves – not so much the future prospect of them as much as the past experience of them – seem to have influenced the adoption of strict liability in the wake of disasters. In some states, elections served as a populist filter: warding off the more cerebral and doctrinal jurists, and attracting more of a politician-lawyer in touch with public opinion and willing to campaign aggressively. Elections also changed the “role fidelity” of state judges. In *Justice Accused*, Robert Cover puzzled over how anti-slavery judges in the North – including the legends Justice Joseph Story and Judge Lemuel Shaw -- deferred so pliantly to pro-slavery laws. Cover’s interpretation was that in the antebellum period, many judges ignored their anti-slavery conscience in part because of

their role fidelity as judges, a self-conception that distanced themselves from their moral values, and instead adhered to a professionalized model of formalistic interpretation of law. They distinguished themselves as judges, rather than legislators, and thus deferred to laws they found abhorrent.

Elections shifted the judge's role fidelity from a formalistic approach based on professional training and elite selection to a more democratic approach that legitimized both constituency and conscience.

In the wake of flooding disasters, elected judges would be more comfortable overlooking the formalistic rules of negligence and responding to public opinion and their own moral sensibility.

The populist filter of elections and the change in role fidelity perhaps shaped the ideology and rhetorical style of the decisions, as well as the doctrine.

Lawyers who won judicial appointments probably were more likely to be political insiders and elites who did not need to relate to the public. Though many judges were not isolated from politics because of their short terms, the method of their appointment made popular culture irrelevant from the beginning, and it continued to shield them thereafter. Judicial elections probably drew candidates who were more comfortable campaigning and identifying with the general public, and they probably retained this sensibility of responsiveness to popular sentiment. Based on my research on the nasty judicial elections in Pennsylvania and New York, judicial elections probably attracted some bare-knuckle politicians willing to get dirty in the rough ground war of judicial campaigns. A certain kind of politician-lawyer was willing to run the partisan gauntlet to win a seat on the bench, and those experiences were likely to shape his understanding of the judge's role and reasoning.

Just as elections attracted a certain political type that may have been more responsive to public opinion, elections may have filtered out some more cerebral, intellectual jurists who would have been more resistant to public opinion. Some appointed elite jurists – perhaps trained in the emerging legal science or trained as apprentices by top practitioners -- may have favored a legal-

science universal fault principle, clear rules, and economic analysis. Elected politician-judges may have disdained more intellectually rigorous or rigid approaches to doctrine and preferred writing in moralistic terms about community norms. Appointed judges probably respected consistency and the rule of law more than their elected counterparts, and at the risk of being bluntly impolitic about politics, they simply may have been smarter and better trained.

There is a surprisingly little research on the educational background of nineteenth century judges, but by extrapolating forward from what we know about the federal courts before the Civil War,⁹⁵ and back from what we know about both state and federal courts in the twentieth century,⁹⁶ I speculate that federal judges were more likely to have graduated from established law schools, and state judges were more likely to have been trained locally, especially by apprenticeship with local practitioners. Thus, state judges would have been steeped in traditional common law along with common sense, while more federal judges and academics would have been exposed to early legal science, its generalized rule of negligence, and some political economy scholarship. While there was more legal action in state courts, federal courts may have been enticing to the best lawyers, especially after witnessing great state judges like Michigan's Thomas Cooley lose their seats in highly partisan elections, without regard to merit on the bench.

The length of term adds an additional dynamic of special interests competing with public opinion. Shorter terms for judges may have been designed to promote "accountability," but that accountability may have been to the political parties and to special interests (in the case of strict liability, industry would have been a powerful special interest opposed to *Rylands*). In an era when party machines dominated many elections and effectively converted an election system into a quasi-appointment system, parties exerted as much pressure as the public, if not more. Nevertheless, these judges adopted *Rylands*. Judges who were elected to long terms did not have to fear public

⁹⁵ KERMIT HALL, *THE POLITICS OF COURTS* 158-59 (1979).

⁹⁶ Burton Atkins, *Judicial Selection in Context: The American and English Experience*, 77 KY. L.J. 577 (1996).

disapproval the same way, and still they too embraced *Rylands*. I posit that judicial elections may have cultivated a bench that was more in touch with current events and public opinion. It is likely that the fault rule and tort liability was not a salient issue to most voters, even if the media described the South Fork Fishing and Hunting Club and its members in those terms (negligence, fault, etc.). Even if voters were not focused on such outcomes, the public's outrage and anxiety was palpable, and elected judges appear to have translated that outrage into a reversal of doctrine and argument. And these judges may have been responding more directly to their own lived experience and the lessons about industrial hazards they derived themselves from these disasters. Elected judges may have been more responsive to changing contexts, events, and emotions, and judges elected to longer terms all the more so, again because this responsiveness would not be checked by party politics and special interests that would have had so much sway in the renomination and re-election process. Thus, counterintuitively, judges serving longer terms would be more responsive to the public.

