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The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law

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The received wisdom is that American judges rejected strict liability through the nineteenth and early twentieth centuries. 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 Article offers quantitative data on the state courts and the particular judges, suggesting a pattern that judicial elections plus long terms shaped a more responsive bench. By itself, this data is suggestive but not conclusive. The Article offers an explanation for this pattern based on the judicial politics of the late nineteenth century. This Article examines three factors in judicial elections that produced this strange outcome: political incentives, selection effects, and institutional/psychological effects. Political incentives—the political pressure of the next election—appear to have been relatively insignificant considering how elected judges became more responsive as their terms got longer. In terms of selection effects, judicial elections may have attracted a certain type of lawyer–politician who was more attuned to public opinion and the influence of events, but it is important not to overstate these effects. Appointed and elective systems appear to have drawn judges from similar backgrounds.

Finally, judicial elections produced institutional and psychological effects. Borrowing from the nineteenth-century designers of judicial elections and twentieth-century legal historians and social psychologists, I suggest that the

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elected judges' "role fidelity" to the people led them to perceive public opinion as an important factor in their decisions. Elected judges with more job security could be more faithful to their role (hence, "role fidelity") and could follow their own perceptions of public interest or public opinion, rather than industrial interests. Modern social psychology offers an explanation for why judges selected by party and special interests would defect in favor of public interests: "role conflict" theory suggests that perceptions of legitimacy are decisive, and judicial elections were designed to legitimize public opinion as a source for law. Long terms built in space for political drift: drift away from party or special interests, and towards the judge's conception of public interest.

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INTRODUCTION

Almost 90% of state judges face some kind of popular election.[1] Thirty-eight states put all of their judges up before the voters.[2] One might think of judicial elections as America's truly peculiar institution: even though many countries have copied American legal institutions, almost no one else in the world has ever experimented with the popular election of judges.[3]

Since the 1980s, judicial elections have become increasingly nasty, noisy, and costly.[4] In the aftermath of one such campaign, the Supreme Court in *Caperton v. A.T. Massey Coal Co.* established a due process right to disqualify a judge who enjoyed significant campaign support from one of the litigants or lawyers.[5] The CEO of a West Virginia coal company had spent $3 million supporting Brent Benjamin's campaign for a seat on the West Virginia Supreme Court, more than 60% of the total amount spent to support Justice Benjamin's campaign. This funding supported an advertising campaign unfairly portraying Benjamin's opponent as an enabler of child molesters. At the same time, the coal company was appealing a $50 million verdict against itself. Benjamin won his election and then cast the deciding vote in the court's 3–2 decision overturning that verdict. In a 5–4 vote, the U.S. Supreme Court rejected Benjamin's refusal to recuse himself. This case is one of many examples confirming that modern judicial elections undermine judicial independence and the rule of law. But this was not always the case. In fact, judicial elections originated from a

1. RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 7 (Matthew J. Streb ed., 2007)

2. Nine states that select judges by gubernatorial appointment are Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont. New York's lower-court judges are elected, but not the judges on its highest court, the Court of Appeals. South Carolina and Virginia use legislative appointment. *See, e.g.*, American Judicature Society: Judicial Selection in the States, http://www.judicialselection.us (last visited Mar. 29, 2010).

3. Even though Americans have exported constitutions and other legal institutions to much of the world, no one else has been importing judicial elections. The only other nations that elect even a tiny number of judges are Switzerland and Japan, and even those countries narrowly limit the scope of those elections. In Japan, the cabinet initially appoints high-court judges, and they run once for election unopposed. The emperor selects the chief judge. In Switzerland, some lay judges of canton courts are elected. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 691 n.3 (1995). In modern France, some lower court judges are elected. *See* Amalia D. Kessler, *Marginalization and Myth: The Corporatist Roots of France's Forgotten Elective Judiciary* (Stanford Pub. Law Working Paper No. 1470271, 2009), *available at* http://ssrn.com/abstract=1470271.

4. *See, e.g.*, David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008).

5. 129 S. Ct. 2252 (2009).

movement to promote judicial independence and the rule of law.

Not coincidentally, judicial elections are drawing more attention from the courts and from academics. Most academic studies focus on selection methods, which are divided into categories of appointment, partisan election, nonpartisan election, and merit plan with retention elections. The research demonstrates, unsurprisingly, that elected judges tend to reach legal results that are 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.[6] Other studies find that elected judges disproportionately rule in favor of their campaign contributors.[7] It has been a long-established practice for parties and lawyers to donate to judges who will later hear their cases, but the difference today is the size of those donations.[8] Spending on judicial campaigns has doubled in the past decade, with 44% of those donations coming from business groups and 21% coming from lawyers.[9]

Justice and fairness depend upon judges being somewhat insulated from political influence and bias. To be a good judge is to be able to set public or private opinion to one side and to rule on the merits of a case. If judicial independence means protection from political pressure, then term length is probably more significant than the selection method, though 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.[10] The implication is that shorter terms make

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6. *See, e.g.*, 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); 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. 25 (1979); Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107–38 (2007); 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); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186–87 (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. Uelmen, *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 in death penalty affirmance rates between judges selected by executive appointment compared with judges selected by election or legislative appointment). *But see* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection*, 72 S. CAL. L. REV. 465 (1999) (showing no significant effect of selection methods on capital case outcomes).

7. Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES, Jan. 29, 2008, at A14; Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1.

8. JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 15–27 (2006), http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf; DEBORAH GOLDBERG ET AL, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004, at 19 (2004), http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BBFBD7C43A3.pdf.

9. SAMPLE ET AL., *supra* note 8, at 18.

10. *See, e.g.*, Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1291 (1999) (finding that, as judges' term lengths

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."[11] 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."[12]

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 its strict liability standard 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 that American courts 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.[13] 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. Part I summarizes this story.

In moving from fault to strict liability in cases pitting industry against public fears, these judges were aligning with public opinion. Elected courts were more

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increase, they are more likely to hear a challenge to an abortion statute under the court's discretionary powers); 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); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 438–39 (1992) (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, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 497–98 (1995) (same); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247 (2004) (finding that judges give longer sentences when they get closer to re-election); *see also* Paul Brace & 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).

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

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

13. *See* Jed Handelsman Shugerman, *A Watershed Moment: Reversals of Tort Theory in the Nineteenth Century*, 2 J. TORT L. (2008) [hereinafter Shugerman, *A Watershed Moment*]; Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of* Fletcher v. Rylands *in the Gilded Age*, 110 YALE L.J. 333 (2000) [hereinafter Shugerman, *Floodgates*]. These articles discuss how I have defined the "adoption" of *Rylands*: a state supreme court relying on *Rylands*'s strict liability language or recognizing a rule that applies strict liability to unnatural activities or a very similar category of artificial or hazardous activities, and there is no subsequent decision casting doubt on *Rylands* or its rule. In an earlier article, I offered four categories: adopting *Rylands*, leaning towards *Rylands* (i.e., adopting a similar rule, or generally adopting *Rylands* despite one less enthusiastic decision), wavering, and rejecting. Shugerman, *Floodgates*, *supra*, at 334–35 & n.9. *See infra* app. A for a table of all states categorized by selection method, term length, and position on *Rylands* and strict liability for unnatural or hazardous activities. In this Article, I often use the term "adopting" when referring to both adopting and leaning states.

populist: they were more likely to adopt strict liability than appointed judges.[14] Federal judges—appointed for life—ignored *Rylands*, and appointed state judges—whose term lengths varied—mostly rejected or ignored *Rylands*, too. Elected judges drove the adoption of *Rylands* and its more populist response to industrial hazards, but surprisingly, state judges elected to longer terms were *the most responsive and the most populist*, defying common-sense wisdom that responsiveness only grows as an election draws closer. Part II sets out this data by examining the courts by selection method and term length, and by looking at the years remaining for the particular judges adopting or rejecting *Rylands*.

This historical evidence challenges the conventional wisdom that longer terms make judges less responsive to events or public opinion. But the quantitative patterns by themselves are not conclusive and do not tell a story. In Part III, I turn to the available historical materials to offer some explanations for these patterns. I suggest that judicial elections generally may have produced judges more sympathetic to public opinion and more responsive to salient and dramatic events. To be clear, this Article does not demonstrate that tort doctrine was an issue in any judicial election campaign. There was no mass movement against the fault rule, no "Strict Liability" political party, no "The People for *Rylands*" street protests. The question is why certain judges responded to specific events and more general shifts in public opinion by translating them into esoteric doctrinal changes. Even if the adoption of *Rylands* had no effect on a judge's popularity, elected judges were attuned to events and populism—and all the more so when they had enjoyed longer terms and had to worry less about getting re-elected.

Section III.A details how Reconstruction-era reformers intentionally designed this dynamic. In response to corruption scandals in which business leaders bribed judges and in which party machines controlled the courts during the 1860s and 1870s, several states lengthened the judges' terms explicitly to give them *more* judicial independence—to give them more freedom from special interest control and from political corruption. These constitutional reformers retained elections precisely because they wanted public opinion to continue to shape the courts. However, their understanding from experience was that, as a judge got closer to an election, the judge would disregard law and public interest and would favor narrow interests. Longer terms insulated judges from the special interests so that the judges could better serve the general interest. This battle for judicial independence ultimately paved the way for *Rylands*'s spread two decades later. The states that extended their judges' terms to ten years or more were the most responsive to populist fears and least responsive to industrial interests.

I focus on two main reasons for this dynamic, which are consistent with why

14. 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 VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 288–91 (1997).

the nineteenth-century constitutional reformers first adopted elections and then retained them while making terms longer. First, these elections created a *selection effect*: a populist filter selecting for judges more willing to run in elections and engage in popular politics. Although the record suggests that elections may have had the effect of shifting the bench from major urban centers to smaller towns, there is limited concrete evidence of other changes in judges' backgrounds. Because the appointment process was already political and partisan in the nineteenth century, the change to popular elections was not as significant a filter as one might have imagined. Nevertheless, the practice of popular judicial elections required a certain political personality; empirical studies today demonstrate that modern elections have a significant selection effect and this data suggests that a similar effect could have been present in the nineteenth century as well.

Second, and probably more significantly, judicial elections had a *psychological* and *institutional* effect, making public opinion or salient events a legitimate and even decisive source of law. First, behavioral law and economics scholarship identifies an "availability heuristic," in which salient and dramatic events dominate more abstract or potential risks in our perceptions and our behavior is shaped more by immediate experiences than by imagined possibilities.[15] The Johnstown Flood is an example of a potential risk that had been overlooked turning into a traumatic event that state judges arguably overemphasized. Next, social psychology's "role theory" helps explain why elected judges followed different norms than did appointed judges. Modern legal historians have already picked up on the concept of "role fidelity" to explain why appointed judges adhered to formalism and ignored their own conscience in slavery cases, and speculated that judicial elections were meant to reverse these norms in favor of public opinion. "Role conflict" theory offers an explanation for why judges selected by party and special interests would defect from those interests in favor of public interests.[16] These theorists suggest that, when someone in an official role is placed in conflict between norms or sides, two factors are decisive: power and legitimacy (or more precisely, the perceptions thereof). The state constitutional conventions from the 1840s through the 1870s adopted and retained judicial elections explicitly to make public opinion a legitimate source of law for judges, and, in their own words, to encourage "fidelity" to the

15. *See, e.g.*, Cass Sunstein and Timor Kuran, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Aaron Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOLOGY 207 (1973).

16. *See infra* section III.E. *See generally* B.J. Biddle, *Recent Development in Role Theory*, 12 ANN. REV. SOC. 67, 82–84 (1986) (describing role conflict as "the concurrent appearance of two or more incompatible expectations for the behavior of a person"); John T. Gullahorn & Jeanne E. Gullahorn, *Role Conflict and Its Resolution*, 4 SOC. Q. 32 (1963) (discussing role conflict in relation to social role and status and methods for its resolution).

people.[17] Even if a judge never faced another election, his legitimacy and power originated with the people. Then, in the wake of corruption scandals and party machine problems, state conventions lengthened the judges' terms to create judicial independence from special interests and parties, thereby diminishing their power. In "role conflict" terms, elections *legitimated* public opinion as a source of law, and long terms reduced the countervailing *power* of other interests to allow these judges to follow the public interest. Long terms built in space for a certain trajectory of political "drift": drift away from party or special interests, and towards the judge's conception of public interest.

With their sympathies shaped by direct democracy, some of these elected judges were shielded from industry favoring the fault rule by long terms of ten years or more. These judges were more able to follow those sympathies or new perceptions of public interest in favor of strict liability. I emphasize that, in the wake of floods and other disastrous events, judges elected to longer terms were more responsive to public opinion than other judges, even if they still had to balance public opinion with other political pressures.

Before the Johnstown Flood, judges of all stripes—Democrat and Republican, elected and appointed, short- and long-term—would have struggled to balance industry's interest in the fault rule against a looser populist valence of strict liability. Given the strength of preferences and political power, it is unsurprising that the fault rule and industrial interests tended to win, even if a handful of elected judges adopted *Rylands* in the 1880s. The Johnstown Flood simply added tons of hydraulic pressure to the populist side of the equation. Unlike other areas of tort law that affected a narrow group of victims, water use and other hazardous activities placed broader populations at risk, and thus public opinion shifted more broadly. Even though strict liability was never a popular campaign issue, elected judges translated broad and unfocused public outrage into a narrow and focused doctrinal change. After the Flood, the judges elected to longer terms had the most political leeway to follow their personal or institutional commitments to translating public opinion into law.

In Part III, I first focus on the practice of judicial elections, with evidence that earning a party's nomination involved a complex balancing of factional politics, regional rivalries, and various special interests. In the general elections, the races were close, and although most judicial candidates did not campaign personally but instead simply relied on the party machines and straight-ticket voting, others engaged in more direct grassroots, brass-knuckle (and sometimes nasty) campaigning. Part III then traces the adoption of longer terms in some states in order to insulate judges from special interests, corruption, and partisanship. In light of the Supreme Court's 2009 decision on judicial elections in *Caperton v. A.T. Massey Coal Co.*, I conclude with some reflections on popular

17. *See* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010) (explaining the rise of judicial elections in the 1840s and 1850s as a means of increasing judicial independence, judicial review, and judicial power).

constitutionalism and the rule of law, and I suggest reforms for judicial elections and lengthening terms.

I. *RYLANDS*: REJECTION AND ADOPTION

This Part lays out the facts of *Rylands* and its strict liability rule, its initially cool reception in America, and the power of the Johnstown Flood of 1889 in transforming public opinion on reservoirs and hazardous activities, ultimately triggering a majority of state courts to adopt the *Rylands* rule by 1900.

A. *FLETCHER V. RYLANDS*: THE CASE

John Rylands, a textile manufacturer, was an extraordinary English industrialist in the middle of the nineteenth century.[18] 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 reservoir collapsed into an abandoned coal-mining shaft which connected to Thomas Fletcher's neighboring coal mines.[19] The reservoir flood forced Fletcher to abandon those mines.[20]

An initial arbitration proceeding—much like a special master—framed one issue for the English courts: could John Rylands be held liable without fault?[21] The Court of the Exchequer ruled against Fletcher because the case fit none of the traditional causes of action of trespass, negligence, and nuisance.[22] 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 prim[a] facie answerable for all the damage which is the natural consequence of its escape.[23]

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.[24]

The House of Lords affirmed the Exchequer Chamber and its strict liability rule in 1868.[25] Lord Cairns emphasized the difference between natural use and

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18. A.W.B. Simpson, *Legal Liability for Bursting Reservoirs: The Historical Context of* Rylands v. Fletcher, 13 J. LEGAL STUD. 209, 239 n.117 (1984).

19. Fletcher v. Rylands, (1865) 159 Eng. Rep. 737, 740–41 (Exch.).

20. Simpson, *supra* note 18, at 241–42.

21. Kenneth S. Abraham, Rylands v. Fletcher*: Tort Law's Conscience*, *in* TORTS STORIES 207, 211 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

22. *Rylands*, 159 Eng. Rep. at 743–47. 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 OF THE LAW OF TORTS § 70, at 480 (3d ed. 1964).

23. Rylands v. Fletcher, (1866) 1 L.R. Exch. 265, 279 (Exch. Ch.).

24. *Id.* at 280.

25. Rylands v. Fletcher, (1868) 3 L.R.E. & I. App. 330, 342 (H.L.).

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 land."[26] 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 "default[ed]," or that the accident was an "act of God."[27] 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.[28]

In America, the initial reception was mixed. Massachusetts and Minnesota immediately adopted *Rylands*[29] and consistently expanded their application of its doctrine.[30] One expansion was a notable opinion by Judge Oliver Wendell Holmes.[31] Then the tide turned against *Rylands*. The highest courts in New York,[32] New Hampshire,[33] and New Jersey[34] 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.[35]

After these prominent eastern state supreme courts rejected *Rylands*, America's treatise writers followed.[36] This initial reaction helped form the conventional wisdom about American tort law: the nineteenth century was the rise and domination of the negligence rule,[37] and strict liability emerged only in the

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26. *Id.* at 338–39.

