Note

The Floodgates of Strict Liability:
Bursting Reservoirs and the Adoption of
Fletcher v. Rylands in the Gilded Age

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In the standard historical interpretation of American tort law, the era of
classical laissez-faire and pro-industry fault liability dominated the
nineteenth and early twentieth centuries, and the mid-twentieth century
marked the gradual rise of strict liability. Scholars and judges
presenting this narrative have focused on the reception of Fletcher v. Rylands,
an English case from the 1860s in which a reservoir used for supplying water
power to a textile mill burst into a neighbor’s underground mine shafts. In one of
the most significant and controversial precedents in the strict liability canon,
the

1. E.g., Lawrence M. Friedman, A History of American Law, 409-27 (1973);
Morton Horwitz, The Transformation of American Law, 1780-1860, at 85-108 (1977);
Bernard Schwartz, The Law in America 55-59 (1974); G. Edward White, Tort Law in
America 3-19 (1980); Guido Calabresi, Some Thoughts on Risk Distribution and the Law of
Torts, 70 Yale L.J. 499, 515-17 (1961); Albert A. Ehrenzweig, Negligence Without Fault, 54
Cal. L. Rev. 1422, 1425-43 (1966); Charles O. Gregory, Trespass to Negligence to Absolute
Liability, 37 Va. L. Rev. 359 (1951); A.W.B. Simpson, Legal Liability for Bursting Reservoirs:
Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1972) (examining the era
of fault and arguing that fault prevailed as the most economically efficient doctrine).
Contra Robert L. Rabin, The Historical Development of the Fault Principle: A Reinterpretation,

2. See Gregory, supra note 1; William K. Jones, Strict Liability for Hazardous Enterprise, 92
Colum. L. Rev. 1705, 1706-11 (1992); Virginia E. Nolan & Edmund Ursin, The Revitalization

3. 159 Eng. Rep. 737 (Ex. 1865), rev’d, 1 L.R.-Ex. 265 (Ex. Ch. 1866), aff’d, 3 L.R.-E & I.
Appp. 330 (H.L. 1868).

4. See William Prosser, The Principle of Rylands v. Fletcher, in Selected Topics on the
English courts held that proof of negligence was not required for “non-natural” or potentially “mischievous” activities. Scholars point to a series of decisions rejecting Rylands to conclude that American courts adhered to the fault doctrine and repudiated strict liability in the late nineteenth century, and the consensus has been that Rylands was not accepted until the mid-twentieth century. Many prominent works on American legal history feature this supposed rejection of Rylands as a centerpiece for their historical claims about the dominance of the fault doctrine as a subsidy for emerging industry.

In fact, a significant majority of the states actually accepted Rylands in the late nineteenth and early twentieth centuries, at the height of the “era of fault.” While New York’s highest court famously declared, in Ives v. South Buffalo Railway in 1911, that due process of law categorically required proof of fault, courts around the country had been applying Rylands over the previous three decades. A few states split on the validity of Rylands in the 1870s, but a wave of states from the mid-1880s to the early 1910s adopted Rylands, with fifteen states and the District of Columbia solidly accepting Rylands, nine more leaning toward Rylands or its rule, five states wavering, and only three states consistently rejecting it. Just after the turn

6. Infra Section I.B.
7. FRIEDMAN, supra note 1; HORWITZ, supra note 1; SCHWARTZ, supra note 1; WHITE, supra note 1; see also RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 134-36 (1995).
8. 94 N.E. 431 (N.Y. 1911).
9. See infra Section I.D. The criterion in this Note for defining a state’s adoption of Rylands is the existence of an approving citation relating to its strict liability rule, without accompanying comments about the fact that states generally disapprove of Rylands, and without a subsequent case doubting Rylands (in the relevant time period). The standard for rejection is an explicit statement rejecting Rylands’s rule itself or declaring that most American states have not adopted it. States that adopted a rule similar to Rylands (finding strict liability for an activity because it is “non-natural” or “artificial”) or generally approved of Rylands, despite a case or two rejecting it, are considered to be “leaning.” States that vacillated between accepting and rejecting Rylands for a significant part of the relevant time period are categorized as wavering.

This Note’s criterion for acceptance is slightly stricter than William Prosser’s implicit standard in The Principle of Rylands v. Fletcher, the only other work to assess thoroughly Rylands’s acceptance nationwide. PROSSER, supra note 4. For example, Prosser listed Missouri as accepting Rylands, based upon French v. Center Creek Powder Manufacturing, 158 S.W. 723 (Mo. Ct. App. 1913). PROSSER, supra note 4, at 153. However, after the Missouri Supreme Court adopted Rylands in Mathews v. St. Louis & San Francisco Railway, 24 S.W. 591 (Mo. 1893), a lower court temporarily rejected it in Murphy v. Gillum, 73 Mo. App. 487, 492-93 (Mo. Ct. App. 1898), and the state supreme court expressed some doubt in Gannon v. Laclede Gaslight, 47 S.W. 907, 912 (Mo. 1898) (declining to apply Rylands to electricity and noting that Rylands “has not met with approval in all American jurisdictions”). Thus, this Note categorizes Missouri as “wavering” over this period. Two more examples are Colorado and West Virginia, which Prosser counts as “accepting.” PROSSER, supra note 4. Because of other cases in this time period that were critical of Rylands, this Note categorizes Colorado as “leaning,” infra note 70, and West Virginia as “wavering,” infra note 88. One final example is Iowa. Prosser characterized Healey v. Citizens’ Gas & Electric Co., 201 N.W. 118 (Iowa 1924), as adopting Rylands. Because this case also discussed several other cases questioning or rejecting Rylands, however, this Note considers Healey as only “leaning” toward Rylands. However, Iowa had adopted Rylands in 1886 in
of the century, the California Supreme Court declared, more correctly than not, that “[t]he American authorities, with hardly an exception, follow the doctrine laid down in the courts of England [in Rylands].” 10 In the following years, some states shifted against Rylands, but an equivalent number of new states also adopted Rylands. 11 Accordingly, a strong majority of states has consistently recognized this precedent for strict liability from about 1890 to the present.

In addition to presenting the new evidence about Rylands’s adoption, this Note also explores the various factors influencing the adoption: broad social changes, economic patterns, political shifts, and a series of reservoir accidents and floods. While urbanization, economics, and politics played a role, this Note concludes that a series of tragic dam failures, particularly the Johnstown Flood of 1889, was the most direct and substantial cause. By focusing on particular disasters, this account seeks to challenge the previous assumptions that either long-term socioeconomic forces or academic and political elites primarily caused Rylands’s adoption in the mid-twentieth century.

Part I presents an overview of Rylands v. Fletcher and then discusses the phases of the American response: the initial acceptance; the Northeastern rejections in the 1870s, which have been the basis for the erroneous scholarly conclusions; and the overlooked tide of acceptances across the country, beginning in the late 1880s and increasing in the 1890s. Part II places this wave of acceptance in its historical context of changing social forces, although these brief sketches are not the primary emphasis of this Note. First, during a period of rapid urbanization, a small number of courts sought to protect residential areas against the risks of industrialization. 12 Second, courts adopted or rejected Rylands partially in response to business cycles: The phase of rejections in the 1870s loosely corresponded to the depression of the 1870s, when courts would have been most eager to subsidize industry, and the subsequent industrial boom in the 1880s and early 1890s corresponded with the wave of acceptances. 13 However, this economic link is undermined by a closer examination of the

Phillips v. Waterhouse, 28 N.W. 539 (Iowa 1886), and thus, for the period studied by this Note, Iowa qualifies as “accepting.”

This Note’s criterion for rejection is about the same as Prosser’s, but this Note’s two middle categories attempt to offer a clearer and more nuanced perspective. A mere recognition of nuisance is not enough to qualify as “leaning toward Rylands,” but a case that explicitly targets “artificial” or “non-natural” uses as the cause of the nuisance can fall under the Rylands doctrine, depending on the court’s language. This Note provides a fuller explanation of why particular states are leaning or wavering. For complete citations and state tallies on Rylands, see infra Section I.D. For the purposes of this historical work, this Note lists cases chronologically.

11. See infra Section I.D for complete citations.
12. See infra Section II.B.
13. Infra Section II.C.
timing of these cycles and the patterns of rejection and acceptance. The initial rejections occurred before the onset of depression in the 1870s, states generally resisted *Rylands* for most of the 1880s boom, and *Rylands* continued to prevail during the depression of the mid-1890s. In terms of politics, the adoption of *Rylands* corresponded with the rise of populism and an emerging legislative consensus to begin regulating industry, most prominently in the Sherman Antitrust Act of 1890. However, the influence of populism is also questionable, because *Rylands* fared better in Republican states than in the more populist states. Each of these forces played an underlying role in *Rylands*’s adoption, but this Note demonstrates that these broader economic, social, and political trends are flawed and insufficient explanations. As a result, these factors are more accurately described as background conditions merely setting the stage, rather than as the direct causes of the adoption.

Finally, and most importantly, Part III suggests the direct cause by connecting a series of bursting reservoirs and floods in the 1880s and 1890s to a decisive breakthrough of adoptions. In his study of *Rylands* in its English context, A.W. Brian Simpson persuasively argues that *Rylands* was the product of British reservoir accidents in 1853 and 1864. Similarly tragic disasters occurred in California and Pennsylvania in the 1880s, with similar legal results. After a series of powerful floods and a long political and legal battle over destructive hydraulic gold-mining techniques, California adopted *Rylands* in 1886. In 1889, an artificial recreational lake owned by a club of the wealthy elite (including business titans Andrew Carnegie and Andrew Mellon) burst through a poorly built dam, destroying Johnstown, Pennsylvania, and killing 2000 people. The nation’s media and courts focused intently on the Johnstown Flood, and perceived, mostly inaccurately, that the fault doctrine prevented recovery through the tort system. Two months after the Flood, one of the most influential law publications in the country, the *American Law Review*, focused on the tragedy and argued that the fault doctrine unjustly prevented recovery in such cases. The *Review* concluded that courts should adopt *Rylands*, rather than the flawed and abuse-prone fault doctrine. Thereafter, state courts began adopting *Rylands* for a wide array of unnatural activities. Whereas Simpson contended that *Rylands*’s rule was anomalous and applied to only a narrow set of cases, American state courts applied *Rylands* expansively across a wide spectrum of industrial and nonindustrial problems. In these courts, the bursting reservoir was not treated as legally unique, but as part of a broader problem of industrial age hazards. Perhaps the most

14. *Infra* Section II.D.
16. For some conjecture about this difference, see *infra* text accompanying note 347, which suggests that American state courts applied *Rylands* more broadly and more responsively to public
surprising part of this trend is that three of the states most widely recognized for their rejection of *Rylands*—New York, New Jersey, and Pennsylvania—reversed their stance on *Rylands* in the 1890s, soon after the Johnstown Flood. The story of *Rylands*’s acceptance offers a new perspective on the history of strict liability and illustrates the responsiveness of state courts to industrial accidents and popular fears, which this Note discusses in Part IV. While American courts initially subsidized the industrial revolution, the late nineteenth century’s rapid urbanization, incredible economic success, and political reform set the stage for broad legal changes, but these forces were insufficient. Ultimately, a series of terrifying experiences with the revolution’s darker side made the industrial age’s risks more salient and triggered a wide imposition of strict liability. These dramatic events, combined with broad social changes, seem to have tapped into an inchoate notion of the “cheapest cost avoider,” though the courts did not yet articulate this understanding in any explicit way. This account also sheds light on the errors of the “legal science” scholars of the early twentieth century, who over-conceptualized doctrine, as well as those of more contemporary legal historians and constitutional scholars, who have over-conceptualized historical eras. Finally, federal courts generally ignored *Rylands* over this period. This Note offers this discrepancy as an example of the different dynamics of the two judicial systems, and of the significance of *Erie Railroad v. Tompkins* in bringing the federal courts back into line with state common law.