How did judges compare with legislators on these questions? In the sessions meeting after the Flood, the Pennsylvania legislature passed no laws regulating reservoirs, water use, any hazardous activity, or any area related to the Johnstown Flood,⁹⁷ and newspaper accounts report no debates on such topics. The only action by the legislature was to provide partial funding for the emergency care and clean up of Johnstown, and even that action came six months after the Flood in an emergency winter session. It appears that Pennsylvania legislators behaved even less responsively to the Flood than the Pennsylvania judges, and one difference may have been that the judges were appointed to twenty-one year terms, which in practice was close to a life term. State senators were elected to four-year terms, and representatives were elected to two-year terms in the state house.⁹⁸ These short-term officials may have been outraged by the Flood, but again, this outrage might have been tempered or cancelled out by the pressure of party patronage and the interests of big industry.

⁹⁷ Pennsylvania Session Laws, 1890-1891.

⁹⁸ Pennsylvania Constitution of 1874, Article II, section 3.

The second reason may be that the Pennsylvania Supreme Court intervened first in *Robb v. Carnegie Brothers* in December 1891, when the first regular session of the legislature was beginning. This timing suggests that court may have been more active in social regulation than legislatures, because they regularly adjudicated the hazards of industrial life more directly and more year-round than legislators. The legislators might have otherwise felt pressure to regulate reservoirs and similar hazards, but they also may have been happy to punt the issue to the more job-secure judges. The legislators could have tackled the issue in its emergency session in late 1889 or by calling a special session in 1890, but they chose not to do so. And certainly the Court's *Robb* decision, though written in broad language, certainly did not attempt to regulate water use broadly, nor in a preventative *ex ante* method, such as mandated reservoir inspections. This episode suggests that judges – especially elected judges with job security – were the most responsive government officials, and perhaps further research is warranted into their role in the growth of the regulatory state.

Finally, selection method appears linked to the judges' styles of argument. In further research on American tort law, I suggest that courts rejecting *Rylands* relied on economic or utilitarian reasoning and “collective” justice, while the courts adopting *Rylands* (particularly after the Johnstown Flood) turned to moral arguments and “corrective” justice.⁹⁹ Elections seem to have created a judicial culture that not only reached doctrinal results consistent with public anxieties about dangerous activities; they may also have cultivated a style of reasoning that emphasized a moral sensibility and common sense as much as the American common law. The elected judges who adopted *Rylands* in the late nineteenth century generally used a language of morals and duties, naturalness, and tradition that was comprehensible to the general public, but often lacked the more rigorous legal and economic analysis of the anti-*Rylands* courts. When appointed courts adopted *Rylands*, it is interesting that two of the three did not turn to social norms, but rather, retained the

⁹⁹ Efficiency and Morality in American Tort Law (work in progress); see also “The Floodgates of Strict Liability,”

legal language of precedent and formalism. For example, New Jersey turned toward *Rylands* after 1895, but, as noted before, based its shift on the case law shift after so many other states had adopted.¹⁰⁰ South Carolina similarly steeped itself in precedent rather than morality, although Vermont had a relatively minor turn to moralism. The imagined audiences of elected and appointed judges seemed to differ based upon the method of selection.

It is worth noting that judicial elections have changed in important ways since the nineteenth century. The most important changes are that states generally have reduced term lengths since the nineteenth century, and modern judicial campaigns have gotten dramatically more expensive due to television and direct mailing. These factors increase the power of parties and special interests. Sometimes local public interest and special interests align, as in the studies showing states with partisan judicial elections generating the highest damage awards against out-of-state defendants.¹⁰¹

III. CONFUSION AND A SEARCH FOR ORDER

A. *Doctrinal Disorder*

The combination of disasters and the political culture of state courts threw American tort law into confusion. To say that tort law was in chaos would be too strong, but to call it “unsettled” would not be strong enough. Many states had ignored *Rylands* and resisted strict liability for two decades, and then suddenly adopted it in the third decade, and a substantial number of states wavered and wobbled both before and after the wave of adoptions. The American liability “rule” for hazardous industries was less a rule than a collection of unclear explanations and a hodge-podge of cases. Even William Prosser, the great consensus torts scholar who made a heroic effort to rationalize and synthesize these cases, conceded that state courts “misunderstood” and misapplied

¹⁰⁰ *Beach v. Sterling Iron & Zinc Co.*, 33 A. 286 (N.J. Ch. 1895).

¹⁰¹ Eric Helland and Alex Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AMERICAN LAW AND ECONOMICS REVIEW 341 (2002).

Rylands, and often confused its place in the body of the common law.¹⁰² This part explores this awkward adolescent transition from fault to absolute liability, and then speculates somewhat loosely about its significance in American legal history and thought.

These decisions demonstrate the responsiveness of state courts and the contingency of judicial politics, but that responsiveness created three problems. First, state precedents were unstable and unreliable. The reversals and twists over *Rylands* were almost a legal realist's parody of judicial decision-making. Pennsylvania's Supreme Court suddenly switched from rejecting *Rylands* in 1886 to adopting its rule in 1891, later expanding it, and then teetered between expanding, contracting and rejecting over the next few decades. New York and New Jersey, supposedly the solid resistance to *Rylands*, performed doctrinal gymnastics from rejecting, adopting and, many years after the Flood, back to rejecting. Texas, Missouri, Indiana, and West Virginia wobbled back and forth as well. These state courts did not inspire a lot confidence in their consistency.