27. *Id.* at 340.

28. *See* Simpson, *supra* note 18, at 251–64.

29. Ball v. Nye, 99 Mass. 582, 583–84 (1868); Cahill v. Eastman, 18 Minn. 324, 334–37, 344–46 (1872).

30. Shipley v. Fifty Assocs., 101 Mass. 251, 252–53 (1869) (extending *Rylands* to defendants who constructed a roof that collected snow and ice but did not prevent it from falling on people traveling on a nearby sidewalk), *aff'd*, 106 Mass. 194 (1870); Berger v. Minneapolis Gaslight Co., 60 Minn. 296 (1895); Hannem v. Pence, 40 Minn. 127 (1889); Knapheide v. Eastman, 20 Minn. 478 (1874).

31. Davis v. Rich, 62 N.E. 375 (Mass. 1902) (upholding jury instructions that required finding liability if a spout was maintained as to cause water to enter a sidewalk, without requiring further proof of negligence).

32. Losee v. Buchanan, 51 N.Y. 476, 486–87 (1873).

33. Brown v. Collins, 53 N.H. 442, 446, 450–51 (1873).

34. Marshall v. Welwood, 38 N.J.L. 339, 341 (1876), *overruled by* State Dept. of Envtl. Prot. v. Ventron Corp., 468 A.2d 150, 157 (N.J. 1983).

35. Pa. Coal Co. v. Sanderson, 6 A. 453 (Pa. 1886). See Shugerman, *A Watershed Moment*, *supra* note 13, for more discussion of *Sanderson* and other related cases.

36. See Shugerman, *Floodgates*, *supra* note 13, at 340–41, for a discussion of these treatises.

37. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 409–27 (1973); MORTON J. 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, 365, 370, 382 (1951); Simpson, *supra* note 18, at 214–16; *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 Reinterpreta-*

mid-twentieth century.[38] Most modern casebooks include some note with this historical interpretation after *Rylands*, often including one or two of the American cases rejecting *Rylands*.[39]

It is true that *Rylands* had a mixed and even hostile reception in America for about two decades,[40] and that federal courts almost completely ignored it well into the twentieth century.[41] However, by the turn of the twentieth century, eighteen states had adopted *Rylands* explicitly and seven more had adopted a general strict liability rule for unnatural activities, hazardous activities, or *Rylands*-like storage of large amounts of water.[42] (This tally does not include the separate line of strict liability cases for fire or blasting). Most of these states adopted *Rylands* in the 1890s.

What accounts for this dramatic reversal? 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.[43] While these factors contributed to the small bump towards *Rylands* in the 1880s,[44] 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.[45] 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.[46] Texas experienced a series of reservoir failures producing severe damage starting in the late 1890s, and at the same time it

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tion, 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).

38. *See* Gregory, *supra* note 37, at 381–88; 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, 257–60 (1987); Rabin, *supra* note 37, at 961.

39. *See, e.g.*, RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 139–43 (9th ed. 2008).

40. *See* Shugerman, *Floodgates*, *supra* note 13, at 338–39.

41. *See id.* at 345–46. See *infra* app. A for a list of cases.

42. *See infra* app. A. "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.

43. *See* Shugerman, *Floodgates*, *supra* note 13, at 347–55.

44. In the mid-1880s, the states of Michigan, Wisconsin, Illinois, and Iowa adopted or leaned towards *Rylands*. *See infra* app. A. This trend towards *Rylands* before the Johnstown Flood may be attributable to what was discussed in Shugerman, *Floodgates*, *supra* note 13, 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).

45. *See* Shugerman, *Floodgates*, *supra* note 13, at 356–72.

46. *See* Colton v. Onderdonk, 10 P. 395, 397–98 (Cal. 1886). 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. & WILLIAM B. SECREST, SR., CALIFORNIA DISASTERS, 1812–1899, at 93–97, 129–31, 187–91 (2006).

wavered on *Rylands*.[47] I will now turn to the Johnstown Flood and the resurrection of *Rylands* in America.

B. THE JOHNSTOWN FLOOD AND THE AMERICAN ADOPTION OF *RYLANDS*

Pittsburgh's titans of industry—including Andrew Carnegie, Andrew Mellon, and Henry Clay Frick—belonged to the South Fork Fishing and Hunting Club, also known as "The Bosses' Club." The club owned one of the largest reservoirs in the world and used it for recreation.[48] The club's owners and employees ignored many warnings of the reservoir dam's decay,[49] and it collapsed in the middle of a violent night storm in 1889. Twenty million tons of water crashed into the valley below at one hundred miles an hour.[50] The flood completely destroyed Johnstown, killing two thousand people, and even flooded Washington, D.C.[51] It became the legendary "Johnstown Flood," one of the most deadly disasters in American history and "the biggest news story since the murder of Abraham Lincoln."[52] Public opinion turned against the club's wealthy members[53] and newspapers demanded justice.[54] A county commission quickly investigated the dam, and on June 7 it announced that the owners were "culpable" and "responsible" for the deaths.[55] Throughout the country, newspapers accused the club of being "negligent," criminally negligent, or even guilty of manslaughter.[56] Mobs gathered and attacked the club.[57]

Two months after the Johnstown Flood, one of the most prestigious legal periodicals of the time, the *American Law Review*, published an article detailing the flood's carnage and calling for courts to adopt *Rylands*.[58] The Johnstown

47. *See* Shugerman, *Floodgates*, *supra* note 13, at 371.

48. *See* DISASTER, DISASTER, DISASTER 17–18 (Dougles Newton ed., 1961).

49. DAVID MCCULLOUGH, THE JOHNSTOWN FLOOD 41–42 (1968).

50. *See* DISASTER, DISASTER, DISASTER, *supra* note 48, at 18.

51. *Id.* at 36; MCCULLOUGH, *supra* note 49, at 264.

52. MCCULLOUGH, *supra* note 49, at 203. It was "the greatest outpouring of popular charity the country had ever seen." *Id.* at 224–25; *see also* WILLIS FLETCHER JOHNSON, HISTORY OF THE JOHNSTOWN FLOOD 266–80 (1889) (noting donations from twenty-five states, and from London, Germany, Belfast, and Turkey). The donations totaled almost $4 million in cash, in addition to food and other necessities. MCCULLOUGH, *supra* note 49, at 225.

53. MCCULLOUGH, *supra* note 49, at 237.

54. *See id.* at 241.

55. JOHNSTOWN TRIB., July 8, 1889; *see also Report of the Committee on the Cause of the Failure of the South Fork Dam*, 24 TRANSACTIONS AM. SOC. CIV. ENGINEERS 431, 456–57 (1891).

56. See Shugerman, *Floodgates*, *supra* note 13, at 360–61, for a survey of the media's outrage; *see also That Fatal Dam: An Expert Engineer Says It Was in Every Respect of Very Inferior Construction*, PITTSBURGH COM. GAZETTE, June 8, 1889, at 1, 7; *The Club Is Guilty*, N.Y. WORLD, June 7, 1889; *The Dam Defective*, PITTSBURGH COM. GAZETTE, June 5, 1889, at 6; *The Fatal Dam*, PITTSBURGH COM. GAZETTE, June 4, 1889, at 1, 6.

57. MCCULLOUGH, *supra* note 49, at 241–43, 255.

58. Note, *The Law of Bursting Reservoirs*, 23 AM. L. REV. 643 (1889). The *American Law Review* was a bimonthly publication regarded as "probably 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

Flood had transformed a vibrant town into a pile of "a great mass of earth, stones, trees, houses, railway locomotives, cars, human bodies, and what not . . . very deep and . . . very solid."[59] The author then concludes that *Fletcher v. Rylands* is "[t]he best answer which has ever yet been given," and which had been "adopted by several American courts, though denied by some."[60] He explains how *Rylands* addresses these risks by allowing the jury to demand justice for the innocent:

> 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.[61]

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 received a great deal of blame in the media. Nancy Little, who lost her husband in the flood, sued the club, alleging negligence.[62] The jury returned a verdict for the club.[63] 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.[64] One businessman, 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 mem-

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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 ALB. L.J. 445, 449 (1870). For a discussion of the significance of these editors, see SURRENCY, *supra*, at 192. Another publication described this group as "illustrious." WOXLAND & OGDEN, *supra*, 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." *American Law Periodicals*, *supra*, at 449.

59. Note, *The Law of Bursting Reservoirs*, *supra* note 58, at 646.

60. *Id.* at 647.

61. *Id.*

62. *Against South Fork Club*, JOHNSTOWN WKLY. DEMOCRAT, July 24, 1891, at 6.

63. Nathan Daniel Shappee, A History of Johnstown and the Great Flood of 1889: A Study of Disaster and Rehabilitation 412 (1940) (unpublished Ph.D. dissertation, University of Pittsburgh), *available at* http://www.accesspadr.org/u?/acacc-jtf,394.

64. *A Flood Damage Suit*, JOHNSTOWN TRIB., May 9, 1894, at 1; *Against the Fishing Club*, JOHNSTOWN TRIB., Nov. 1, 1893, at 1; *see* Shappee, *supra* note 63, at 413.

bers' individual negligence.[65] After Strayer abandoned his suit in 1891, a group of Johnstown businessmen hired lawyers for their own tort suit against the club, but these lawyers also concluded that a 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.[66] The media generally picked up on the requirement to prove individual negligence as the legal obstacle to these suits,[67] 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.

While the trial courts frustrated the flood's 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 *Pennsylvania Coal Co. v. Sanderson*.[68] More than thirty times, the court referred to mine-water runoff or to mining in general as "natural" or occurring "naturally,"[69] a mantra used to distinguish *Sanderson* from *Rylands*, though it ignored the role of "powerful engines" and "an artificial water-course" in creating the runoff.[70] Even though the court ruled that *Rylands* was inapplicable to such "natural" activities, it still took the opportunity to attack the case, declaring that *Rylands* had been rejected in America and that its rule was "arbitrary."[71] The court also emphasized the "great public interest" of industry's unfettered development, dismissing the "mere personal" and "trifling inconveniences" that were caused by industrial damage and that must "give way to the necessities of a great community."[72]

The Johnstown Flood swept in a new attitude toward big industry and liability. In *Robb v. Carnegie Bros.*, 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.[73] The plaintiff's counsel cited *Fletcher v. Rylands* and argued that the damage caused by the coal factory, unlike the damage caused by the mine water in *Sanderson*, was not caused by a "natural product," but rather by one

65. *The South Fork Fishing & Hunting Club in Court*, JOHNSTOWN TRIB., June 18, 1891, at 1.

66. *An Old Case Heard From*, JOHNSTOWN TRIB., June 26, 1897, at 1; *Johnstown Flood Suit Recalled*, JOHNSTOWN TRIB., Nov. 23, 1896, at 1; *South Fork Club Suits*, JOHNSTOWN WKLY. DEMOCRAT, May 18, 1894, at 3; *The South Fork Cases*, JOHNSTOWN TRIB., Feb. 24, 1892, at 1; *The South Fork Club Suits*, JOHNSTOWN TRIB., Feb. 23, 1892; *The South Fork Fishing Club*, JOHNSTOWN WKLY. DEMOCRAT, June 19, 1891, at 1; *The South Fork Fishing & Hunting Club in Court*, *supra* note 65, at 1; *The South Fork Suit*, JOHNSTOWN TRIB., Dec. 15, 1891, at 1; *see* Shappee, *supra* note 63, at 413.

67. *See* MCCULLOUGH, *supra* note 49, at 258–59 (summarizing local and national newspapers and noting how victims' lawyers and the media stressed difficulty of proving individual negligence).

68. 6 A. 453, 460–63 (Pa. 1886).

69. *Id.* at 456–58.

70. *Id.* at 454.

71. *Id.* at 462–63.

72. *Id.* at 459.

73. 22 A. 649 (Pa. 1891).

that was "brought" to the defendants' property.[74] The case was first argued on October 10, 1889,[75] 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.[76] One of these judges was Judge Silas Clark, who was the author of the *Sanderson* opinion and who had been so solicitous of industry.[77] The *Robb* ruling limited "natural" activities to the natural "develop[ment of] the resources of his property," which sharply distinguished *Sanderson*.[78] The key distinction between *Sanderson* and *Robb* rested on the natural and unnatural dichotomy: coal mining itself was natural, but any further development or manufacturing of the coal was not natural.[79] Again, this dispute over naturalness and non-naturalness was an implicit reference to *Rylands*.

Robb further eviscerated *Sanderson* by rejecting *Sanderson*'s reasoning about the supreme importance of industrial development. *Robb* first asserted that "[i]t is a fundamental principle of our system of government that the interest of the public is higher than that of the individual."[80] The opinion then stated that industry is not public, like roads, rails, highways, and canals, but rather private.

> [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.[81]

The language here emphasizes the private and self-interested choices of the industrialist. The Johnstown Flood was the most apparent cause for the sudden

74. Robb v. Carnegie Bros., 145 Pa. 324, 336 (1891).

75. *Id.* at 324.

76. *Robb*, 22 A. at 650–51. The reversing judges were Clark, Green, and Paxson.

77. *See* SMULL'S LEGISLATIVE HAND BOOK OF PENNSYLVANIA 351 (Thomas B. Cochran ed., Harrisburg, E.K. Meyers 1887).

78. *Robb*, 22 A. at 650–51.

79. *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 . . . .").

80. *Id.* at 651.

81. *Id.*

change in the justices' suppositions about industry and the individual homeowner.

Three months later, in *Lentz v. Carnegie Bros.*, the Pennsylvania Supreme Court again ruled unanimously against the Carnegie Company, holding it liable without fault for damages caused by the same coke works.[82] In 1893, the court similarly distinguished *Sanderson* by unanimously finding the storage of oil unnatural and subject to strict liability.[83] Justice Paxson, 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."[84] Throughout the next three decades, Pennsylvania courts, in more than a dozen cases, continued to expand strict liability to more activities, based primarily on the natural versus unnatural use distinction.[85]

Most courts before the Flood had ignored the English strict liability precedent for about two decades.[86] As of 1883, three prominent states—New York,[87] New Hampshire,[88] and New Jersey[89]—had rejected *Rylands* with much vocal pro-industry fanfare, while just two states—Massachusetts[90] and Minnesota[91]—had adopted *Rylands* explicitly. Between 1883 and 1889, only four more states had adopted *Rylands* explicitly,[92] perhaps due to other flooding disasters such as California's of the early 1880s. In an earlier article, I detail how southern California experienced terrible natural floods and how northern California repeatedly endured man-made floods caused by hydraulic mining and industry techniques, with the worst ones occurring just before the California Supreme Court adopted *Rylands* in 1886.[93] California's pattern is a mini-Johnstown

82. 23 A. 219 (Pa. 1892).

83. Hauck v. Tide Water Pipe-Line Co., 26 A. 644, 645 (Pa. 1893); *see also* Gavigan v. Atl. Ref. Co., 40 A. 834, 835 (Pa. 1898) (holding defendant strictly liable for damage caused by his oil and gasoline storage tanks).

84. *Hauck*, 26 A. at 645–46.

85. *See* Mulchanock v. Whitehall Cement Mfg., 98 A. 554, 554 (Pa. 1916) (stone blasting); Welsh v. Kerr Coal Co., 82 A. 495, 495 (Pa. 1912) (coal mining); Vautier v. Atl. Ref. Co., 79 A. 814, 815 (Pa. 1911) (oil refining); Sullivan v. Jones & Laughlin Steel Co., 57 A. 1065, 1068–69 (Pa. 1904) (steel manufacturing); Keppel v. Lehigh Coal & Navigation Co., 50 A. 302, 302 (Pa. 1901) (coal mining); Gavigan, 40 A. at 834–36; Commonwealth v. Russell, 33 A. 709, 710 (Pa. 1896) (oil wells); Robertson v. Youghiogheny River Coal Co., 33 A. 706, 706 (Pa. 1896) (coal mining); Hindson v. Markle, 33 A. 74, 75–76 (Pa. 1895) (coal mining); Good v. City of Altoona, 29 A. 741, 741–42 (Pa. 1894) (city sewage); Evans v. Reading Chem. Fertilizing Co., 28 A. 702, 711 (Pa. 1894) (per curiam) (fertilizer manufacturing); Green v. Sun Co., 32 Pa. Super. 521, 525 (1907) (oil refining); Campbell v. Bessemer Coke Co., 23 Pa. Super. 374, 380 (1903) (coke manufacturing).

86. *See* Shugerman, *Floodgates*, *supra* note 13, at 338–46.

