

October 2008

The Twist of Long Terms: Disasters, Elected Judges, and American Tort Law

Jed H. Shugerman Mr.

Harvard Law School, jshugerman@law.harvard.edu

Follow this and additional works at: https://lsr.nellco.org/harvard_faculty

Part of the [Judges Commons](#), and the [Torts Commons](#)

Recommended Citation

Shugerman, Jed H. Mr., "The Twist of Long Terms: Disasters, Elected Judges, and American Tort Law" (2008). *Harvard Law School Faculty Scholarship Series*. 25.

https://lsr.nellco.org/harvard_faculty/25

This Article is brought to you for free and open access by the Harvard Law School at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Harvard Law School Faculty Scholarship Series by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

**The Twist of Long Terms:
Disasters, Elected Judges, and American Tort Law¹**

Abstract

The received wisdom is that American judges rejected strict liability through the nineteenth and early twentieth century. To the contrary, a majority of state courts adopted *Rylands v. Fletcher* and strict liability for hazardous or unnatural activities 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.

In moving from fault to strict liability, these judges were essentially responding to increased public fears of industrial or man-made hazards. Elected courts were more populist: They were more likely to adopt strict liability than appointed courts. But surprisingly, state courts elected to longer terms were *the most populist*. Many of these judges never expected to face another election, but even without direct political pressure, they were the most responsive group of judges in adopting *Rylands* after the floods.

This historical episode illuminates the differences between types of political influence on judges. Judicial elections generally may produce judges more sympathetic to public opinion and more responsive to recent events. Longer terms, shielding judges from opposing political pressure from industry favoring the fault rule, then allowed judges to follow those sympathies or new perceptions of public interest in favor of strict liability.

The historical record suggests that judicial elections plus long terms shaped a more responsive bench. A shorthand for these effects are: filtering, role fidelity, and fear and favor. First, these elections created a populist filter: Elections seemed to have filtered out some elite jurists from major urban centers and filtered in more local lawyer-politicians, who would be more connected to public opinion. Second, borrowing from the language used by nineteenth-century advocates of judicial elections and by modern historians, I suggest that the elected judges' "fidelity" to the people led them to perceive public opinion as an important factor in their decisions.

Even with filtering and role fidelity, judges elected to short terms would still face the reality of "fear and favor," due to special interests and partisan renomination politics. Elected judges with more job security could be more faithful to their role (hence, "role fidelity") and could follow their own perception of public interest or public opinion, rather than industrial interests. The Article concludes with some priorities for judicial reform based upon this historical episode.

¹ Selected for the Yale-Stanford Junior Faculty Forum, 2007; and the Conference on Empirical Legal Studies, New York University, 2007.

Contents

Introduction 3

1. RYLANDS: REJECTION AND ADOPTION 5

 A. *Fletcher v. Rylands: The Case* 5

 B. The Johnstown Flood and the American Adoption of *Rylands* 8

II. PATTERNS OF ADOPTION:

 A. Overview 13

 B. Federal and State 15

 C. Elected vs. Appointed, Short and Long Term 17

 D. The “Switch in Time” Judges 21

III. JUDICIAL ELECTIONS: HISTORY AND INTERPRETATIONS 23

 A. A More Local, Small Town Bench 23

 B. Judicial Corruption, Reform, and Longer Terms 25

 C. The Historical Evidence of Hotly Competitive Judicial Elections 30

 D. The “Switch in Time” Judges 34

 E. A Theory: Filters, Role fidelity, Fear and Favor 37

Conclusion 41

Graph: The Adoption and Rejection of *Rylands* 43

Appendix A. Judicial Selection and Strict Liability 45

Appendix B: Tables for different Groupings 50

Introduction

Since the 1980s, judicial elections have become increasingly nasty, noisy, and costly.² Not coincidentally, they are drawing more academic attention, especially for empirical study. Most studies focus on selection method (divided into categories of appointment, partisan election, non-partisan election, and merit plan with retention elections). The research demonstrates, unsurprisingly, that elected judges tend to reach legal results more in following with local public opinion, and they hypothesize that these elected judges are subject to greater political pressure in deciding cases than other judges are.³

If the key question is the degree of judicial independence from political pressure, then term length is probably more significant than the selection method, but this question receives less attention. The studies on term length conclude, again unsurprisingly, that when judges have less time remaining on their terms, they become more responsive to public opinion.⁴ The implication is that shorter terms

² See, e.g., David Pozen, “The Irony of Judicial Elections,” 108 *Colum. L. Rev.* 265 (2008).

³ See, e.g., Sanford C. Gordon and Gregory A. Huber, “The Effect of Electoral Competitiveness on Incumbent Behavior,” *Quarterly Journal of Political Science*, 2 (May 2007): 107-138; Alexander Tabarrok and Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 *JOURNAL OF LAW AND ECONOMICS* 157 (1999) (finding damage awards higher in elected courts, particularly against out-of-state businesses, and highest in partisan-election states, and concluding that judges, not juries, were the cause); Gerald F. Uelman, *Elected Judiciary*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 170, 171 (Leonard W. Levy, Kenneth L. Karst & John G. West, Jr. eds., Supp. I 1992) (showing meaningful differences between judges selected by executive appointment compared with judges selected by other methods, such as elections); Daniel R. Pinello, *The Impact of Judicial Selection Method on State-Supreme-Court Policy* (1996); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 *Int’l Rev. L. & Econ.* 13 (1992); Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make?*, 5 *Just. Sys. J.* 1 (1979); F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 *J. Legal Stud.* 205 (1999); Daniel R. Pinello, *The Impact of Judicial-Selection Method on State-Supreme-Court Policy* 130 (1995) (observing that appointed judges are more likely than elected judges to adopt less popular criminal procedure rules); but see John Blume and Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection*, 72 *S.C. L. Rev.* 465 (1999) (showing no significant effect of selection methods).

⁴ See, e.g., Gregory A. Huber and Sanford Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 *AM. J. POLI. SCI.* 247 (2004) (finding that judges give longer sentences when they get closer to re-election); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 *AM. POL. Q.* 485, 497-98 (1995) (finding that state supreme court judges are less likely to vote against the death penalty as they approach the end of the judicial term); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 *J. Pol.* 427, 438-39 (1992) (same); Richard R.W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 *J. CRIM. L. & CRIMINOLOGY* 609, 637 (2003) (finding that Chicago judges were more likely to sentence defendants to death when they faced election that year); Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 *ALB. L. REV.* 1265 (1999) (finding that, as judges’ term lengths increase, they are more likely to hear a challenge to an abortion statute under the court’s discretionary powers); see also Paul Brace &

make judges more politically responsive and less independent. Ignoring the political consequences of a decision near election time “would be like ignoring a crocodile in your bathtub.”⁵ This was a colorful comparison offered by the late California Supreme Court justice, Otto Kaus, soon after Chief Justice Rose Bird and two colleagues lost their seats in 1986. One observer underscored the point: “The ability to ignore the crocodile doubtless depends on how long before you have to take a bath.”⁶

Given this common-sense conventional wisdom, an important episode in American legal history presents a puzzle. In the late nineteenth century and early twentieth century, state courts adopted *Fletcher v. Rylands* and strict liability for unnatural or hazardous activities in the wake of the catastrophic Johnstown Flood and other high-profile flooding disasters. Torts scholars and historians had universally concluded the American courts had rejected *Rylands* and defended the negligence requirement in the late nineteenth century, but in fact, a majority of state courts shifted from the fault rule to *Rylands* and strict liability by 1900. The media and legal commentary had perceived the negligence requirement as the barrier to justice for Johnstown, and in the following years, state courts changed the doctrine, suddenly turning to moralistic arguments.⁷

In moving from fault to strict liability in cases pitting industry against public fears, these judges were lining up with public opinion. Elected courts were more populist: they were more likely to adopt strict liability than appointed judges.⁸ But surprisingly, state courts elected to longer terms were *the most populist*.

This article does not offer this episode simply to challenge the conventional wisdom. This key moment in the development of American tort law helps to distinguish between types of political influence on judges and to explain why judges elected to long terms might have been so responsive. By interpreting the available historical materials, I suggest that judicial elections generally may have produced judges more sympathetic to public opinion and more responsive to recent events. First, these elections created a populist filter: Elections seemed to have filtered out some elite jurists from major urban centers and filtered in more local lawyer-politicians, who would be more connected to public opinion. Second, elected judges then conceived of their legitimacy as being democratically accountable – even if they never faced another election. Borrowing from the language used by nineteenth-

Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 *Pol. Res. Q.* 5, 22-24 (1995) (finding that partisan electoral competition correlates positively with upholding death sentences in state supreme courts);

⁵ Paul Reiding, *The Politics of Judging*, 73 *A.B.A.J.*, April 1987, at 58.

⁶ Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1583 n.361 (1990).

⁷ See *The Floodgates of Strict Liability*, 110 *YALE L.J.* 333 (2000), and *A Watershed Moment*, 2 *JOURNAL OF TORT LAW* (forthcoming 2008).

⁸ This finding confirms Peter Karsten’s suggestion that judicial elections may have led state courts to favor plaintiffs in tort suits in the late nineteenth century. PETER KARSTEN, *HEART VS. HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA* 314-15 (1997).

century advocates of judicial elections and by modern historians, I suggest their “fidelity” as elected judges led them to perceive public opinion as an important factor in their decisions. With their sympathies shaped by direct democracy, long terms (ten years or more) shielded some of these elected judges from industry favoring the fault rule. These judges were more able to follow those sympathies or new perceptions of public interest in favor of strict liability.

This Article proceeds in three parts. Part I sets out the background of these cases, focusing on the English strict liability precedent, *Fletcher v. Rylands* and its reception in America. Part II contrasts federal and state judges, and then contrasts state judges along the following lines: elected and appointed judges, and then judges with short terms and judges with long terms. Two patterns emerge. First, when tragic events made the risks of industrialization more salient in the late nineteenth century, elected judges were more populist and more responsive than appointed judges in adopting strict liability. Second, judges elected to relatively long terms were even more responsive and populist than judges elected to shorter terms, a surprising result.

Part III offers some theories based on interpretations of the available historical record on state judicial elections to explain these patterns. I first focus on the practice of judicial elections, with evidence that earning a party’s nomination involved complex balancing of factional politics, regional rivalries, and various special interests. In the general elections, the races were close and competitive, with some judicial candidates simply riding the party machine, while others engaged in more direct grassroots brass-knuckle (and sometimes nasty) campaigning. Part III also traces the adoption of longer terms in some states in order to insulate judges from special interests, corruption, and partisanship. I conclude with some reflections of popular constitutionalism and the rule of law, and I suggest reforms for judicial elections and lengthening terms.

I. RYLANDS: REJECTION AND ADOPTION

A. *Fletcher v. Rylands: The Case*

John Rylands, a textile manufacturer, was probably the wealthiest industrialist in England in the middle of the nineteenth century.⁹ In 1860, he hired a contractor to dig a large ditch and create a reservoir to add water power for one of his mills. The

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

reservoir collapsed into an abandoned coal-mining shaft which connected to Thomas Fletcher's neighboring coal mines.¹⁰ The reservoir flood destroyed those mines.¹¹

An initial arbitration proceeding (much like a special master) framed one issue for the English courts: Could John Rylands be held liable without fault?¹² 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.¹³ Fletcher then appealed to the Exchequer 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.¹⁴

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.¹⁵

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."¹⁶ 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*¹⁷ and consistently expanded their application of its

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

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

¹² Kenneth Abraham, "Rylands v. Fletcher: Tort Law's Conscience," in TORTS STORIES 211 (2003).