Second, courts adopted *Rylands* without clear principles about what was "natural" and what was "unnatural," giving little guidance and broad discretion to the judges who had to apply *Rylands*. Of course, nineteenth century judges applied the fault rule itself with broad latitude. As Gary Schwartz powerfully demonstrated¹⁰³ (and re-demonstrated),¹⁰⁴ these judges interpreted fault flexibly and often bent the rule to favor sympathetic plaintiffs over deep-pocket defendants. And of course, the *Rylands* rule was already ambiguous. What things are "likely to do mischief" and what things aren't? What is natural and unnatural? However, as I noted above, the English courts narrowly cabined *Rylands* to reservoirs, while American courts broadened "naturalness" into doctrinal mush.

Third, ambiguous terminology led to confusing and inconsistent application to particular cases. The Pennsylvania cases in this period are incoherent as to which uses of land or water are

¹⁰² Prosser, *supra* note **Error! Bookmark not defined.**, at 159, 170.

¹⁰³ Gary Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Re-Interpretation*, 90 YALE L.J. 1717 (1981).

¹⁰⁴ Gary Schwartz, *The Character of Early American Tort Law*, 36 U.C.L.A. L.REV. 641 (1989).

natural and which are unnatural. Some states followed *Rylands* in privileging mining as natural, but others, like Ohio and New Jersey, declared it unnatural and destructive. New York judges used *Rylands* to establish strict liability for ice falling from a tower,¹⁰⁵ and, in a dissenting opinion, to argue for liability for the growth of poison ivy—even though the ivy *naturally* grew on the land.¹⁰⁶ Other courts deemed any human activity involving a building, water, and/or ice might be deemed unnatural: ice and snow sliding off a steep roof¹⁰⁷ and a collapsing awning;¹⁰⁸ ice sliding off a hazardously steep roof;¹⁰⁹ a collapsing wall;¹¹⁰ a collapsing chimney;¹¹¹ a slab of zinc falling from a roof;¹¹² and a leaking pipe creating an icy sidewalk.¹¹³ State courts also extended *Rylands* to industrial activities and railroads,¹¹⁴ but many states seemed more enthusiastic about applying *Rylands* to all kinds of seemingly natural uses of water (or even non-uses of water), rather than to much more unnatural and hazardous industries, as a common sense reading of *Rylands* might have suggested. In short, the states' application of *Rylands* hardly inspired confidence or established clarity.

B. Fault and Industrial Growth

Some scholars have suggested that one reason the United States achieved such industrial dominance in the nineteenth century was because the fault rule shielded young enterprises from

105. *Davis v. Niagara Falls Tower Co.*, 64 N.E. 4, 5 (N.Y. 1902) (citing *Shipley v. Fifty Assocs.*, 106 Mass. 194 (1869)). Counsel for the plaintiff had cited *Shipley* and *Rylands* jointly in his arguments. *Davis v. Niagara Falls Tower Co.*, 171 N.Y. 336, 336 (1902).

106. *George v. Cypress Hills Cemetery*, 52 N.Y.S. 1097, 1103 (App. Div. 1898) (Woodward, J., dissenting).

107. *Hannem v. Pence*, 41 N.W. 657 (Minn. 1889).

108. *Waller v. Ross*, 110 N.W. 252 (Minn. 1907).

109. *Shipley v. Fifty Assocs.*, 101 Mass. 251 (1869), *aff'd*, 106 Mass. 194 (1870). The Massachusetts cases that apply *Rylands* so broadly and confusingly demonstrate that appointed life-term judges also had difficulty interpreting its rule clearly.

110. *Gorham v. Gross*, 125 Mass. 232, 238, 239 (1878).

111. *Gray v. Boston Gas Light Co.*, 114 Mass. 149 (1873) (citing *Shipley*, 101 Mass. 251).

112. *Khron v. Brock*, 11 N.E. 748 (1887) (citing *Gray*, 114 Mass. 149).

113. *Davis v. Rich*, 62 N.E. 375, 377 (Mass. 1902). Holmes was in the majority in Judge Knowlton's opinion in *Ainsworth v. Lakin*, 62 N.E. 746 (Mass. 1902), which also endorsed *Rylands*.

114. *See Chi. & N.W. Ry. v. Hunerberg*, 16 Ill. App. 387, 390-91 (1885); *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268 (1890); .

liability.¹¹⁵ One might interpret the adoption of *Rylands* to call that assumption into question, and suggest that economic growth happily co-existed with strict liability. However, at this stage I would be cautious about such an argument, because state courts applied *Rylands* to industrial activities in a relatively inconsistent manner, sometimes driven by periods of popular discontent. It is unclear in this study whether lower courts applied *Rylands* across the board to industry, or whether state courts applied it mainly to disfavored activities and protected more favored or powerful industries.

C. The Progressive “Search for Order”

After *Rylands*’s chaotic adoption, the schools of thought of legal realism, the consensus school, and law and economics school emerged – and these schools of legal thought turned their attention to rationalizing strict liability. The progressives and the legal realist movement sought to replace an arbitrary jurisprudence with a new order of empirical social science.¹¹⁶ Moral argumentation about property rights was abandoned in favor of Fowler Harper’s language in 1933 of “social engineering”¹¹⁷: Strict liability was justified by “allocating a probable or inevitable loss in such a manner as to entail the least hardship upon any individual and thus to preserve the social and economic resources of the community.” Strict liability emerged “from considerations of social expediency.”¹¹⁸ In 1938, the Restatement of the Law adopted “absolute liability” for ultrahazardous

¹¹⁵ See, e.g., Richard Posner, *A Theory of Negligence*, 1 JOURNAL OF LEGAL STUDIES 29 (1972).