87. Losee v. Buchanan, 51 N.Y. 476, 485–87 (1873).

88. Brown v. Collins, 53 N.H. 442, 444–51 (1873).

89. Marshall v. Welwood, 38 N.J.L. 339, 341 (1876), *overruled by* State Dept. of Envtl. Prot. v. Ventron Corp., 468 A.2d 150, 157 (N.J. 1983).

90. Ball v. Nye, 99 Mass. 582 (1868).

91. Cahill v. Eastman, 18 Minn. 324, 334–37, 344–46 (1872).

92. These states are Illinois, Iowa, California, and Wisconsin. *See infra* app. A.

93. *See* Shugerman, *Floodgates*, *supra* note 13, at 356–57.

Flood, and with its judges serving twelve-year terms,[94] it also matches the twist of long terms. Other mining states—Colorado[95] and Nevada[96]—adopted *Rylands* around the same time, perhaps responding to the same growing fears over hydraulic mining as well as irrigation floods.[97]

Before the Johnstown Flood, all judges—both elected and appointed, both short-term and long-term—had to struggle to balance industry's interest in the fault rule with the looser populist valence of strict liability. Both had strong bases in precedent, but the fault rule and industrial interests tended to win then. Nevertheless, some state courts adopted *Rylands*, and in the 1880s the only judges to side with the populist doctrine were elected judges.

A majority of state courts adopted *Rylands* in the decade after the Flood. The Johnstown Flood simply added tons of hydraulic pressure to the populist side of the political equation. Even though strict liability was never a popular campaign issue, these judges translated broad and unfocused public outrage into a narrow, focused doctrinal change. By 1900, *fifteen* states jumped on board, with eight more leaning towards *Rylands*.[98] 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.[99]

Throughout the 1890s, the Pennsylvania Supreme Court expanded strict liability to more and more industries, and a wave of states across 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, and Utah, plus Tennessee in 1900.[100] Together with the states that had already adopted *Rylands*, this wave of adoptions produced a majority of state courts favoring *Rylands* or *Rylands*-style strict liability at the turn of the twentieth century.[101] 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 was no geographic, national-political, industrial-agricultural, or business-cycle pattern to the adoption of strict liability.[102] The modern American tort doctrine of strict liability for hazardous activities did not

94. CAL. CONST. of 1879, art. VI, § 3.

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

96. Boynton v. Longley, 6 P. 437, 439 (Nev. 1885).

97. *See* Shugerman, *Floodgates*, *supra* note 13, at 356–58.

98. See the graph at the end of this Article for the patterns of adoption. "Leaning" means that the state had adopted a very similar rule without relying on *Rylands*, or that it had relied on *Rylands*, but with some recognition that the case was controversial. Specifically, this Article categorizes Michigan, Nevada, Colorado, Alabama, New York, Pennsylvania, New Jersey, and Utah as leaning towards *Rylands* in this era.

99. For more on this wave of adoptions, see Shugerman, *Floodgates*, *supra* note 13.

100. *See infra* app. A.

101. *See infra* app. A (graph of adoptions); Shugerman, *Floodgates*, *supra* note 13.

102. *See* Shugerman, *Floodgates*, *supra* note 13; *see also* app. A (list of states).

emerge in the middle of twentieth century—as the conventional wisdom had held[103]—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

The most obvious split over the adoption of *Rylands* is between federal and state courts, and this Part discusses how the federal–state split tracks with the split between appointed judges opposing *Rylands* and elected judges supporting *Rylands*. This Part then shows the differences among state courts: between appointed and elected state judges, and then among term lengths. A quantitative pattern emerges: judges elected to longer terms are the most favorable to strict liability. See Appendix A for a state-by-state list, along with explanations for how the states are considered for the statistical analysis.[104]

States appointed judges from the Founding through the first half of the nineteenth century, with just a few isolated exceptions. Then, between 1846 and 1851, a dozen states switched to judicial elections, which prompted more states to follow thereafter so that, by the Civil War, two-thirds of the states elected all of their judges and several others elected some lower court judges.[105] The elected judges drove the adoption of *Rylands*.

The next stage of development occurred during Reconstruction (the late 1860s to the early 1870s), as Part III will detail below. In response to corruption scandals in which business leaders bribed judges and where party machines controlled the courts, several states lengthened the judges' terms explicitly to give them *more* judicial independence—specifically, more freedom from special interest control and from political corruption. These constitutional reformers retained elections precisely because they wanted public opinion to continue to shape the courts. However, their understanding from experience was that, as a judge approached an election, the judge would disregard law and public interest and would favor narrow interests. Judicial independence was defined as independence from the interests, not independence from the people. This battle for judicial independence ultimately paved the way for *Rylands*'s spread two

103. *See supra* note 38.

104. 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 approving of *Rylands*, despite a case or two rejecting it. 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. Shugerman, *Floodgates*, *supra* note 13, at 334 n.9. 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.

105. *See* Shugerman, *supra* note 17.

decades later. The states that extended their judges' terms to ten years or more were the most responsive to populist fears and least responsive to industrial interests.

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

B. FEDERAL VERSUS STATE (APPOINTED VERSUS ELECTED)

State courts, as 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.[106] However, federal courts ignored it until around the time of the New Deal.[107] 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 tort claims in state courts and not federal courts. Although 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. They attribute it to an increasing number of railroad accidents opening the federal courts to torts through diversity jurisdiction, and note that the law required a minimum in damages ($500) for federal jurisdiction that barred few of these actions.[108] In my own database searches for lower federal court torts cases 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 of accidental torts cases in the 1890s, while a search of the Seventh Circuit and its district courts yielded hundreds of such cases.[109] 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 un-

106. 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*: fifteen states and the District of Columbia solidly accepted *Rylands*; nine more leaned toward *Rylands* or its rule; five states wavered; and only three states consistently rejected it. *See infra* app. A.

107. 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. *See* Shugerman, *Floodgates*, *supra* note 13, at 345–46 & nn.98–104.

108. EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 52 (2000); WHITE, *supra* note 37, at 51–52.

109. I searched for "tort" or "negligence" in these databases through the 1890s.

natural 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.

One obvious difference between the federal courts and the pro-*Rylands* state courts is appointments versus elections. If both sets of judges were ruling on torts cases involving hazardous and unnatural activities, they may have been considering different audiences and different authorities. Federal courts may have been affected by the timing and the prestige of certain state decisions rejecting *Rylands*. *Rylands* was decided in the House of Lords in 1868, and within five years, two states had adopted it (Massachusetts and Minnesota),[110] and two had rejected it (New Hampshire and New York).[111] While the Massachusetts and Minnesota opinions spent little time justifying their support for *Rylands*, Judge Earl of New York and Judge Doe of New Hampshire engaged in lengthy analysis and offered multiple arguments against *Rylands*.[112] Moreover, Pennsylvania added almost a political and legal treatise against *Rylands* a decade later.[113] New York, New Hampshire (especially under Chief Justice Doe, who authored the rejection of *Rylands*), New Jersey, and Pennsylvania were a more influential and prestigious set of authorities than Massachusetts (Minnesota was probably ignored or overlooked).

Treatise writers and eastern judges relied upon this set of decisions to conclude that *Rylands* was down for the count.[114] Treatise writing had become significant in the mid-nineteenth century, booming 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*, while eastern states aside from Massachusetts did not start citing *Rylands* until the 1890s. Once the treatises in the 1870s and 1880s rejected *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*, decided in 1842, empowered federal judges to create federal common law detached from state law and perhaps created a legal culture that led federal judges to be dismissive of local state precedent.[115] Federal judges sought a more national, pro-commercial common law drawn primarily from treatises and the more established commercial states in the east, and were more likely to pay attention to other federal

110. Ball v. Nye, 99 Mass. 582, 583–84 (1868); Cahill v. Eastman, 18 Minn. 324, 334–37, 344–46 (1872).

111. Brown v. Collins, 53 N.H. 442, 444–51 (1873); Losee v. Buchanan, 51 N.Y. 476, 485–87 (1873).

112. *Losee*, 51 N.Y. at 485–87; *Brown*, 53 N.H. at 444–51.

113. Pa. Coal Co. v. Sanderson, 6 A. 453, 460–65 (Pa. 1886).

114. *See* Shugerman, *Floodgates*, *supra* note 13, at 340 & nn.49–53.

115. 41 U.S. (16 Pet.) 1, 18–19 (1842), *overruled by* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

courts rather than to their companion state courts. Federal judges cited treatises more than elected state court judges, perhaps because treatises allowed them to survey Anglo–American law and were a vital tool for formulating federal common law, while state judges had little use for federal common law. Or perhaps federal judges simply had more access to treatises. At the turn of the century, professional status and national prestige seems to have mattered more to appointed judges than to elected judges, as Robert Cover suggested in his seminal book *Justice Accused.*[116] Meanwhile, state judges were relying more on their own precedents or those of neighboring states. For some combination of reasons, appointed federal judges and elected state judges cited different authorities for different audiences.

C. ELECTED VERSUS APPOINTED AND TERM LENGTH

Turning to the states, a pattern emerges. Unsurprisingly, elected judges were more populist and responsive to public opinion than were appointed judges. 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 number of states in this category was admittedly very small).

Eight common law states appointed judges to limited terms in this period.[117] In six, the governor appointed judges: Connecticut (eight year terms); Delaware (twelve years); Maine (seven years); Mississippi (nine years); New Jersey (seven years); and Vermont (two years). In two, the legislature appointed judges: South Carolina (seven years); and Virginia (twelve years).[118] In Rhode Island, judges served only at the "pleasure" of the assembly. This group of state judges enjoyed less job security than the elected judges of states like Pennsylvania and New York (which had term lengths of twenty-one and fourteen years, respectively), but yet remained 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.[119] New Jersey wavered six years after the

116. ROBERT M. COVER, JUSTICE ACCUSED 177–78 (1975).

117. EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 101–35 (1944).

118. 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. Hooper v. Wilkinson, 15 La. Ann. 497 (1860).

119. Gilson v. Del. & Hudson Canal Co., 26 A. 70, 72 (Vt. 1892); Frost v. Berkeley Phosphate Co., 20 S.E. 280, 283 (S.C. 1894).

flood.[120] 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 in New England, and therefore 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* in this era: Massachusetts and Vermont adopted *Rylands*,[121] while New Hampshire rejected it,[122] 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* at this time: South Carolina adopted *Rylands*,[123] New Jersey wavered towards it,[124] 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.[125]

Elected judges also followed no geographic, economic or political pattern. In every region, elected courts adopted *Rylands*. In states controlled by Republicans (mostly in the north, Great Lakes, and Pacific) and by Democrats and Populists (the south, the Great Plains, and the Rockies), elected judges generally adopted *Rylands*. And in both industrial and rural states, elected judges adopted *Rylands*. Only Kentucky, North Dakota, and Washington had elected judges who consistently opposed *Rylands*,[126] in addition to Texas's wavering against *Rylands*.[127] One might have expected the elected judges in eastern states with powerful industries to have been more likely to defer to those industrial interests by rejecting *Rylands*, but they tended to embrace *Rylands*, particularly after the Flood. Aside from the elected versus appointed pattern, there simply do not appear to be any other patterns among the pro-*Rylands* versus anti-*Rylands* states. However, I will also discuss below the pattern of long and short terms among elected judges.

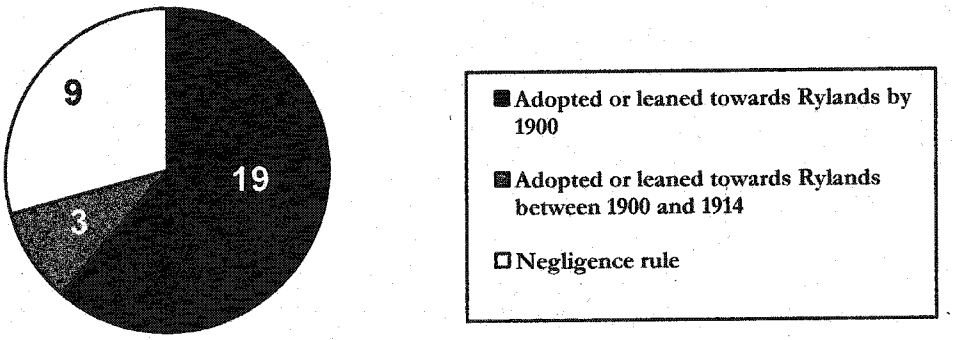
The following chart clarifies the sharp distinction between these categories of courts. The list of states and other details are provided in Appendix A. The

120. *See infra* note 338.
121. Ball v. Nye, 99 Mass. 582 (1868); *Gilson*, 26 A. at 72.
122. Brown v. Collins, 53 N.H. 442, 442–47 (1873).
123. *Frost*, 20 S.E. at 283.
124. *See infra* note 338.
125. King v. Hartung, 96 S.E. 202, 203–04 (Va. 1918); Worth v. Dunn, 118 A. 467, 470 (Conn. 1922).
126. Triple-State Natural Gas & Oil Co. v. Wellman, 70 S.W. 49, 50 (Ky. 1902); Langer v. Goode, 131 N.W. 258, 259 (N.D. 1911); Klepsch v. Donald, 30 P. 991, 993 (Wash. 1892).
127. *See infra* note 329.

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 measures the decade after the Johnstown Flood. See Appendix A for lists of states according to different ways of categorizing the states and time periods, and Appendix B for a statistical significance evaluation.

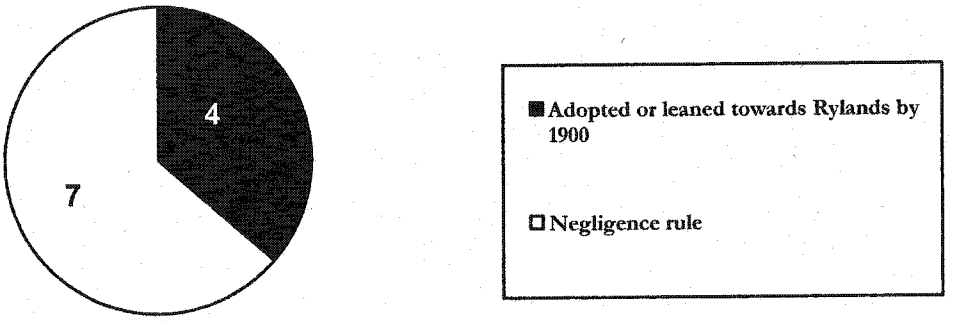
Elected courts drove the adoption of Rylands*:*

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



Appointed courts were much less receptive:

Of the 11 established states with judicial appointments around the time of the Johnstown Flood:

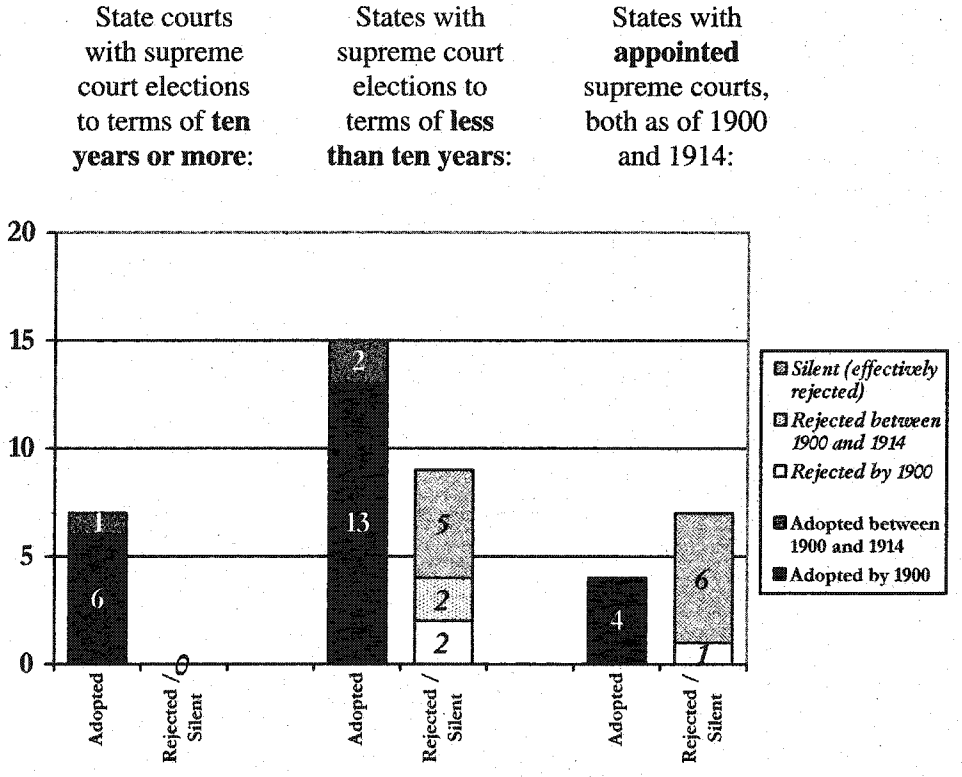


Subgroups:

Elected courts with long terms (ten years or more) were unanimously in favor of *Rylands*.