13. *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).

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

15. *Id.* at 280.

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

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

doctrine.¹⁸ One expansion was a notable opinion by Judge Oliver Wendell Holmes.¹⁹ Then the tide turned against *Rylands*. The high courts in New York,²⁰ New Hampshire²¹ and New Jersey²² famously rejected *Rylands* in the 1870s in cases that many of today's tort casebooks continue to offer as representative of American tort law. Pennsylvania rejected *Rylands* in *Pennsylvania Coal Co. v. Sanderson* in 1886, producing the last of the major *Rylands* rejections of the nineteenth century.²³

With several prestigious state courts in the northeast rejecting *Rylands*, America's treatise writers did, too.²⁴ The academics' dismissal of *Rylands* fit into a standard historical interpretation of American tort law: pro-industry fault liability dominated the nineteenth and early twentieth centuries,²⁵ and the mid-twentieth century marked the gradual rise of strict liability.²⁶ Many prominent torts casebooks and legal historians have featured this supposed rejection of *Rylands* as a centerpiece for their historical claims about the dominance of the fault rule.

It is true that *Rylands* had a mixed reception in America for about two decades, and it is true that federal courts almost completely ignored it well into the twentieth century.²⁷ As of 1883, only two states adopted *Rylands* explicitly, and as of 1889, a mere six states had. However, by the turn of the twentieth century, a majority of states had adopted *Rylands* explicitly or had adopted a general strict liability rule for unnatural activities, hazardous activities, or *Rylands*-like storage of large amounts of

¹⁸ *Shingley v. Fifty Assocs.*, 101 Mass. 251 (1869), *aff'd*, 106 Mass. 194 (1870). See *infra* Section II.B for other Massachusetts cases.

¹⁹ *Davis v. Rich*, 62 N.E. 375 (Mass. 1902).

²⁰ *Losee v. Buchanan*, 51 N.Y. 476 (1873).

²¹ *Brown v. Collins*, 53 N.H. 442 (1873).

²² *Marshall v. Welwood*, 38 N.J.L. 339 (1876).

²³ 6 A. 453 (Pa. 1886). See *A Watershed Moment*, 2 J. TORT LAW, for more discussion of *Sanderson* and these other cases.

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).

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 See Shugerman, *Floodgates*, *supra*.

water (and these cases do not include the separate line of strict liability cases for fire or blasting).²⁸

What accounts for this dramatic reversal in the late 1880s and 1890s? In a previous article, I suggested that larger social, economic, and political forces had set the table for the adoption of strict liability: increasingly heavy industries developing side-by-side with urban or residential areas; business cycles (bust in the 1870s, boom in the 1880s, and bust in the 1890s); and the rise of the Populists as critics of industry's excess in the 1890s.²⁹ While these factors contributed to the small bump towards *Rylands* in the 1880s,³⁰ they were not sufficient to explain the enormous spike in the 1890s. The trigger for this wave of adoptions was a series of flooding disasters in California, Pennsylvania, and Texas.³¹ After a series of powerful floods in the 1880s (both natural and unnatural) and a long political and legal battle over destructive hydraulic gold-mining techniques, California adopted *Rylands* in 1886.³² 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 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 world.³³ The club was known as “The Bosses Club” because of its titans-of-industry membership, including Andrew Carnegie, Andrew Mellon, and Henry Clay Frick. The club’s owners and employees disregarded the dam’s leaks, crumbling foundation, and multiple warnings of structural problems.³⁴

²⁸ By 1900, *eighteen* states adopted *Rylands*, with seven more leaning towards *Rylands*. See the graph at the end of this article for the patterns of adopting. “Leaning” means that the state had adopted a very similar rule without relying on *Rylands*, or that they had relied on *Rylands*, but with some recognition that it was controversial.

²⁹ See *The Floodgates of Strict Liability*, 110 Yale L. J. 333 (2000).

³⁰ In the mid-1880s, the Great Lakes states of Michigan, Wisconsin, and Illinois, plus Iowa adopted or leaned towards *Rylands*. This trend towards *Rylands* before the Johnstown Flood may be attributable to the factor discussed in *The Floodgates of Strict Liability* as a background factor: urban growth and residential expansion near industrial activity. Chicago and other areas of the Midwest were experiencing rapid urban and industrial growth in the 1880s. See John T. Cumbler, *Northeast and Midwest United States: An Environmental History* 138-41 (2005).

³¹ See *The Floodgates of Strict Liability*, 110 YALE L. J. 333 (2000).

³² Severe floods struck California periodically through the nineteenth century, particularly in 1861-62, 1871, and 1890, leading to a number of deaths. WILLIAM B. SECREST, JR. AND WILLIAM B. SECREST, SR., *CALIFORNIA DISASTERS, 1800-1890*, at 93-97, 129-131, 187-191 (2006).

³³ DISASTER, DISASTER, DISASTER 17 (Douglas Newton ed., 1961) [hereinafter DISASTER].

³⁴ DAVID MCCOLLOUGH, *THE JOHNSTOWN FLOOD* (1968).

In a stormy night on May 31, 1889, the dam in the mountains collapsed, unleashing 20 million tons of water into the valley below.³⁵ One of the most deadly disasters in American history, the flood completely destroyed Johnstown, killing two thousand people.³⁶ The Flood was “the biggest news story since the murder of Abraham Lincoln.”³⁷ The public focused its anger on the South Fork Club and its wealthy members,³⁸ and the media called on the club members to compensate the Johnstown victims.³⁹ 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.”⁴⁰ Newspapers around the country condemned the club for being “negligent,” even criminally negligent, or even guilty of manslaughter.⁴¹ Mobs responded by violently attacking the club.⁴²

Just two months after the Johnstown Flood, a note in the influential *American Law Review* described the horrors of the flood and called for courts to adopt *Rylands*.⁴³ 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

35. See DISASTER, *supra* note 33, at 18.

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

37. *Id.* at 203. “the greatest outpouring of popular charity the country had ever seen.” 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

38. *Id.* at 237.

39. See *id.* at 241.

40. *Johnstown Tribune*, July 8, 1889. See also “Report of the Committee on the Cause of the Failure of the South Fork Dam,” American Society of Civil Engineers, *Transactions*, 24 (June, 1891): 456-457.

41 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.

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

43 Note, *The Law of Bursting Reservoirs*, 23 AM. L. REV. 643 (1889). 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.

pile of “a great mass of earth, stones, trees, houses, railway locomotives, cars, human bodies, and what not . . . very deep and . . . very solid.”⁴⁴ The author then offers *Fletcher v. Rylands* as “[t]he best answer which has ever yet been given,” and which had been “adopted by several American courts, though denied by some.”⁴⁵ 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.⁴⁶

Consistent with the *American Law Review's* concern, the victims of the Johnstown Flood failed in their tort suits against the club and its members. Several legal problems undermined their cases, but the negligence requirement receive a great deal of blame in the media. Nancy Little, who lost her husband in the flood, sued the club, alleging negligence by the club. The jury returned a verdict for the club.⁴⁷ Ann Jenkins lost her parents and a brother, and survived only because a spike pierced her foot and held her from being swept away. Her suit against the club for negligence also resulted in a jury verdict for the club – almost five years after the flood because of repeated delays by the club's lawyers.⁴⁸ One business, Jacob J. Strayer, filed suit, and argued that individual members of the club had been negligent, but newspapers reported that his lawyers were “adverse to any proceedings,” implicitly because they could not prove members' individual negligence.⁴⁹ After Strayer abandoned his suit in 1891, a group of Johnstown businessmen hired lawyers for their own torts suit against the club, but these lawyers also concluded that the suit would be unsuccessful. As the newspapers reported, the lawyers explained that the club itself had no assets, and that individual members of the club would be liable only if the plaintiffs could prove individual negligence.⁵⁰ The media generally picked up on the

⁴⁴ *Id.* at 646.

⁴⁵ *Id.* at 647.

⁴⁶ *Id.*

⁴⁷ *Johnstown Weekly Democrat*, July 24, 1891

⁴⁸ *Johnstown Tribune*, December 2, 1892, November 1, 1893, May 9, 1894.

⁴⁹ *Johnstown Tribune*, June 18, 1891.

⁵⁰ *Johnstown Tribune*, June 18, December 15, 1891; February 23-24, May 22, 1892, May 23, 1893, November 23, 1896, June 26, 1897; *Johnstown Weekly Democrat*, June 19, 1891, May 18, 1894. See

requirement to prove individual negligence as the legal obstacle to these suits, even though the corporate veil separating the judgment-proof club from its deep-pocket members (who were not legally liable for the club's actions) was the more direct problem.⁵¹

While the trial courts had frustrated the victims, the Pennsylvania Supreme Court was responding quickly on a broader doctrinal level. Three years before the flood, the Pennsylvania Supreme Court went out of its way to repudiate *Rylands* in *Sanderson*.⁵² The court referred to mine-water runoff or to mining in general as “natural” twenty-six times,⁵³ 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.⁵⁴ 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.”⁵⁵ Before the Flood, the court emphasized the “great public interest” of industry's unfettered development, and dismissed the “mere personal [and] trifling inconveniences” that were caused by industrial damage, and which must “give way to the necessities of a great community.”

The Johnstown Flood swept in a new attitude toward big industry and liability. In *Robb v. Carnegie Bros.*,⁵⁶ 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.⁵⁷ 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.⁵⁸ One of these judges was Judge Silas Clark, the author of *Sanderson* who had been so solicitous of industry.⁵⁹ The

Nathan Shappee, *A History of Johnstown and the Great Flood of 1889: A Study of Disaster and Rehabilitation* (dissertation, University of Pittsburgh, 1940).

51. McCollough, *The Johnstown Flood*, at 258-59 (summarizing his reading of local and national papers and noting how the victims' lawyers and the media stressed the difficulty of proving individual negligence).

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

53. *Id.* at 456.

54. *Id.* at 454.

55. *Id.* at 462-63.

56. 22 A. 649 (Pa. 1891).

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

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

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

Robb ruling limited “natural activities” to the natural “develop[ment of] the resources of his property,” which sharply distinguished *Sanderson*.⁶⁰ 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.⁶¹ 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.”⁶² Then the opinion moved on to the point that industry is private, not public, like roads, rails, highways, and canals.

[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.⁶³

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.*,⁶⁴ 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

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

61. *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 . . .”).

62. *Id.* at 651.

63. *Id.* at 651.

64. 23 A. 219 (Pa. 1892).

distinguished *Sanderson* by unanimously finding the storage of oil unnatural and subject to strict liability.⁶⁵ 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.”⁶⁶ 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.⁶⁷

As I have shown elsewhere, a majority of state courts adopted *Rylands* in the decade after the Flood -- after most courts had ignored the English strict liability precedent for about two decades.⁶⁸ As of 1883, three prominent states, New York, New Hampshire, and New Jersey, had rejected *Rylands* with much vocal pro-industry fanfare, while just two states, Massachusetts and Minnesota had adopted *Rylands* explicitly. Between 1883 and 1889, only four more states had adopted *Rylands* explicitly, perhaps due to other flooding disasters (such as California’s of the early 1880s). Yet by 1900, *eighteen* states jumped on board, with seven more leaning towards *Rylands*.⁶⁹ 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.⁷⁰

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, and 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

65. *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).