I. *RYLANDS* IN THE CENTURY OF FAULT

A. Fletcher v. Rylands: *The Case*

*Rylands* is perhaps as renowned for its bizarre series of events as for its sweeping declaration of strict liability. John Rylands, an extremely successful entrepreneur, needed to provide an additional source of water for his huge steam-powered textile mill, so he hired a contractor to dig a large ditch and create a reservoir. In 1860, the reservoir burst through an abandoned coal-mining shaft, which connected with neighboring active
coal mines owned by Thomas Fletcher. The reservoir water flooded the interlocking maze of mines, causing Fletcher to abandon his coal mines permanently.

Fletcher sued Rylands in the Court of the Exchequer, but this trial court relied on the common law’s limitation of recovery to trespass, negligence, and nuisance, and ruled that Fletcher’s case met none of these causes of action. Fletcher then appealed to the Exchequer Chamber and won. Writing for a unanimous court of six justices, Justice Blackburn announced a broad statement of liability, beyond the established grounds of trespass, nuisance, or negligence:

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

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.

On July 17, 1868, the House of Lords upheld the Exchequer Chamber’s ruling in favor of strict liability and elaborated upon Justice Blackburn’s opinion. Consistent with Justice Blackburn, Lord Cairns emphasized the difference between natural use and non-natural use. Such a “non-natural use” must be “likely to do mischief,” rather than a use that would be expected “in the ordinary course of the enjoyment of the land.”

B. The Initial Split in the American Courts

Massachusetts and Minnesota immediately adopted Rylands. In 1868, just two months after Lord Cairns delivered the final Rylands decision, the Massachusetts Supreme Court relied upon his ruling in imposing liability without fault. Massachusetts consistently expanded its application of the

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23. Simpson, supra note 1, at 241-42.
24. Rylands, 159 Eng. Rep. at 744-47. At the time of the accident, the doctrine of respondeat superior did not make an employer legally responsible for independent contractors. See William L. Prosser, Handbook on the Law of Torts § 70, at 480 (1964). This rule applies today, although there are many exceptions, including one for “inherently dangerous activities.” Id.; see also John W. Wade et al., Prosser, Wade and Schwartz’s Cases and Materials on Torts 666 (10th ed. 2000).
25. Fletcher v. Rylands, 1 L.R.-Ex. 265, 279 (Ex. Ch. 1866).
26. Id. at 280.
Rylands doctrine,\textsuperscript{29} most notably in a decision by Oliver Wendell Holmes,\textsuperscript{30} who otherwise championed the fault doctrine in his immensely influential writings.\textsuperscript{31} Minnesota adopted Rylands in 1872 and continued to apply it extensively.\textsuperscript{32}

This initially open reception ended in New York in 1873. In the case of Losee v. Buchanan,\textsuperscript{33} a steam boiler exploded because of a manufacturer’s defect, without any negligence by the owner. New York’s highest court unanimously held that liability for such damage required proof of negligence. In its repudiation of Rylands, the court offered a social contract philosophy that civilization requires the sacrifice of some rights in order to promote economic and industrial development, which provide for the “general good.”\textsuperscript{34} Six months later, New Hampshire weighed in against Rylands in Brown v. Collins.\textsuperscript{35} Judge Charles Doe contended that strict liability was a vestige of a primitive time, now inconsistent with industrial growth, while the negligence rule was a “modern,” “rational,” “coherent and logical system,” and was compatible with the industrial age.\textsuperscript{36} The New Jersey Supreme Court joined in the condemnation of Rylands in Marshall v. Welwood,\textsuperscript{37} declaring that “[t]he common rule, quite institutional in its character, is that, in order to sustain an action for a tort, the damage complained of must have come from a wrongful act.”\textsuperscript{38}

Pennsylvania initially approved of Rylands in Pennsylvania Coal Co. v. Sanderson\textsuperscript{39} in 1878 and 1880, but it reversed itself in a new appeal of the same case in 1886.\textsuperscript{40} The Pennsylvania Supreme Court noted that Rylands “has not been generally received in this country,”\textsuperscript{41} and announced, “[W]e are unwilling to recognize the arbitrary and absolute rule of responsibility it declares . . . .”\textsuperscript{42} The court expressed its concern that such rules would threaten the state’s coal industry, which was “a great public interest.”\textsuperscript{43}

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\textsuperscript{29} Shipley v. Fifty Assocs., 101 Mass. 251 (1869), aff’d, 106 Mass. 194 (1870). See infra Section II.B for other Massachusetts cases.
\textsuperscript{31} Holmes famously set forth his support for the fault doctrine in OLIVER WENDELL HOLMES, THE COMMON LAW (Boston, Little, Brown 1881).
\textsuperscript{32} Cahill v. Eastman, 18 Minn. 324, 334-37, 344-46 (1872); see also infra Section II.B. Despite the apparent differences between Minnesota and Massachusetts, this Note suggests in Section II.B that these acceptances relate to the impact of urbanization.
\textsuperscript{33} 51 N.Y. 476 (1873).
\textsuperscript{34} Id.
\textsuperscript{35} 53 N.H. 442 (1873).
\textsuperscript{36} Id. at 449-50; see also Garland v. Towne, 55 N.H. 55 (1874) (rejecting Rylands again).
\textsuperscript{37} 38 N.J.L. 339 (1876).
\textsuperscript{38} Id. at 343.
\textsuperscript{39} 86 Pa. 401 (1878) [hereinafter Sanderson I], aff’d, 94 Pa. 302 (1880) [hereinafter Sanderson II].
\textsuperscript{40} 6 A. 453 (Pa. 1886) [hereinafter Sanderson III].
\textsuperscript{41} Id. at 460.
\textsuperscript{42} Id. at 463.
\textsuperscript{43} Id. at 459.
C. Rejection by the Scholars

With New York, New Hampshire, and New Jersey rejecting Rylands, and with Pennsylvania switching to a rejection, torts scholars drew their final conclusions. Initially, scholars were either receptive or had mixed views. Oliver Wendell Holmes played a crucial role in establishing the negligence rule, but that distinction often overshadows his approval of Rylands. Recognizing this exception to tort law’s general “culpability” requirement, Holmes credited Rylands to “more or less definitely thought-out views of public policy [as opposed to legal principle]. . . . [I]t is politic to make those who go into extra-hazardous employments take the risk on their own shoulders.” In The Common Law in 1881, Holmes noted that “[s]ome courts have refused to follow Rylands v. Fletcher,” citing New Jersey’s Marshall v. Welwood, but he continued to support Rylands. Judge Holmes applied Rylands in a little-known case in 1902 involving an icy sidewalk: “When knowledge of the damage done or threatened to the public is established, the strict rule of Rylands v. Fletcher is not in question.”

While Holmes continued to support Rylands, other contemporary torts scholars repudiated it and reported its rejection. The influential “legal science” scholars of the 1910s, including Francis Bohlen, Ezra Ripley Thayer, and Jeremiah Smith, continued to rely almost exclusively on the Northeastern rejections of the 1870s and ignored the groundswell of acceptance.

Scholars continued to assert that American courts rejected Rylands until 1953, when William Prosser published a study demonstrating that the
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assumption about Rylands’s continuing rejection was “erroneous.” 54 Prosser’s article focused on its acceptance at that time, and not on the historical patterns of its acceptance.55 In 1971, Prosser discussed his understanding of the historical development of this gradual adoption. After noting Massachusetts’s and Minnesota’s acceptances, Prosser focused more on the rejections in New York, New Hampshire, and New Jersey, and the “condemn[ation] by legal writers,” including Thayer and Smith in the 1910s.56 Prosser explained that Rylands was rejected because of the country’s desire to promote “industrial and commercial development.”57

Strict liability could be accepted only after the close of the frontier and the development of the nation’s resources and economy. Prosser never pinpointed when courts shifted, but he added, “After a long period during which Rylands v. Fletcher was rejected by the large majority of the American courts which considered it, the pendulum has swung to acceptance of the case and its doctrine in the United States.”58 Emphasizing a “long period” of rejection, Prosser’s storyline found its way into the major torts casebooks and legal historical works from the 1970s to the present,59 which generally assert that Rylands was not adopted until the mid-twentieth century.

54. PROSSER, supra note 4, at 152.

55. The point of Prosser’s article was to demonstrate that American courts, whether or not they adopted Rylands, created a rule of “absolute nuisance.” PROSSER, supra note 4, at 190. His article cited fifteen states adopting Rylands as of 1953; three more that could be included as adopting Rylands, although these cases were “not so clear”; and twelve states that rejected Rylands. Id. at 151-54. Prosser cites some adopting cases from the 1880s and 1890s, but they appear only in footnotes, and they are not placed into any historical context.


57. Id. at 549.

58. Id.

59. E.g., MARC A. FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 448-49 (5th ed. 1992) (“From the outset, American courts were less than enthusiastic about recognizing a broad principle of strict liability, on the basis of Rylands, that would apply to cases involving neighboring landowners.”); JERRY J. PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS 660-61 (1991) (mentioning “frequent attacks on the rule in Rylands v. Fletcher by courts of the United States,” and citing a 1982 case recognizing the national acceptance of Rylands); RICHARD A. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 506 (1982) (“Losee is typical of a number of cases in which American courts have ‘rejected’ the doctrine of Rylands v. Fletcher.”); HARRY SHULMAN ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 63-64 n.31 (3d ed. 1976) (arguing that “the reluctance to impose strict liability” has been “relaxed,” and citing cases and articles from the 1930s and 1940s, along with Prosser’s 1953 article); WADE ET AL., supra note 24, at 693 (“These decisions [in New York, New Hampshire, and New Jersey] gave Rylands v. Fletcher a bad name, and it was rejected in several jurisdictions . . . In recent years the American trend has been very much in favor of approval of the case, and a substantial majority now favor the case.” (emphasis added)); see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 425-26 (1973) (“But the case had a mixed reception in America. A few courts eagerly accepted the principle. [Friedman here mentions only an Ohio case in 1899.] Other courts reacted in utter panic at this alien intruder. The doctrine was too much, too soon.”); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 124 (1992) (“Most American courts immediately resisted [Rylands], this new major barrier to the triumph of the negligence
Based upon these mistaken assumptions, one accepted theory posits that the Restatement of Torts in 1938, which approved of strict liability for “ultrahazardous activity,” \(^{60}\) turned the tide against the courts’ opposition to \textit{Rylands}.\(^{61}\) This top-down, academia-centered theory suggests that legal scholars alone were responsible for the shift toward \textit{Rylands}, which occurred in the midst of the sweeping political and economic upheaval of the Great Depression and the New Deal. This Note attempts to refute this claim, and shows that economics was only a partial factor in the adoption.

D. \textit{The Overlooked Acceptance of Rylands}

Legal scholars looked no further than the rulings in the four prominent Northeastern courts of Massachusetts, New York, New Hampshire, and Pennsylvania. However, Louisiana\(^{62}\) and Georgia\(^{63}\) had already adopted a rule similar to \textit{Rylands}, and then a wave of courts in the West, Midwest, and South accepted \textit{Rylands} or a similar rule in the mid-1880s: Wisconsin,\(^{64}\) Michigan,\(^{65}\) Illinois,\(^{66}\) Iowa,\(^{67}\) Nevada,\(^{68}\) California,\(^{69}\) Colorado,\(^{70}\) and...
In the early 1890s, six Eastern courts jumped on the Rylands bandwagon: Maryland, Ohio, Vermont, South Carolina, and even two more.  