Elected courts with short terms (less than ten years) favored *Rylands* (fifteen to nine).

Appointed courts generally opposed *Rylands*, regardless of term length.



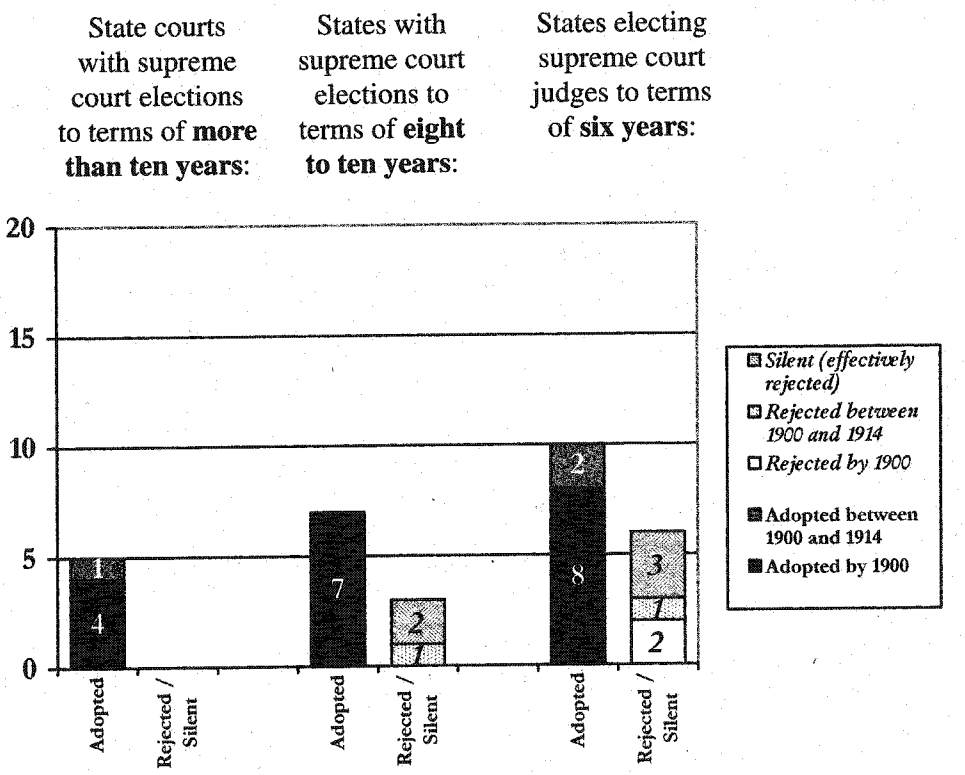
Subgroups of Elected Courts: Short, Middle, and Long Terms

The state supreme court terms cluster around specific term lengths: six-year terms were common as the shortest terms; the next common set was eight to ten years; 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:

Elected courts with long terms (more than ten years) were unanimously in favor of *Rylands*.

Elected courts with middle-length terms favored *Rylands* more than two-to-one.

Elected courts with short-length terms favored *Rylands*, but less than two-to-one.



1. State courts with supreme court elections to terms of **more than ten years**: **4 of 5** (80%) adopted through 1900, **5 of 5** (100%) through 1914[128]

2. States with supreme court elections to terms of **eight to ten years**: **7 of 10** (70%) adopted or leaned towards *Rylands* (both through 1900 and 1914)[129]

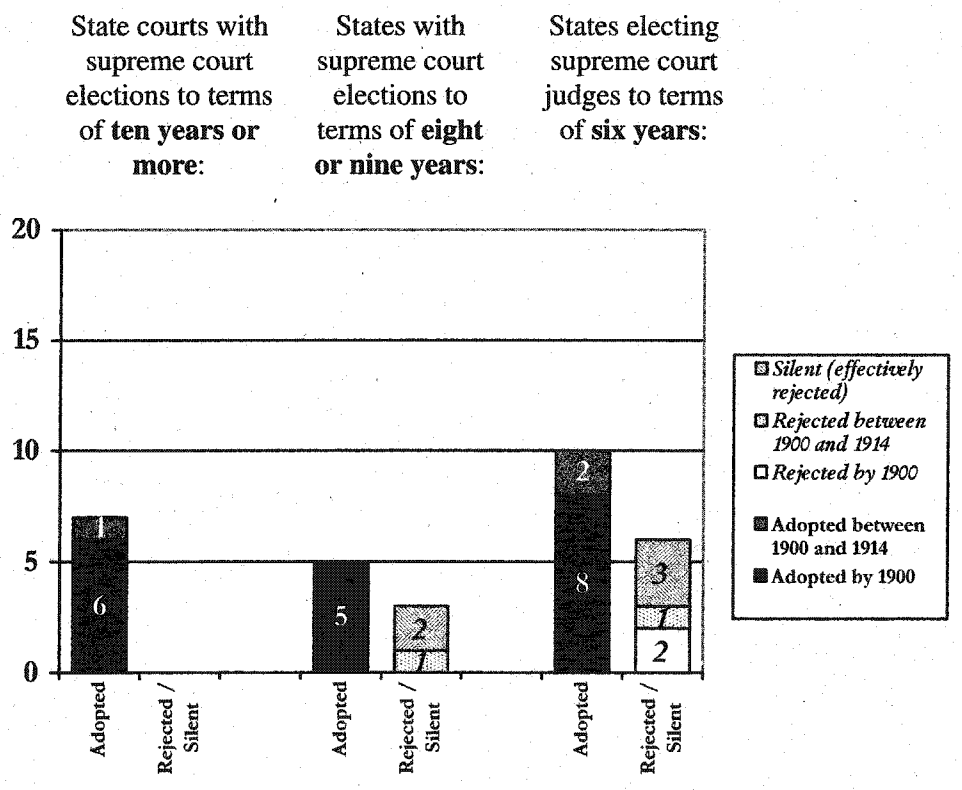
3. States electing supreme court judges to terms of **six years**: **8 of 16** (50%) adopted *Rylands* through 1900, **10 of 16** (62.5%) through 1914.[130]

128. California, Maryland, New York, and Pennsylvania. *See infra* notes 307–10 and accompanying text. West Virginia was silent through 1900, and had adopted *Rylands* as of 1914. *See infra* note 336 and accompanying text.

129. Wisconsin, Missouri, Michigan, Illinois, Colorado, Wyoming and Tennessee adopted. Kentucky rejected *Rylands*, and Arkansas and North Carolina were silent on *Rylands*; each of these three had eight-year terms, the shortest terms within this group. *See infra* app. A.

130. The *Rylands* adopters were: Minnesota, Nevada, Iowa, Alabama, Ohio, Oregon, 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. *See infra* app. A.

One more slice of the states by term:



1. State courts with supreme court elections to terms of **ten years or more**: 6 of 7 (86%) adopted through 1900, **7 of 7** (100%) through 1914[131]

2. States with supreme court elections to terms of **eight or nine years**: **5 of 8** (62.5%) adopted or leaned towards *Rylands* (both through 1900 and 1914)[132]

3. States electing supreme court judges to terms of **6 years**: **8 of 16** (50%) adopted *Rylands* through 1900, **10 of 16** (62.5%) through 1914.[133]

131. Wisconsin, California, Maryland, New York, Pennsylvania, and Missouri. West Virginia was silent through 1900, and had adopted *Rylands* as of 1914. See *infra* app. A.

132. Wyoming, Michigan, Illinois, Colorado, and Tennessee adopted *Rylands*. Kentucky rejected it, and Arkansas and North Carolina were silent; each of these three had eight-year terms, the shortest terms within this group. *See infra* app. A.

133. *See supra* note 130.

The number of appointed courts is small, 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*.[134] Of the four courts with appointments to ten years or more, one adopted *Rylands*.[135] The bottom line is that, unlike elected judges, a majority of appointed courts, either with short or long terms, rejected *Rylands*.

Appendix B addresses the question of whether the correlations between selection method, term length, and strict liability in this era are statistically significant. The sample sizes in this historical study are unavoidably small. We cannot replicate late nineteenth-century America and recreate a horrible flooding disaster. The Fisher Exact Method is a test designed to find statistical significance for these types of small samples. Appendix B shows that some of these correlations are significant beyond the 95% confidence interval, meaning that there is a 5% chance or less that such patterns are random. Other correlations are close to that standard. Nevertheless, with such a small number of states, the raw numbers are probably the most helpful, and Appendix A allows one to look at exactly which states adopted *Rylands* and when. There are some geographic patterns to judicial selection and term length. New England states retained appointments throughout the era, but other eastern states in the Mid-Atlantic and the South retained appointments also, and there is no geographic pattern for which appointed judges adopted or rejected *Rylands*. Moreover, longer terms were spread throughout the country—from New York, Pennsylvania, and Maryland to Wisconsin to Missouri to California—and the adoptions and rejections of *Rylands* were also distributed relatively evenly throughout the regions. New England, the Mid-Atlantic, the Upper South, the Deep South, the Midwest/Great Plains, the Mountain States, and the Pacific each had states adopting, rejecting, or ignoring *Rylands*. The Great Lakes states were the only ones to be unanimously in favor of strict liability, but a majority of those states had short six-year terms, and only Wisconsin had ten-year terms. Thus, geographic patterns did not produce a correlation between higher adoption rates and longer terms for elected judges.

D. INDIVIDUAL JUDGES WITH JOB SECURITY

The state courts with longer term lengths were more responsive in adopting strict liability.[136] But one might ask not just about the courts in general. What about the particular judges on these courts? The judges on the long-term courts

134. Vermont, South Carolina, and New Jersey adopted. *See infra* app. A.

135. Massachusetts adopted. *See infra* note 339.

136. Interestingly, the tiny set of states with appointments to long terms (Massachusetts adopting and New Hampshire rejecting) was slightly more pro-*Rylands* than those states with short-term appointed judges, but this is a very small sample size.

might have won a term of ten years or more, but when specific judges actually authored their decisions, how much more time did they have left on their terms? Did that affect whether or not they adopted *Rylands*?

First, 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 (twenty-one years, beginning in 1874); New York (fourteen years, beginning in 1876); California (twelve years, beginning in 1879); West Virginia (twelve years, beginning in 1862); Maryland (ten years, beginning in 1864); Missouri (ten years, beginning in 1872); and Wisconsin (ten 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* relatively late, in 1911). 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.[137]

The three Pennsylvania "switch in time" judges[138] that reversed their previous rejection of *Rylands* after the Johnstown Flood—Henry Green, Silas Clark, and Edward Paxson—were serving full twenty-one-year elected terms, which in practice were single terms expiring around retirement age. Clark and Green had nine years left in their terms after their 1891 pro-strict liability ruling.[139] 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 in fact resigned two years later.[140] Thus, even though these state judges had little to fear from elections for their job security, they generally were responsive to the Flood in reshaping tort 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 terms and were not worried about renomination or re-election anytime soon. After all, it is 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 halfway through his ten-year term.[141] In California, Judge Henry Stuart Foote joined the court in 1885 and authored *Colton v. Onderdonk* one year later.[142] In 1890, months after the Johnstown Flood, Judge

137. *See* Shugerman, *Floodgates*, *supra* note 13, at 356.

138. *See infra* notes 208, 226–37 and accompanying text.

139. 1 THE PHILADELPHIA PRESS ALMANAC FOR 1897, at 34 (Philadelphia, Press Co., Ltd., Publishers Philadelphia Press 1897).

140. WILLIAM W.H. DAVIS, 3 HISTORY OF BUCKS COUNTY, PENNSYLVANIA 156–57 (Warren S. Ely & John W. Jordan eds., 2d ed. 1905), *available at* http://www.rootsweb.ancestry.com/pabucks/BIOS_DAVIS/edwardmpaxson.html.

141. Atkinson v. Goodrich Transp. Co., 18 N.W. 764, 775 (Wis. 1884). See www.politicalgraveyard.com/geo/WI/ofc/spju.html for Taylor's term.

142. 10 P. 395, 397–98 (Cal. 1886).

Edward W. Hatch wrote a decision adopting *Rylands* for the Superior Court of New York at Buffalo, and he was in the third year of his fourteen-year term.[143] 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 halfway through his fourteen-year term and, more importantly, had recently 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 did Peckham.[144] In Maryland, Judge John M. Robinson wrote his decision adopting *Rylands* for a unanimous court in 1890, and he had seven years left on his term.[145] 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.[146]

Meanwhile, the judges elected to shorter terms (less than ten years) followed a similar pattern. The ten pro-*Rylands* judges who had been elected to six-year terms had an average of 3.9 years remaining of their terms when they filed their decisions.[147] The four judges who rejected *Rylands* had two, five, four, and no years

143. *See* ALDEN CHESTER, 3 COURTS AND LAWYERS OF NEW YORK: A HISTORY, 1609–1925, at 1264 (1925).

144. Judge O'Brien had nine years left, Judge Bartlett had thirteen 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. *See* THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY 205, 241, 247, 263, 269 (Albert M. Rosenblatt ed., 2007).

145. Susquehanna Fertilizer Co. v. Malone, 20 A. 900, 901 (Md. 1890); James McSherry, Speech at the Annual Meeting of the Maryland State Bar Association: The Former Chief Judges of the Court of Appeals (1905) (transcript available at Maryland State Law Library), *available at* http://marylandlegalhistory.net/megafile/msa/speccol/sc2900/sc2908/html/appeals.html.

146. Mathews v. St. Louis & S.F. Ry., 24 S.W. 591, 598 (Mo. 1893); *see* HISTORY OF THE BENCH AND BAR OF MISSOURI 477 (A.J.D. Stewart ed., 1898).

147. In Minnesota, Judge Christopher G. Ripley, elected in 1869, had three years remaining on his term. *See* Cahill v. Eastman, 18 Minn. 324, 334–37, 344–46 (1872); *Proceedings in Memory of Chief Justice Ripley*, 67 Minn. xxiii (1881), *available at* http://www.lawlibrary.state.mn.us/judges/memorials/Mem67Ripley.pdf. In Nevada, Thomas Porter Hawley had been reelected in 1884 and had five years remaining. *See* Boynton v. Longley, 6 P. 437, 441 (Nev. 1885); Nevada Dept. of Cultural Affairs, State Library and Archives: The Nevada Supreme Court, http://nsla.nevadaculture.org/index.php?option=com_content&task=view&id=945&Itemid=418 (last visited Apr. 23, 2010). In Iowa, Judge William H. Seevers had two years remaining. *See* Phillips v. Waterhouse, 28 N.W. 539, 540 (Iowa 1886); Iowa Judicial Branch, Iowa Courts History, http://www.iowacourts.gov/wfdata/frame1773-1463/pressrel21.asp (last visited Apr. 23, 2010). In Alabama, Henderson Somerville had three years remaining. *See* City of Eufaula v. Simmons, 6 So. 47, 48 (Ala. 1889); Terence Finnegan, *Lynching and Political Power in Mississippi and South Carolina*, *in* UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH 189, 215 n.5 (W. Fitzhugh Brundage ed., 1997); J. Ed Livingston et al., A History of the Alabama Judicial System 3 (1991) (unpublished manuscript, on file with Alabama Unified Judicial System), *available at* http://judicial.alabama.gov/docs/judicial_history.pdf. In Ohio, William T. Spear had two years remaining. *See* Columbus & Hocking Coal & Iron Co. v. Tucker, 26 N.E. 630, 633 (Ohio 1891); F.E. SCOBEY & B.L. MCELROY, THE BIOGRAPHICAL ANNALS OF OHIO, 1902–1903, at 645 (1903). In Oregon, Frank A. Moore had five years remaining. *See* Esson v. Wattier, 34 P. 756, 757 (Or. 1893);

remaining on their six-year terms, averaging 2.75 years.[148] The five pro-*Rylands* judges elected to eight- or nine-year terms had an average of five years remaining on their courts.[149] The one eight-year-term judge rejecting *Rylands* had four years remaining. Again, these patterns are not conclusive, but they are suggestive.

Unfortunately, these judges have left little archival material and only the most basic biographical records.[150] In the next Part, I draw more generally from the available historical record to offer some interpretations and speculation to explain these patterns.