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

67. *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. Youghioghney 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).

68. “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.

69. See the graph at the end of this article for the patterns of adopting. “Leaning” means that the state had adopted a very similar rule without relying on *Rylands*, or that they had relied on *Rylands*, but with some recognition that it was controversial.

70. For more on this wave of adoptions, please see “The Floodgates of Strict Liability,” 110 *Yale L.J.* 333 (2000).

liability at the turn of the twentieth century.⁷¹ 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. As I have argued elsewhere, there is no geographic, national political, industrial/agricultural, or business cycle pattern to the adoption of strict liability.⁷² 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.

II. THE PATTERNS OF ACCEPTANCE

A. Overview

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 are both appointed for life. 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.⁷³ 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 federal judges 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*.⁷⁴ Twenty-three of the twenty-seven state courts adopting or leaning towards *Rylands* were elected, and of the thirty-three states with elected judiciaries at the time of the Johnstown Flood, twenty-four would adopt or lean by 1920.⁷⁵ Only

⁷¹ Again, see the graph of adoptions, the appendix, and “The Floodgates of Strict Liability.”

⁷² See *id.*; see also the appendix for a list of states.

⁷³ See A.W.B. Simpson, *supra*, for his “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.

⁷⁴ 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.

⁷⁵ Minnesota, Illinois, Iowa, California, Missouri, Maryland, Ohio, Oregon, Wyoming, Kansas, Tennessee, Montana, Indiana, Idaho, and Nebraska adopted. Wisconsin, Michigan, Nevada, Colorado, Alabama, Pennsylvania, and Utah leaned toward *Rylands*. The appointed courts that adopted were Massachusetts, Vermont, and South Carolina.

three elected courts rejected *Rylands*.⁷⁶ See the appendix for a state-by-state list, along with explanations for how the states are considered for the statistical analysis. I defined “leaning” as adopting a rule similar to *Rylands* (finding strict liability for an activity because it is “non-natural,” “artificial,” or a similar explanation) or generally approved of *Rylands*, despite a case or two rejecting it, are considered to be leaning. States that vacillated between accepting and rejecting *Rylands* for a significant part of the relevant time period are categorized as wavering, but states that wavered by adopting *Rylands* after the Johnstown Flood are counted as “adopting” for the purposes of this historical study. If a state did not adopt *Rylands* or a similar rule, and if it did not reject *Rylands*, I categorized it as “silent” and counted it among the rejecting states – primarily because if the state had not adopted *Rylands* or a similar rule, it adhered to the negligence requirement, with perhaps the traditional, cabined exceptions for strict liability in cases of blasting, nuisance, respondeat superior, keeping wild animals, etc.⁷⁷

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.⁷⁸ 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 the

⁷⁶ Washington, Kentucky, and North Dakota rejected.

⁷⁷ See Shugerman, “The Floodgates of Strict Liability,” at 334 n. 9.

⁷⁸ 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.

following groups in this Part: federal vs. state judges; and state judges appointed to short and long terms; and state judges elected to short and long terms.

B. Federal v. State

Let's start with one of the most obvious patterns in the adoption of *Rylands*. State courts, as I noted above, initially had a mixed reaction to *Rylands*, but a sizable majority of them adopted it or its rule by the turn of the century.⁷⁹ However, federal courts ignored it until around the time of the New Deal. What accounts for these starkly different patterns between state and federal courts? In this Section, I focus on the federal/state divide on *Rylands*.

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. Legal historians have observed that federal courts played an ever growing role in tort law in the nineteenth century, and attributed it to an increasing number of railroad accidents opened the federal courts to torts through diversity jurisdiction, and noted that the low required minimum in damages (\$500) for federal jurisdiction that barred few of these actions.⁸⁰ 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.

A more likely factor was the timing and the prestige of certain state decisions, combined with *Swift v. Tyson* and federal common law removing federal judges somewhat from the turns in state precedent. *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

⁷⁹ 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.

⁸⁰ WHITE, *supra* note __, at 51-52; EDWARD PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 49, 52.

Rylands, Judge Earl of New York and Judge Doe of New Hampshire engaged in lengthy analysis and offered multiple arguments against *Rylands*.⁸¹ 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 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.

C. Elected vs. Appointed and Term Length

Turning to the states, a pattern emerges. Elected judges were more populist and responsive than appointed judges – not a huge surprise. More counterintuitively, judges elected to long terms were “super-populist” and “super-responsive” relative to the somewhat populist judges elected to shorter terms. Among appointed judges, term length did not make much of a difference (but the numbers of states admittedly are very small).

Eight common law states appointed judges to limited terms in this period: Connecticut (eight years); Delaware (twelve years); Maine (seven years); Mississippi

⁸¹ Losee, 51 N.Y. 476 (1873); *Brown v. Collins*, 53 N.H. 422 (1873).

(nine years); New Jersey (seven years); South Carolina (seven years); Vermont (two years); and Virginia (twelve years).⁸² Rhode Island judges served only at the “pleasure” of the assembly. This group of state judges enjoyed less job security than the judges of Pennsylvania, New York, etc., but they were 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 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*, **20** had elected supreme courts. If including states wavering towards *Rylands*, **22** of those **28** states had elected judiciaries.

⁸² 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.

Of the **31** established states with judicial elections around the time of the Johnstown Flood:

22 adopted or leaned towards *Rylands* in this period;

3 reject *Rylands* consistently.

Subgroups:

1. State courts with supreme court elections to terms of ten years or more:

6 of 7 adopted through 1900, **7 of 7** adopted as of 1914⁸³

2. States with supreme court elections to terms of less than ten years:

14 of 25 adopted or leaned towards *Rylands* as of 1900;

16 of 25 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.)

The state Supreme Court terms cluster around groups of terms: six year terms were common as the shortest terms; the next common set was eight to ten; and another set was twelve years or more. When the elected courts are divided into these three groups based on term length, the pattern continues:

1. State courts with supreme court elections to terms of **more than 10 years:**

4 of 5 (80%) adopted through 1900, **5 of 5** (100%) through 1914⁸⁴

2. States with supreme court elections to terms of **8 to 10 years:**

7 of 10 (70%) adopted or leaned towards *Rylands* (both through 1900 and 1914)⁸⁵

⁸³ I include West Virginia here, but not in the statistical analysis. 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.

⁸⁴ Pennsylvania, New York, Maryland, and California. Again, West Virginia was silent through 1900, and had adopted *Rylands* as of 1914. See Appendix.

⁸⁵ Wisconsin, Missouri, Colorado, Illinois, Michigan, Wyoming and Tennessee adopted. Kentucky rejected, and Arkansas and North Carolina were silent – and each of these three had eight year terms, the shortest terms within this group.

3. States with appointed supreme courts **with 6 years:**
9 of 17 (53%) adopt *Rylands* through 1900, **11 of 17** (65%) through 1914.⁸⁶

The number of appointed courts is small already, and those numbers get smaller when the courts are subdivided by term length, which makes it difficult to find significant patterns. Nevertheless, judges appointed to shorter terms were more likely to adopt *Rylands*. Of the seven courts with appointments to less than ten years, three adopted *Rylands*. Of the four courts with appointments to ten years or more, one adopted *Rylands*. The bottom line is that, unlike elected judges, a majority of appointed courts, either with short and long terms, rejected *Rylands*.

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 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:

	Adopt	Reject/silent	Total
Elected Judges	22	9	31
Appointed Judges	4	7	11
Totals	26	16	42

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	Reject/silent	total
Term 10+	8	3	11

⁸⁶ The *Rylands* adopters were: Minnesota, Nevada, Iowa, Alabama, Ohio, Oregon, South Carolina, Kansas, Utah (before 1900), plus Montana and Indiana by 1914. Washington, Texas, and North Dakota rejected, and Nebraska, South Dakota and Idaho were silent through 1914.

Term <10	18	13	31
Totals	26	16	42

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 suggest, at best, a weak connection on the *sole* basis of term length, without considering selection method. When the states are divided by selection 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	7	0	7
Elected, Less than ten years	15	9	24
Totals	22	9	31

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:

	Adopt	Reject/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.⁸⁷ 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	Reject/silent	Total
Elected 10+	7	0	7
Appointed 10+	1	3	4
Totals	8	3	11

⁸⁷ Through 1900, the p value is .46 (46%), a very high chance of randomness, but the p value decreases to .28 when one excludes the recently admitted western states – but still too high to be recognized as significant.

The p value is .02, or a 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.

	Adopt	Reject/silent	total
Elected, 10 or more	7	0	7
Appointed, <10	3	4	7
Totals	10	4	14

See the Appendix for more charts contrasting various patterns, including divisions of elected judges into three groups in term length.

D. Elected Courts with Job Security and Individual Judges with Job Security

The state courts with longer terms lengths were more responsive in adopting strict liability. But one might ask not just about the courts in general. What about the particular judges on these courts? Sure, the judges on the long-term courts might have won a term of ten years or more, but when they decided these torts cases, some had many years left in their terms, while others had fewer years left and would be facing elections soon, much like their short-term brethren in other states.

Here I focus on the particular judges who adopted *Rylands* in the long-term states and how much time they had left on their own terms. Again, seven 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); Maryland (10 years, beginning in 1864); Missouri (10 years, beginning in 1872); West Virginia (12 years, beginning in 1862); and Wisconsin (10 years, beginning in 1877). All seven states adopted *Rylands* in this era (although West Virginia was silent for most of this period, and adopted *Rylands* in 1911, late in this period). 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.⁸⁸

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.⁸⁹ Thus, even though these state judges

⁸⁸ See *The Floodgates of Strict Liability*, 110 YALE L.J. 333, 356-58 (2000).

⁸⁹ THE PHILADELPHIA PRESS ALMANAC FOR 1897, at 34 (1897); <http://www.rootsweb.com/~pabucks/edwardmpaxson.html>

had little to fear from elections for their job security, they were very responsive to events in reshaping doctrine.

In the other states with long judicial term lengths, the judges who authored the opinions adopting *Rylands* or its rule generally had many years left in their term and were not worried about renomination and re-election anytime soon. After all, it's possible that the state's term length might be irrelevant if the specific judges who put themselves on the line for strict liability were actually facing renomination or re-election in the near future. But that was not the case. In Wisconsin, Judge David Taylor adopted *Rylands* in 1884 in a unanimous opinion, when he was barely half way through his ten year term.⁹⁰ In California, Judge Henry Stuart Foote joined the court in 1885, and authored *Colton v. Onderdonk* one year later.⁹¹ In 1890, months after the Flood, Judge Edward W. Hatch wrote a decision on the Superior Court of New York at Buffalo adopting *Rylands*, and he was in the third year of his fourteen year term. The New York Court of Appeals followed Hatch's lead in 1895 in an opinion written by the renowned conservative Judge Rufus Peckham, who was half way through his fourteen year term, and more importantly, recently had been nominated to the U.S. Supreme Court with no apparent opposition. Peckham was a renowned pro-industry conservative who advised Cornelius Vanderbilt, John Rockefeller and other business titans. If his *Rylands* decision was political in any sense, he was probably balancing out his record to soften the opposition of any populist or anti-corporate Senators (assuming they paid attention to tort doctrine). Each of the judges signing onto his opinion had more time left in their terms than Peckham did.⁹² In Maryland, Judge John M. Robinson wrote his adopting of *Rylands* for a unanimous court in 1890, and he had seven years left on his term.⁹³ Finally, in Missouri, Judge James Britton Gantt joined the Supreme Court in 1891, and adopted *Rylands* two years later, with eight years left on his term.⁹⁴

Unfortunately, these judges have left little archival material and only the most basic biographical records.⁹⁵ In the next Part, I draw more generally from the

⁹⁰ *Atkinson v. Goodrich Transp. Co.*, 18 N.W. 764, 775 (Wis. 1884). See Taylor's term at www.politicalgraveyard.com.