In Boynton v. Longley, the Nevada Supreme Court held that a landowner was not liable for naturally flowing water. However, this rule...only applies to waters which flow naturally from springs, from storms of rain or snow, or the natural moisture of the land. Wherever courts have had occasion to discuss this question, they have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man.  

In Garnet Ditch and Reservoir Co. v. Sampson, the Colorado Supreme Court questioned Rylands. Id. at 80. Nevertheless, Garnet still adhered to the Rylands rule based upon a Colorado statute imposing strict liability for reservoir breaks, but it also used expansive language about “dangerous” activities:  

The storage of water is a source of profitable investment of capital. The owners know, however, that water, from its nature, is pressing outward in all directions and continually striving to break through any artificial barrier by which it may be restrained. They know that the breaking of the barrier may result in great damage to many innocent persons; that death and destruction may follow the escape of the stored water, and the legislature has said to these owners: “If you collect so dangerous an agency on your own land, you must keep it confined—if it escapes—it is at your peril.”  

Id. at 83. Colorado’s resistance to Rylands continued in North Sterling Irrigation Co. v. Dickman, 149 P. 97, 98 (Colo. 1914) (citing Garnet, supra, for negligence standard), but it returned to the fold in the 1920s. Beaver Water and Irrigation Co. v. Emerson, 227 P. 547, 547 (Colo. 1924); Ryan Gulch Reservoir Co. v. Swartz, 234 P. 1059, 1061 (Colo. 1925). Though the Colorado Supreme Court clearly adopted Rylands in the 1880s and reaffirmed its commitment to Rylands in the 1920s, this Note categorizes Colorado as “leaning,” because Garnet questioned Rylands itself while adhering to the Rylands rule.  

In City of Eufaula v. Simmons, the municipality’s sewers and ditches had overflowed and damaged the plaintiff’s property. Without mentioning nuisance, the court ruled that if one in the construction of sewers and digging of ditches...caused a large quantity of rain water, which naturally flowed in another direction, to be diverted so as to flow on the plaintiff’s premises in destructive quantities, resulting in the injury of her adjoining property, the defendant corporation would be liable to her in damages, whether the work was done negligently or not.  

Simmons, 6 So. 47, 48 (Ala. 1889); Drake v. Lady Ensley Coal Co., 14 So. 749, 751 (Ala. 1894) (rejecting Sanderson III, 6 A. 453 (Pa. 1886)). In City of Eufaula v. Simmons, the municipality’s sewers and ditches had overflowed and damaged the plaintiff’s property. Without mentioning nuisance, the court ruled that if one in the construction of sewers and digging of ditches...caused a large quantity of rain water, which naturally flowed in another direction, to be diverted so as to flow on the plaintiff’s premises in destructive quantities, resulting in the injury of her adjoining property, the defendant corporation would be liable to her in damages, whether the work was done negligently or not.  

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Simmons, 6 So. 47, 48.
of the most prominent rejecting states, New York and New Jersey.\textsuperscript{76} Four Western and Midwestern states also adopted \textit{Rylands} in the 1890s: Oregon,\textsuperscript{77} Missouri,\textsuperscript{78} Wyoming,\textsuperscript{79} and Kansas.\textsuperscript{80} Also at this time, Pennsylvania embraced \textit{Rylands}’s rule in the early 1890s,\textsuperscript{81} Utah leaned toward \textit{Rylands},\textsuperscript{82} and Texas wavered.\textsuperscript{83} Between 1900 and 1911, Tennessee,\textsuperscript{84} Montana,\textsuperscript{85} the District of Columbia,\textsuperscript{86} Indiana,\textsuperscript{87} and West

\textsuperscript{76} For New York and New Jersey, see infra Subsection III.D.4.

\textsuperscript{77} Esson v. Wattier, 34 P. 756, 757 (Or. 1893); see also Mallett v. Taylor, 152 P. 873, 874 (Or. 1915).

\textsuperscript{78} Mathews v. St. Louis & S.F. Ry., 24 S.W. 591, 598 (Mo. 1893); see also French v. Ctr. Creek Powder Mfg., 158 S.W. 723, 725 (Mo. Ct. App. 1913). \textit{Contra} Murphy v. Gillum, 73 Mo. App. 487, 492-93 (Mo. Ct. App. 1898) (noting that other states generally reject \textit{Rylands} and reinterpreting \textit{Rylands} as requiring “due care”); Gannon v. Laclede Gaslight Co., 47 S.W. 907, 912 (Mo. 1898) (declining to apply \textit{Rylands} to electricity and noting that \textit{Rylands} “has not met with approval in all American jurisdictions”). Because Murphy and Gannon resisted \textit{Rylands} while Mathews and French supported \textit{Rylands} more decisively, this Note categorizes Missouri as “wavering.”

\textsuperscript{79} Clear Creek Land & Ditch Co. v. Kilkenny, 36 P. 819, 820 (Wyo. 1894).

\textsuperscript{80} Reinhart v. Sutton, 51 P. 221, 222 (Kan. 1897).


\textsuperscript{82} N. Point Consol. Irrigation Co. v. Utah & Salt Lake Co., 52 P. 168, 173 (Utah 1898). The Utah Supreme Court ruled in favor of a plaintiff whose land was damaged by the defendant’s irrigation waste water:

Undoubtedly a proprietor of higher land is entitled to the benefit of the natural flow therefrom, onto the lands of another, of surface or other water not brought there by artificial means. But, when the water is brought onto the higher land by artificial means, the proprietor is not entitled to such natural flow onto the land of another, to his injury.

\textit{Id.} The court did not refer to \textit{Rylands} and did not generalize from artificial water use to all “non-natural” mischiefous uses, but the ruling never relied upon proof of fault and it closely resembled \textit{Rylands}’s distinction between natural and artificial.


\textsuperscript{84} Ducktown Sulphur, Copper & Iron Co. v. Barnes, 60 S.W. 593, 600-01 (Tenn. 1900); Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658, 664 (Tenn. 1904).

\textsuperscript{85} Longtin v. Persell, 76 P. 699, 700 (Mont. 1904).


\textsuperscript{87} Niagara Oil Co. v. Ogle, 98 N.E. 60, 62 (Ind. 1912); Niagara Oil Co. v. Jackson, 91 N.E. 825, 826-27 (Ind. Ct. App. 1910). \textit{Contra} Lake Shore & Mich. S. Ry. v. Chi., Lake Shore & S. Bend Ry., 92 N.E. 989, 991-92 (Ind. Ct. App. 1910) (recognizing that American law holds unnatural users liable only for negligence); Postal Tel. & Cable Co. v. Chi., Lake Shore & S. Bend Ry., 97 N.E. 20, 21 (Ind. Ct. App. 1912) (same). For a discussion of \textit{Klenberg v. Russell}, 25 N.E. 596, 596-97 (Ind. 1890), see infra note 305. Because the Indiana Supreme Court resolved this controversy in 1912, this Note recognizes Indiana as “adopting.” One might argue that for the same reason, Texas ought to be considered “rejecting,” because the Texas Supreme Court rejected \textit{Rylands}. However, the Indiana Supreme Court ended the controversy in favor of \textit{Rylands}, while in Texas, a lower court continued to cite \textit{Rylands} even after the Texas Supreme Court’s rejection, and it adopted a rule similar to \textit{Rylands} in the 1910s. See infra notes 331-334.
Virginia adopted Rylands. Over these years, only New Hampshire, Washington, and Kentucky consistently rejected the English precedent. From the mid-1880s to the early 1910s, fifteen states and the District of Columbia solidly accepted Rylands, nine more were leaning toward Rylands or its rule, five states wavered over this period, and only three states consistently rejected. Most surprisingly, the states most commonly cited for their rejection of Rylands—New York, New Jersey, Pennsylvania, and Texas—began adopting Rylands or its rule in this period. In the following years, some states shifted against Rylands, but an equivalent number of states also adopted Rylands, so that a strong majority of the states has always recognized this precedent for strict liability from the 1890s to the present. However, the federal courts generally ignored Rylands over this period. From 1890 to 1910, only the Seventh Circuit and the

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88. 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) (commenting that Rylands is “not the American law” and requiring proof of fault). Because of these conflicting rulings, this Note categorizes West Virginia as “wavering,” but after Weaver, West Virginia remained solidly pro-Rylands.


90. See Klepsch v. Donald, 30 P. 991, 993 (Wash. 1892). Washington then left the question open in 1919, Anderson v. Rucker Bros., 183 P. 70, 72 (Wash. 1919), but, considering the earlier rejection, this Note considers Washington as continuing to reject Rylands.

91. Triple-State Natural Gas & Oil Co. v. Wellman, 70 S.W. 49, 50 (Ky. 1902); Mangan’s Adm’r v. Louisville Elec. Light Co., 91 S.W. 703, 705 (Ky. 1906); Long v. Louisville & Nashville Ry., 107 S.W. 203, 205 (Ky. 1908); Union Light, Heat & Power Co. v. Lakeman, 160 S.W. 723, 724 (Ky. 1913). Contra Winchester Waterworks Co. v Holliday, 45 S.W.2d 9, 11 (Ky. 1931) (holding a dam owner liable without fault for flooding resulting from the dam’s safety design).

92. See supra note 87.

93. These states were: New Jersey and New York, see infra Subsection III.D.4; North Dakota, see Langer v. Goode, 131 N.W. 258, 259 (N.D. 1911); Pennsylvania, see Householder v. Quemahoning Coal Co., 116 A. 40, 41 (Pa. 1922); Oklahoma, see Gulf Pipe Line Co. v. Sims, 32 P.2d 902, 905-06 (Okla. 1934); Rhode Island, see Rose v. Socony-Vacuum Corp., 173 A. 627, 629 (R.I. 1934); Texas, see Turner v. Big Lake Oil Co., 128 Tex. 155, 164-66 (1936); Wyoming, see Jacoby v. Town of Gillette, 174 P.2d 505, 514 (Wyo. 1947); and Maine, see Reynolds v. W.H. Hinman Co., 75 A.2d 802, 810-11 (Me. 1950).

94. These states adopting Rylands during this period were Idaho, see Burt v. Farmers’ Co-operative Irrigation Co., 30 Idaho 752, 767 (1917); Virginia, see King v. Hartung, 96 S.E. 202, 204 (Va. 1918); Georgia, see Holman v. Athens Empire Laundry Co., 100 S.E. 207, 210 (Ga. 1919); Nebraska, see Barnum v. Handschiegel, 173 N.W. 593, 594 (Neb. 1919); Connecticut, see Worth v. Dunn, 118 A. 467, 470 (Conn. 1922); South Dakota, see Midwest Oil Co. v. City of Aberdeen, 10 N.W.2d 701, 702 (S.D. 1943); and Arkansas, see Chapman Chem. Co. v. Taylor, 222 S.W.2d 820, 827 (Ark. 1949).
federal Circuit Court of California\textsuperscript{99} recognized \textit{Rylands}, and the District of
Tennessee rejected it.\textsuperscript{100} In the 1910s and 1920s, the Fourth\textsuperscript{101} and Sixth
Circuits\textsuperscript{102} adopted \textit{Rylands}, the Third Circuit voiced mild approval,\textsuperscript{103} and the Second Circuit temporarily rejected it.\textsuperscript{104} The following two Parts offer some historical explanations for this
overlooked groundswell of strict liability by examining social changes, economic cycles, political shifts, and tragic events. In the final analysis, these tragic events—destructive floods and reservoir collapses in the 1880s
and 1890s—seem to have had the most demonstrably direct impact on legal
change. This case study also suggests that state courts were more responsive to changes in society and to public outcry, while federal courts
generally adhered to fault rules regardless of the states’ overwhelming
adoption of \textit{Rylands}.