Oregon Blue Book: Supreme Court Justices of Oregon, http://bluebook.state.or.us/state/elections/elections27.htm (last visited Apr. 23, 2010). In Kansas, Frank Doster had just been reelected, and had six years remaining on his term. *See* Reinhart v. Sutton, 51 P. 221, 222 (Kan. 1897); Kansas Judicial Branch: History of the Kansas Supreme Court Justices, http://www.kscourts.org/kansas-courts/general-information/justice-listing.asp (last visited Apr. 23, 2010). In Utah, Charles S. Zane had four years remaining. *See* N. Point Consol. Irrigation Co. v. Utah & Salt Lake Co., 52 P. 168, 173 (Utah 1898); Utah History To Go: Justice Charles S. Zane and the Antipolygamy "Crusade," http://historytogo.utah.gov/utah_chapters/statehood_and_the_progressive_era/justicezaneandantipolygamy.html (last visited Apr. 23, 2010). In Montana, William L. Holloway had five years remaining. *See* Longtin v. Persell, 76 P. 699, 700 (Mont. 1904); 1989 JUDICIAL REPORT: MONTANA COURTS 50–51 (1990), *available at* http://courts.mt.gov/content/annual_reports/1989rpt.pdf. In Indiana, Douglas J. Morris had four years remaining. *See* Niagara Oil Co. v. Ogle, 98 N.E. 60, 62 (Ind. 1912); Indiana Supreme Court Justice Biographies: Justice Douglas J. Morris, http://www.in.gov/judiciary/citc/justice-bios/morris.html (last visited Apr. 23, 2010).

148. In Washington State, Theodore Stiles had two years left in his term. *See* Klepsch v. Donald, 30 P. 991, 993 (Wash. 1892); EDMOND STEPHEN MEANY, HISTORY OF THE STATE OF WASHINGTON 366 (1910). In Texas, Frank Alvan Williams had five years remaining. *See* Gulf, Colo. & Santa Fe Ry. v. Oakes, 58 S.W. 999, 1000–01 (Tex. 1900); Tarlton Law Library, Justices of Texas 1836–1986—Frank Alvan Williams, http://tarlton.law.utexas.edu/justices/spct/williams.html (last visited Apr. 23, 2010). In Kentucky, John Hobson had four years remaining. *See* Triple-State Natural Gas & Oil Co. v. Wellman, 70 S.W. 49, 50 (Ky. 1902); E. POLK JOHNSON, 2 A HISTORY OF KENTUCKY AND KENTUCKIANS 718–19 (1912). In North Dakota, Alexander Burr was at the very end of his term. *See* Langer v. Goode, 131 N.W. 258, 259 (N.D. 1911); North Dakota Supreme Court Justices: Alexander Burr, http://ndcourts.org/court/bios/burr.htm (last visited Apr. 23, 2010).

149. In Michigan, James Campbell had six years remaining. *See* Boyd v. Conklin, 20 N.W. 595, 598 (Mich. 1884); Michigan Supreme Court Historical Society: Biographies: James Campbell, http://www.micourthistory.org/bios.php?id=32 (last visited Apr. 23, 2010). In Illinois, Simeon Peter Shope had seven years remaining. *See* Seacord v. People, 13 N.E. 194, 200 (Ill. 1887); The Third Branch—A Chronicle of the Illinois Supreme Court, http://www.state.il.us/court/supremecourt/justicearchive/Bio_Shope.asp (last visited Apr. 23, 2010). In Colorado, Joseph Church Helm had five years remaining. *See* G., B. & L. Ry. v. Eagles, 13 P. 696, 697–98 (Colo. 1887); 3 HISTORY OF COLORADO 46–47 (1918). In Wyoming, Asbury B. Conaway had four-and-a-half years remaining. *See* Clear Creek Land & Ditch Co. v. Kilkenny, 36 P. 819, 820 (Wyo. 1894); *Death List of the Day*, N.Y. TIMES, Dec. 9, 1897, at 7, *available at* http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9501EEDA1039E433A2575AC0A9649D94669ED7CF. In Tennessee, John Summerfield Wilkes had two years remaining. *See* Ducktown Sulphur, Copper & Iron Co. v. Barnes, 60 S.W. 593, 600–01 (Tenn. 1900); Tennessee Supreme Court Historical Society: Justices, http://planadmin.us/tschs/?q=node/11 (last visited Apr. 23, 2010).

150. Digging further into the Pennsylvania story is a 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. *See* 4 FRANK M. EASTMAN, COURTS AND LAWYERS OF PENNSYLVANIA (1922). The judges in the Pennsylvania cases have few remaining archival records, and whereas some state reporters printed memorials for deceased judges, I have not been able to locate memorials for these judges in the Pennsylvania Reports. I have not yet found obituaries for the judges or articles about these judges in the state's daily newspapers.

III. JUDICIAL ELECTIONS: HISTORY AND INTERPRETATIONS

A. OVERVIEW

The foregoing data suggests that, in adopting strict liability, elected judges were more populist and responsive than appointed judges. More counterintuitively, the data also suggests that judges elected to longer terms were the most populist and responsive. Thus, traditional political incentives are less a part of this story because elected judges become more responsive and populist the further away the next election is—if they ever face another election at all. The historical evidence suggests that the politics of judicial elections changed the character of the state bench. This Part emphasizes two effects: 1) selection effects in filtering for a more populist and political judge, and 2) psychological and institutional effects in legitimating public opinion as a source of law and creating "role fidelity" to the people. Elected judges of all kinds and term lengths faced countervailing political pressures, but longer terms insulated some judges from party machines and special interests so that these judges were more influenced by their political inclinations and their role fidelity. The evidence below suggests that selection effects were less significant then, relative to what one might have imagined today, and thus the institutional legitimacy effect might have been more significant in order to explain these results.

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 nineteen of twenty-one state constitutional conventions adopted judicial elections wholesale between 1846 and 1860.[151] 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.[152] 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.[153]

During Reconstruction, state constitutional reformers responded to a series of corruption scandals involving elected judges, but they did not abandon judicial elections because they wanted to retain a judiciary responsive to democracy. Instead, they lengthened terms to foster *judicial independence*: to give judges

151. For a comprehensive table of adoptions, see HAYNES, *supra* note 117, at 99–135. Between 1846 and 1860, twenty-one states revised their constitutions and nineteen adopted an elective judiciary. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elective Judiciary, 1846–1860*, 46 HISTORIAN 337, 337 (1983); *see also* Shugerman, *supra* note 17.

152. FRIEDMAN, *supra* note 37, at 323; Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190 (1993).

153. For more on this argument, see Shugerman, *supra* note 17.

more freedom from special interest control and from political corruption. Their experience taught that initial elections produced a more populist bench while long terms enabled those judges to serve the public better. This combination of judicial populism and judicial independence ultimately paved the way for *Rylands*'s spread two decades later. The states that extended their judges' terms to ten years or more were the most responsive to populist fears and least responsive to industrial interests. The rest of the Part shows how competitive partisan elections could make judges both more and less populist (due to selection effects and psychological effects versus powerful special interests and party machine politics). Shorter terms meant that judges would be captured more by the latter (special interests and party machines). Longer terms insulated judges from those forces and increased the relative strength of the selection effects and psychological and legitimacy effects. Once the Johnstown Flood hit, elected judges may have drifted—or jumped—away from the political leanings and special interests that led to their initial election and towards public opinion, as legitimated by elections in the first place.

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 to decrease the influence of corruption or special interests. Soon after the adoption of judicial elections before the Civil War, some states began lengthening the judges' terms during the Civil War era and thereafter. Although debates occurred about whether appointing or electing judges would better insulate them from corruption, states tended to agree that longer terms could provide judicial independence regardless of the selection process. In the 1860s, California switched from six to ten years and Maryland from ten to fifteen years.[154] In the 1870s, Missouri, New York, Pennsylvania, Wisconsin, and California again lengthened their supreme court judges' terms to ten, fourteen, twenty-one, ten, and twelve years, respectively.[155] 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.

Before these reforms, New Yorkers regarded their judges (elected to eight-year terms) as corrupted by political machines and special interests.[156] 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.[157] In New York City, the Democratic nomination was a guarantee of election.[158] A contemporary observer described the Democratic judicial

154. HAYNES, *supra* note 117, at 103–04, 115.

155. *Id.* at 103–04, 118–19, 123, 127, 135.

156. Renée Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 GEO. MASON L. REV. 109, 116–18 (2007).

157. *Id.* at 123.

158. *Id.* at 120.

nominating convention as a swarm of sycophants, and the nominations were compromises ironed out by the ward bosses and their patronage demands.[159] This combination of patronage and demagoguery 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 because judges would often either dismiss cases against them outright or influence the jury to return a verdict of acquittal.[160] One major figure of the corrupt courts was New York 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.[161]

Many delegates, including both those who opposed and supported reform, believed that New York's Constitutional Convention in 1867 had been called to address the judiciary, and much of the convention did in fact focus on judicial reform.[162] Most of the New York delegates did not think highly of the judiciary, and nearly all blamed the Constitution of 1846 for creating judicial elections, for creating short judicial terms, or both.[163] Delegates complained that the New York bench's prestige had declined sharply 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 upon the bench, he depends for his continuance there upon . . . all the influences which affect political parties."[164] 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.[165]

As a result, judges remained deeply involved in party politics:

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159. *Id.*
160. *Id.* at 127–30.
161. *Id.* at 123–24, 145–46, 157–58.
162. *Id.* at 132.
163. *Id.* at 132, 136–38.
164. 3 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2365 (Albany, Weed, Parsons & Co. 1868).
165. *Id.*

> [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 . . . .[166]

Daly also blamed 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 renominate them.[167] 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.[168] Other convention delegates added names of good judges who were not reelected.[169] 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 the political parties" after they reached the bench.[170] The New York Convention reached a consensus to extend terms on the Court of Appeals from eight years to fourteen years, which many delegates compared to life tenure. They also scheduled a referendum on judicial elections versus judicial appointments for 1873, allowing several years for the public to observe the new constitution and its extended judicial terms in practice.[171]

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 that rates of conviction per arrest in criminal cases had declined.[172] 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."[173] 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 alterna-

166. *Id.* at 2359.
167. *Id.* at 2373.
168. *Id.* at 2368.
169. *Id.* at 2382.
170. Lerner, *supra* note 156, at 138.
171. *Id.* at 143, 156–59.
172. *Id.* at 157 (citing D.B. EATON, SHOULD JUDGES BE ELECTED? OR THE EXPERIMENT OF AN ELECTIVE JUDICIARY IN NEW YORK (New York, J.W. Amerman 1873)).
173. *Id.* (alteration in original) (citation, footnote, and quotation marks omitted).

tively illustrating how the public was hopeful that longer terms would change the integrity of the courts.

By the 1870s, Pennsylvania elites, much like New Yorkers, were increasingly exasperated by corruption and party machines. These leaders called for a new constitutional convention in 1873, in which the tenure of state supreme court justices was lengthened from fifteen to twenty-one years and all judges were from then on to be elected.[174] The elected judiciary does not appear to have been a major target for reformers, perhaps because fifteen-year state supreme court terms had already created more judicial independence. However, across the spectrum, the debate over selection of judges was significantly focused on insulating the judiciary from the rank partisanship that infected the political branches of Pennsylvania government.[175]

In 1870, the Philadelphia newspaper *Public Ledger* decried reckless legislating, in which legislators "cheated" the public by passing hundreds of bills before being fully apprised of their contents.[176] Urban machine politics led to "the tyranny of local political bosses of the majority party."[177] Endemic corruption led to "special legislation" against the public interest.[178] 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."[179] In a speech articulating the official position subsequently adopted by the Union League of Philadelphia, Charles Gibbons listed "the conferring of political patronage upon the courts" among the issues that should be addressed in a constitutional convention.[180] In 1872, the Speaker of the Senate delivered a speech in connection with the creation of a special committee on constitutional reform.[181] He acknowledged that Pennsylvanians were demanding "[m]any reforms," but listed only three, one of which was "improvement of [Pennsylvania's] judiciary system."[182] In an editorial 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."[183]

The judiciary's relationship to the partisan politics of the late nineteenth

174. 4 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 486 (Harrisburg, Benjamin Singerly 1873).

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

176. *Id.* at 159–60.

177. *Id.* at 162.

178. *Id.* at 165.

179. *Id.* at 170.

180. *Id.* at 166.

181. *Id.* at 177.

182. *Id.*

183. *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 and spent by cities. *Id.* (quoting F. JORDAN, STATISTICAL AND OTHER INFORMATION FOR THE CONSTITUTIONAL CONVENTION OF PENNSYLVANIA 20 (Harrisburg, Benjamin Singerly 1872)).

century is seen more clearly 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.[184] 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.[185] This sparked a fiery debate among the delegates, ending in a rejection of the Committee's recommendation.[186] They reached a compromise to extend the terms of judges from an already lengthy fifteen-year term 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,[187] including, arguably, the lengthy fifteen-year terms for supreme court justices. Nevertheless, there were concerns that party machines could affect the debates on the judiciary. For example 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."[188] Another imagined a judge appointed "by a corrupt Governor, and confirmed by a Senate combining for a corrupt purpose."[189] A small number of delegates who opposed electing judges argued that free and fair elections were essentially impossible.[190] However, most of the convention had more faith in popular elections than in appointments, but shared the concern that the corrupting influences affecting the appointment process could infect sitting elected judges as well.

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

184. *See* 3 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA, *supra* note 174, at 637–779 (recording days eighty-seven through eighty-nine); 4 *id.* 3–489 (recording days ninety through one hundred).

185. 3 *id.* at 729.

186. *See* 4 *id.* at 486.

187. 3 *id.* at 691, 706, 749; 4 *id.* at 33.

188. 3 *id.* at 706.

189. *Id.* at 748.

190. 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.* at 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.

change on the grounds that an appointment process would result in "party men go[ing] upon the bench."[191] Another like-minded delegate argued that appointed judges "derive their office from the favoritism of an Executive, sanctioned by another branch of the government."[192] One delegate directly referenced the problem of 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 concluded that elections produced less of this problem and others.[193]

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 nonpolitical positions."[194] 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."[195]

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 were driven by party machines, and judges generally did not campaign publicly in general elections. From the first judicial elections through much of the nineteenth century, there is little or no evidence that judges campaigned with direct appeals to the public, with stances on issues, appearances in the media, or political fundraising.[196] Nevertheless, the nomination process and the elections themselves were still competitive, and this competition was important for a few reasons: close competition reinforced the populist aspects of elections, including the selection effects of drawing more political

191. 3 *id.* at 753.

192. *Id.* at 771; *see also* 4 *id.* at 21 ("The problem is this: To exclude politicians from the bench; to secure a nonpartisan, 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.").

193. 4 *id.* at 21.

194. 3 *id.* at 756.

195. *Id.* at 744.

196. SHUGERMAN, THE PEOPLE'S COURTS: JUDICIAL ELECTIONS AND JUDICIAL INDEPENDENCE IN AMERICA (forthcoming).

personalities, the fidelity to the role of representing public opinion, and the institutional legitimacy of public opinion and elections. On the other hand, close elections also increased the significance of party machines, pitting special interests against public interest. Elections were won or lost based on getting straight-ticket party voting and party mobilization.

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.[197] In California, the winning candidate garnered less than 55% of the vote in 74% of judicial elections in that period.[198] Only 4% of California judicial elections were uncontested.[199] 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.[200] Tennessee and Texas were one-party states for most of this era, and yet the winners of judicial elections commanded less than 55% of the vote surprisingly often given the one-party rule (20% and 15%, respectively), and the races were rarely uncontested (20% and 19%).[201] 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.[202] Voter turnout 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 turnout compared to today.[203]

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.[204] The winning candidate prevailed with more than 52% of the state vote in only two elections (1893 and 1899).[205] In five of the other seven elections, the winning candidate garnered

197. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, 9 AM. BAR FOUND. RES. J. 345, 354–55 (1984).

198. *Id.* at 355 tbl.1.

199. *Id.*

200. *Id.*

201. *Id.* at 355 & tbl.1.

202. *Id.* at 355.

203. *Id.* at 357. Turnout in off-year nonpresidential elections has been about 40% in recent years. *See* United States Elections Project: 2006 General Election Turnout Rates, http://elections.gmu.edu/Turnout_2006G.html (last visited Mar. 16, 2010); United States Elections Project: 2002 General Election Turnout Rates, http://elections.gmu.edu/Turnout_2002G.html (last visited Mar. 16, 2010).