⁹¹ *Colton v. Onderdonk*, 10 P. 395, 397-98 (Cal. 1886)

⁹² Judge O'Brien had nine years left, Judge Bartlett had 13 years left, and Judge Haight had just arrived on the Court of Appeals. Of the two dissenters, Judge Finch was retiring from the court that year, and Judge Gray had eight years remaining.

⁹³ *Susquehanna Fertilizer Co. v. Malone*, 20 A. 900, 901 (Md. 1890). James McSherry, The Former Chief Judges of the Court of Appeals, at <http://marylandlegalhistory.org/megafile/msa/speccol/sc2900/sc2908/html/appeals.html>

⁹⁴ *Mathews v. St. Louis & S.F. Ry.*, 24 S.W. 591, 598 (Mo. 1893). A.J.D. Stewart, History of the Bench and Bar of Missouri 477 (1898)

⁹⁵ Digging further into the Pennsylvania story is an enormous challenge. Frank Eastman's "Courts and Lawyers of Pennsylvania" records very slim paragraph summaries of the lives of the Pennsylvania Supreme Court Justices, with little on the pre-judicial careers of the relevant justices. 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

available historical record to offer some interpretations and speculation to explain these patterns.

III. JUDICIAL ELECTIONS: HISTORY AND INTERPRETATIONS

The historical evidence suggests that the politics of judicial elections changed the character of the state bench. Before 1846, only Mississippi adopted judicial elections for all of its courts, and only three other states had experimented with judicial elections in lower courts. Then New York adopted judicial elections in 1846, and between 1846 and 1860, nineteen of twenty-one state constitutional conventions adopted judicial elections wholesale.⁹⁶ By the Civil War, two-thirds of the states elected most of their judges, and every state that entered the Union between 1846 and 1911 established at least a partially elective judiciary.⁹⁷ The constitutional convention delegates who adopted judicial elections explicitly wanted judges to be more responsive to the “popular will” and to be more activist in many ways (and not weaker, as the conventional wisdom assumes). These delegates also understood that political parties, local interests and other special interests would play a strong role in the election of judges, but they accepted these influences as a necessary trade-off (or even an advantage).⁹⁸ This Part examines some of the practices and effects of judicial elections on the late nineteenth century state courts: first, a change in the backgrounds of who won elections to the bench; second, the influence of party politics and corruption, which triggered the shift to longer terms after the Civil War in some states; and third, the competitiveness of judicial campaigns.

The historical record suggests that judicial elections plus long terms shaped a more responsive bench. First, these elections created a *populist filter*. Elections seemed to have filtered out some elite jurists from major urban centers and filtered in more local lawyer-politicians, who would be more connected to public opinion. 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

Pennsylvania Reports. I have not yet 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.

⁹⁶ 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).

⁹⁷ FRIEDMAN, *supra* note ___ at 323.

⁹⁸ For more on this argument, see Shugerman, “The People’s Courts: The Rise of Judicial Elections and Judicial Power” (dissertation, Yale University, 2008).

decisions. Even with filtering and role fidelity, judges elected to short terms would still face the reality of “fear and favor,” due to special interests and partisan renomination politics. Elected judges with more job security could be more faithful to their role (hence, “role fidelity”) and could follow their own perception of public interest or public opinion, rather than industrial interests.

A. A More Local, Small Town Bench

The slim biographical materials that remain of Pennsylvania judges do not offer clear evidence of how judicial elections affected the character of the bench.⁹⁹ It is difficult to generalize from the paragraph-long sketches in Eastman’s *Courts and Lawyers of Pennsylvania*, and the differences between periods seem relatively minor. From the pre-judicial elections period from the 1820s to the 1840s, slightly less than half of the judges were elite Philadelphia lawyers. In the era of judicial elections, a somewhat lower number of judges had been Philadelphia lawyers, but that change might have occurred demographically, even without a change in selection method. Nevertheless, there were slightly more country lawyers and small town lawyers who were elected to the Supreme Court, relative to those who had been appointed, even as Pennsylvania was increasingly urbanizing and industrializing.

Judges after 1850 were less likely to have studied in Ivy League law schools, but that distinction was not as salient in the nineteenth century, when many prominent lawyers read law and apprenticed without attending law school at all. One might also have guessed that the elected judges would have been more likely to have held other elected offices, especially to the state legislature or to Congress. However, the pattern from the 1820s-40s is very similar to the pattern from the 1850s-80s: slightly more than half had previously held legislative office. From the mid-1880s through 1900, only one Justice who had previously served in the legislature won a seat on the court.¹⁰⁰ This change does not seem to be the result of the switch to longer terms, for that had occurred a decade earlier. Instead, this shift away from legislative experience may have been the result of the increasing professionalization of bench and bar nationally in the late nineteenth century. The 1873 reforms do not seem to have triggered other obvious changes to the Pennsylvania courts, based on these short biographical sketches.

Some of the individual justices leave behind records that reveal more of the politics of the elected Pennsylvania Supreme Court. Ellis Lewis, who was among the

⁹⁹ 2 FRANK EASTMAN, *COURT AND LAWYERS OF PENNSYLVANIA* 457-60, 505-519 (1922)

¹⁰⁰ In the 1820s-40s, eight of fourteen Pennsylvania Supreme Court Justices had been elected to legislative office, either to the state legislature or to U.S. Congress. From the beginning of judicial elections in 1850 through the early 1880s, thirteen of twenty-two had been elected to legislative office. In the mid-1880s through 1900, only one judge elected to the Pennsylvania Supreme Court had been elected to the legislature, perhaps as part of a general professionalization of law and judging that was occurring nationally in the late nineteenth century. *Id.*

first elected Justices and became the second elected Chief Justice, had been orphaned as a nine-year-old, became a printer as a teenager in New York, and then returned to Pennsylvania to study and practice law. He served as a deputy attorney general and then in private practice in rural northwestern Pennsylvania, and was elected to the state legislature in 1832. In 1833, he became attorney general and then a trial judge. He taught law while sitting on the bench, and then served on the state supreme court from 1851 to 1857. While he was chief justice from 1854 to 1857, a Pennsylvania commentator wrote, “He is perhaps too much of a politician; but that is not his fault so much as the fault of the circumstances into which he has been thrown, by those accidents which are ever attendant upon the wayward footsteps of self-taught men.”¹⁰¹ The writer went on to commend his honesty and impartiality, but the emphasis on Lewis as an honest politician. As I explain below, this image fits the fidelity mold of the earnest elected official in judicial robes, serving his constituents.

B. Judicial Corruption, Reform, and Longer Terms

States explicitly turned to long terms to allow their elected judges to be responsive to the people, and not corruption or special interests. Soon after the adoption of judicial elections before the Civil War, some states began lengthening the judges’ terms in the Civil War era and after. In the 1860s, California, Maryland and New York extended their highest judges’ terms to ten, fifteen and fourteen years, respectively.¹⁰² In the 1870s, Missouri, Pennsylvania, Wisconsin and California again lengthened their Supreme Court judges’ terms to ten, twenty-one, ten, and twelve years, respectively.¹⁰³ New York and Pennsylvania, and perhaps others, were attempting to foster more judicial independence from corrupting influences and partisanship, while they decided to retain elections.

The New York judiciary was generally regarded as perhaps the most corrupt in the country by contemporary observers.¹⁰⁴ Machine politicians controlled offices throughout the state with patronage – either by appointment or by rigging the party nomination process for elected offices, such as judgeships.¹⁰⁵ In New York City, the Democratic nomination was a guarantee of election.¹⁰⁶ A contemporary observer described the Democratic judicial nominating convention as a swarm of “sniveling sycophancy,” and the nominations were compromises ironed out by the ward bosses and their patronage demands.¹⁰⁷ This combination of patronage and demagoguery

¹⁰¹ *Id.* at 506.

¹⁰² EVAN HAYNES, SELECTION AND TENURE OF JUDGES 103-04, 115, 123 (1944).

¹⁰³ *Id.* at 118-19, 127, 135, 103-04.

¹⁰⁴ Renee Lettow Lerner, *The New York Bar and Reform of the Elected Judiciary After the Civil War* (The George Washington University Law School Pub. Law & Legal Theory Working Paper No. 139, 2005), available at <http://ssrn.com/abstract=697902>.

¹⁰⁵ *Id.* at 20.

¹⁰⁶ *Id.* at 14.

¹⁰⁷ *Id.* at 15.

infected New York politics, and judges elected to short terms were most vulnerable. Tammany Hall and the corrupt Tweed Ring dominated the New York Democratic Party and wielded tremendous influence over judges. The Tweed Ring was largely immune from criminal prosecution, as judges would often either dismiss cases against them outright, or influence the jury to return a verdict of acquittal.¹⁰⁸ One major figure of the corrupt courts was Supreme Court Judge Albert Cardozo, Justice Benjamin Cardozo's father. Albert Cardozo was caught in an enormous Tammany Hall scandal over Erie Railroad maneuvers during the late 1860s, engineered by financier Jay Gould and reaching almost every level of state government. Cardozo resigned in 1872, and many other judges were swept up in similar scandals in this era.

Many delegates believed that New York's Constitutional Convention in 1867 had been called to address the judiciary, including both those who opposed and supported reform, and much of the convention focused on judicial reform.¹⁰⁹ Most of the New York delegates did not think highly of the judiciary, and nearly all blamed the Constitution of 1846 either for creating judicial elections, creating short judicial terms, or both.¹¹⁰ Delegates complained that the New York bench's prestige had sharply declined since 1846, and that other states were no longer following New York precedents. Delegates were less concerned about the politicization of the initial appointment process than about the ongoing corrupting influence once a judge was on the bench. Judge Charles Daly, a Democrat elected to the Court of Common Pleas in New York City, and a delegate at the 1867 convention, declared from experience, "The real evil at present is that, after he goes on the bench, he depends for his continuance there upon . . . all the influences which affect political parties."¹¹¹ Daly suggested that a judge "soon learns that his continuance in office does not depend upon his learning, his ability, or his integrity. . . . He may have the learning of Mansfield and the integrity of Hale, but it will avail him little if his party is not in power, and if he is not an active, leading and influential member of it."¹¹² As a result, judges remained deeply involved in party politics: "[W]ithin the last six or seven years, the name of almost every judge in the city of New York has been heralded in the newspapers as president or vice-president of some political meeting, not from their own choice in all cases, but because the exigencies of party demanded it."¹¹³ Daly also blamed elections to short terms for removing good judges from the bench, noting some examples of learned judges from both parties who were not reelected either because their party fell out of power or because their party would not

¹⁰⁸ *Id.* at 25-30.

¹⁰⁹ *Id.* at 42-44.

¹¹⁰ *Id.* at 43, 48-51.

¹¹¹ Report on the Proceedings and Debates of the Convention for the Revision of the Constitution of the State of New York 1867-68, at 2365 (Daly).