II. PRECONDITIONS AND PRECIPITANTS

A. \textit{Overview}

In his classic study of the origins of the English Civil War, Lawrence
Stone separated various causes into three categories: “preconditions” for
long-term trends (mostly social and economic); “precipitants” for shorter-
term trends (mostly political and economic); and “triggers” for particular
events sparking the end result.\textsuperscript{105} The preconditions and precipitants set the
stage for the event, but the trigger causes the event to happen in a specific
manner at a specific time. In the next two Parts, I borrow Stone’s
vocabulary to present several different causes of the adoption of \textit{Rylands}. In
addition to the continuing prestige of English precedents in America,
another precondition was rapid urbanization alongside industrialization. The first precipitant of business cycles and increasing industrial dominance,

\begin{itemize}
\item \textsuperscript{98} Burke \textit{v. Anderson}, 69 F. 814, 818 (7th Cir. 1895) (adopting \textit{Rylands} in an explosives
case); see also Goodlander Mill \textit{v. Standard Oil Co.}, 63 F. 400, 402 (7th Cir. 1894)
(recognizing \textit{Rylands} in an oil shipping case, but limiting its application “to instruments and
articles in their nature calculated to do injury, such as are essentially and in their elements
instruments of danger; to acts that are ordinarily dangerous to life or property”).
\item \textsuperscript{99} Parrott \textit{v. Barney}, 18 F. Cas. 1236, 1242 (C.C. Cal. 1871).
\item \textsuperscript{100} Cumberland Tel. & Tel. \textit{v. United Elec. Ry.}, 42 F. 273, 280-81 (D. Tenn. 1890).
\item \textsuperscript{101} Norfolk & W. Ry. \textit{v. Amicon Fruit Co.}, 269 F. 559, 562 (4th Cir. 1920) (distinguishing
\textit{Jennings v. Davis}, 187 F. 703 (4th Cir. 1911)).
\item \textsuperscript{102} Memphis Consol. Gas & Elec. \textit{v. Letson}, 135 F. 969, 973 (6th Cir. 1905); see also
Henderson \textit{v. Sullivan}, 159 F. 46 (6th Cir. 1908) (applying \textit{Rylands} in ruling explosives a
nuisance).
\item \textsuperscript{103} Jacob Doll & Sons \textit{v. Ribetti}, 203 F. 593 (3d Cir. 1913).
\item \textsuperscript{104} Actieenselskabet \textit{Ingrid} \textit{v. Cent. Ry.}, 216 F. 72, 77-78 (2d Cir. 1914). The Second Circuit
(2d Cir. 1931).
\item \textsuperscript{105} Lawrence Stone, \textit{The Causes of the English Revolution} 1529-1642, at 3-22
(1972).
\end{itemize}
and the second precipitant of populism and political reform further set the stage for legal change. Finally, disastrous dam failures and massive flooding triggered the wider adoption of Rylands. This Note briefly sketches these preconditions and precipitants, and points out the insufficiencies and weaknesses of these factors. Then this Note emphasizes the trigger of flooding in California, Pennsylvania, and Texas, mainly because the evidence suggests that this cause was the most direct, and also because this trigger offers the most interesting insights into the dynamics of legal change. In one sense, this Note offers these preconditions and precipitants as important background conditions that shaped Rylands’s reception, but in another sense, this Note addresses these factors as counterarguments to the reservoir flooding theory. Accordingly, the following Sections highlight the importance of these factors, as well as their weaknesses and inconsistencies in explaining the pattern of adoption.

B. Urbanization

The most significant trends of the post-Civil War period were urbanization, industrialization, and stunning population growth. From 1870 to 1900, the population almost doubled, and at the same time, the number of urban areas increased by 260%. While Eastern cities grew to the largest sizes, the Midwest and West witnessed the most rapid growth. Industrialization powered the urban growth, so that industrial areas and railroads overlapped with residential areas, until factories began moving out to the suburbs after 1900. Urban factories produced more than 90% of the industrial output of this era. Perhaps the most troubling aspect of the new American industrial city was its population density, which created health problems and a greater risk that accidents would harm more people. Considering these rapidly emerging trends, it is not surprising that courts began imposing strict liability on “non-natural” industrial activities and urban hazards.

The first two states to adopt Rylands—Massachusetts in 1868 and Minnesota in 1871—are prime examples of the urbanization boom, and not coincidentally, they applied Rylands to distinctly urban problems. From 1830 to 1860, the number of households in Boston quadrupled. The leader in Eastern urban growth, Boston was the most rapidly growing city.

108. Id. at 45.
109. See Degler, supra note 106, at 51-52.
outside the American West in the mid-nineteenth century, and was one of
the first cities in America to reach a population of 100,000. Minnesota
was home to the “Western” model of urban growth in the mid-nineteenth
century: a more sudden population increase, in connection with the
development of agriculture and transportation. St. Paul served as the most
important railroad hub of the upper Midwest, and then Minneapolis
achieved “regional hegemony” over agricultural production, milling, and
manufacturing.

In their application of Rylands, both Massachusetts and Minnesota
focused primarily on urban safety and managing residential life in crowded
spaces. The first American case adopting Rylands, Ball v. Nye, applied
strict liability to a city resident whose filthy stored water percolated into a
neighbor’s well. Thereafter, Massachusetts cited Rylands (or its precedents
based on Rylands) for a wide variety of urban hazards applied in urban
contexts: ice sliding off a hazardedly steep roof; a public reservoir
flooding a barn; a collapsing wall; a collapsing chimney; a slab of
zinc falling from a roof; and, in a ruling by Oliver Wendell Holmes, a
leaking pipe creating an icy sidewalk. Minnesota shared the same
concerns, imposing strict liability in urban contexts for ice and snow sliding
off a steep roof in Minneapolis; escaping petroleum in Minneapolis; a
bursting reservoir in another city; and a collapsing awning in
Minneapolis. These cases form the core of the Rylands precedents in
Massachusetts and Minnesota, which courts across the country began to cite
and apply broadly.

However, the problems with urbanization did not persuade many other
courts to adopt strict liability. In the Rylands revival of the 1880s and
1890s, courts in Iowa, California, Maryland, South Carolina, and

111. McKELVEY, supra note 107, at 3-4 (1963).
112. Id. at 25, 35, 37.
113. 99 Mass. 582 (1868).
119. Davis v. Rich, 62 N.E. 375, 377 (Mass. 1902). Holmes was in the majority in Judge
Knowlton’s opinion in Ainsworth v. Lakin, 62 N.E. 746 (Mass. 1902), which also endorsed
Rylands.
120. Hannem v. Pence, 41 N.W. 657 (Minn. 1889).
121. Berger v. Minneapolis Gaslight Co., 62 N.W. 336 (Minn. 1895); see also Gould v.
Winona Gas Co., 111 N.W. 254 (Minn. 1907) (imposing strict liability for escaping petroleum).
122. Wiltsie v. City of Red Wing, 109 N.W. 114 (Minn. 1906).
123. Waller v. Ross, 110 N.W. 252 (Minn. 1907).
125. Colton v. Underdown, 10 P. 395 (Cal. 1886).
126. Susquehanna Fertilizer Co. v. Malone, 20 A. 900 (Md. 1890); Baltimore Breweries’ Co.
v. Ranstead, 28 A. 273 (Md. 1894).
New Jersey applied \textit{Rylands} in urban contexts, but in this phase the urban focus seems to have been only a secondary concern. Furthermore, New York’s and New Jersey’s consistent rejection of \textit{Rylands} from the mid-1870s until the early 1890s and the general dormancy of \textit{Rylands} in the 1870s and 1880s suggest that the urbanization boom was an insufficient background condition for nationwide adoption.

C. \textit{Business Cycles and Industrial Dominance}

Economic trends correspond with the general patterns of \textit{Rylands}’s treatment. The Panic of 1873 and the resulting depression correspond loosely to the phase of rejections of \textit{Rylands} in the 1870s. Then, as the depression lifted and American industry achieved global dominance, courts embraced \textit{Rylands}. At first glance, business cycles appear to be decisive, but a closer examination reveals some problems with this link.

Massachusetts and Minnesota adopted \textit{Rylands} in a time of post-Civil War economic success. In 1872, a Massachusetts commission announced that there had been “amazing development” of manufacturing production since the end of the war. The entire Midwest experienced similar success. However, despite widespread industrial success, only Massachusetts and Minnesota were willing to adopt \textit{Rylands}, which suggests that economics played at most a marginal role at this stage.

In January 1873, New York rallied to the defense of industry and rejected \textit{Rylands}, and New Hampshire followed suit in June 1873. While there were signs of economic problems in 1872 and early 1873, the Panic struck in the fall of 1873, months after these rejections. The most likely explanation for New York’s resistance to \textit{Rylands} is that it already had a fairly strong body of its own heightened liability precedents for certain hazardous activities, which were more narrowly and carefully tailored than \textit{Rylands}’s broader pronouncements. Once New York had

\begin{thebibliography}{9}

\bibitem{128} Grey v. Mayor of Paterson, 42 A. 749 (N.J. Ch. 1899).
\bibitem{129} Victor S. Clark, History of Manufactures in the United States, 1860-1914, at 145-48 (1928).
\bibitem{130} Losee v. Buchanan, 51 N.Y. 476 (1873).
\bibitem{131} Brown v. Collins, 53 N.H. 442 (1873).
\bibitem{132} Soon after Massachusetts and Minnesota adopted \textit{Rylands}, signs of economic problems appeared. First, the Franco-Prussian War of 1870 to 1871 weakened the world’s financial structure, and Europeans began selling off American securities. Then, huge fires in Chicago in 1871 and in Boston in 1872 crippled the poorly regulated insurance industry, and in May 1873, European creditors again scrambled to unload their American holdings. Farm crop failures, which had been increasing through the early 1870s, led to the closing of the nationally significant New York Warehouse and Security Company in 1873. William Appleman Williams, The Roots of the Modern American Empire 176 (1969). That autumn, these events triggered the “Panic of 1873” and a worldwide depression that lasted until 1879.
\bibitem{133} See Hay v. Cohoes Co., 2 N.Y. 159 (1849) (holding that plaintiffs did not have to prove fault in a case of rock blasting in canal construction); Pixley v. Clark, 35 N.Y. 520 (1866)
\end{thebibliography}
already adopted precedents applying to specific hazards, *Rylands*, with its ambiguous wording and potentially sweeping applicability, probably seemed like an unnecessary and hazardous risk itself. Thus, New York’s rejection of *Rylands* was not a categorical rejection of strict liability, but rather a selective and cautious approach to strict liability.

Even though the Panic itself was not the cause of the rejections, the cases of New York and New Hampshire suggest that economics was still very influential, and that the importance of growth outweighed the desire to protect urban populations from industry and other risks. The language of the New York case rejecting *Rylands*, *Losee v. Buchanan*, reveals an underlying anxiety about economic success and expresses a belief that individuals must sacrifice their rights and their safety in favor of the common good of economic growth:

> By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. . . . We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. . . . I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands.134

It is difficult to establish if these courts were responding to the initial economic problems of 1872 and early 1873, which casts some doubt on the role of business cycles. However, it is striking that throughout the national depression of the 1870s, courts either rejected *Rylands*135 or completely ignored it. During the depression, Pennsylvania was the only exception to this trend.136 Therefore, even if the depression of the 1870s did not cause the initial rejections, it probably played a role in preventing other adoptions.