¹¹⁶ The dominant critique by the progressives of nineteenth century law was that it had *too much* order. Nevertheless, a secondary strain of thought also motivated some progressives, realists, and later, the consensus school and the law and economics school: a concern that the legal system was incoherent, unstable, and disorderly without social science. Some legal realists focused their critique of disorder and irrationality in the law, such as Underhill Moore’s leading study of legal disorder, revealing that state judges conformed banking law not to general principles or to reason, but to local conventions, which differed from town to town. The result was a litany of arbitrary and conflicting rules. Underhill Moore, *An Institutional Approach to the Law of Commercial Banking* (1929). Jerome Frank represented another strain of legal realists critiquing legal disorder. Frank borrowed from psychoanalysis to portray decision-making as irrational and arbitrary. Again, the adoption of *Rylands* in the wake of tragic floods confirmed the power of fear, outrage, and timing. The progressives and the legal realist movement sought to replace an arbitrary jurisprudence, cloaking itself as science, with a new order of empirical social science.

¹¹⁷ HARPER, THE LAW OF TORTS. 334 (1933)

¹¹⁸ *Id.*

activities, and it used economic language to explain its rules.¹¹⁹ The advocates for strict liability increasingly turned to economic arguments in the following years,¹²⁰ and at the same time, strict liability replaced the fault rule in more and more areas of tort law. Along this line of thought, William Prosser turned to the same kinds of efficiency arguments, “placing liability upon the party best able to shoulder it . . . [A]s a matter of social engineering the responsibility must be his.”¹²¹ Prosser, the leader of the consensus school in torts,¹²² directly confronted the disorder in the *Rylands* line of cases, and while he recognized some incoherence in the case law, he created a new sense of order.¹²³ Thus, the disorder in American tort law, at least partly attributable to elected judges and their responsiveness and instability, appears to have contributed to the twentieth century critique of formalism and the budding of realism, critical legal studies, and law and economics.

CONCLUSION

This Article tells a story of elected judges responding quickly to disasters and public outrage by placing doctrinal checks on unnatural activities. On the one hand, it is a story of democracy shaping and modernizing the law to respond to public needs. On the other hand, it also demonstrates that too much democracy impeded this responsiveness: judges elected to long terms, even effectively life terms, were more responsive than their counterparts with shorter terms. According to my interpretation of this data, frequent elections tethered judges to special interests and party politics, and liberation from elections allowed judges to respond to events and public

¹¹⁹ RESTATEMENT ON TORTS (Second)

¹²⁰ Ehrenzweig, *Negligence without Fault* (1951), reprinted in 54 CA. L. REV. 1422 (1966); Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952); Prosser; Harper and James, *THE LAW OF TORTS* 743 (1956); Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L.REV. 401 (1959); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); J. FLEMING, *THE LAW OF TORTS*, 9-14 (3d Ed. 1965); Calabresi, *The Decision for Accidents*, 78 HARV. L REV. 713 (1965); Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?*, 33 LAW & CONTEMP. PROB. 429 (1968); CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

¹²¹ PROSSER, *HANDBOOK ON THE LAW OF TORTS* 430, 431, 468 (1941).

¹²² G. EDWARD WHITE, *TORT LAW IN AMERICA* 139-89.

¹²³ See WILLIAM PROSSER, *The Principle of Rylands v. Fletcher*, in *SELECTED TOPICS ON THE LAW OF TORTS* 135, 135 (1953).

opinion. Moreover, it is important not to romanticize the responsiveness of elected state judges, because their responsiveness led to a confusing and chaotic body of tort doctrine in the nineteenth century. The story of *Rylands*'s adoption is a sympathetic case in the light of the victims of Johnstown, but it also raises questions about how public opinion (and public whim) can override the protections of law afforded to unpopular minorities – in these cases, industrialists, entrepreneurs and property owners, and in other cases, criminal defendants, racial minorities, and other groups seeking the protection of the rule of law. In the twentieth century, some states reformed judicial elections, but the system generally became less responsive to the general public, and more responsive to large campaign contributors (particularly trial lawyers, insurance companies, and chambers of commerce), mobilized interest groups, and pork-barrel judicial politics.

The adoption of *Rylands* demonstrates the power of democracy in American law and the contingency of its legal protections. From one perspective, it is an inspiring tale, and in another perspective, it is a cautionary tale. First, do we want our legal system to be so responsive to recent events? And to shifts in public opinion? Perhaps in some areas, but less so where individual rights are concerned. In tort law and even more so in criminal law, fear and favor¹²⁴ are particularly powerful forces on judges. Given the reality that states will continue to elect judges (whether this choice is wise or unwise), the best solution appears to be longer terms. The adoption of *Rylands* suggests that shorter terms were less successful in achieving the goals of elections (accountability and responsiveness to the public) than longer terms, while leaving judges vulnerable to the biggest problems with elections (the influence of parties, money, and special interests). Those problems have gotten more severe in modern America, and seem to be getting worse.¹²⁵ Longer terms allow

¹²⁴ See, e.g., Judicial Code of Conduct, Canon 1 comment.