¹¹² *Id.*

¹¹³ *Id.* at 2359.

renominate them.¹¹⁴ Republican William Evarts supported the Democrat Daly on this point, adding that one of the judges that Daly mentioned, Chief Justice Bosworth, was not renominated by the Democrats because he had ruled against Boss Tweed's interests.¹¹⁵ Other convention delegates added names of good judges who were not reelected.¹¹⁶ All implied that the New York bench's declining prestige was due to the replacement of these judges with less able judges.

New York delegates were largely indifferent to the method of judicial selection. Given the ease with which party machines reached judges, most wanted to focus on keeping judges "beyond the power of political parties" after they reached the bench.¹¹⁷ The New York convention reached a consensus to extend terms on the Court Appeals from eight years to fourteen years, which many delegates compared to life tenure. They also scheduled a referendum on judicial elections vs. judicial appointments for 1873, allowing several years for the public to observe the new constitution and its extended judicial terms in practice.

In 1873, in the midst of political and judicial scandals, reformers went on the attack. One reformer, Dorman Eaton, produced extensive statistical and anecdotal evidence purporting to show the corrupting influence of elections. He demonstrated that, in the era of judicial elections, New York courts had more appeals, more new trials, and more reversals of civil cases, and in criminal cases, rates of conviction per arrest had declined.¹¹⁸ He suggested that elections were responsible for these "failings" – a dubious claim. But most damning was this statistic: "the unexampled number of five judges . . . awaiting trial for official corruption [in 1872] – a number greater than were arraigned in the whole period of appointed judges in this state from 1777 to 1846."¹¹⁹ Despite the Erie Railroad scandal in the early 1870s and the judicial resignations of 1872, voters chose to continue electing judges in 1873, illustrating how difficult it has been to switch back from judicial elections to appointments, or alternatively illustrating how the public was hopeful that longer terms would change the integrity of the courts.

By the 1870s, Pennsylvania elites also were increasingly exasperated by corruption and party machines, similar to New Yorkers. These leaders called for a new constitutional convention in 1873, in which the tenure of Supreme Court justices was lengthened from fifteen to twenty-one years and all judges were now to be elected.¹²⁰ The elected judiciary was not appear to have been a major target for reformers, perhaps because fifteen year Supreme Court terms created more judicial

¹¹⁴ Id. at 2373

¹¹⁵ Id. at 2368.

¹¹⁶ Id. at 2382 (Hale).

¹¹⁷ Lettow Lerner at 51.

¹¹⁸ Lettow Lerner at 87 (citing DORMAN B. EATON, *SHOULD JUDGES BE ELECTED? OR THE EXPERIMENT OF AN ELECTIVE JUDICIARY IN NEW YORK* (1873)).

¹¹⁹ Id.

¹²⁰ 4 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1873, 486.

independence already. However, across the spectrum, the debate over selection of judges was significantly about insulating the judiciary from the rank partisanship that infected the political branches of Pennsylvania government.¹²¹

In 1870, the Philadelphia newspaper *Public Ledger* decried reckless legislating, in which legislators passed hundreds of bills before being fully apprised of their contents and cheated the public.¹²² Urban machine politics led to “the tyranny of local political bosses of the majority party.”¹²³ Endemic corruption led to “special legislation” against the public interest.¹²⁴ Governor John White Geary went so far as to suggest that the proliferation of special and local bills “had almost destroyed the theory of representative government.”¹²⁵ In a speech articulating the official position of the Union League of Philadelphia, Charles Gibbons listed “the conferring of political patronage upon the courts” among the issues which should be addressed in a constitutional convention.¹²⁶ In 1872, the Speaker of the Senate delivered a speech in connection with the creation of a special committee on constitutional reform.¹²⁷ He acknowledged that Pennsylvanians were demanding “[m]any reforms,” but only listed three, one of which was “improvement of [Pennsylvania’s] judiciary system.”¹²⁸ In an op-ed in the *Public Ledger*, a prominent civic affairs leader laid out three broad aims that would need to be accomplished in any constitutional convention, one of which was achieving “prompt judicial protection against municipal corruption.”¹²⁹

The judiciary’s relationship to the partisan politics of the late nineteenth century is more clearly seen in the debates at the 1873 state constitutional convention. The delegates discussed proposed changes to Article V (the section dealing with the judiciary) for the bulk of fourteen consecutive days.¹³⁰ The Committee on the Judiciary recommended that Justices of the Supreme Court be appointed by the governor with the concurrence of two thirds of the Senate.¹³¹ This sparked an at times fiery debate among the delegates, which resulted in the delegates rejecting the Committee’s recommendation and continuing the tradition of electing all judges that had begun in 1850.¹³² They reached a compromise to extend the terms

¹²¹ See Mahlon H. Hellerich, *The Origin of the Pennsylvania Constitutional Convention of 1873*, 34 PENN. HIST. 158 (1967).

¹²² *Id.* at 159-60.

¹²³ *Id.* at 162.

¹²⁴ *Id.* at 165.

¹²⁵ *Id.* at 170.

¹²⁶ *Id.* at 166.

¹²⁷ *Id.* at 177.

¹²⁸ *Id.*

¹²⁹ *Id.* at 185. The other two were preserving stability “against sudden changes by the legislature, actuated by politics or corrupt motives” and strict regulation of the money raised by cities. *Id.*

¹³⁰ See 3 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION 637-779, 4 *Id.* 3-489.

¹³¹ 3 *Id.* 729.

¹³² See 4 *Id.* 486.

of judges from already long term of fifteen years to the quasi-life term of twenty-one years.

Most delegates opposed the partisanship of the appointment process, and thus supported the continuation of judicial elections. The convention's consensus was that the existing judiciary was performing fairly well,¹³³ and arguably the long terms of fifteen years for the Supreme Court Justices. Nevertheless, there were concerns that party machines could affect the debates on the judiciary. One of these ways is that the Convention appears to have stuck with the elected judiciary in part because of perceived corruption in the judicial appointment process. One delegate asserted that "the people, in their votes, have been less governed by party ties than the Governor."¹³⁴ Another imagined a judge appointed "by a corrupt Governor, and confirmed by a Senate combining for a corrupt purpose...."¹³⁵ A small number of delegates who opposed electing judges argued that free and fair elections were essentially impossible.¹³⁶ However, most of the convention had more faith in popular elections than in appointments, but shared the concern that the influences that had corrupted the appointment process could infect sitting elected judges, too.

The clearest example illustrating the fear of "party machines," however, is the litany of arguments against partisanship in the judiciary. Advocates of an elected and appointed judiciary both centered their arguments on proving that their preferred proposals would minimize politicization and maximize neutrality among judges. A proponent of the elected judiciary, for example, argued against change on the grounds that an appointment process would result in "party men go[ing] upon the bench."¹³⁷ A different but like-minded delegate argued that appointed judges "derive their office from the favoritism of an Executive, sanctioned by another branch of the government."¹³⁸ One delegate directly referenced the problem of

¹³³ 3 *Id.* at 706, 749, 691; 4 *Id.* 33

¹³⁴ 3 *Id.* 706.

¹³⁵ 3 *Id.* at 748.

¹³⁶ Along these lines, one delegate asserted that "if it was safe to elect judges in 1850, when our elections were free and pure, it is not safe to elect them now, when, by common consent, popular elections have ceased to be either free or pure." *Id.* at 742 Another sarcastically asked "[d]o any of us who are familiar with the manner in which these elections are brought about, believe that the mass of the people have any voice in the nomination or election of a judge." *Id.* at 776 Finally, a delegate despaired that "there is no longer any hope that we can save the selection of judges from the common pollution and disgrace into which the whole system of electing all other public officers has assuredly fallen." 4 *Id.* 25. To be sure, those opposing the continuation of judicial elections also made more conventional, less counterintuitive arguments. For example, the point was made that electing judges is contrary to the well-established distinction between political and judicial officers. 3 *Id.* at 735.

¹³⁷ 3 *Id.* 753.

¹³⁸ *Id.* at 771. *See also* 4 *Id.* 25 ("But it is said that the judges if appointed would be less partisan. This experience does not sustain."). *Id.* at 21 ("The problem is this: To exclude politicians from the bench; to secure a non-partisan, unprejudiced, fearless and upright judiciary. To take the power of selecting judges from the people and give it to a partisan Executive, backed by a partisan Senate, does not, in my judgment, afford a solution.").

corruption, noting that “one of the great evils in this country has been this matter of executive patronage, and out of that has grown the evil of having in office incompetent persons,” and then concluding that elections produced fewer of this problem and others.¹³⁹

Perceiving this backlash against party machines, proponents of appointment attempted (ultimately unsuccessfully) to persuade their colleagues that appointment resulted in a less partisan judiciary. An advocate of appointment disputed several criticisms from the pro-election camp, asserting that in appointing states, “the party politics of the country have nothing to do with elevating men to these non-political positions.”¹⁴⁰ Another claimed that “[i]f a majority or two-thirds of the Senate be required to concur in Executive appointment of judges, the Governor will be compelled to select carefully and to subordinate party politics to the public good.”¹⁴¹

These convention delegates turned to longer terms not to insulate judges from the people, but rather, to insulate judges from corruption so that they could better serve the people that had elected them in the first place. It is not surprising that these judges generally would respond to the Johnstown Flood by siding with public perceptions rather than industry. Even if the public did not know anything about *Rylands* or tort doctrine, these judges were able to translate a more general concern about modern hazards into a specific doctrinal change, regardless of industry’s preferences.

C. The Historical Evidence of Competitive Judicial Elections

Judicial elections may have been driven by party machines, but they were still competitive. 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 close in states with two-party systems, and surprisingly competitive in states with one-party rule.¹⁴² 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%,

¹³⁹ 4 *Id.* 23.

¹⁴⁰ 3 *Id.* 756.

¹⁴¹ *Id.* at 744.

¹⁴² 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).

respectively), and the races were rarely uncontested (20% and 19%). Thus, it appears that in 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.¹⁴³

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 nine state supreme court elections between 1877 and 1901.¹⁴⁴ In only two elections (1893 and 1899) did the winning candidate prevail with more than 52 per cent of the state vote.¹⁴⁵ In five of the other seven elections, the winning candidate garnered between 51 and 52.6 per cent of the vote.¹⁴⁶ As for the other two elections, the winner in 1877 prevailed by about 1% (45.7%-44.4%), and the winner in 1882 garnered a plurality of 48%-43%.¹⁴⁷

Pennsylvania Supreme Court Election Voting, 1877-1901

	Republican candidate %	Democratic candidate %
1877	44.4%	45.7%
1880	51.4%	47.1%
1882	42.7%	48.3%
1887	50.9%	45.7%
1888	52.6%	44.8%
1892	51.7%	45.3%
1893	56.7%	39.5%
1899	58.8%	38.2%
1901	51.3%	46.4%
Average	51.0%	44.8%

The elections were partisan with one Republican candidate and one Democratic candidate, along with minor third party candidates who drew small

¹⁴³ *Id.* at 357

¹⁴⁴ 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).

¹⁴⁵ SMULL'S LEGISLATIVE HANDBOOK (1894) at 554; and *Id.* (1900) at 618-19.

¹⁴⁶ 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.

¹⁴⁷ SMULL'S LEGISLATIVE HANDBOOK (1878), at 412-14; *Id.* (1883) at 693-94.

numbers of votes. Republicans prevailed in six of the eight 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%-47% margin,¹⁴⁸ and Justice Silas Clark, the lone victorious Democrat, won his in 1882 with a 48%-43% plurality.¹⁴⁹ 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.