The 1880s ushered in a new wave of industrial success. By the end of the decade, the American economy was the most powerful in the world, and

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134. *Id.* at 484-85.
it continued to expand at an incredible pace.\textsuperscript{137} Contrary to the common perception, this industrial and manufacturing success was not limited to the Northeast and Midwest. As soon as the depression lifted, the South rapidly transformed its economy, shifting from agriculture to textile manufacturing and extensive railroad construction.\textsuperscript{138} In the first years of this economic expansion, state courts were apparently still cautious and avoided the \textit{Rylands} controversy. However, once the recovery had lasted several years, more and more state courts adopted \textit{Rylands}: Michigan,\textsuperscript{139} Illinois,\textsuperscript{140} Iowa,\textsuperscript{141} California,\textsuperscript{142} and Colorado.\textsuperscript{143} In addition, Nevada and Alabama adopted rules similar to \textit{Rylands},\textsuperscript{144} and Wisconsin recognized its validity.\textsuperscript{145} Whereas Massachusetts and Minnesota had focused mainly on common urban and distinctly nonindustrial hazards (like snow falling off roofs),\textsuperscript{146} these other courts began applying strict liability to big industry, mining, and railways.\textsuperscript{147}

In 1886, in the midst of strong growth, Pennsylvania aggressively attacked and rejected \textit{Rylands}.\textsuperscript{148} However, after 1890, Pennsylvania applied strict liability to numerous major industries, including coal mining, iron production,\textsuperscript{149} and oil refining.\textsuperscript{150} Beginning in 1891, Ohio adopted

\begin{itemize}
\item \textsuperscript{137} See Gavin Wright, \textit{The Origins of American Industrial Success, 1879-1940}, in \textit{HISTORICAL PERSPECTIVES ON THE AMERICAN ECONOMY} 455, 457 chart 1 (Robert Whaples & Dianne C. Betts eds., 1995). Income per worker declined sharply in the manufacturing and mining industries through the 1870s, but then rose even more sharply in those industries afterward, attaining unprecedented heights in the 1890s. See Lance E. Davis et al., \textit{AMERICAN ECONOMIC GROWTH} 53 tbl.2.17 (1972). While value added by manufacturing increased just 41% in the 1870s, it increased 210% in the 1880s. Over the course of the decade, aggregate energy consumption and steel production skyrocketed fivefold. ROBERT HIGGS, \textit{THE TRANSFORMATION OF THE AMERICAN ECONOMY, 1865-1914}, at 47 (1971). From 1880 to 1900, coal mining and pig iron production quadrupled, gold and silver production doubled, copper production increased tenfold, and oil production increased by 240%. See Louis M. Hacker & Benjamin B. Kendrick, \textit{THE UNITED STATES SINCE 1865}, at 189 (1946). By 1892, unemployment had dwindled to a minuscule 3.0%. Williams, supra note 132, at 358.
\item \textsuperscript{138} Jacquelyn Dosh Hall et al., \textit{Like a Family: The Making of a Southern Cotton Mill World} 24, 26-27 (1987).
\item \textsuperscript{139} Boyd v. Conklin, 20 N.W. 595, 598 (Mich. 1884).
\item \textsuperscript{141} City of Eufaula v. Simmons, 6 So. 47, 48 (Ala. 1889).
\item \textsuperscript{142} Sullivan v. Jones & Laughlin Steel Co., 57 A. 1065 (Pa. 1904).
\item \textsuperscript{143} See supra notes 113-120 and accompanying text. After 1890, Minnesota also began applying \textit{Rylands} to industrial hazards. Berger v. Minneapolis Gaslight Co., 62 N.W. 336 (Minn. 1895); Gould v. Winona Gas Co., 111 N.W. 254, 100 Minn. 258 (1907).
\item \textsuperscript{144} See Sullivan v. Jones & Laughlin Steel Co., 57 A. 1065 (Pa. 1904).
\item \textsuperscript{145} See supra notes 113-120 and accompanying text. After 1890, Minnesota also began applying \textit{Rylands} to industrial hazards. Berger v. Minneapolis Gaslight Co., 62 N.W. 336 (Minn. 1895); Gould v. Winona Gas Co., 111 N.W. 254, 100 Minn. 258 (1907).
\item \textsuperscript{146} See supra notes 113-120 and accompanying text. After 1890, Minnesota also began applying \textit{Rylands} to industrial hazards. Berger v. Minneapolis Gaslight Co., 62 N.W. 336 (Minn. 1895); Gould v. Winona Gas Co., 111 N.W. 254, 100 Minn. 258 (1907).
\item \textsuperscript{147} Sanderson III, 6 A. 453, 460-65 (Pa. 1886).
\end{itemize}
Rylands’s rule in cases of gas explosions, bursting water tanks, and exploding nitroglycerine. Ohio also adopted Rylands in a case of flooding caused by a coal company. Stating its position in extremely clear language, the Ohio court declared that mining was unnatural and “destructive.” Maryland, South Carolina, and indeed, even New York and New Jersey employed Rylands in imposing strict liability upon industry, mining, gas companies, and railway companies in the 1890s.

This industrial boom seems to have influenced Rylands’s revival. However, the roaring 1880s witnessed only a handful of adoptions, while most of the adoptions occurred in the 1890s, even during the depression from 1893 to 1897, which was about as severe as the one in the 1870s. The railroad industry crumbled, unemployment exploded to 18.4% in 1894, and the economy plummeted an astounding 18% between 1892 and 1894. Perhaps the most intriguing and puzzling aspect of this trend is that, in contrast to the 1870s depression, most of these states continued applying Rylands, new states began endorsing Rylands, and rejections were extremely rare during the 1890s depression. If sustained economic growth led to a series of adoptions, then why did courts continue to adhere to Rylands in a second period of severe economic crisis? This inconsistency demonstrates that business cycles, like urbanization, were merely an insufficient background condition.

One response might be that the growth from 1879 to 1893 created an unshakeable sense of security, but this explanation is highly unlikely. The chain of growth and collapse, growth and collapse would hardly instill confidence in economic stability. Two other explanations seem more plausible. First, the Johnstown Flood, discussed in Part III, seems to have crystallized a new perspective on “unnatural” hazards and liability. Second, whereas the Panic of 1873 occurred at a time of political stasis and produced no discernable political movement, the Panic of 1893 struck after

152. Defiance Water Co. v. Olinger, 44 N.E. 238, 240 (Ohio 1896).
155. Id. at 632.
156. Susquehanna Fertilizer Co. v. Malone, 20 A. 900 (Md. 1890); Baltimore Breweries’ Co. v. Ranstead, 28 A. 273 (Md. 1894).
161. By 1899, courts were heralding the “general prosperity,” Harding v. Harding, 54 N.E. 587, 601 (Ill. 1899), and “these piping times of prosperity,” Spencer v. Sandusky, 33 S.E. 221, 222 (W. Va. 1899). While recovery might have solidified the courts’ commitment to Rylands, this roller coaster of business cycles might have been expected to cause a rejection of Rylands, especially because sharp growth is also destabilizing.
a reform agenda had emerged, and it produced a strong Populist mobilization. The next Section explores this political factor, with mixed conclusions.

D. Reform, Regulation, and Populism

A second precipitant was the rise of industrial reform and regulation in national politics, in the form of Populism, labor activism, and Congressional regulation. These political developments of the 1880s and 1890s seem to have influenced judicial attitudes toward industry, or at least reflected general beliefs about corporate accountability that also influenced the courts.

The labor movement gained momentum in the mid-1880s, and continued gaining power for the next thirty years, despite several major setbacks throughout these years. Membership in the Knights of Labor peaked in 1886, and after their sudden demise, the American Federation of Labor (AFL) and other specialized trade unions continued the cause. The AFL grew steadily through the 1890s, and received a tremendous boost in membership after 1899. The late 1880s and 1890s were marked by labor unrest and a popular challenge to laissez-faire economics.

Also at this time, a national movement in favor of regulating railroads and trusts emerged. In response to the railroad companies’ “arrogant, brutal, and dishonest” abuse of power, Westerners, Southerners, and Midwesterners aligned to push for regulation in the 1870s and 1880s. After years of legislative maneuvering, Congress passed the Interstate Commerce Act with bipartisan support in 1887. The Interstate Commerce Commission was a symbol of increasing regulatory power, but it was also largely ineffectual. An even greater symbol of this political challenge was the Sherman Antitrust Act of 1890. Anxieties about rising industry with concentrated power had coalesced into a “desire for community self-determination,” and an “overwhelming majority” of American leaders committed themselves to anti-monopoly policies. The Sherman Antitrust Act passed almost unanimously in 1890. These two congressional acts resulted from a broad-based popular movement demanding greater control over corporations and greater protection of consumers. This tide manifested itself in a series of pro-Rylands cases against railroads in Illinois.
Colorado, Missouri, and Texas, and in cases against railroads and oil companies in New York, in addition to the other industrial Rylands cases discussed in this Note. However, both the Interstate Commerce Act and the Sherman Antitrust Act also demonstrate the resistance of the judiciary to regulation, because the courts stripped the regulatory powers of both laws and rendered Congress’s actions mostly irrelevant. This judicial resistance suggests that American courts may have fought against populist political impulses, so that populism might have produced a pro-business judicial reaction as much as it produced antitrust legislation. On the other hand, this judicial challenge to regulation highlights the resistance of federal courts to popular movements, which is consistent with the federal resistance to Rylands, and which contrasts with the state courts’ acceptance of Rylands.

Finally, the emergence of the Populists defined the politics of the 1890s. Reformist writers such as Henry George, Henry Demarrest Lloyd, and Edward Bellamy advanced the Populist agenda in the 1880s, and a coalition of Westerners, Southerners, and Northern labor emerged by the mid-1890s. With agriculture in long-term decline and the economy in shambles, the Populist Party and its leader, William Jennings Bryan, aligned with the Democratic Party, and together they mounted a bold reformist challenge to the Republicans in 1896. Despite their failure in national elections, the Populists successfully broke through the political stasis and kept reform in the national spotlight, undoubtedly influencing state politics and state courts. These political trends may not have been a primary reason for the adherence to Rylands, but they shaped the agenda and reflected broader attitudes toward laissez-faire capitalism.

Just as Rylands defied the depression years of the 1890s, it also survived in the most pro-business, anti-populist states. Republican William McKinley won twenty-four states in 1896, predominantly in the Northeast, the Great Lakes region, and the Pacific. Fourteen of those states, including the Republican strongholds of New York, New Jersey, and Pennsylvania, continued to adhere to Rylands after 1896, and also after McKinley’s even more decisive election over Bryan in their 1900 rematch. Of these Republican states, only New Hampshire and Indiana continued to reject

171. See infra Section III.E.
172. See infra Subsection III.D.4.
176. See generally Sanders, supra note 163.
177. In addition to New York, New Jersey, and Pennsylvania, the other states were Massachusetts, Vermont, Maryland, Ohio, Illinois, Michigan, Wisconsin, Minnesota, Iowa, Oregon, and California. See supra Section I.D for cases.
Rylands, followed by West Virginia and Kentucky in 1902.\(^{178}\) Even in this political climate, which championed laissez-faire economics and gave rise to the Lochner era, Rylands still held onto a fourteen-to-four majority of Republican states.\(^{179}\) This odd political marriage suggests that although national party politics may have influenced the courts somewhat, populism was not the major explanation for Rylands’s nationwide adoption. Despite a state’s general sympathy for business interests, a set of traumatic events—massive dam failures and flooding—could crystallize public opinion on certain issues.