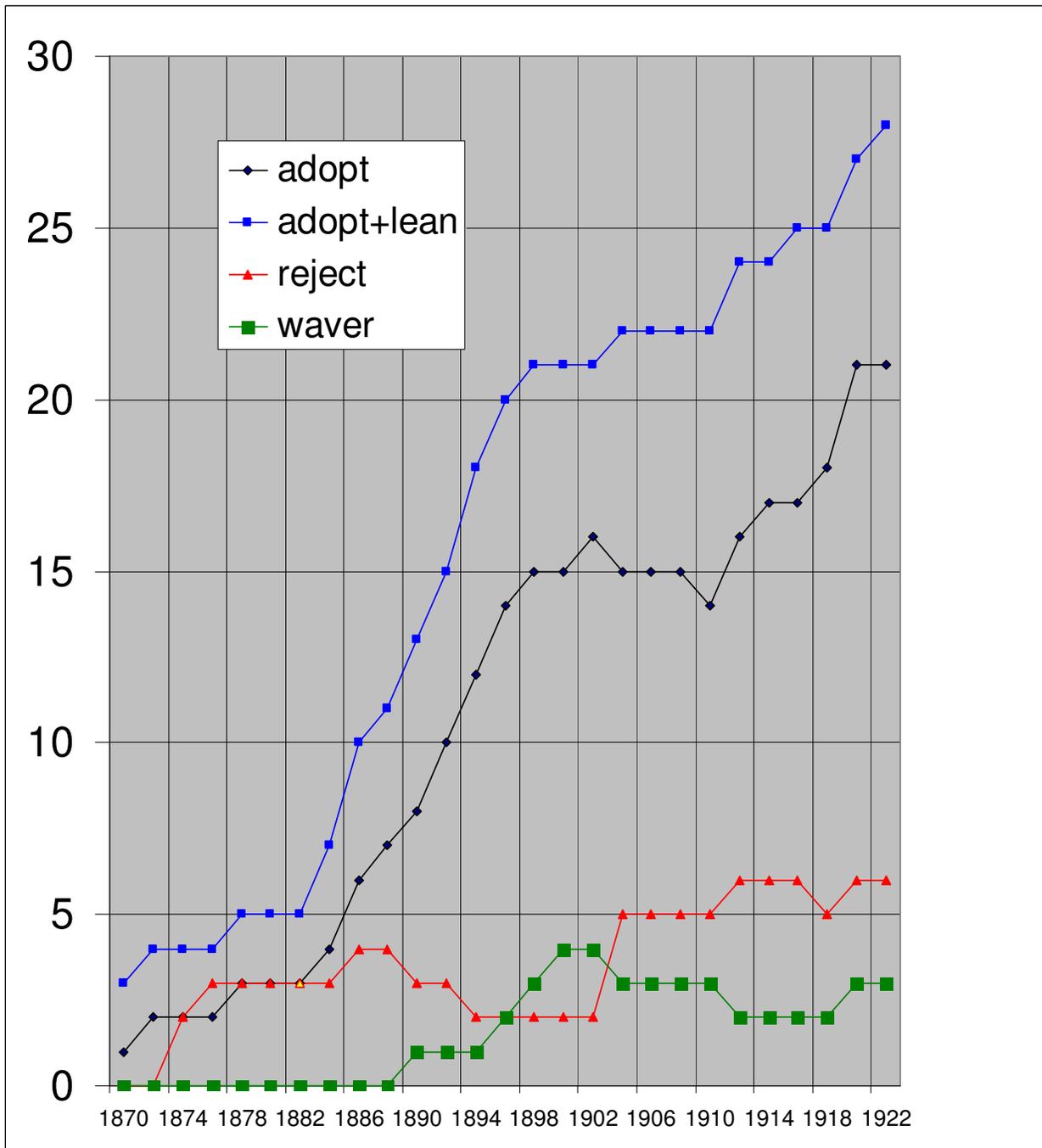
¹²⁵ See, e.g., Dorothy Samuels, *Justice for Sale*, N.Y. Times, Dec. 12, 2006; Adam Liptak and Janet Roberts, *Tilting the Scales: The Ohio Experience; Campaign Cash Mirrors High Court Rulings*, N.Y. TIMES, Oct. 1, 2006; Justice at Stake, “The New Politics of Judicial Elections, 2004: How Special Interest Pressure on Our Courts Has Reached a

judges to reject partisan “fear and favor,” and instead to interpret the public’s fears and needs, or simply to vote their conscience, as shaped by democratic principles. This historical moment suggests that, to restore judicial independence and the rule of law in tandem with democratic accountability, reformers ought to turn their attention to lengthening terms before they seek to reform the election process itself.¹²⁶

Tipping Point,” (<http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>). See generally [justiceatstake.org](http://www.justiceatstake.org) and [ajs.org](http://www.ajs.org).

¹²⁶ This paper is part of a dissertation that examines the rise of judicial elections in America, and concludes that some form of life-tenure or long terms is crucial for restoring judicial independence in state courts. In “A Six-Three Rule,” I argued that the Supreme Court should adopt a consensus rule – specifically a two-thirds supermajority rule – in order to overturn federal legislation. *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. (2003). This rule would serve to check judicial independence gone wild. There is no inconsistency between these two positions. Each individual judge should be protected from political pressure and the appearance of political pressure, but in order to balance that unique degree of power, judges should also be constrained by specific voting rules and norms of consensus and deference when checking the democratic process.