“My dear Judge,” wrote Justice Edward Paxson of the Pennsylvania Supreme Court to lower court 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.”¹⁵⁰ A few weeks later, Williams won his election to the Supreme Court by a margin of 51%-46%.¹⁵¹ A year later, Paxson congratulated Mitchell on his Republican nomination to the Pennsylvania Supreme Court, and he later won the election by the same narrow margin.¹⁵² 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.¹⁵³ The Johnstown Flood struck three years *after* that decision, and Paxson reversed himself in adopting strict liability in less than two years after that in *Robb v. Carnegie*.

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 general elections for the Pennsylvania Supreme Court, candidates mainly ran on party tickets, and there is little evidence that they campaigned actively

¹⁴⁸ SMULL'S LEGISLATIVE HANDBOOK (1881) at 271-72.

¹⁴⁹ SMULL'S LEGISLATIVE HANDBOOK (1883), at 693-94.

¹⁵⁰ Justice Edward M. Paxson to Judge James T. Mitchell, Oct. 17, 1887, Supreme Court of Pennsylvania Collection, Historical Society of Pennsylvania, Philadelphia, PA.

¹⁵¹ SMULL'S LEGISLATIVE HANDBOOK AND MANUAL OF THE STATE PENNSYLVANIA 401-02 (1888).

¹⁵² Justice Edward M. Paxson to Judge James T. Mitchell, April 25, 1888, Supreme Court of Pennsylvania Collection, Historical Society of Pennsylvania, Philadelphia, PA.

¹⁵³ 159 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).

for themselves on the stump or taking particular stances on legal issues. However, the party nomination battles and the newspapers offer a very different story. In 1877, the convention were competitive between judicial candidates, and particularly in a chaotic Democratic convention, where there was a “wild sense of confusion” as “personal altercations” erupted between the supporters of different candidates.¹⁵⁴ In the general election, party newspapers traded attacks on each other’s judicial candidates and their integrity.

In 1882, Republican judicial candidates found themselves in the center of a factional civil war between populist/reformist “Independents” and machine-politics “Regulars.” In the run-up to the convention, a Regular leader emphasized party loyalty (and loyalty to the machine): “We have scores of able, pure, and learned lawyers who have always been staunch Republicans, and I think we should take one of them.”¹⁵⁵ The Regulars pushed through their candidates, including Henry Rawle, on their “Harrisburg” ticket, with the support of Simon Cameron, the senator known among the reformers as the “party boss.” The Independent Republicans organized an opposition “Philadelphia” ticket, and battled throughout the convention for their judicial candidates, especially Thayer. The Regulars represented industrial and mining interests in central and western Pennsylvania, while the Independents supported Philadelphia elites and commercial interests. Throughout the summer, these different factions and interests fought a nasty political battle in public – rather than their usual practice of fighting out nominations in conventions and backrooms.¹⁵⁶

The efforts to reunify the party failed that summer, and one newspaper described a “triangular fight” between the Democratic, “Regular” Republican, and Independent parties, with the Greenback Labor party as a minor fourth player.¹⁵⁷ The breaking point was the Independent’s refusal to go along with the boss system, and again, Rawle is mentioned as one of the central figures in the fight.¹⁵⁸

In the midst of this campaign, newspapers in other states picked up on the same themes. *The Baltimore Sun* reported on the Independents’ fight against the

¹⁵⁴ Proceedings of the Convention: Balloting for Supreme Judge, *Philadelphia Inquirer*, Aug. 23, 1877, at 1, col. 5.

¹⁵⁵ *Wheels Within Wheels: Complicated Local Politics*, *Philadelphia Inquirer*, March 22, 1882, at 2, col. 1.

¹⁵⁶ *The Convention*, *Philadelphia Inquirer*, May 11, 1882, at 1, col. 2. In Philadelphia: How the Nominations were Received- Expressions of Opinion, *Philadelphia Inquirer*, May 11, 1882, at 1, col. 5. *The Work of the Convention*, *Philadelphia Inquirer*, May 11, 1882, at 4, col. 2. *Getting Interesting: A Ticklish Political Outlook*, *Philadelphia Inquirer*, May 29, 1882, at 2, col. 4; *The Independents: Their Approaching Convention*, *Philadelphia Inquirer*, May 18, 1882, at 2, col. 1; *Young Republicans Indorsing the Regular Ticket*, *Philadelphia Inquirer*, June 28, 1882, at 2, col. 5. *Young Republicans Indorsing the Regular Ticket*, *Philadelphia Inquirer*, June 28, 1882, at 2, col. 5; A Few of the Republican Leaders Discussing the Political Situation, *Philadelphia Inquirer*, July 1, 1882, at 2, col. 4. A Few of the Republican Leaders Discussing the Political Situation, *Philadelphia Inquirer*, July 1, 1882, at 2, col. 4.

¹⁵⁷ The Political Field: Workers Active and Hopeful-- A Greenback Labor Boom, *Philadelphia Inquirer*, July 17, 1882, at 2, col. 2.

¹⁵⁸ *Nothing In It: The Talk About Compromise*, *Philadelphia Inquirer*, Sept. 12, 1882, at 2, col. 1.

Regulars in an article titled, “Independent Judges: The Uprising of the People for a Free Bench.”¹⁵⁹ This article reports that a meeting was held of citizens spanning all classes to assert their opinions “against the tyranny of bosses and the arrogance of placemen.” One official offered a strident speech: “In early days the fathers of the republic declared the judiciary was the sheet-anchor of our liberty. In these later times, when education is general, this is a truism. The faction of a party which has undertaken to dictate your choice has invaded your liberties. When the political manipulators extend their methods to the judiciary they should and must be put down.” In the end, the Republican factions failed to mend their split, and the Democratic candidate Silas Clark prevailed by a 48%-43% plurality.

Sometimes hardball politics emerged in races for lower courts. 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.¹⁶⁰ 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.”¹⁶¹

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.”¹⁶² 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.”¹⁶³ These political “qualifications” easily could overshadow more traditional legal qualifications for the bench, repelling a more traditional lawyer from the bench and drawing a more political and populist candidate. Thus, elections filtered in judges who were, by temperament and training, more populist.

D. The “Switch in Time” Judges

¹⁵⁹ Independent Judges: The Uprising of the People for a Free Bench, *The Sun*, Oct. 19, 1882, at 1, col. 4.

¹⁶⁰ “The Westmoreland Judgeship,” *PITTSBURGH COMMERCIAL GAZETTE*, Oct. 24, 1889.

¹⁶¹ “The Thirty-Fifth Judicial District,” *PITTSBURGH COMMERCIAL GAZETTE*, Oct. 30, 1889.

¹⁶² 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).

¹⁶³ *Id.* (citing “Seventh Judicial District,” *New York Times*, Sept. 15, 1894).

The three “switch in time” Justices who shifted on *Rylands* after the Johnstown Flood were elected after the terms had been extended to twenty-one years, and they also were involved in electoral state politics. Justice Silas Clark was a descendant of the early settlers of rural Indiana County, Pennsylvania, and was raised and educated in the area through college. He started his legal career in Indiana County, and remained there until his election to the Pennsylvania Supreme Court in 1882. As a local lawyer, he served in various elected or party offices: Indiana Borough Councilman, Chairman of the Indiana County Democratic Committee, Indiana School Director and Board Secretary, Democratic delegate to the Pennsylvania Constitutional Convention of 1873, Delegate to the National Democratic Convention, President of the First National Bank of Indiana and President of the Indiana Agricultural Society.¹⁶⁴ We know less about Henry Green, except that he was born in New Jersey, graduated from Lafayette College, and practiced law in Easton until he became a Supreme Court Justice in 1879. He was a Republican and served as a delegate to the 1873 Pennsylvania Constitutional Convention, which had lengthened the Justices’ terms to twenty-one years.¹⁶⁵

Justice Edward M. Paxson, the third of the switching judges, began his career as a journalist in Bucks County,¹⁶⁶ founding *The Newtown Journal* at age eighteen and developing it into a successful newspaper, and he founded a second newspaper in Philadelphia. At age twenty-four, he began “reading” law and then practiced in Philadelphia before becoming a Common Pleas judge. He was active in the Republican Party, and a popular party figure.¹⁶⁷ He was elected to the Supreme Court in 1875, and served as Chief Justice from 1889 to 1893, when he retired to accept the receivership of the Reading Railroad Company. Chief Justice Paxson was the Pennsylvania Supreme Court Justice who, as cited in the introduction in this Article, pressured another judge (Judge Mitchell) to get out the popular vote in Philadelphia in order to get his own preferred judge (Judge Williams) elected, and Judge Mitchell eventually gained a seat on the Pennsylvania Supreme Court, too. Judge Paxson’s letter suggests that judges were keenly aware of electoral politics while still on the bench – which may suggest that they were not fully “liberated” from party politics by twenty-one year terms. Even if longer terms protected their seat on the bench, they had an interest in who else joined them on the bench.

Nevertheless, this pressure was less direct than facing an election themselves. Furthermore, I do not argue that judges elected to long terms were generally liberated from party politics and special interests in all cases. I emphasize that, in the wake of floods and other disastrous events, judges elected to longer terms were more

¹⁶⁴ The Clark House: <http://www.rootsweb.com/~paicgs/clarkhouse.shtml>. Unfortunately the Clark House has no records, letters, or other papers of Justice Clark. *See also* EASTMAN, *supra*, 515.

¹⁶⁵ Eastman, *supra*, 515.

¹⁶⁶ EASTMAN, *supra*, 513; www.rootsweb.com/~pabucks/edwardmpaxson.html

¹⁶⁷ <http://search.ancestry.com/cgi-bin/sse.dll?db=pabio&recid=421&recoff=>

responsive to public opinion than other judges, even if they still had to balance public opinion with other political pressures.

Paxson 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:¹⁶⁸

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.”¹⁶⁹

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.”¹⁷⁰ Indeed, Paxson instead showed that Pennsylvania had a tradition of judges practicing politics, albeit with less candor about that fact.

The newspaper coverage of the judicial elections of the early 1890s reflects no debate about tort law or legal reactions to the Johnstown Flood. The newspapers mostly covered the party politics of the races.¹⁷¹ The politics of the elections do not seem to have directly created pressure for strict liability. Instead, elections shaped a bench that was, by personality, more responsive to events and public opinion. The Johnstown Flood would have changed these judges’ sense of public necessities, shifting from promoting industry to protecting the people from it. Long terms

¹⁶⁸ 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, Philadelphia, PA.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *Philadelphia Inquirer*, Jan. 18, 1892, Jan. 31, 1892; March 3, 1892; March 9, 1892; March 13, 1892; March 23, 1892; March 27, 1892; March 30, 1892; April 13, 1892; April 19, 1892; April 20, 1892; April 21, 1892, April 22, 1892; May 15, 1892; Sept. 19, 1892; Nov. 5, 1892.

allowed these judges to change their votes from the fault rule in the 1880s to strict liability in the 1890s without facing political retribution from industrial interests and party machines.