III. The Triggers: Dam Collapses and Tragic Floods

A. Simpson’s Explanation of Rylands: The Context of Dam Failures

A.W. Brian Simpson persuasively argues that the underlying cause of the English courts’ “anomalous”\(^{180}\) strict liability rulings in Rylands was a pair of bursting reservoirs elsewhere in England, which had far more tragic results than Fletcher’s flooded coal mines. Simpson begins by examining a dam collapse in Yorkshire in 1852 that killed seventy-eight people.\(^{181}\) In 1853, Parliament responded with legislation rebuilding the dam with new safety precautions, requiring annual inspections and reports by an appointed engineer, and empowering local justices of the peace to lower the water level in case of danger.\(^{182}\) Then, in 1864, during the litigation of Rylands, a dyke owned by the Sheffield Waterworks Company collapsed in the middle of the night, killing at least 238 people, destroying several villages, and creating alarm about many other dams around the country.\(^{183}\) In 1866, the Committee of the Commons proposed a bill to impose strict liability for bursting reservoirs and safety precautions for all reservoirs, but the bill

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178. Vieth v. Hope Salt & Coal Co., 41 S.E. 187, 188-90 (W. Va. 1902) (commenting that Rylands is “not the American law” and requiring proof of fault); Triple-State Natural Gas & Oil Co. v. Wellman, 70 S.W. 49, 50 (Ky. 1902) (commenting that Rylands “is generally disapproved in this country”). The Republican states that were silent on Rylands in this period were Maine, Rhode Island, Connecticut, Delaware, North Dakota, and South Dakota.

179. The presidency of Theodore Roosevelt, beginning in 1901, marked a change to progressivism and a departure from McKinley’s more laissez-faire approach. One might suggest that the adoption of Rylands ties into the progressive movement, but Rylands prevailed in the late 1880s and early 1890s. Progressivism was certainly developing at this time, but it had not yet emerged as a more coherent political force. Furthermore, the elections of 1896 and 1900 indicate the strength of nonprogressive pro-business attitudes among the electorate, particularly in the states that had adopted Rylands.

180. Simpson, supra note 1, at 214.

181. Id. at 219-21. The flood put about 7000 people out of work, and “destroyed four mills, ten dye houses, ten drying stoves, twenty seven cottages, seven tradesman’s houses, and seven shops.” Id.

182. See Act of 1853, 16 & 17 Vict., c. 138, cl. 64, 65 (cited in Simpson, supra note 1, at 225 & n.55.

failed in 1867. However, in 1864, Parliament did pass an act assigning three commissioners to assess all claims against the Sheffield Waterworks Company for the disaster, with the House of Lords insisting on an amendment “to make it clear that in no case need negligence be proved.” 184 Simpson then traces the Rylands litigation and demonstrates how these disasters and legislative responses, though never mentioned by any of the key actors, shaped the final ruling. 185

Similarly, this Note demonstrates that American courts adopted Rylands in the context of bursting reservoirs and other floods. However, this Note departs from Simpson’s conclusion that Rylands was an “isolated incident in the legal history of the period,” 186 and questions his “new working hypothesis” that “the case was about bursting reservoirs . . . [and] their unique features,” and not about other hazards. 187 These observations about Rylands’s sharply limited application and isolated rule may be slightly overstated, but as William Prosser confirms in a more moderate stance, English courts confined Rylands’s application to the “extraordinary,” “exceptional,” and “abnormal,” and to limited contexts. 188 However, American courts applied Rylands not only to bursting reservoirs, but to a wider spectrum of “non-natural” and often relatively ordinary industrial enterprises, after a series of terrifying events in California and Pennsylvania.

B. California

California’s adoption of Rylands in 1886 arose in the context of industrial destruction and flooding resulting from dangerous mining techniques, dam failures, and a series of severe natural floods in the 1880s. California’s gold rush brought with it a culture of environmental exploitation. In the mid-1850s, gold mining enterprises began using hydraulic methods, spraying highly pressurized water to clear mountainsides. This technique, which reached its peak in 1880, wreaked extraordinary damage with “rivers of mud” and detritus and badly polluted waterways. 189 Hydraulic mining swept away emergency levees around

184. *Id.* at 234.
185. *Id.* at 243-51.
188. Prosser, *supra* note 4, at 142.
Sacramento and other towns and severely exacerbated the area’s flooding. In order to produce massive amounts of pressurized water, gold mining companies built many large reservoirs (containing a total of 7,000,000 cubic feet of water) and 6000 miles of water ditches.  

After a series of failed legal battles over this damage, California farmers sought a modest legislative solution: the construction of dams to block the flow of mining debris. However, in the early 1880s, these dams created far greater problems and threatened to collapse. Just as the legislature was debating this situation in 1881, a “monster flood, one of the greatest in the history of the Sacramento Valley,” devastated the region and revealed that the protective levees were a complete failure. In 1883, the large English Dam in Sierra County, California, measuring 331 feet in length and 100 feet in height, collapsed under the pressures of high waters and “rapidly crumpled to its foundations.” In the farmers’ suit against the hydraulic miners in 1884, the federal Circuit Court of California noted that the English Dam collapse was “a striking illustration of what is liable hereafter to occur.” The court, in granting an injunction, found that hydraulic mining was “an alarming and ever-growing menace, a constantly augmenting nuisance, threatening further injuries to the property of complainant, as well as the lives and property of numerous other similarly situated citizens.” Coinciding with the hydraulic mining controversy, residents of the Sacramento Valley and Los Angeles began building a series of dams in the 1870s and 1880s, some of which flooded land or collapsed.

Severe floods struck California regularly, about once every ten years throughout the nineteenth century. For twenty years after the great flood of 1861, the state was spared, but then the flood waters returned with a vengeance throughout the 1880s. The flood of 1881 devastated Northern California and led to the prohibition against hydraulic mining. Then Southern California endured two incredible floods in the middle of the decade. The flood of 1884 “caused considerable damage to the lower portions” of Los Angeles, sweeping away about fifty houses, killing one

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190. Id. at 76; ROBERT L. KELLEY, GOLD VS. GRAIN: THE HYDRAULIC MINING CONTROVERSY IN CALIFORNIA’S SACRAMENTO VALLEY 21-56 (1959).
191. E.g., Keyes v. Little York Gold Washing & Water Co., 53 Cal. 724 (1879); KELLEY, supra note 190, at 117.
193. Id. at 217.
194. Notable Dam Failures of the Past, 100 ENGINEERING NEWS-REC. 472, 472 (1928).
196. Id.
197. Moulton v. Parks, 6 P. 613, 616-17 (Cal. 1883); HUNDELY, supra note 189, at 121-48;
KELLEY, supra note 192, at 139-54.
198. 1 J.M. GUINN, A HISTORY OF CALIFORNIA 375-77 (1907).
person, and increasing the size of the Santa Clara River so that “for some time [it] rivaled the Mississippi River during a spring rise.” In February 1886, a similarly severe flood washed away more homes and drowned two people. Just one month later, the California Supreme Court adopted *Rylands* in *Colton v. Onderdonk*. Severe floods inundated California again in 1889 to 1890 and in 1891, drowning a family of three. In the midst of these floods, the court reaffirmed its commitment to the rule in *Rylands*. In *Parker v. Larsen*, the court held that the defendant’s irrigation water “was not a natural stream . . . but was brought upon the land by artificial means. And the rule is general that, where one brings a foreign substance on his land, he must take care of it and not permit it to injure his neighbor.” The opinion cited no cases, but one can assume that this rule came directly from *Rylands*. Thereafter, California remained committed to its doctrine. Around the same time, Michigan adopted *Rylands* with similar concerns about water use and reservoir floods, and two other Western states, Nevada and Colorado, adopted rules similar to *Rylands*.

### C. The Johnstown Flood and Its Impact

The South Fork Dam, resting directly above Johnstown, Pennsylvania, had contained one of the largest reservoirs in the country, with 20,000,000 tons of water across 450 acres. In 1879, the South Fork Fishing and Hunting Club purchased the dam and the reservoir basin for use as a recreational lake. Andrew Carnegie and Henry Clay Frick, two titans of
American industry, were among the founders of the club in 1879, which was soon tagged as the “Bosses Club.” 211 Many other Pittsburgh capitalists, including Andrew Mellon and three Pittsburgh bank directors, 212 joined the club not long after it was established.

In the definitive work on the Johnstown Flood, David McCullough presents a very disturbing story of hubris, arrogance, and incompetence. The dam had been left untended since 1857 and had broken open in 1862. 213 Right after purchasing the emptied reservoir, the club rebuilt the dam and reservoir—without the help of any engineers 214—and generated anxiety in the town below. 215 The valley had witnessed dam failures caused by flooding in 1808, 1847, and 1880, and endured severe flooding in 1885, 1887, and 1888. 216 In 1880, an engineer warned the club that its repairs were “unsubstantial . . . , leaving a large leak, which appears to be cutting the new embankment,” and that the lack of a drainage pipe prevented the club from regulating the water’s height. 217 He noted that a break would produce “considerable damage” through the valley below, and recommended “a thorough overhauling” and the construction of “an ample discharge pipe to reduce or remove the water to make necessary repairs.” 218 Despite these numerous warning signs, the club president ignored the recommendations. 219 Even though the dam began to sag in the center, and even though the water levels rose to unsafe levels, 220 the club did little to maintain or monitor the dam. 221

On May 31, 1889, the dam in the mountains collapsed under a torrential storm and unleashed 20,000,000 tons of water, tearing through the valley at 100 miles per hour. 222 In one of the most devastating man-made disasters in American history, the Flood completely destroyed the town, killing 2000 people 223 and causing $17 million in property damage. 224 One day later, reporters from New York to Chicago 225 flocked to Johnstown, and newspapers around the country issued daily reports of the death toll and
damage. The Flood turned into “the biggest news story since the murder of Abraham Lincoln.” On June 3, President Harrison called upon the nation to assist Johnstown, and the governors of Pennsylvania and New York also pleaded for support. The journalists’ horrific tales of death and destruction, also recounted in several books within two years of the flood, evoked sympathy and charity from every region of the country and around the world: “the greatest outpouring of popular charity the country had ever seen.”

As the cause of the dam collapse became clearer, the public focused its anger on the South Fork Club and its wealthy members. The nation turned its attention to the club’s membership list, and expected the club members to compensate the Johnstown victims. The club made a modest donation, but its incredibly wealthy members donated only trivial amounts to the town, and also tactlessly denied any responsibility to the newspapers. Their dismissive response stoked the public’s anger and provoked a violent mob’s attack on the club. A county commission quickly investigated the dam, and on June 7 it announced:

[W]e find the owners . . . culpable in not making [the dam] as secure as it should have been, especially in view of the fact that a population of many thousands were in the valley below; and we hold that the owners are responsible for the fearful loss of life and property . . .

A New York World headline screamed, “THE CLUB IS GUILTY,” and the Chicago Herald proclaimed that there was “no question whatever” that the dam collapse involved criminal negligence. An expert journal, Engineering News, concluded that the club constructed the dam “with
slight care” and “[n]egligence,” and condemned the club for hiring no engineers and no trained inspectors.237 The media and the public vilified the millionaire club members and demanded compensation. The New York Times, which had earlier reported the condemning commission report, editorialized, “[J]ustice is inevitable even though the horror is attributable to men of wealth and station, and the majority of the victims the most downtrodden workers in any industry in the country.” 238

However, justice did not prevail. Several families and businessmen sued the club, but all the legal efforts failed. While the true challenge seems to have been the difficulty of piercing the corporate veil, McCullough’s account suggests that the public and the media perceived that fault rules prevented recovery.239 Just as the Rylands trial court in England had revealed the shortcomings and abuses of negligence rules, the Johnstown Flood also focused attention on the faults of the fault doctrine.