GRAPH: States Adopting and Rejecting *Rylands*



The light blue line (marked by squares on data points) is the total number of states adopting *Rylands*, leaning towards it, or adopting a similar rule.

The California flooding occurred in the early 1880s, and the Johnstown Flood was 1889. Note the rapid rise of adoptions from the late-1880s to 1900.

APPENDIX A: JUDICIAL SELECTIONS AND STRICT LIABILITY

The code (E-12) means the Supreme Court judges were elected to 12 year terms. (A-10) means they were appointed to 10 year terms. The code “A 1886” means the state adopted *Rylands* in 1886. “R 1892” means a rejection in 1892. Because this article studies the adoption of *Rylands* and strict liability from after the Civil War through the Progressive Era, the established dates for this periodization are 1865 (the end of the Civil War) through 1914 (the start of World War I).

ELECTED JUDICIARIES

A. The following states **elected** their Supreme Court judges to terms **ten years or longer** and **adopted** *Rylands* or its rule:

1. Georgia¹²⁷ (E-12) Leaning toward, 1872
2. Wisconsin,¹²⁸ E 10, adopt 1884
3. California¹²⁹ (E-12) adopt 1886
4. Colorado¹³⁰ (E-10) Lean 1887, 1893
5. Maryland¹³¹ (E-15), adopt 1890
6. Missouri¹³² (E-10), waver toward, 1893
7. New York,¹³³ (E 14), waver toward, 1890-1908
8. Pennsylvania,¹³⁴ (E-21), lean toward, 1891

(See note on West Virginia below).

B. The following states **elected** their Supreme Court judges to terms **shorter** than ten years and **adopted** *Rylands* or its rule:

1. Minnesota,¹³⁵ (E-6), adopt, 1872
2. Michigan¹³⁶ (E-8), leaning toward, 1884

¹²⁷ Georgia adopted strict liability for artificial water drainage in 1872, when its Supreme Court was elected to twelve year terms. *Phinizy v. City Council*, 47 Ga. 260, 266 (1872).

¹²⁸ *Atkinson v. Goodrich Transp. Co.*, 18 N.W. 764, 775 (Wis. 1884)

¹²⁹ *Colton v. Onderdonk*, 10 P. 395, 397-98 (Cal. 1886)

¹³⁰ *G., B. & L. Ry. v. Eagles*, 13 P. 696, 697-98 (Colo. 1887); *see also* *Sylvester v. Jerome*, 34 P. 760, 762 (Colo. 1893); *Larimer County Ditch Co. v. Zimmerman*, 34 P. 1111, 1112 (Colo. Ct. App. 1893).

¹³¹ *Susquehanna Fertilizer Co. v. Malone*, 20 A. 900, 901 (Md. 1890); *Baltimore Breweries' Co. v. Ranstead*, 28 A. 273, 274 (Md. 1894).

¹³² *Mathews v. St. Louis & S.F. Ry.*, 24 S.W. 591, 598 (Mo. 1893); *see also* *French v. Ctr. Creek Powder Mfg.*, 158 S.W. 723, 725 (Mo. Ct. App. 1913). Missouri is categorized as “wavering towards,” because in 1898 the Missouri Supreme Court declined to extend its interpretation of *Rylands* to the use of electricity and noted in 1898 that *Rylands* “has not met with approval in all American jurisdictions,” but it did not criticize *Rylands* more broadly than that. *Gannon v. Laclede Gaslight Co.*, 47 S.W. 907, 912 (Mo. 1898).

¹³³ *Deigleman v. New York, L. & W. Ry. Co.*, 12 N.Y.S. 83 (Sup. Ct. 1890); *Schmeer v. Gaslight Co.*, 42 N.E. 202 (N.Y. 1895); *Davis v. Niagara Falls Tower Co.*, 64 N.E. 4, 5 (N.Y. 1902); *Duerr v. Consolidated Gas Co.*, 83 N.Y.S. 714 (App. Div. 1903).

¹³⁴ *Robb v. Carnegie Bros.*, 22 A. 649, 650-51 (Pa. 1891); *Lentz v. Carnegie Bros.*, 23 A. 219, 220 (Pa. 1892); *Hauck v. Tide Water Pipe-Line Co.*, 26 A. 644, 645 (Pa. 1893)

¹³⁵ *Cahill v. Eastman*, 18 Minn. 324, 334-37, 344-46 (1872).

3. Nevada¹³⁷ (E-6), leaning toward, 1885
4. Illinois¹³⁸ (E-9) adopt 1885, 1887
5. Iowa¹³⁹ (E-6) adopt 1886
6. Alabama¹⁴⁰ (E-6) Lean, 1889
7. Ohio¹⁴¹ (E-6), adopt, 1891
8. Oregon¹⁴² (E6, adopt 1893
9. South Carolina,¹⁴³ E6, adopt 1894
10. Wyoming,¹⁴⁴ E8 Adopt 1894
11. Kansas¹⁴⁵ (E-6) adopt 1897
12. Utah¹⁴⁶, E6 leaned, 1898
13. Tennessee,¹⁴⁷ E8, Adopt 1900

Post-1900:

14. Montana¹⁴⁸ E6, Adopt 1904 (statehood in 1889)
15. Indiana¹⁴⁹ (E-6) adopt 1912

C. The following states **elected** their Supreme Court judges to terms **shorter** than ten years and **rejected** *Rylands*.