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

205. SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA 554 (Thos. B. Cochran ed., Harrisburg, Clarence M. Busch 1894); SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA 618–19 (Thos. B. Cochran ed., Harrisburg, Wm. Stanley Ray 1900).

between 51% and 52.6% of the vote.[206] As for the other two elections, the winner in 1877 prevailed by about 1% (45.7% to 44.4%), and the winner in 1882 garnered a plurality of 48% to 43%.[207]

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 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' margins of victory were almost always less than five percentage points—much closer than modern Congressional and modern judicial elections. The Pennsylvania reversal on this doctrine between 1886 and 1891 was due to three judges "switching in time"[208] after the Johnstown Flood: Judge

206. Those five were the elections of 1880, 1887, 1888, 1892 and 1901. *See* SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA 271–72 (William P. Smull ed., Harrisburg, Lane S. Hart 1881) [hereinafter SMULL'S 1881]; SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA 401–02 (Thos. B. Cochran ed., Harrisburg, E. K. Meyers 1888) [hereinafter SMULL'S 1888]; SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA 410–11 (Thos. B. Cochran ed., Harrisburg, E. K. Meyers 1889); SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA 490–91 (Thos. B. Cochran ed., Harrisburg, Clarence M. Busch 1893); SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA 624–25 (Thos. B. Cochran ed., Harrisburg, Wm. Stanley Ray 1902).

207. SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA 412–14 (John A. Smull ed., Lane S. Hart 1878); SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA 693–94 (Lane S. Hart 1883) [hereinafter SMULL'S 1883].

208. "Switch in time" is a reference to the U.S. Supreme Court's reversals on the New Deal in 1937, as President Franklin Roosevelt threatened to "pack the court" with new appointments. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 132–44, 177–79 (1995); *see also infra* notes 226–37 and accompanying text.

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% to 47% margin,[209] and Justice Silas Clark, the lone victorious Democrat, won his in 1882 with a 48% to 43% plurality.[210] Pennsylvania judicial elections in the late nineteenth century were no mere formalities, and Pennsylvania judges were increasingly involved in the campaign process.

Judicial elections perhaps attracted more politicians willing to play hardball with morality and character attacks in order to win. Nineteenth-century Pennsylvania newspapers reveal some nasty campaigns for the state bench.[211] In the general elections for the Pennsylvania Supreme Court, candidates mainly ran on party tickets, and there is little evidence that they campaigned actively for themselves on the stump or adopted particular stances on legal issues. Parties and outside groups also did not run any advertising specifically for judges. Newspapers with partisan leanings simply published the party ticket, listing their candidates. However, the party nomination battles were sometimes more contentious. In 1877, the conventions were competitive between judicial candidates, and particularly in a chaotic Democratic convention, where there was a "wild sense of confusion" as "personal altercation[s]" erupted between the supporters of different candidates.[212] 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 and 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."[213] 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."[214] The Independent Republicans organized an opposition "Philadelphia" ticket and battled throughout the convention for their judicial candidates, especially Thayer.[215] The Regulars represented industrial and mining interests in central and western Pennsylvania and 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

209. SMULL'S 1881, *supra* note 206, at 271–72.

210. SMULL'S 1883, *supra* note 207, at 693–94.

211. *See infra* notes 221–25 and accompanying text.

212. *Proceedings of the Convention: Balloting for Supreme Judge*, PHILA. INQUIRER, Aug. 23, 1877, at 1.

213. *Wheels Within Wheels: Complicated Local Politics*, PHILA. INQUIRER, Mar. 22, 1882, at 2.

214. *The Convention*, PHILA. INQUIRER, May 11, 1882, at 1.

215. *Id.*

of fighting out nominations in conventions and backrooms.[216]

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.[217] The breaking point was the Independents' refusal to go along with the boss system.

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 Regulars, noting that a meeting was held of citizens spanning all classes to assert their opinions "against the tyranny of bosses and the arrogance of placemen."[218] 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.[219]

In the end, the Republican factions failed to mend their split, and the Democratic candidate Silas Clark prevailed by a 48% to 43% plurality.[220]

Sometimes hardball politics emerged in races for lower courts. In the fall 1889 elections for seven Pennsylvania lower court seats, five were contested by both parties and three were tossups. 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 licenses and promised to grant liquor licenses "liberal[ly]." The Republican Pittsburgh newspaper angrily denounced his "bribes" and his "bitter" campaign.[221] 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."[222]

An 1894 judicial election in New York was "fierce," with partisan thugs and "gang[s] of rowdies" beating each other senseless in a "free for all scuffle" at the ballot box.[223] One newspaper titled its article on the election *Disgraceful*

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

217. *The Political Field: Workers Active and Hopeful—A Greenback Labor Boom*, PHILA. INQUIRER, July 17, 1882, at 2.

218. *Independent Judges: The Uprising of the People for a Free Bench*, BALT. SUN, Oct. 19, 1882, at 1.

219. *Id.* (reproducing the remarks of J. Hall Pleasants).

220. SMULL'S LEGISLATIVE HAND BOOK AND MANUAL OF THE STATE OF PENNSYLVANIA (Lane S. Hart 1882).

221. *The Westmoreland Judgeship*, PITTSBURGH COM. GAZETTE, Oct. 24, 1889.

222. *The Thirty-Fifth Judicial District*, PITTSBURGH COM. GAZETTE, Oct. 30, 1889.

223. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 157, 281 n.22 (2004) (quoting *First Round for Warner*, N.Y. HERALD, June 12, 1894).

Scene.[224] The *New York Times*, an explicitly Republican newspaper at the time, criticized the Republican victor in the race, Judge 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.'"[225] 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 likely filtered in judges who were, by temperament and training, more populist.

D. THE "SWITCH IN TIME" JUDGES

The three "switch in time" Pennsylvania 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.[226] 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, . . . delegate to the Pennsylvania Constitutional Convention, Delegate to the National Democratic Convention, President of the First National Bank of Indiana and President of the Indiana Agricultural Society."[227] Less is known about Justice Henry Green, except that he was born in New Jersey, graduated from Lafayette College, and practiced law in Easton until he became a Pennsylvania 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.[228]

A letter in 1887 from the third of these justices, Edward Paxson, to a lower court judge, James T. Mitchell—an aspiring candidate for the state supreme court—reveals some of Justice Paxson's behind-the-scenes politics and on-the-ground involvement:

> My dear Judge,
>
> 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 compro-

224. *Disgraceful Scene*, ROCHESTER UNION & ADVERTISER, June 12, 1894.

225. WITT, *supra* note 223, at 158, 281 n.23 (quoting *Seventh Judicial District*, N.Y. TIMES, Sept. 15, 1894).

226. Unfortunately the Clark House has no records, letters, or other papers of Justice Clark. The Historical and Genealogical Society of Indiana County, Pennsylvania, About the Clark House, http://www.rootsweb.ancestry.com/~paicgs/clarkhouse.shtml (last visited Mar. 20, 2010).

227. *Id.*; *see also* 2 FRANK EASTMAN, COURT AND LAWYERS OF PENNSYLVANIA 515 (1922).

228. EASTMAN, *supra* note 227, at 515.

> mise 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.[229]

Justice Paxson wrote this letter one year after casting his deciding vote in *Sanderson* to reject *Rylands*. A few weeks later, Justice Williams won his election to the Pennsylvania Supreme Court by a margin of 51% to 46%.[230] A year later, Justice Paxson congratulated Judge Mitchell on his Republican nomination to the Pennsylvania Supreme Court, and he later won the election by the same narrow margin.[231] After the flood, Justice Williams wrote the unanimous decision adopting *Rylands*'s rule in *Robb v. Carnegie Bros.*, with Justices Clark, Green, and Paxson joining in adopting strict liability.

Justice Paxson's letter suggests that elected judges did engage in electioneering and remained connected to voter turnout, another reason why judicial elections may have selected for a particular kind of political personality. Justice Paxson began his career as a journalist in Bucks County, founding *The Newtown Journal* at age eighteen and developing it into a successful newspaper, and he founded a second newspaper in Philadelphia.[232] At age twenty-four, he began studying law and then practiced in Philadelphia before becoming a Common Pleas judge. He was active in the Republican Party and a popular party figure.[233] 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.[234] Justice Paxson's letter suggests that he was keenly aware of electoral politics while still on the bench, which may suggest that elected judges were not fully "liberated" from party politics by twenty-one year terms. Even if longer terms protected their seats on the bench, they had an interest in who else joined them there.

Nevertheless, this pressure was less direct than facing elections themselves. Furthermore, I do not argue that judges elected to long terms were liberated from party politics and special interests in all cases. Rather, I emphasize that, in the wake of floods and other disastrous events, judges elected to longer terms were more responsive to public opinion than other judges, even if they still had to balance public opinion with other political pressures.

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229. Letter from Edward M. Paxson, Assoc. Justice on the Pa. Supreme Court, to James T. Mitchell, Assoc. Law Judge of the First Dist. (Oct. 17, 1887) (on file with the Supreme Court of Pennsylvania Collection of the Historical Society of Pennsylvania).

230. *See* SMULL'S 1888, *supra* note 206, at 401–02.

231. Letter from Edward M. Paxson, Assoc. Justice on the Pa. Supreme Court, to James T. Mitchell, Assoc. Law Judge of the First Dist. (Apr. 25, 1888) (on file with the Supreme Court of Pennsylvania Collection of the Historical Society of Pennsylvania).

232. EASTMAN, *supra* note 227, at 513–14; *see also* DAVIS, *supra* note 140, at 156–57.

233. *See* HISTORICAL SOCIETY OF PA., 2 ENCYCLOPEDIA OF CONTEMPORARY BIOGRAPHY OF PENNSYLVANIA (Bethlehem, Historical Society of Pa. 1868), *available at* http://search.ancestry.com/cgi-bin/sse.dll?db=pabio&recid=421.

234. EASTMAN, *supra* note 227, at 513–14.

Paxson eventually maneuvered to become chief justice and retired in 1893. In a speech in 1900 that focused on judicial elections, he claimed that he had never participated in politics and that judicial elections had "worked fairly well" in the past, but warned of a new generation of judges that had ascended to the bench:

> 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.[235]

Justice Paxson observed that most judges were not yet this type of political hack, but that "the evil [was] increasing" and that 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."[236] Although Justice Paxson, like other Pennsylvania judges, had refrained from campaigning publicly, he still had been practicing politics behind the scenes.

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.[237] 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 could have changed these

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235. Edward Paxson, Chief Justice of the Pa. Supreme Court, retired, Address Delivered Before the New Jersey Bar Association in Atlantic City (June 16, 1900) (transcript available in the Edward Paxson file of the Pennsylvania Supreme Court collection of the Historical Society of Pennsylvania).

236. *Id.*

237. *See, e.g.*, *A Strong Ticket for Republicans*, PHILA. INQUIRER, Apr. 21, 1892, at 1–2; *Berke Orphans' Court Judgeship*, PHILA. INQUIRER, May 15, 1892, at 1; *Clearfield Republicans*, PHILA. INQUIRER, Mar. 30, 1892, at 2; *Delegates are To Go Uninstructed*, PHILA. INQUIRER, Apr. 20, 1892, at 1; *Democrats at Odds over Party Rules*, PHILA. INQUIRER, Mar. 23, 1892, at 2; *Farmer Taggart in the Path of Coal King Lilly*, PHILA. INQUIRER, Mar. 13, 1892, at 8; *Hannity's Hand To Be Shown To-Day*, PHILA. INQUIRER, Apr. 13, 1892, at 1; *Here are the Independent Candidates*, PHILA. INQUIRER, Jan. 31, 1892, at 2; *It Costs To Run a Big Campaign*, PHILA. INQUIRER, Sep. 19, 1892, at 2; *Judge Henderson's Claims Presented*, PHILA. INQUIRER, Mar. 3, 1892, at 2; *Republicans Now Have Their Inning*, PHILA. INQUIRER, Apr. 19, 1892, at 1; *Republicans Win over in Camden*, PHILA. INQUIRER, Mar. 9, 1892, at 1; *Senator Quay's Great Victory at the Polls*, PHILA. INQUIRER, Mar. 27, 1892, at 1; *The Senators at Donegal*, PHILA. INQUIRER, Apr. 22, 1892, at 1; *The Supreme Judgeship*, PHILA. INQUIRER, Jan. 18, 1892, at 4.

judges' senses of public necessities, shifting from promoting industry to protecting the people from it. Long terms 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. SELECTION EFFECTS: POPULIST FILTERING?

The preceding two sections show that judicial elections in the nineteenth century were partisan, factional, competitive, and sometimes nasty. Did elections fundamentally change people who ran for the bench or draw a different set of candidates for office? Do judicial elections select for a certain kind of populist judge and filter out more professional, lawyerly, or formalistic judges?

In a recent empirical study of appointed and elected judges in the 21st century, titled *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, Stephen Choi, Mitu Gulati, and Eric Posner find modern selection effects along these lines.[238] They find that appointed judges write higher quality opinions, but elected judges write a larger quantity of opinions, more than compensating for the lower quality.[239] "Politicians want to satisfy the voting public, and this might mean deciding cases expeditiously and in great number. Professionals are more concerned about their reputation among other lawyers and judges and are more interested in delivering well-crafted opinions that these others will admire."[240] They then compare the judges in elected and appointed courts, and find that elected judges

> make more campaign contributions; are paid less; are on less stable benches; and have shorter tenures. . . . [They] are more likely to have gone to a law school in the state in which they sit and are more likely to have gone to a lower-rank law school. They are, in short, more politically involved, more locally connected, more temporary, and less well educated than appointed judges. They are more like politicians and less like professionals.[241]

However, they surprisingly find that elected judges are not more partisan in their voting patterns than appointed judges.[242]

Studies of the nineteenth century bench suggest that there were some similar selection or filtering effects, but that those effects were relatively limited. Historian Kermit Hall examined the nineteenth century elected state courts and the federal courts of the Midwest, and found few, if any, differences in

238. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, J.L. ECON. & ORG. (advance access publication, Nov. 8, 2008), *available at* http://jleo.oxfordjournals.org/cgi/reprint/ewn023v1.

239. *Id.* at 3.

240. *Id.* at 38.

241. *Id.*

242. *Id.* at 38–39.

terms of family background, political background, experience, education, or length of tenure.[243] He has also found no strong selection effects in the South.[244] My own research of nineteenth-century judges in the Mid-Atlantic (New York, New Jersey, and Pennsylvania) also finds few concrete changes in the backgrounds of appointed versus elected judges. One might think that elections would introduce more veterans of political campaigning. However, the appointed judges of these Mid-Atlantic states much more often than not had run and won popular campaigns for local or state office before their appointments to the bench. Before New York and Pennsylvania adopted judicial elections in 1846 and 1850 respectively, most of their appointed judges had held elected offices and were involved in party politics.[245] New Jersey has never elected its judges, but it is striking that, from the creation of its modern supreme court in 1844 through 1900, eight of its nine chief justices had won a popular election to a local or state office.[246] Elections also did not produce a less educated court. In New York, the elected judges after 1846 were much more likely to have attended college or law school than the appointed judges immediately before the changeover,[247] and in Pennsylvania, there was little difference.[248] In all three states, both the elected and the appointed judges were experienced lawyers. Even though some advocates of judicial elections hoped that elections would introduce more lay people to the bench, there is no evidence that their plan worked.

In Pennsylvania, there was a geographic shift with the change to elections. During the appointments period of 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 as the western part of the state grew in population, economic strength, and political power. Nevertheless, there were also slightly more coun-

243. *See* Kermit L. Hall, *Constitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges, 1861–1899*, *in* THE NEW HIGH PRIESTS 29, 42 (Gerald W. Gawalt ed., 1984).

244. Kermit L. Hall, *The "Route to Hell" Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832–1920*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 229 (David J. Bodenhamer and James W. Ely, Jr. eds., 1984).

245. *See generally* CHESTER, *supra* note 143; EASTMAN, *supra* note 150; THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY, *supra* note 144.

246. *See* EDWARD QUINTON KEASBEY, 2 THE COURTS AND LAWYERS OF NEW JERSEY, 1661–1912 (The Lawbook Exchange, Ltd. 2002) (1912). Henry Woodhull Green had been elected town recorder of Trenton. *Id.* at 710. Edward W. Whelpley had been elected to the state assembly. *Id.* at 722. Oliver Halsted was elected a state assemblyman, Newark city recorder, mayor, and state constitutional convention delegage. *Id.* at 727. Benjamin Williamson had not held elected office. *Id.* at 731–36. Abraham O. Zabriskie was elected to state senate. *Id.* at 738. Mercer Beasley was elected city solicitor and president of city council, and later ran for mayor and assembly but lost. *Id.* at 746. Theodore Runyan was elected mayor of Newark, then ran for governor but lost. *Id.* at 759. Alexander T. McGill was elected to assembly. *Id.* at 763. William Magie was elected to the state senate. *Id.* at 767.

247. *See* THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY, *supra* note 144.

248. EASTMAN, *supra* note 227, at 457–60, 505–19.

try lawyers and small-town lawyers who were elected to the Pennsylvania Supreme Court, relative to those who had been appointed, even as Pennsylvania was increasingly urbanizing and industrializing.