E. A Theory: Filters and Fidelity, Fear and Favor

What do we make of these patterns in light of this historical sketch of judicial elections, in which special interests and party interests wielded so much power in the nomination process, and in which some candidates engaged in nasty campaigns? Being elected makes judges more responsive to events and/or public opinion than being appointed – not a shocking result. 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, especially in the wake of disastrous floods. 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. Lawyers who won judicial appointments probably were more likely to be political insiders and elites who did not need to relate to the public. Many appointed judges held their appointments for relatively short terms, and thus they were not isolated from politics. Nevertheless, the method of their appointment made popular culture less relevant from the beginning, and the appointment process 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 heated 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.

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,¹⁷² and back from what we know about both state and federal courts in the twentieth century,¹⁷³ it appears 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 (one of the most important jurists and treatise writers of the late nineteenth century) lose their seats in highly partisan elections, without regard to merit on the bench. Elections seem to have shaped a less elite, less educated state bench.

Elections also changed the “fidelity” of state judges, in the language of the mid-nineteenth-century designers of judicial elections. 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.

In the 1850s and thereafter, judicial elections flipped this fidelity. In the wave of conventions that initially adopted judicial elections, state delegates argued explicitly in these terms: that judicial elections were not merely a mechanism for voting out unpopular judges, but were also a means of shaping the judges’ self-conception.¹⁷⁴ New York’s delegates, in the 1846 convention that triggered the wave of adoptions by twelve states over the next five years, argued that

¹⁷² KERMIT HALL, *THE POLITICS OF COURTS* 158-59 (1979).

¹⁷³ Burton Atkins, *Judicial Selection in Context: The American and English Experience*, 77 KY. L.J. 577 (1996).

¹⁷⁴ Shugerman, *The People’s Courts* (book manuscript).

appointments had fostered an “aristocratic” judiciary.¹⁷⁵ Judicial elections would liberate judges from those interests and “increase[] fidelity” to the people.¹⁷⁶ In the Illinois convention of 1847, future Supreme Court justice David Davis complained that appointed judges had “none of the confidence of the people,” while elected judges “would always receive the support and protection of the people.” He “would rather see judges the weathercocks of public sentiment, in preference to seeing them the instruments of power, to see them registering the mandates of the Legislature, and the edicts of the Governor.”¹⁷⁷ An Ohio delegate believed judicial elections would cultivate a bench of “sentinels” to guard the people, as opposed to a bench fearful of the people.¹⁷⁸ Judicial elections would discourage judges from relying on legal technicalities and doctrine, and instead to “take care that their opinions reflect justice and right.”¹⁷⁹ The creators of the elected judiciary intentionally designed a judiciary that would identify with the people.

After the post-Civil War corruption scandals, many questioned the wisdom of judicial elections, as discussed above. Instead of abandoning judicial elections, delegates in several state conventions resisted the calls to return to appointments, and instead gave judges longer terms. These decisions in the 1870s in New York, Pennsylvania, California, and Maryland ratified the original commitment to shaping a judicial mindset in a more democratically responsive mold initially, and then insulating that mindset from normal politics thereafter.

Elections created a new personal narrative for the judge, and altered the role 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. Even if their initial election was the product of party machine deals, a questionable nomination process, and perhaps an unfair vote (as some of the experiences in New York and Pennsylvania might suggest), it would only be natural for an elected judge to “filter” that experience (a second filtering process, more internal and psychological than the first) and imagine that the election was the

¹⁷⁵ *Debates and Proceedings of New York Constitutional Convention of 1846*, at 575. See also *Debates and Proceedings*, Ohio, I: 585-638.

¹⁷⁶ *Debates and Proceedings of New York Constitutional Convention of 1846*, at 575.

¹⁷⁷ *Illinois Constitutional Debates of 1847* at 462 (David Davis).

¹⁷⁸ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, J. V. Smith, Official Reporter to the Convention (Columbus: S. Medary, 1851), II:217 (Taylor).

¹⁷⁹ Ohio *Debates and Proceedings*, I:695. Conventions in New York, Virginia, Maryland, Illinois, and Indiana offered similar arguments.

legitimate voice of the popular will – perhaps that the ends justified the means, and those means were necessary to allow the judge to represent the right-minded public and their needs.

For judges who had lingering qualms about the integrity of their election, it would be natural for them to overcompensate after their election to *a long term*. Suddenly liberated from the partisanship, special interests, ethnic constituencies, and machinations that got them into office, these judges could become statesmen attentive to the public good. 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, 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 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. 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,¹⁸⁰ 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

¹⁸⁰ Pennsylvania Session Laws, 1890-1891.

representatives were elected to two-year terms in the state house.¹⁸¹ 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.

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.¹⁸² 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 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.¹⁸³ 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.

¹⁸¹ Pennsylvania Constitution of 1874, Article II, section 3.

¹⁸² "A Watershed Moment: Reversals in Tort Theory," 2 *Journal of Tort Law*; see also "The Floodgates of Strict Liability,"

¹⁸³ *Beach v. Sterling Iron & Zinc Co.*, 33 A. 286 (N.J. Ch. 1895).

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.¹⁸⁴

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, while more insulation from re-elections allowed judges to respond to events and public opinion. Moreover, it is important not to romanticize the responsiveness of elected state judges, because their responsiveness led to a confusing and unstable 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 if our notion of constitutionalism and the rule of law is to protect individual rights from majoritarian excesses. In tort law and even more so in criminal law, fear and favor¹⁸⁵ are particularly powerful forces on judges.

¹⁸⁴ Eric Helland and Alex Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AMERICAN LAW AND ECONOMICS REVIEW 341 (2002).

¹⁸⁵ *See, e.g.*, Judicial Code of Conduct, Canon 1 comment.

Most states will continue to elect judges, whether this choice is wise or unwise. Given that political reality, what lessons can we draw from the past? Of course, much has changed from the nineteenth century campaign practices. Today judges campaign more independently from their state and local parties, and they are relatively more direct in voicing their positions on legal matters.¹⁸⁶ Nevertheless, empirical evidence from the past suggests that lengthening the terms of elected judges could produce a state bench that balances independence and responsiveness, and reduces the influence of special interests. 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.¹⁸⁷ Today, longer terms would allow 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. The fastest growing selection method is the merit plan (also known as the Missouri Plan), in which judges are nominated by a commission, and then are appointed by the governor. The merit plan then has these judges face yes-or-no retention elections often after six or eight year terms). The merit plan reversed the late-nineteenth-century model of elections to long terms. Election to long terms started with democratic influence, but then alleviated it thereafter; the merit plan distances democratic influence initially, and then increases it thereafter.

Considering that judicial elections seem here to stay, this historical episode a century ago suggests that, to restore judicial independence and the rule of law in tandem with democratic accountability, reformers might consider lengthening terms, instead of focusing so much on the political mechanics of the initial appointment.¹⁸⁸

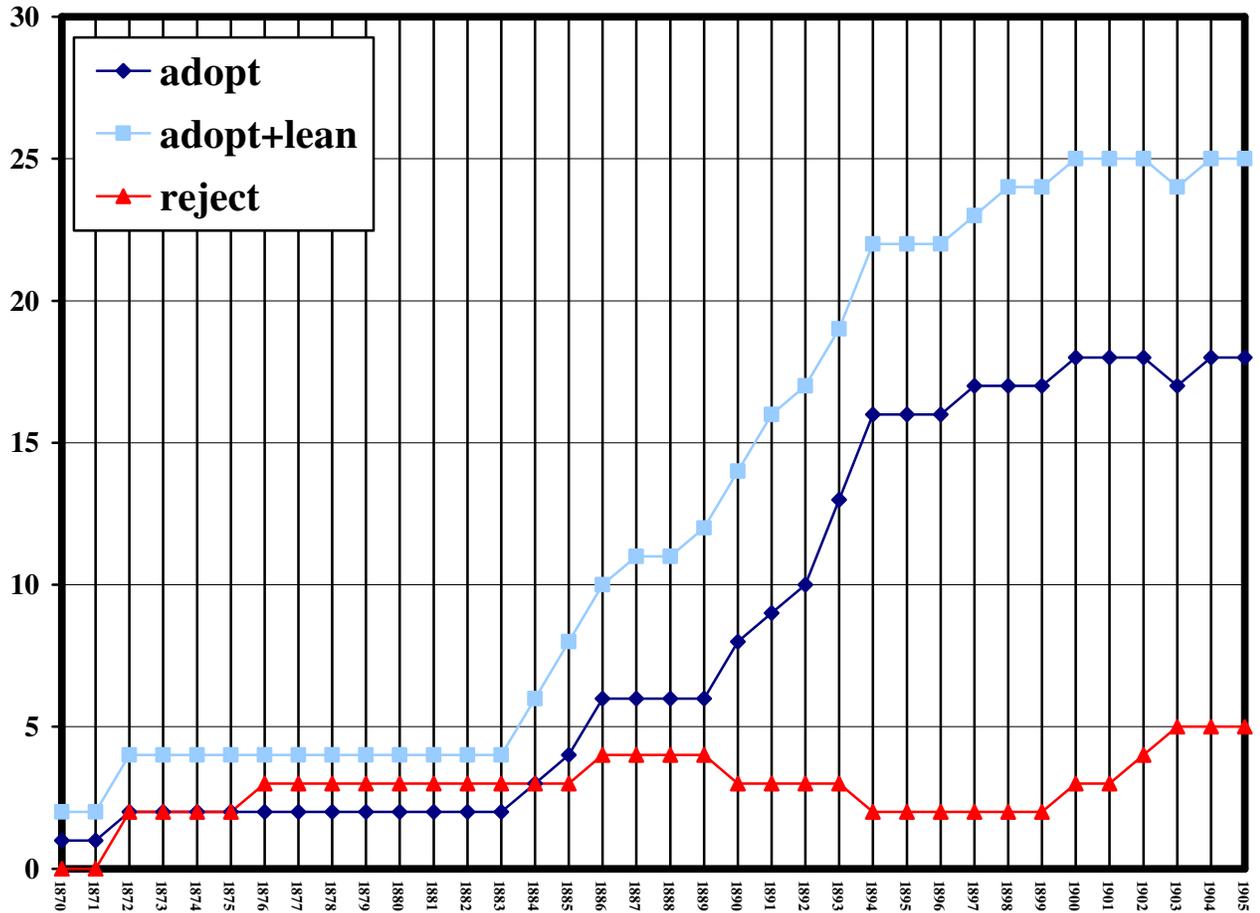
¹⁸⁶ See David Pozen, *The Irony of Judicial Elections*, supra note __. See also *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

¹⁸⁷ See, e.g., MATTHEW J. STREB, ED., *RUNNING FOR JUDGE* (2007); 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 Tipping Point,” (<http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>). See generally [justiceatstake.org](http://www.justiceatstake.org) and [ajs.org](http://www.ajs.org).

¹⁸⁸ 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.

The result might be a bench that is simultaneously more independent from special interests and more responsive to the public.

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 Johnstown Flood was May 31, 1889. Note the rapid rise of adoptions from 1889 to 1900, especially the dark blue line for explicit adoptions.

The pattern of adoption starting in the mid-1880s, before the Johnstown Flood, is attributable to a few factors, which were addressed in an earlier article, *The Floodgates of Strict Liability*: 1) Disastrous California floods in the early 1880s led to the state's adoption of *Rylands* in 1886. Some of those floods related to hydraulic mining, and two other states adopting in the 1880s were mining states (Nevada in 1885, Colorado

in 1887) 2) Upper Midwestern states were the majority of the other states in the 1880s (Michigan and Wisconsin in 1884, Illinois in 1885/1887, and Iowa in 1886). In the 1880s, this region's population and industry were growing rapidly, and the region's political trends had recently shifted toward agrarian populism and against industry.