1. Washington¹⁵⁰, E6, Reject 1893
2. Texas,¹⁵¹ E6, wavering and leaning against, 1900
3. Kentucky¹⁵² E8, Rejected 1902
4. North Dakota¹⁵³, E6, rejected 1911 (statehood in 1889)

¹³⁶ *Boyd v. Conklin*, 20 N.W. 595, 598 (Mich. 1884).

¹³⁷ *Boynton v. Longley*, 6 P. 437, 441 (Nev. 1885).

¹³⁸ *Chi. & N.W. Ry. v. Hunerberg*, 16 Ill. App. 387, 390-91 (1885); *Seacord v. People*, 13 N.E. 194, 200 (Ill. 1887).

¹³⁹ *Phillips v. Waterhouse*, 28 N.W. 539, 540 (Iowa 1886).

¹⁴⁰ *City of Eufaula v. Simmons*, 6 So. 47, 48 (Ala. 1889); *Drake v. Lady Ensley Coal Co.*, 14 So. 749, 751 (Ala. 1894).

¹⁴¹ *Columbus & Hocking Coal & Iron Co. v. Tucker*, 26 N.E. 630, 633 (Ohio 1891); *Defiance Water Co. v. Olinger*, 44 N.E. 238, 239-40 (Ohio 1896)

¹⁴² *Esson v. Wattier*, 34 P. 756, 757 (Or. 1893).

¹⁴³ *Frost v. Berkeley Phosphate Co.*, 20 S.E. 280, 283 (S.C. 1894).

¹⁴⁴ *Clear Creek Land & Ditch Co. v. Kilkenny*, 36 P. 819, 820 (Wyo. 1894).

¹⁴⁵ *Reinhart v. Sutton*, 51 P. 221, 222 (Kan. 1897).

¹⁴⁶ *N. Point Consol. Irrigation Co. v. Utah & Salt Lake Co.*, 52 P. 168, 173 (Utah 1898).

¹⁴⁷ *Ducktown Sulphur, Copper & Iron Co. v. Barnes*, 60 S.W. 593, 600-01 (Tenn. 1900); *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 664 (Tenn. 1904).

¹⁴⁸ *Longtin v. Persell*, 76 P. 699, 700 (Mont. 1904).

¹⁴⁹ *Niagara Oil Co. v. Ogle*, 98 N.E. 60, 62 (Ind. 1912); *Niagara Oil Co. v. Jackson*, 91 N.E. 825, 826-27 (Ind. Ct. App. 1910). *Contra* *Lake Shore & Mich. S. Ry. v. Chi., Lake Shore & S. Bend Ry.*, 92 N.E. 989, 991-92 (Ind. Ct. App. 1910) (recognizing that American law holds unnatural users liable only for negligence); *Postal Tel. & Cable Co. v. Chi., Lake Shore & S. Bend Ry.*, 97 N.E. 20, 21 (Ind. Ct. App. 1912) (same). The Indiana Supreme Court resolved this controversy in 1912 by adopting.

¹⁵⁰ *Klepsch v. Donald*, 30 P. 991, 993 (Wash. 1892).

¹⁵¹ *Gulf, Colorado & Santa Fe Railway v. Oakes*, 58 S.W. 999, 1000 (Tex. 1900); and *Barnes v. Zettlemyer*, 62 S.W. 111, 112 (Tex. Civ. App. 1901). For pro-*Rylands* decisions by lower courts, see *Texas & Pacific Railway v. O'Mahoney*, 50 S.W. 1049, 1052 (Tex. Civ. App. 1899); *Texas & Pacific Railway v. O'Mahoney*, 60 S.W. 902, 904 (Tex. Civ. App. 1900); and *Texas & Pacific Railway v. Frazer*, 182 S.W. 1161, 1161-62 (Tex. Civ. App. 1916).

¹⁵² *Triple-State Natural Gas & Oil Co. v. Wellman*, 70 S.W. 49, 50 (Ky. 1902);

¹⁵³ *Langer v. Goode*, 131 N.W. 258, 259 (N.D. 1911)

D. The following states **elected** their Supreme Court judges to terms **shorter** than ten years and **were silent on *Rylands***, meaning that the state applied the fault rule, not strict liability to such cases of hazardous, artificial or “unnatural” activities:

1. Arkansas E8, silent
2. Nebraska, E6, silent¹⁵⁴
3. North Carolina, E8, silent
4. South Dakota (statehood in 1889), E6, silent
5. Idaho¹⁵⁵ (statehood in 1890) (E-6), silent through 1914, adopted in 1917

Total of 11 rejecting or silent states through 1900, and 9 through 1914.

APPOINTED JUDICIARIES:

E. The following states **appointed** their Supreme Court judges and **rejected** or **were silent on *Rylands***, again meaning they applied the fault rule to such cases.