Judges in Pennsylvania after 1850 were less likely to have studied in Ivy League law schools, but that distinction was less salient in the nineteenth century when many prominent lawyers read law and apprenticed without attending law school. 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 to the 1840s is very similar to that from the 1850s to the 1880s: 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.[249] 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 national increase in professionalization of the bench and bar in the late nineteenth century. The 1873 reforms do not seem to have triggered other obvious changes to the Pennsylvania courts.[250]

One reason for a somewhat limited selection effect of elections is that appointments were already so politicized and partisan. On the eve of Pennsylvania's ratification of an amendment to adopt popular judicial elections, the *American Law Journal* pointed out that lawyers had been jockeying for appointments behind the scenes much in the same way that they would be jockeying for party nominations for elections.[251] Nineteenth-century observers do not paint a pretty picture of the appointment process, describing it as an aristocracy of patronage and cronyism rather than merit. Appointments were based on "service to party" rather than the appointees' "legal skills or judicial temperament."[252] Early twentieth-century observers wrote that party leaders were often lawyers themselves, and believed it was crucial to nominate competent candidates and to be seen as responsibly preserving the quality of the state courts.[253] In 1905, the first president of the American Bar Association concluded that the selection method was not as important as the influence of the bar on whichever process the state used.[254]

In the end, there is some evidence that judicial elections had selection effects in the nineteenth century, but it is important not to overstate those effects or to

249. From the 1820s to the 1840s, eight of fourteen Pennsylvania Supreme Court justices had been elected to legislative office, either to the state legislature or to the 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. *See id.*

250. For these observations, I relied on Frank Eastman's biographical sketches of Pennsylvania judges. *See generally id.*

251. *Election of Judges*, 8 AM. L.J. 481, 485–86 (1849).

252. SAMUEL MEDARY, THE NEW CONSTITUTION 225, 236, 238, 316 (Columbus, S. Medary 1849).

253. JAMES BRYCE, THE AMERICAN COMMONWEALTH 353–54 (1906).

254. *See* SIMEON E. BALDWIN, THE AMERICAN JUDICIARY 101 (1905).

assume that those effects alone are sufficient to explain judicial behavior. Even if the same type of person became a judge in either system, could the design of the institution—the use of elections to choose judges—change the judge's notion of what sources of law were legitimate?

F. PSYCHOLOGICAL EFFECTS: ROLE FIDELITY, POWER, AND LEGITIMACY

If elections had a limited effect on which kinds of men ran for election, they may have changed more significantly the mentality of the men who won those elections. This section turns to the popular "fidelity" arguments of the nineteenth-century reformers who designed judicial elections and then lengthened terms. It also looks to modern historians, social psychology, and empirical research on modern courts to explain the theory of role fidelity.

The historian most linked with "role fidelity" is Robert Cover, the late great Yale Law professor. In *Justice Accused*, Robert Cover puzzled over how anti-slavery judges in the North—including the legendary 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.[255] Instead of fidelity to morality, they adhered to "fidelity to law," a professionalized model of formalistic interpretation of law.[256] They distinguished themselves as judges, rather than legislators, and thus deferred to laws they found abhorrent. Cover himself argued that the institution of appointment produced a more professional role fidelity, shaping a judicial mindset that focused on "fidelity to law" as the separation of law from personal morality. Cover speculated that supporters of an elected judiciary in the 1840s and 1850s desired to change the judicial mindset from fidelity to professional formalism to a fidelity to their local community and public opinion.[257]

The convention debates of the 1840s and 1850s confirm Cover's general intuition (although, as I show in *The People's Courts*, the debates were not shaped so much by pro-slavery or anti-slavery attitudes[258]). In the 1850s and thereafter, judicial elections flipped this fidelity. In the wave of conventions that initially adopted judicial elections, state delegates argued explicitly that judicial elections were not merely a mechanism for voting out unpopular judges, but were also a means of shaping the judges' self-conceptions.[259] New York's delegates, in the 1846 convention that triggered the wave of adoptions by twelve states over the next five years, argued that appointments had fostered a

255. COVER, *supra* note 116, at 229–32.

256. *Id.*; *see also* Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 113 (2009) (judging requires "fidelity to role").

257. *Id.* at 144–45, 177–78.

258. SHUGERMAN, *supra* note 196.

259. *Id.*; *see also* Shugerman, *supra* note 17.

"judicial aristocracy."[260] Judicial elections would liberate judges from those interests and "increase[] fidelity" to the people.[261] 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 weather-cocks 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."[262] 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.[263] Judicial elections would discourage judges from relying on legal technicalities and doctrine, and instead to "take care that their opinions reflect justice and right."[264] 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.[265] 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 initially shaping the judicial mindset in a more democratically responsive mold, and thereafter insulating that mindset from normal politics. These longer terms institutionalized drift, but these Reconstruction-era reformers were planning for elections to long terms to shape judges who would have popular inclinations, so that over a longer term—even tantamount to a life term—they would drift away from partisanship and special interests, and towards their notion of the public interest.

Modern social psychology established "role theory" to explain how social situations, social expectations, and institutions shape self-conception and behavior.[266] "Functional role theory" focuses on how social positions create shared normative expectations and how those expectations shape behavior.[267] Functional

260. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, 1846, at 651 (Albany, Office of the Evening Atlas 1846) (statement of Mr. W.B. Wright); *see also* 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, at 585–638 (Columbus, Medary 1851).

261. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, *supra* note 260, at 645.

262. 2 CONSTITUTIONAL SERIES: THE CONSTITUTIONAL DEBATES OF 1847, at 461–62 (Arthur Charles Cole ed., 1919) (statement of Mr. Davis).

263. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, *supra* note 260, at 217 (statement of Mr. Taylor).

264. 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 700 (Boston, White & Potter 1853). Conventions in New York, Virginia, Maryland, Illinois, and Indiana offered similar arguments. *See* Shugerman, *supra* note 17.

265. *See supra* section III.A.

266. *See* Biddle, *supra* note 16, at 68.

267. *See id.* at 70.

role theory led to "organizational role theory," which focuses on complex organizations and social systems, how particular positions and offices in those systems establish specific norms and expectations, and how they resolve dissonance and "role conflict."[268] Courts are classic models of complex social systems generating role conflicts, and judicial elections shape the role of judges by announcing that the people hold the power over the courts and that public opinion is a legitimate source for law. Karl Llewellyn's notion of "situation-sense"—that judges engage with roles and context case-by-case[269]—is loosely related to role theory.

Organization role theorists have contended that those in organizational roles resolve their frequent role conflicts by judging who holds power in the organization and which norms are most legitimate.[270] Role theory and its emphasis on "legitimacy" help explain why a judge elected by a party machine might defect from the party or a special interest in favor of the perceived public interest and strict liability. In the late nineteenth century, political power might be ranked: first, the parties; second, special interests; and third, the voters themselves. When terms are short, the power of parties and special interests trumps the public, but longer terms attenuate this effect. Thus, legitimacy becomes a more influential factor in these role conflicts. In the ongoing public debates over judicial elections in the nineteenth century, conventional delegates reiterated how elections underscored the legitimacy of public opinion and public interest. Elected judges would institutionally elevate public interests as legitimate, while the party machine or special interests would be deemed less legitimate. Thus, role theorists would not be surprised that elected judges with job security would resolve their role conflict by favoring public interests over private ones.

For one more angle on the same concept, it helps to return to the recent empirical work on elected and appointed judges by Stephen Choi, Mitu Gulati, and Eric Posner in *Professional or Politicians*.[271] As described above, they find that modern appointed judges write higher quality opinions but that elected judges compensate by writing many more opinions.[272] Choi, Gulati, and Posner first suggest that selection effects might shape these results:

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268. *See id.* at 73–74.

269. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60–61, 122–23 (1960) (describing situation-sense and how the felt duty of judges works through the facts of a given case).

270. *See generally* GROSS ET AL., EXPLORATIONS IN ROLE ANALYSIS (1958); Gullahorn & Gullahorn, *supra* note 16 (discussing types of role conflict in terms of social status and social role and presenting methods of conflict resolution); Jackson Toby, *Some Variables in Role Conflict Analysis*, 30 SOC. FORCES 323 (1951–52) (describing institutionalized mechanisms, including hierarchies of role obligations, that serve to limit the disruption of role conflicts).

271. Choi, Gulati & Posner, *supra* note 238.

272. *Id.* at 3.

> In sum, a simple explanation for our results is that electoral judgeships attract and reward politically savvy people, whereas appointed judgeships attract more professionally able people . . . . It is possible that the politically savvy people might give the public what it wants—adequate rather than great opinions, issued in greater quantity and therefore (given the time constraint) greater average speed.[273]

It is not clear from their story that selection effects explain their results. The same type of person could be appointed or elected. Once appointed, she imagines her role to be a professional among other professionals and other elites who appointed her. Thus, she strives to write the highest quality opinions for that audience. Put that same person through an election to a court, and she reconceives of her role and her audience. This result can be attributable to roles and norms shaped by elections and the imagined public audience—including parties in court who seek quick resolution more than erudite reasoning.

Considering these perspectives from historians, psychologists, and empirical data, it is not hard to imagine that elections could create a new self-conception for a judge, and could alter the role from elite selection and professional formalism 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 sensibilities. 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 her 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[274]), 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 legitimate voice of the popular will. Perhaps the judge will imagine that the ends justified the means, and that those means were necessary to allow the judge to represent the right-minded public and its needs.

For judges who had lingering qualms about the integrity of their elections, it would be natural to overcompensate after election to long terms. 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 pres-

273. *Id.* at 39.

274. *See supra* section III.B.

sure as the public, if not more. Elected judges adopted *Rylands*, but only after the Johnstown Flood triggered a powerful shift in public perceptions.[275] Though they did not explicitly state that they were responding to the Flood or public opinion, they did shift from formalism and efficiency arguments to a more expressive, moralistic language consistent with public outrage.[276]

The Judicial Code of Conduct today warns that "fear or favor" are threats to judicial independence,[277] and fear and favor have more influence on judges with short terms. One might imagine that judges elected to shorter terms would be more responsive to shifts in public opinion, but the evidence here suggests that judges elected to longer terms were able to remain independent from the fear and favor of party and special interests. Pro-defense and pro-industry interests were much more powerful and organized in this era than pro-plaintiff, pro-consumer, and pro-labor interests. Labor unions were not yet active in judicial elections,[278] so they were not a countervailing pro-plaintiff "special interest" whose role would have been diminished by longer terms. Longer terms allowed elected judges to resist certain kinds of fear and favors while remaining responsive to public opinion—more out of fidelity than out of fear of voters.

I posit that judicial elections may have cultivated a bench that was more in touch with current events and public opinion. Though the media described the South Fork Fishing and Hunting Club and its members in those terms (negligence, fault, etc.),[279] most voters still did not grasp the basics of tort law. Even so, 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 experiences and the lessons about industrial hazards they derived themselves from these disasters. According to the "availability heuristic," salient events overwhelm our judgment, crowding out potential risks in our minds. Humans exaggerate concrete recent experiences and underappreciate abstract possibilities.[280]

The Johnstown Flood transformed an overlooked potential risk into an overemphasized actual event—particularly among state judges, and among state judges, particularly those elected to long terms. 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 party politics and special interests would be diminished relative to broader public opinion and conscience. Counterintuitively, judges serving longer terms would be more responsive to the public and current events.

How did judges compare with legislators on these questions? In the sessions

275. *See supra* section I.B.

276. *See* Shugerman, *A Watershed Moment*, *supra* note 13, at 33–36.

277. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 cmt. (2009), *available at* http://www.uscourts.gov/library/codeOfConduct/Code_Effective_July-01-09.pdf.

278. *See* William J. Nancarrow, Vox Populi: Democracy and the Progressive Era Judiciary, 1890–1916 (Jan. 2004) (unpublished Ph.D. dissertation, Boston College).

279. *See supra* note 56 and accompanying text.

280. *See, e.g.*, Sunstein & Kuran, *supra* note 15; Tversky & Kahneman, *supra* note 15.

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,[281] 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 cleanup of Johnstown, and even that action came six months after the Flood in an emergency winter session. It appears that Pennsylvania legislators behaved even less responsively to the Flood than the Pennsylvania judges, and one difference may have been that the judges were appointed to twenty-one-year terms, which in practice was close to a life term. State senators were elected to four-year terms and representatives were elected to two-year terms in the state house.[282] 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.

Another reason that legislators were less responsive may have been that the Pennsylvania Supreme Court intervened first in *Robb v. Carnegie Bros.* in December 1891,[283] when the first regular session of the legislature was beginning. This timing suggests that courts may have been more active in social regulation than were legislatures, because they 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 legislature 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, 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—may have been more responsive than some other government officials, and perhaps further research is warranted into their role in the growth of the regulatory state.

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 that modern judicial campaigns have become dramatically more expensive due to television and direct mailing.[284] 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.[285]

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281. *See* LAWS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA (Harrisburg, Edwin K. Meyers 1891).

282. PA. CONST. of 1874, art. II, § 3.

283. 22 A. 649 (Pa. 1891); *see supra* notes 73–81 and accompanying text.

284. *See* HAYNES, *supra* note 117; *supra* notes 7–10 and accompanying text.

285. *See* Eric Helland & Alex Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 368 (2002).

G. CONTINUITY IN OTHER TORT DOCTRINES

One might wonder whether the adoption of *Rylands* was actually part of a broader shift in favor of victims and plaintiffs in the late nineteenth and early twentieth centuries. To the contrary, state and federal courts did not make other pro-plaintiff changes in tort doctrine in the late nineteenth century. The fact that elected judges drove one limited change in tort doctrine, but not others, bolsters the argument in favor of the Johnstown Flood's influence when combined with the selection effects and psychological effects of judicial elections. Other areas of tort law, such as contributory negligence, assumption of risk, and the fellow-servant rule, had the biggest impact on a relatively narrow slice of the population: blue-collar workers.[286] These issues did not capture public opinion the same way that broad risks of manmade disasters did, especially after the Johnstown Flood. Ultra-hazardous activities created a broader scale of fear and influenced public opinion more broadly, so that judges more attuned to broad public opinion and to events would be more responsive.

In contributory negligence, most states placed the burden of proof on the defendant to show negligence, while a handful continued to place the burden of proof on the plaintiff.[287] Throughout the second half of the nineteenth century, courts continued to apply the doctrines of assumption of risk, but generally allowed the cases to go to the jury and did not rule that laborers assumed the risk of employers' negligence or of concealed risks. Courts applied the fellow-servant rule while also carving out exceptions for latent risks, faulty equipment, and "superior servants," deferring if state legislatures abrogated the common law rule.[288] Proximate cause provided an additional line of defense, but it was not particularly robust in the mid- or late nineteenth century.[289] In all of these other tort doctrines, courts did not make any major shifts, and certainly not the kind of reversal as they did on *Rylands*.

Contributory negligence, assumption of risk, and the fellow-servant rule generally blocked individual laborers and individual consumers from recovery against employers, manufacturers or transportation companies. Even though in the aggregate these risks affected society broadly, each accident had a narrow and limited scope, even if the accident was fatal. The risks from ultra-hazardous "unnatural" activities and objects—especially reservoirs—were both broad and deep, like the reservoirs themselves. As demonstrated in England in the Dale Dyke disaster[290] and again in Pennsylvania during the Johnstown Flood, a

286. *See generally* WITT, *supra* note 223 (examining developments in tort law spurred by post-Civil War industrialism).

287. *See* 1 THOMAS G. SHEARMAN & AMASA A. REFIELD, A TREATISE ON THE LAW OF NEGLIGENCE §§ 106–08 (6th ed. 1913) (listing thirty-nine states in which the burden of proof is on the defendant, as against eight states where the burden of proof is on the plaintiff).

288. *See* KARSTEN, *supra* note 14, at 108–27 (describing the application of assumption of the risk in America and the exceptions and relaxations of the rule that courts employed).

289. *See id.* at 105–08.

290. *See* Simpson, *supra* note 18, at 225–38.

collapsing reservoir could wipe out an entire community. Thus, ultra-hazardous activities were more potent in triggering fear and public opinion than more narrowly targeted dangers in an industrial society. Furthermore, the risks to blue-collar labor had less political traction than risks to other segments of society in the late nineteenth century. Organized labor had been gaining influence, but had not achieved anything like the political power it attained in the twentieth century.[291] If the "political incentives" model of re-elections and re-nomination were significant, one would have seen labor unions gaining more traction on their issues (such as contributory negligence, fellow-servant, and assumption of risk) through interest-group pressure on the party system. Instead, the selection effect and "role fidelity" institutional effect were more significant. In terms of public opinion and its effect on judges, the risks of "unnatural" activities—especially after the Johnstown Flood—were more salient than the risks of the coal mine or the factory, and thus would have more of an effect on judges who, by personality or by institutional role, would be more responsive to public opinion and salient events.