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. Wisconsin,¹⁸⁹ E 10, adopt 1884
2. California¹⁹⁰ (E-12) adopt 1886
3. Maryland¹⁹¹ (E-15), adopt 1890
4. New York,¹⁹² (E 14), waver toward, 1890-1908
5. Pennsylvania,¹⁹³ (E-21), lean toward, 1891
6. Missouri¹⁹⁴ (E-10), waver toward, 1893

(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,¹⁹⁵ (E-6), adopt, 1872

¹⁸⁹ *Atkinson v. Goodrich Transp. Co.*, 18 N.W. 764, 775 (Wis. 1884)

¹⁹⁰ *Colton v. Onderdonk*, 10 P. 395, 397-98 (Cal. 1886)

¹⁹¹ *Susquehanna Fertilizer Co. v. Malone*, 20 A. 900, 901 (Md. 1890); *Baltimore Breweries' Co. v. Ranstead*, 28 A. 273, 274 (Md. 1894).

¹⁹² *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).

¹⁹³ *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)

¹⁹⁴ *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).

2. Michigan¹⁹⁶ (E-8), leaning toward, 1884
 3. Nevada¹⁹⁷ (E-6), leaning toward, 1885
 4. Illinois¹⁹⁸ (E-9) adopt 1885, 1887
 5. Iowa¹⁹⁹ (E-6) adopt 1886
 6. Colorado²⁰⁰ (E-9) Lean 1887, 1893
 7. Alabama²⁰¹ (E-6) Lean, 1889
 8. Ohio²⁰² (E-6), adopt, 1891
 9. Oregon²⁰³ (E6, adopt 1893
 10. South Carolina,²⁰⁴ E6, adopt 1894
 11. Wyoming,²⁰⁵ E8 Adopt 1894
 12. Kansas²⁰⁶ (E-6) adopt 1897
 13. Utah²⁰⁷, E6 leaned, 1898
 14. Tennessee,²⁰⁸ E8, Adopt 1900
- Post-1900:
15. Montana²⁰⁹ E6, Adopt 1904 (statehood in 1889)
 16. Indiana²¹⁰ (E-6) adopt 1912

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

¹⁹⁵ Cahill v. Eastman, 18 Minn. 324, 334-37, 344-46 (1872).

¹⁹⁶ Boyd v. Conklin, 20 N.W. 595, 598 (Mich. 1884).

¹⁹⁷ Boynton v. Longley, 6 P. 437, 441 (Nev. 1885).

¹⁹⁸ Chi. & N.W. Ry. v. Hunerberg, 16 Ill. App. 387, 390-91 (1885); Seacord v. People, 13 N.E. 194, 200 (Ill. 1887).

¹⁹⁹ Phillips v. Waterhouse, 28 N.W. 539, 540 (Iowa 1886).

²⁰⁰ 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).

²⁰¹ City of Eufaula v. Simmons, 6 So. 47, 48 (Ala. 1889); Drake v. Lady Ensley Coal Co., 14 So. 749, 751 (Ala. 1894).

²⁰² 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)

²⁰³ Esson v. Wattier, 34 P. 756, 757 (Or. 1893).

²⁰⁴ Frost v. Berkeley Phosphate Co., 20 S.E. 280, 283 (S.C. 1894).

²⁰⁵ Clear Creek Land & Ditch Co. v. Kilkenny, 36 P. 819, 820 (Wyo. 1894).

²⁰⁶ Reinhart v. Sutton, 51 P. 221, 222 (Kan. 1897).

²⁰⁷ N. Point Consol. Irrigation Co. v. Utah & Salt Lake Co., 52 P. 168, 173 (Utah 1898).

²⁰⁸ 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).

²⁰⁹ Longtin v. Persell, 76 P. 699, 700 (Mont. 1904).

²¹⁰ 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.

1. Washington²¹¹, E6, Reject 1893
2. Texas,²¹² E6, wavering and leaning against, 1900
3. Kentucky²¹³ E8, Rejected 1902
4. North Dakota²¹⁴, E6, rejected 1911 (statehood in 1889)

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, silent²¹⁵
3. North Carolina, E8, silent
4. South Dakota (statehood in 1889), E6, silent
5. Idaho²¹⁶ (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) Silent²¹⁷

²¹¹ Klepsch v. Donald, 30 P. 991, 993 (Wash. 1892).

²¹² *Gulf, Colorado & Santa Fe Railway v. Oakes*, 58 S.W. 999, 1000 (Tex. 1900); and *Barnes v. Zettlemoyer*, 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).

²¹³ *Triple-State Natural Gas & Oil Co. v. Wellman*, 70 S.W. 49, 50 (Ky. 1902);

²¹⁴ *Langer v. Goode*, 131 N.W. 258, 259 (N.D. 1911)

²¹⁵ Nebraska adopted *Rylands* in 1919.

²¹⁶ *Burt v. Farmers' Co-operative Irrigation Co.*, 30 Idaho 752, 767 (1917)

7. New Hampshire,²¹⁸ A-Good behavior, Reject 1873

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

Terms shorter than 10 years

8. Vermont²¹⁹, A2, Adopt 1892

9. South Carolina,²²⁰ A 6 Adopt 1894

10. New Jersey,²²¹ A 6/7, waver towards

Terms longer than 10 years:

11. Massachusetts²²² A-Good Behavior, Adopted 1868

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

West Virginia:²²³ (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.

Georgia: (Appointed to 12 year terms under the 1868 Constitution; terms shortened to six years in the 1877 Constitution; elected by the public to six year terms by a 1896 amendment). Georgia distinguished between natural and artificial water drainage in *Phinizy v. City Council of Augusta*, 47 Ga. 260, 266 (1872), but the court placed this distinction clearly in the context of traditional nuisance law. It is difficult to categorize *Phinizy* as leaning to *Rylands*’s rule, but it is also difficult to categorize Georgia as silent. Thus I decided not to include it in either category. As an elected court, the Georgia Supreme Court adopted *Rylands* explicitly in 1919, a few years after the time period examined in this article.

Florida (silent on *Rylands*) 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

²¹⁷ Virginia adopted *Rylands* in 1918, after the relevant time period of the study of the Gilded Age and Progressive Era (1876-1914).

²¹⁸ *Brown v. Collins*, 53 N.H. 442, 442-47 (1873).

²¹⁹ *Gilson v. Del. & Hudson Canal Co.*, 26 A. 70, 72 (Vt. 1892).

²²⁰ *Frost v. Berkeley Phosphate Co.*, 20 S.E. 280, 283 (S.C. 1894).

²²¹ *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).

²²² *Ball v. Nye*, 99 Mass. 582 (1868).

²²³ *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)

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, late in this period

Arizona: 1912 statehood, late in this period

Oklahoma, E6, 1907 statehood, late in this period

Louisiana A10, Leaning towards *Rylands*, civil law system.

Appendix B:

Cochran-Armitage Trend Test of Three Groups:

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.²²⁴ 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	7	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	7	0

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

²²⁴ 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.

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 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, with p-values provided for the various tables based on the Cochran-Armitage Trend Test.

To test robustness, I have also separated the elected courts into three groups by term length: terms of ten years or more; terms of eight or nine years; and six years or fewer (six years is the median number among all courts). In these groups, the one-tailed p-value is more relevant, because it takes into account whether elections or long term length indeed made the adoption of strict liability more likely, but I provide both the one- and two-tailed for each table.

Through 1900, the one-tailed p-value was .0802 (two-tailed was .1328).

	Adopting	Rejecting/silent
6 year terms	9	8
8-9 year terms	5	3
10+ year terms	5	1

Through 1914, the one-tailed p-value was .0968 (two-tailed was .1552):

	Adopting	Rejecting/silent
6 year terms	11	6
8-9 year terms	5	3
10+ year terms	6	0

Alternatively, the states can be divided into a similar set of three: terms of more than ten years; terms of eight to ten years; and terms of six years or fewer. Through 1900, the one-tailed p-value was .2294 (two-tailed was .4458). These p-values suggest not much significance for this group:

	Adopting	Rejecting/silent
6 year terms	9	8
8-10 year terms	7	3
12+ year terms	4	1

Through 1914, the significance is stronger. The one-tailed p-value was .1327 (two-tailed was .2014):

	Adopting	Rejecting/silent
6 year terms	11	6

8-10 year terms	7	3
12+ year terms	5	0

What was the difference between 1900 and 1914? First, West Virginia, with twelve year terms, goes from silence to excluded and not counted. Even though West Virginia adopted *Rylands* in 1911 and thus would seem to bolster the pattern here, I exclude it after 1900 for the reasons in the appendix. Second, more states with elections to short terms move from silence to adopting – which would weaken the trend. If West Virginia dropping out of the study had more impact on the statistical significance than the short-term elected states adopting *Rylands*, these statistics should be taken with a grain of salt. Nevertheless, these patterns suggest the same trend: the longer the term, the more likely elected judges adopted *Rylands* and strict liability in the midst of late-nineteenth century flooding disasters.

APPENDIX C: TABLES FOR DIFFERENT GROUPINGS

1. State courts with supreme court elections to terms of **more than 10 years:**

4 of 5 (80%) adopted through 1900, **5 of 5** (100%) through 1914²²⁵

2. States with supreme court elections to terms of **8 to 10 years:**

7 of 10 (70%) adopted or leaned towards *Rylands* (both through 1900 and 1914)²²⁶

3. States with appointed supreme courts **with 6 years:**

9 of 17 (53%) adopt *Rylands* through 1900, **11 of 17** (65%) through 1914.²²⁷

THROUGH 1900:

²²⁵ Pennsylvania, New York, Maryland, and California adopted *Rylands* by 1900. Again, West Virginia was silent through 1900, and had adopted *Rylands* in 1911.

²²⁶ Wisconsin, Missouri, Colorado, Illinois, Michigan, Wyoming and Tennessee adopted. Kentucky rejected, and Arkansas and North Carolina were silent – and each of these three had eight year terms, the shortest terms within this group.

²²⁷ The *Rylands* adopters were: Minnesota, Nevada, Iowa, Alabama, Ohio, Oregon, South Carolina, Kansas, Utah (before 1900), plus Montana and Indiana by 1914. Washington, Texas, and North Dakota rejected, and Nebraska, South Dakota and Idaho were silent through 1914.

All states for 1865-1900:
value = .0247

two-sided p-

	adopting	Rejecting/silent
Appointed	4	7
Elected, short term	13	11
Elected, long term	6	1 ²²⁸

1865-1900, without New England:
= .0578

p-value

	adopting	Rejecting/silent
Appointed	2	3
Elected, short term	13	11
Elected, long term	6	1

1865-1900, without the very recently admitted western states (post-1889): p-value =
.0205

	adopting	Rejecting/silent
Appointed	4	7
Elected, short term	13	7
Elected, long term	6	1

1865-1900, without New England and without western states:
= .0838

p-value

	adopting	Rejecting/silent
Appointed	2	3
Elected, short term	13	7
Elected, long term	6	1

THROUGH 1914:

²²⁸ West Virginia was silent in this era.

All states for 1865-1914:
.0079

p =

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

1865-1914, with no New England states:
.0341

p =

	adopting	Rejecting/silent
Appointed	2	3
Elected, short term	15	9
Elected, long term	7	0