The impact of the Johnstown Flood is even clearer when compared to the English dam failures of the 1850s and 1860s that led to the Rylands decision.240 Whereas the English dam failures drowned a total of 348 people,241 the Johnstown Flood killed more than 2000 and destroyed an entire town. Whereas the English dams served important industrial purposes, the South Fork dam merely created a playground for America’s wealthiest capitalists. In England and the United States, negligence rules prevented recovery, and as A.W. Brian Simpson demonstrates, the English system responded by adopting strict liability. American courts would follow the same legal course in the 1890s and after.

The Johnstown disaster made a long-lasting and widespread impression on American courts. For more than twenty years, the Pennsylvania Supreme Court found itself immersed in cases involving the Johnstown Flood: the town’s destruction;242 the flood victims;243 destroyed roads, railways, canals, and bridges;244 other property loss;245 and the relief effort.246 Maryland’s
highest court also confronted numerous cases related to the Flood, and described the event as “[t]he great and disastrous flood which caused such widespread and appalling destruction.” Courts around the country referred to the Johnstown Flood, either in direct discussions of its damage, or as a paradigmatic catastrophe: New York, Tennessee, Illinois, Missouri, Texas, West Virginia, Minnesota, Iowa, Kansas, Alabama, and Washington. The Illinois Supreme Court even noted a show entitled “The Johnstown Flood” touring the area in 1905 and 1906. The Flood caught the public’s attention, and it caught the courts’ attention.

D. A Flood of Strict Liability

1. The American Law Review Endorses Rylands

Just two months after the Johnstown Flood, a note in the American Law Review discussed the horrors of the Johnstown Flood, and then focused on the courts’ tendency to abuse fault rules and on the superiority of Rylands v. Fletcher. The American Law Review was a bimonthly publication regarded as “the most influential legal periodical of the nineteenth century,” and 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. In the Review’s early years, its editorial staff resembled an all-star team of legal scholars and practitioners.


255. Bibb Broom Corn Co. v. Atchison, Topeka & Santa Fe Ry., 102 N.W. 709, 711 (Minn. 1905).


including Oliver Wendell Holmes, Arthur Sedgwick, John C. Ropes, and John C. Gray.\footnote{American Law Periodicals, 2 ALBANY L.J. 445, 449 (1870). For a discussion of the significance of these editors, see SURRENCY, supra note 263, at 192. Another publication described this group as “illustrious.” WOXLAND & OGDEN, supra note 262, at 48.} In 1889, when this note appeared, the editorial board included Leonard A. Jones, whose index of legal periodicals continues to guide researchers today. With its articles, law reports, digests, notes, and book notices, 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.”\footnote{American Law Periodicals, supra note 264, at 447.}

The note The Law of Bursting Reservoirs begins with an extended introduction about the destructive force of water. The prime example is the Johnstown Flood, which still left the writer’s “legal mind . . . all in a whirl” two months afterward.\footnote{Note, supra note 261, at 646.} Commenting with understatement that “water can do a great deal of mischief,” the writer refers to the Johnstown Flood’s aftermath: “a great mass of earth, stones, trees, houses, railway locomotives, cars, human bodies, and what not . . . very deep and . . . very solid.”\footnote{Id. at 646-47.} From this recounting of the disaster, the writer moves immediately to the legal question of negligence versus strict liability. He acknowledges that the jury would probably be able to negotiate around the negligence rule and find the defendants liable, if only a judge would let it actually hear the case. “But unfortunately we have judges who think that, on questions of ordinary care and questions of what is reasonable in practical life, one legal scholar (although a poor one) knows more than twelve practical men in the jury box.”\footnote{Id. at 646-47.} According to the author, the problem of the negligence rule was less a doctrinal issue than a question of institutional abuse. Judges were apparently manipulating the fault rule to enter summary judgments for defendants or to instruct juries unfairly against plaintiffs.

The note then offers Fletcher v. Rylands as “[t]he best answer which has ever yet been given,” and which had been “adopted by several American courts, though denied by some.”\footnote{Id. at 647.} The note focuses not upon the question of strict liability, but on Justice Blackburn’s ruling that the possession of mischievous or perilous things creates a prima facie case for damages.\footnote{Id.} The advantage of Rylands is that it shifts the power from judge to jury to apply its common sense and to decide what is the proper duty of care and what is an act of God. The author’s language about the jury interpreting “reasonable care” suggests that he is not interpreting Rylands...
as a doctrine of truly strict liability, but, in a passage full of contempt for the club members, he explains how *Rylands* places the burden on the defendant and shifts the question more to causation:

> It is good enough for the practical purpose of charging with damages a company of gentlemen who have maintained a vast reservoir of water behind a rotten dam, for the mere pleasure of using it for a fishing pond, to the peril of thousands of honest people dwelling in the valley below. It is enough that they are *prima facie* answerable. That takes the question to the jury. The jury will do the rest. They can be safely trusted to say whether or not it was the plaintiff’s default, that is the fault of some poor widow in Johnstown, whose husband and children were drowned while she was cast ashore and suffered to live.271

According to the note, once *Rylands* creates a *prima facie* case, the jury should recast the question as assigning moral and causal responsibility. The author then reformulates the defense of *vis major* or “act of God.” While the judge may have a certain expansive notion of an act of God, the author recognizes that “a jury of Pennsylvania Lutherans, Reformed Dutch, Presbyterians, Methodists, Baptists, or Catholics[,] will not take readily to the attempt to cast the responsibility of such a catastrophe from the shoulders of the fine rich gentlemen who owned the fish pond and the rotten dam, to the shoulders of God.”272 The author understands that a jury, if given a chance to hear these kinds of cases, will be guided by its own sense of outrage and morals, and will apply a standard that is effectively strict liability. The author concludes that if this case ever went to a jury, the members of the South Fork Fishing Club would be in serious trouble. But this case never went to trial, and the *American Law Review* note seems to suggest that the fault doctrine thwarted justice. Just as no English court ever actually applied strict liability to the fatal reservoir failures of 1853 or 1864, no court ever applied *Rylands* to the would-be case of *Johnstown v. South Fork Fishing Club*. However, courts in Pennsylvania and around the United States began applying *Rylands* to a wide range of other cases.

2. *Pennsylvania*

Soon after the Flood, courts across the country, particularly in the East, embraced *Rylands*. While the Pennsylvania courts never explicitly adopted *Rylands*, they adopted its rule on unnatural use very soon after the Johnstown Flood, and continued to expand the rule to new “unnatural”

271. *Id.*
272. *Id.*
activities over the next three decades. In 1886, the Pennsylvania Supreme Court strained itself in *Sanderson* to repudiate *Rylands*. The court referred to mine-water runoff or to mining in general as “natural” twenty-six times, a mantra used to distinguish Sanderson’s case from *Rylands*, though it ignored the role of powerful engines and “an artificial water-course” in creating the runoff. Even though the court ruled that *Rylands* was inapplicable to such “natural” activities, it still took the opportunity to attack *Rylands*, declaring that *Rylands* had been rejected in America and that its rule was “arbitrary.” Finally, the court emphasized the economic significance of the state’s coal industry:

> [M]ere private personal inconveniences, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.

Before the Flood, the court emphasized the “great public interest” of industry’s unfettered development, and denigrated the “mere personal inconveniences” caused by industrial damage.

The 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. The plaintiff’s counsel cited *Fletcher v. Rylands* and argued that this damage, unlike the mine-water in *Sanderson*, was not from a “natural product,” but rather was “brought” to the defendants’ property. The case was first argued on October 5, 1889, just five months after the Johnstown Flood.

The court applied strict liability in a unanimous decision, with three of the *Sanderson* judges changing their pre-Flood stance. One of these judges was Judge Clark, the author of *Sanderson*, whose home was in

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274. *Sanderson III, 6 A. 453 (Pa. 1886).*
275. *Id. at 456.*
276. *Id. at 454.*
277. *Id. at 462-63.*
278. *Id. at 459.*
279. 22 A. 649 (Pa. 1891).*
281. *Id.* The reversing judges were Clark, Green, and Paxson.
western Pennsylvania near Johnstown.\textsuperscript{282} The \textit{Robb} ruling limited “natural activities” to the natural “develop[ment of] the resources of his property,” which sharply distinguished \textit{Sanderson}.\textsuperscript{283} The key distinction between \textit{Sanderson} and \textit{Robb} rested on the natural/unnatural dichotomy: Coal mining itself was natural, but any further development or manufacturing of the coal was not natural.\textsuperscript{284} \textit{Robb} further eviscerated \textit{Sanderson} in reversing \textit{Sanderson}’s dicta about the supreme importance of industrial development:

\begin{quote}
[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.\textsuperscript{285}
\end{quote}

The unanimous court’s depiction of the industrialist as tremendously powerful, capricious, and manipulative—and deserving of no special protection from the court—stands in remarkable contrast to the court’s dicta in \textit{Sanderson} extolling the public service of the capitalists. In \textit{Sanderson}, Justice Clark wrote that mining was responsible for the region’s prosperity, and that the plaintiffs assumed the risks of coal mining by moving into coal country.\textsuperscript{286} However, in \textit{Robb}, the court gave the Carnegie Company no privileges for enriching the region. And interestingly, the \textit{Robb} court easily could have applied the same “assumption of risk” rule to the plaintiff, who had knowingly bought land adjacent to the Carnegie coke ovens (albeit before they were expanded significantly). He had even helped construct some of the ovens as a paid contractor.\textsuperscript{287} Surely, then, the Pennsylvania

\begin{footnotes}
\textsuperscript{283} \textit{Robb}, 22 A. at 650-51.
\textsuperscript{284} \textit{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 . . . .”).
\textsuperscript{285} \textit{id.} at 651.
\textsuperscript{286} \textit{Sanderson III}, 6 A. 453, 464-65 (Pa. 1886).
\textsuperscript{287} See \textit{Robb}, 145 Pa. at 324.
\end{footnotes}
Supreme Court could have condemned him for turning around a few years later and suing the Carnegie Company for pollution he not only was aware of, but also helped to create. The most apparent cause for the sudden change in the justices’ suppositions about industry and the individual homeowner was the Johnstown Flood.

The American Law Register, which soon after became the University of Pennsylvania Law Review, announced the significance of the Robb decision in 1892, and presented it as an American version of Rylands. The Register first printed the entire decision and then offered seven pages of commentary. After emphasizing Justice Williams’s dicta that the conflict is not between the private landowner plaintiff and the public good, but rather between two private owners “who stand on equal ground,” the commentary then linked Robb to Rylands: “The reason for this decision is well expressed in the judgment of the Exchequer Chamber in Fletcher v. Rylands.”288 The author then cited a long passage from Judge Blackburn’s opinion and statements from Lord Cranworth and Lord Cairns, and explained that Robb, which reasons that “a use of land to be a natural use must have a necessary connection with the soil or the subjacent strata,” is in harmony with the opinions in Rylands.289 Contemporary scholarship therefore understood Robb essentially as an adoption of Rylands.