CONCLUSION

Former U.S. Senator Richard Russell once described his six-year term as "two years to be a statesman, two to be a politician and two to demagogue." Ernest Hollings added, "Now we take all six years to raise money."[292] In the story of *Rylands*'s adoption, appointed judges acted as elite statesmen, adhering to the fault rule and setting aside popular fears. Judges elected to longer terms arguably conceived of themselves as politician–statesmen, translating public opinion into doctrine through *Rylands*. Judges elected to shorter terms had a more difficult balance of roles within nineteenth-century party machines, and instead of "demagoging" to the people, they were more captured by party nomination constraints and special interests. Although they did not need to raise money, they did need to retain party nominations, and thus they were more politically constrained from adopting *Rylands*.

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, it 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

291. *See generally* DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925 (1987) (providing a history of labor organization and activism in the late nineteenth and early twentieth centuries); ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917 (1999) (describing the agrarian movement and the political power of farmers and workers in the half century prior to World War I).

292. Ernest F. Hollings, *Stop the Money Chase*, WASH. POST, Feb. 19, 2006, at B7.

interests and party politics, while more insulation from re-elections allowed judges to respond to events and public opinion. The evidence suggests that elections did not change the judges from one kind of background to another; rather, elections changed the judges' institutional mindsets once they won their elections, even if they never faced another election. Elected judges were faithful to a new institutional role, more than to whichever voting block or special interest helped them win that office. That role fidelity elevated public opinion as a relevant factor in their interpretations of common law tort doctrine. The historical record reflects that special interests retained a strong degree of control over nominations and renominations, so longer terms would decrease the influence of those interests while retaining the broader role fidelity to "the people," even if that role was partly a fiction or an exaggerated self-conception. Long terms created space for populist political drift: drift away from partisanship and special interests, and drift towards the judges' conceptions of public interest, especially in the light of new facts and the shadows of new fears.

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 from another perspective, it is a cautionary tale. Do we want our legal system to be so responsive to recent events? And to shifts in public opinion? Perhaps we do in some areas, but less so if our notion of constitutionalism and the rule of law is to protect individual rights from majoritarian excesses.[293] In tort law and even more so in criminal law, fear and favor are particularly powerful forces on judges.

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 far more direct in voicing their positions on legal matters.[294] They

293. *See* David Pozen, Judicial Elections as Popular Constitutionalism (Feb. 23, 2010) (unpublished manuscript, on file with author).

294. *See* Pozen, *supra* note 4; *see also* Republican Party of Minn. v. White, 536 U.S. 765, 770, 788 (2002) (holding unconstitutional the announce clause in Minnesota's Code of Judicial Conduct, which prohibited judicial candidates from "announc[ing] . . . views on disputed legal or political issues").

raise enormous amounts of money—often millions of dollars, and often large amounts from parties and lawyers with pending cases—in order to finance expensive media campaigns. Those problems are getting worse.[295] In the spring of 2009, the U.S. Supreme Court finally responded in one particularly egregious case, *Caperton v. A.T. Massey Coal Co.*[296] In 2002, a West Virginia jury found A.T. Massey, a coal company, liable for tortious interference with a contract and imposed a $50 million verdict.[297] As Massey appealed the verdict, its CEO spent $3 million supporting Brent Benjamin's 2004 campaign for a seat on the West Virginia Supreme Court—more than 60% of the total amount spent to support Justice Benjamin's campaign.[298] This funding supported shrill campaign ads accusing Benjamin's opponent of protecting child molesters. Benjamin won his election and in 2007, after refusing to recuse, cast the deciding vote in the court's 3–2 decision overturning the entire verdict—a fairly profitable 1500% return on a $3 million investment. In a 5–4 ruling, the Court ruled that a party has a right under due process to disqualify a judge who has received significant campaign support from another litigant or lawyer.[299] Justice Anthony M. Kennedy concluded that such political and financial influences on the court violate due process and "threaten to imperil public confidence in the fairness and integrity of the nation's elected judges."[300] As more and more groups are spending heavily on judges' races, the Supreme Court will have to continue to address whether due process requires recusal in cases of substantial financial support.

Unsurprisingly, the petitioner's brief and amicus briefs before the Supreme Court in *Caperton* focus on recusal as one solution, but they recognize that it is but a partial solution. One of the briefs devotes itself to potential reforms that a due process ruling could bolster, such as merit selection and public financing.[301] However, none of the briefs mentions that longer terms could help reduce the influence of special interests at the core of this case, and the Court in *Caperton* did not discuss the issue of job security—even though West Virginia Supreme Court justices enjoy the job security of twelve-year terms, some of the longest in American state courts. In other materials, these reform groups mention other worthwhile reforms, including campaign conduct committees and voter guides, but again, they do not mention lengthening terms.[302] All of these other reforms are worthwhile, but longer terms are an additional reform that should not be overlooked.

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295. *See, e.g.*, DEBORAH GOLDBERG ET AL, *supra* note 8; RUNNING FOR JUDGE, *supra* note 1; Adam Liptak & Janet Roberts, *Tilting the Scales: The Ohio Experience; Campaign Cash Mirrors High Court Rulings*, N.Y. TIMES, Oct. 1, 2006; Dorothy Samuels, *Justice for Sale*, N.Y. TIMES, Dec. 12, 2006.

296. 129 S. Ct. 2252 (2009).

297. *Id.* at 2257.

298. *Id.*

299. *Id.* at 2256–57.

300. *Id.* at 2266 (internal quotation marks omitted).

301. Brief of Justice at Stake, et al. as Amici Curiae in Support of Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22).

302. Press Release, Justice at Stake, 2008 Supreme Court Elections: More Money, More Nastiness (Nov. 8, 2008), *available at* http://www.justiceatstake.org/newsroom/press_release.cfm/2008_supreme_court_elections_more_money_more_nastiness?show=news&newsID=5680.

This historical evidence 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 were longer terms, while leaving judges vulnerable to the biggest problems with elections—the influence of parties, money, and special interests. 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 appointed by the governor.[303] The merit plan then has these judges face yes-or-no retention elections, often after six- or eight-year terms—a shorter term than many judges benefited from a century ago. The merit plan reversed the late-nineteenth-century model of elections to long terms. Election to long terms started with direct popular influence but then alleviated it thereafter with the longer term. The modern merit plan reduces democratic influence initially and brings back popular influence more often thereafter.

Longer terms would certainly increase the value of each election, so parties and interests might invest even more money in each campaign. For that reason, longer terms should be part of a more comprehensive package of reforms, including some combination of merit selection, campaign conduct committees, public financing, voter guides, and perhaps a higher threshold for defeating an incumbent in a retention election (for instance, the "no" vote must be 55% or 60% to remove the judge from office). But longer terms are a key part of the solution to the modern problems with judicial elections.

Considering that judicial elections seem to be 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.[304] The result might be a bench that is simultaneously more independent from special interests and more responsive to the public.

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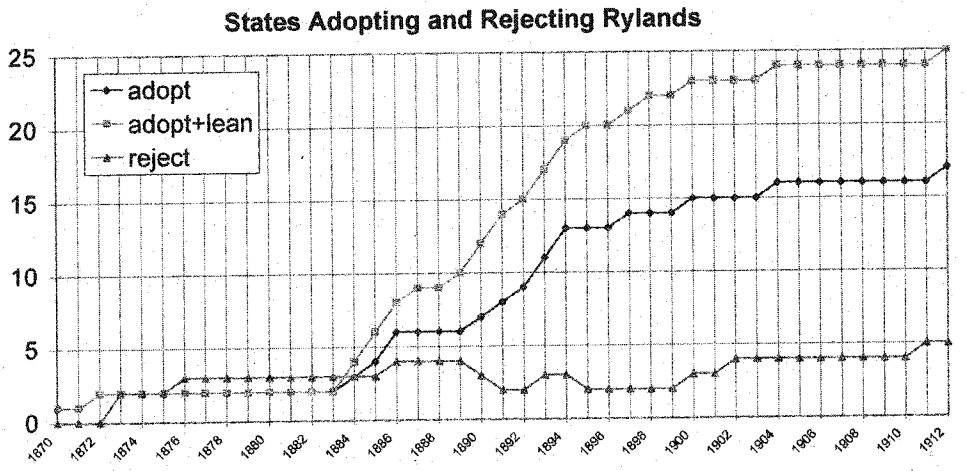
303. *See* F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 439–40, 452 (2004).

304. 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. Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (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 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 line marked by diamonds 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*:[305] First, 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 and Colorado in 1887). Second, upper Midwestern states were the majority of the other adopting states in the 1880s (Michigan and Wisconsin in 1884, Illinois in 1885 and 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 twelve-year terms. "(A-10)" means they were appointed to ten-year terms. 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). Those states with judges whose terms are maintained during good behavior are counted as ten years or more, while those who served at the legislature's pleasure are counted as less than ten years.

305. *See* Shugerman, *Floodgates*, *supra* note 13.

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 (E-10), adopt 1884[306]
2. California (E-12), adopt 1886[307]
3. Maryland (E-15), adopt 1890[308]
4. New York (E-14), leaning toward 1890–1908[309]
5. Pennsylvania (E-21), leaning toward 1891[310]
6. Missouri (E-10), adopt 1893[311]

After 1900:

7. West Virginia (E-12): adopt 1911[312]

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

1. Minnesota (E-6), adopt 1872[313]
2. Michigan (E-8), leaning toward 1884[314]
3. Nevada (E-6), leaning toward 1885[315]
4. Illinois (E-9), adopt 1885, 1887[316]

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

307. Colton v. Onderdonk, 10 P. 395, 397–98 (Cal. 1886).

308. Baltimore Breweries' Co. v. Ranstead, 28 A. 273, 274 (Md. 1894); Susquehanna Fertilizer Co. v. Malone, 20 A. 900, 900–01 (Md. 1890).

309. Deigleman v. N.Y., L. & W. Ry. Co., 12 N.Y.S. 83 (Sup. Ct. 1890); Schmeer v. Gaslight Co. of Syracuse, 42 N.E. 202, 205 (N.Y. 1895); Davis v. Niagara Falls Tower Co., 64 N.E. 4, 5 (N.Y. 1902); Duerr v. Consol. Gas Co. of N.Y., 83 N.Y.S. 714, 717–18 (App. Div. 1903).

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

311. Mathews v. St. Louis & S.F. Ry., 24 S.W. 591, 598–99 (Mo. 1893); *see also* French v. Ctr. Creek Powder Mfg., 158 S.W. 723, 725 (Mo. Ct. App. 1913).

312. 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).

313. Cahill v. Eastman, 18 Minn. 324, 334–37, 344–46 (1872).

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

315. Boynton v. Longley, 6 P. 437, 439 (Nev. 1885).

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

5. Iowa (E-6), adopt 1886[317]
6. Colorado (E-9), leaning toward 1887, 1893[318]
7. Alabama (E-6), leaning toward 1889[319]
8. Ohio (E-6), adopt 1891[320]
9. Oregon (E-6), adopt 1893[321]
10. Wyoming (E-8), adopt 1894[322]
11. Kansas (E-6), adopt 1897[323]
12. Utah (E-6), leaning toward 1898[324]
13. Tennessee (E-8), adopt 1900[325]

After 1900:

14. Montana (E-6), adopt 1904[326] (statehood in 1889)
15. Indiana (E-6), adopt 1912[327]

C. The following states elected their supreme court judges to terms shorter than ten years and rejected *Rylands*:

1. Washington (E-6), reject 1893[328]
2. Texas (E-6), wavering and leaning against 1900[329]

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

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

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

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

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

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

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

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

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

326. Longtin v. Persell, 76 P. 699, 700–01 (Mont. 1904).

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

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

329. Gulf, Colo. & Santa Fe Ry. v. Oakes, 58 S.W. 999, 1000–01 (Tex. 1900); Barnes v. Zettlemoyer, 62 S.W. 111, 112 (Tex. Civ. App. 1901). For pro-*Rylands* decisions by lower courts, see *Texas &*

3. Kentucky (E-8), reject 1902[330]
4. North Dakota (E-6), reject 1911[331] (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 (E-8), silent
2. Nebraska (E-6), silent[332]
3. North Carolina (E-8), silent
4. South Dakota (E-6), silent (statehood in 1889)
5. Idaho (E-6), silent through 1914, adopted in 1917[333] (statehood in 1890)

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 ten years:

1. Mississippi (A-9), silent
2. Maine (A-7), silent
3. Connecticut (A-8), silent
4. Rhode Island (A-at pleasure of legislature), silent

Terms longer than ten years:

5. Delaware (A-12), silent
6. Virginia (A-12), silent[334]
7. New Hampshire (A-good behavior), reject 1873[335]

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).

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

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

332. Nebraska adopted *Rylands* in 1919. Barnum v. Handschiegel, 173 N.W. 593, 594 (Neb. 1919).

333. Burt v. Farmers' Co-operative Irrigation Co., 168 P. 1078, 1082–83 (Idaho 1917).

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

335. Brown v. Collins, 53 N.H. 442, 450 (1873).

F. The following states appointed their supreme court judges and adopted *Rylands*:
Terms shorter than ten years:

1. Vermont (A-2), adopt 1892[336]
2. South Carolina (A-6), adopt 1894[337]
3. New Jersey (A-6/7), leaning towards 1895–1896[338]

Terms longer than ten years:

4. Massachusetts (A-good behavior), adopt 1868[339]

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

Georgia (A-12 under the 1868 state constitution; terms shortened to six years in the 1877 state constitution; elected by the public to six-year terms by an 1896 amendment). Georgia distinguished between natural and artificial water drainage in *Phinizy v. City Council of Augusta*, but the court placed this distinction clearly in the context of traditional nuisance law.[340] 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.[341]

Florida (A-6 through 1887, then switched to E-6), silent. Because it had both selection methods in this time period, it is complicated to include it in one category or the other. An alternative would be to include Florida in both the "appointed" category and the "elected to short terms" category. Because Florida was silent on judicial elections, its inclusion in both categories would only strengthen this Article's statistical conclusions because the states with judges elected to long terms would have been even more likely to adopt *Rylands* than the other states.

New Mexico: 1912 statehood, late in this period
Arizona: 1912 statehood, late in this period
Oklahoma (E-6), 1907 statehood, late in this period
Louisiana (A-10), leaning towards *Rylands*, civil law system.

336. Gilson v. Del. & Hudson Canal Co., 26 A. 70, 72 (Vt. 1892).
337. Frost v. Berkeley Phosphate Co., 20 S.E. 280, 283 (S.C. 1894).
338. Grey v. Mayor of Paterson, 42 A. 749, 752 (N.J. Ch. 1899); Sterling Iron & Zinc Co. v. Sparks Mfg. Co., 41 A. 1117, 1117 (N.J. 1896); Beach v. Sterling Iron & Zinc Co., 33 A. 286, 289–90 (N.J. Ch. 1895).
339. Ball v. Nye, 99 Mass. 582 (1868).
340. 47 Ga. 260, 266 (1872).
341. Holman v. Athens Empire Laundry Co., 100 S.E. 207, 210 (Ga. 1919).

APPENDIX B: FISHER EXACT TEST FOR STATISTICAL SIGNIFICANCE WITH SMALL DATA SETS

Quantitative analysis is not a perfect match for this historical material partly because the number of states is so small. Nevertheless, the Fisher Exact Test is designed for small numbers and it may add a layer of statistical analysis to these conclusions.

The gold standard for statistical significance is a confidence interval (or a p-value) of .05 or less, meaning that there is a 5% chance or less that the observed pattern is random, rather than an actual recurring pattern. Some of the tables below reach that gold standard, but even the ones that do not still suggest that the correlations between elections, long terms, and the adoption of strict liability are more likely a recurring pattern than a random occurrence.

First, a comparison of elected judges to appointed judges:

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

The p-value is .05, a 5% 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 cutoff date, the p-value is .14 (14% 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
Term <10	18	13	31
Totals	26	16	42

The p-value is .31, which means that there is a 31% chance that correlation between longer terms and strict liability is random. Through 1900, the p-value is .37 (37%). 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, <10 year terms	15	9	24
Totals	22	9	31

The p-value is .064, which means that there is a 6.4% chance that the pattern of longer-term elected judges being more likely to adopt *Rylands* was chance. Again, this p-value satisfies the 95% confidence level. For the states through 1900, the p-value is .14 (14%).

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

	Adopt	Reject/silent	Total
Elected <10	15	9	24
Appointed <10	3	4	7
Totals	18	13	31

The p-value is .31, or a 31% chance that this pattern of elected judges serving short terms being more likely to adopt *Rylands* was random. 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

The p-value is .024, or a 2.4% chance of being random. As of 1900, the p-value is .087. 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 .035, a 3.5% chance of being random. Through 1900, the p-value is .13.

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