Terms shorter than 10 years:

1. Mississippi, A9, silent
2. Maine, A7, Silent
3. Connecticut (A-8) Silent
4. Rhode Island, A-at pleasure of legislature, silent

Terms longer than 10 years:

5. Delaware (A-12) Silent
6. Virginia (A12) Silent¹⁵⁶
7. New Hampshire,¹⁵⁷ A-Good behavior, Reject 1873

F. The following states **appointed** their Supreme Court judges and **adopted *Rylands***:

Terms shorter than 10 years

8. Vermont¹⁵⁸, A2, Adopt 1892
9. South Carolina,¹⁵⁹ A 6 Adopt 1894
10. New Jersey,¹⁶⁰ A 6/7, waver towards

Terms longer than 10 years:

11. Massachusetts¹⁶¹ A-Good Behavior, Adopted 1868

¹⁵⁴ Nebraska adopted *Rylands* in 1919.

¹⁵⁵ *Burt v. Farmers' Co-operative Irrigation Co.*, 30 Idaho 752, 767 (1917)

¹⁵⁶ Virginia adopted *Rylands* in 1918, after the relevant time period of the study of the Gilded Age and Progressive Era (1876-1914).

¹⁵⁷ *Brown v. Collins*, 53 N.H. 442, 442-47 (1873).

¹⁵⁸ *Gilson v. Del. & Hudson Canal Co.*, 26 A. 70, 72 (Vt. 1892).

¹⁵⁹ *Frost v. Berkeley Phosphate Co.*, 20 S.E. 280, 283 (S.C. 1894).

¹⁶⁰ *Beach v. Sterling Iron & Zinc Co.*, 33 A. 286 (N.J. Ch. 1895); *Sterling Iron & Zinc Co. v. Sparks Mfg. Co.*, 41 A. 1117, 1117 (N.J. 1896); *Grey v. Mayor of Paterson*, 42 A. 749, 752 (N.J. Ch. 1899).

The following states were not included because of some complications and questions, or they were admitted as states later:

West Virginia:¹⁶² (E12): rejected 1902, adopted 1911. As of 1914, West Virginia adopted *Rylands*, and a good case can be made that it should be counted as “wavering towards.” Nevertheless, I do not include the state as adopting as of 1914 (including it would lend more support to the pattern I identify). I count it as silent as of 1900.

Florida (silent) appointed its judges to six year terms through 1887, and then switched to elections to six year terms. Because it had both selection methods in this time period, it is complicated to include it in one category or the other. An alternative would be to include Florida in both the appointed category and the elected to short-terms category. Because Florida was silent on judicial elections, its inclusion in both categories would only strengthen this Article’s statistical conclusions because the states with judges elected to long terms would have been even more likely to adopt *Rylands* than the other states.

New Mexico: 1912 statehood

Arizona: 1912 statehood

Oklahoma, E6, 1907 statehood

Louisiana A10, Lean toward, civil law system.

APPENDIX B: TABLES FOR DIFFERENT GROUPINGS

All states for 1865-1900

	adopting	Rejecting/silent
Appointed	4	7
Elected, short term	13	11
Elected, long term	8	1 ¹⁶³

1865-1900, without New England

	adopting	Rejecting/silent
Appointed	2	3
Elected, short term	13	11
Elected, long term	8	1

1865-1900, without the very recently admitted western states (post-1889):

	adopting	Rejecting/silent
Appointed	4	7

¹⁶¹ Ball v. Nye, 99 Mass. 582 (1868).

¹⁶² Weaver Mercantile Co. v. Thurmond, 70 S.E. 126, 128-29 (W. Va. 1911) (adopting *Rylands* and noting its adoption by Minnesota and Massachusetts). *Contra* Vieth v. Hope Salt & Coal Co., 41 S.E. 187, 188-90 (W. Va. 1902)

¹⁶³ West Virginia was silent in this era.

Elected, short term	13	7
Elected, long term	8	1

1865-1900, without New England and without western states

	adopting	Rejecting/silent
Appointed	2	3
Elected, short term	13	7
Elected, long term	8	1

1865-1900, without wavering states (no NY, NJ, MO, but with TX and IN)

	adopting	Rejecting/silent
Appointed	3	7
Elected, short term	13	11
Elected, long term	6	0

1865-1900, without wavering states and without New England

	adopting	Rejecting/silent
Appointed	1	3
Elected, short term	13	11
Elected, long term	6	0

1865-1900, without wavering states and without recently admitted western states

	adopting	Rejecting/silent
Appointed	3	7
Elected, short term	13	7
Elected, long term	6	0

1865-1900, without wavering states, without recently admitted western states, and without New England

	adopting	Rejecting/silent
Appointed	1	3
Elected, short term	13	7
Elected, long term	6	0

All states for 1865-1914

	adopting	Rejecting/silent
Appointed	4	7
Elected, short term	15	9
Elected, long term	8	0

1865-1914, with no New England states

	adopting	Rejecting/silent
Appointed	2	3
Elected, short term	15	9
Elected, long term	8	0

1865-1914, without wavering states (no IN, NJ, NY, MO, but with TX)

	adopting	Rejecting/silent
Appointed	3	7
Elected, short term	14	9
Elected, long term	6	0

1865-1914, without wavering states and without New England

	adopting	Rejecting/silent
Appointed	1	3
Elected, short term	14	9
Elected, long term	6	0