Three months later, in Lentz v. Carnegie Bros.,290 the Pennsylvania Supreme Court again ruled unanimously against the Carnegie Company, holding it liable without fault for damages caused by the same coke works. In 1893, the court similarly distinguished Sanderson by unanimously finding the storage of oil unnatural and subject to strict liability.291 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.”292 Throughout the 1890s and the first two decades of the 1900s, the court in more than a dozen cases continued to carve away at Sanderson and applied strict liability to more and more hazardous industries.293 During this period, the Pennsylvania Supreme Court declared

289. Id. at 40. Rylands, Robb, and Sanderson are consistent with the principle that unnatural use of land creates liability, but the commentary then addressed the converse question: Is natural use a defense against liability? The common law rule has two parts: “(1) the use of land must be natural; (2) the agency which transports the injurious substance from its original position to the plaintiff’s property must also be natural.” Id. at 41. The author suggested that Pennsylvania was a lone exception to this doctrine, with a different second step: “[T]he act causing the damage to the plaintiff should be necessary to the use.” Id. at 43.
290. 23 A. 219 (Pa. 1892).
292. Hauck, 26 A. at 646.
293. See Evans v. Reading Chem. Fertilizing Co., 28 A. 702 (Pa. 1894) (per curiam); Good v. City of Altoona, 29 A. 741 (Pa. 1894); Hindson v. Markle, 33 A. 74, 76 (Pa. 1895);
and repeated that Sanderson “has never been and never ought to be extended beyond the limitations put upon it by its own facts.”

3. Other States

Eighteen months after the Johnstown Flood swept into its own riverways, Maryland’s highest court adopted Rylands in Susquehanna Fertilizer Co. v. Malone. Three years later, the court applied Rylands to a large collection of water that had escaped. Ohio’s switch on Rylands also corresponds intriguingly to the Johnstown Flood. One month before the Flood, Ohio’s supreme court cited Losee v. Buchanan and Marshall v. Welwood in requiring proof of fault for an exploding boiler. However, in January 1891, a year and a half after the Flood, Ohio adopted Rylands in a case of flooding caused by a coal company. In a defiant stance similar to Pennsylvania’s, the Ohio court declared that mining was unnatural and “destructive.” From this beginning, Ohio then applied Rylands to a series of industrial “non-natural uses.”

Other states also adopted Rylands in the 1890s. Vermont adopted Rylands in 1892, when a railway company diverted a river and flooded the neighboring land. Two years later, South Carolina relied upon Rylands in finding a mill owner liable for noxious gases, declaring that Losee’s dismissal of Rylands was “incorrect[].” In 1893, the Oregon Supreme Court applied Rylands in enjoining the construction of a dam because of fears of flooding. In addition, five other states accepted or leaned toward Rylands in the 1890s.


295. 20 A. 900, 900-01 (Md. 1890).
299. Id. at 632.
300. See supra Section II.C.
303. Esson v. Wattier, 34 P. 756 (Or. 1893).
304. Those states were Colorado, Missouri, Wyoming, Kansas, and Utah. See supra Section I.D. for complete citations. The Colorado Supreme Court had already adopted Rylands in 1887, and it announced its adherence to the precedent again in 1893. Sylvester v. Jerome, 34 P. 760, 762.
4. New York and New Jersey Waver

In the 1890s, the name “Rylands” surprisingly began to creep into the decisions of two of the most widely recognized Rylands-resisters: New York and New Jersey.306 Just two months before the Johnstown Flood, a New York court cited Losee, holding that a nonnegligent dam break would impose no liability on the dam’s owner.307 But one year after the Flood, another New York court creatively flipped around Losee by applying strict liability for allowing large amounts of water to collect in its ditches.308 The court cited a section of an opinion of Vanderwiele v. Taylor,309 which was written by Judge Earl, the author of Losee, and which was based on Losee.310 This passage distinguished the exploding boiler from Rylands’s unnatural water use, “where the owners of lands brought or gathered upon their land unusual quantities of water, which escaped and caused injury.”311 The Superior Court then employed this distinction against Judge Earl and in favor of Rylands, by finding that the railroad company had gathered unusual amounts of water and should be held strictly liable. In the same year, the New York Court of Appeals delivered a now famous precedent establishing strict liability for nuisance in Bohan v. Port Jervis Gas-Light Co.312

In 1895, Judge Peckham recognized Rylands as a valid authority, but distinguished it from a gas explosion, since gas was ordinary and “universally used.”313 In 1898, Rylands turned up in a dissenting opinion arguing for liability for the growth of poison ivy—even though the ivy

(Colo. 1893); see also Larimer County Ditch Co. v. Zimmerman, 34 P. 1111, 1112 (Colo. Ct. App. 1893).

305. In 1890, Indiana recognized Rylands as a valid precedent, but only for establishing that an owner was not liable for an attack by his cow. Klenberg v. Russell, 25 N.E. 596, 596 (Ind. 1890). This Note therefore does not include this case as adopting or leaning. The court cited Rylands as an authority, and quoted Justice Blackburn’s opinion that an owner of “tame beasts” is liable “for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore.”Id. (citing Fletcher v. Rylands, 1 L.R.-Ex. 265, 280 (Ex. Ch. 1866) (Blackburn, J.)).

306. This shift is surprising because Losee v. Buchanan, 51 N.Y. 476 (1873), and Marshall v. Welwood, 38 N.J.L. 339 (1876), are two of the most often cited rejections of Rylands. See supra Section I.B.


309. 65 N.Y. 341 (1875).

310. Id. at 348.


312. 25 N.E. 246 (N.Y. 1890). The importance of this case is demonstrated by its inclusion in torts casebooks, such as SHULMAN ET AL., supra note 57, at 71.

naturally grew on the land. Though this citation was a misapplication of the rule, it indicates that the judges believed that Rylands was a valid precedent, and some invoked it quite liberally. After the turn of the century, Rylands continued to find its way into New York rulings that established strict liability for ice falling from a tower, and for the “artificial accumulation of water.” However, Rylands disappeared from New York opinions after 1908.

New Jersey followed a similar path in its brief recognition of Rylands. Less than three years before the Johnstown Flood, New Jersey’s Court of Chancery cited Sanderson v. Pennsylvania Coal Co., and held that mining was “natural.” But six years after the Flood, in a case of a mining company polluting a stream, the Court of Chancery launched into an adamant rejection of Sanderson. The court noted that Sanderson was “inharmonious” with other Pennsylvania precedents, that it “has not been . . . followed in any other state,—certainly not in this state,” that the doctrine has not “ever had the least foothold in this state,” and that “[i]t was repudiated in Ohio, whose mining interests are quite large, in the recent and well-considered case of [Columbus] Iron Co. v. Tucker.” The court also cited Rylands and enjoined the mining company from polluting the stream. One year later, New Jersey’s highest appellate court affirmed this decision. In 1899, the Court of Chancery extensively quoted Beach’s holding that mining was unnatural, including Beach’s citations to Rylands and Columbus Iron Co. v. Tucker, and granted an injunction against the municipality of Paterson against polluting the Passaic River with sewage. New Jersey’s brief acceptance of Rylands starting in 1895 suggests that its courts were not directly reacting to Johnstown, but rather were following

320. Id. at 288-89.
321. Id. at 289.
322. Id. at 293.
the post-Johnstown shift by other states. New Jersey’s weak commitment to *Rylands* is demonstrated by the state’s drifting back to rejecting *Rylands* in 1903, and its disapproval thereafter.

E. *Rylands* and Dam Failures in Texas

The timing of Texas’s shift to *Rylands* also corresponds with dam construction and failure. After 1880, waterpower and dam construction became increasingly widespread through the South, as well as the rest of the country. In 1893, the state government of Texas constructed near Austin one of the largest dams in the world, spanning 1091 feet. Unfortunately, severe design miscalculations became obvious soon after completion. The volume of available upstream storage “fell far below expectations,” creating a “serious shortfall in capacity” of the project. After the dam’s completion, there was one initial failure in the dam’s foundation, and leakage and other engineering problems continued for years. Then a flood in April 1900 swept out half of the dam, drowning eight people. After this tragedy, Texas abandoned the project for forty years.

While scholars point to Texas as a prominent rejecting state, the state’s courts actually moved toward *Rylands* during this period. In 1899, in the midst of the Austin Dam’s engineering troubles, but just before its final collapse, the Texas Court of Civil Appeals cited the American line of *Rylands* cases and *Rylands*-like cases in holding a reservoir owner liable without fault for the damage caused by its overflow, and in upholding this decision one year later, the same court added more citations to *Rylands* cases. Around the same time, the Texas Supreme Court and a lower court sharply criticized *Rylands*, so that Texas’s courts were split on the matter. In the 1910s, Texas courts shifted more and more towards *Rylands*, but ultimately repudiated the precedent in 1936. 

328. Id. at 246.
329. Notable Dam Failures of the Past, supra note 194, at 472.
334. In 1915, Texas passed a statute prohibiting the diversion of the natural flow of surface waters and the impounding of such waters “in such a manner as to damage the property of another, by the overflow of said water so diverted or impounded.” Anderson v. Highland Lake Co., 258 S.W. 218, 218 (Tex. Civ. App. 1924) (citing Act of May 29, 1915, TEX. REV. CIV. STAT.
Rylands around the time of the Austin Dam’s problems and ultimate collapse, followed years later by unambiguous restrictions on dams and reservoirs, suggest a link between risky dam construction and the adoption of Rylands.

After discussing the incredible damage of the Johnstown Flood, one member of the Washington Supreme Court referred to the reservoir disasters in both Pennsylvania and Texas. “The [twenty] years between Johnstown and Austin are dotted thick with similar warnings, men, women, and children swept away and drowned, property wiped out of existence. At least 81 dams of considerable size burst, unleashing ruin, during those 20 years.”\(^{335}\) While this pattern of “ruin” did not motivate the State of Washington to embrace Rylands, the vast majority of states adopted its strict liability rule, including all of the other state courts that discussed the Johnstown Flood,\(^{336}\) even if the adoption by Texas and New York was only temporary. The decade between the Johnstown Flood and the Austin Dam failure represents a watershed for Rylands.

IV. THE HISTORY OF FAULT AND THE FAULTS OF HISTORY

A. The Dynamics of Legal Change

The current scholarship on Rylands presents two fundamentally different views on legal change. One view of Rylands’s adoption suggests that American courts responded to broad, long-term social and economic forces. According to this perspective, the courts at first resisted Rylands for a “long period” because the country was still developing industrially and socially, and the courts did not want to hinder that development by imposing tough liability standards.\(^{337}\) Once the nation had firmly established its economy sometime in the mid-twentieth century, its courts no longer needed to subsidize industry and they imposed strict liability.

Another theory, ascribing legal change to the influence of elites and academics rather than to social forces, contends that the Restatement of

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\(^{335}\) State ex rel. Golden Valley Irrigation Co. v. Superior Court, 122 P. 19, 22 (Wash. 1912) (Chadwick, J., concurring).

\(^{336}\) See supra text accompanying notes 242-260. Texas and New York are included in this list, even though they wavered on Rylands and eventually rejected it.

\(^{337}\) See, e.g., KEETON ET AL., supra note 56, at 548.
Torts in 1938 granted legitimacy to Rylands and turned the tide. The first theory emphasizes economic growth and stability, while the second places the shift in the midst of economic disaster and instability. The first credits social and economic forces and the courts’ response to them; the second attributes change to the legitimization offered by legal scholars.

This Note challenges both of these theories. Rylands’s adoption correlated with economic success, but very loosely, and sometimes it sharply conflicted with economic patterns. The boom of the 1880s led to only scattered acceptances, and during the collapse of 1890s, courts actually strengthened Rylands’s role in the common law. While its pattern of acceptance corresponds to national political shifts favoring reform (with Populism, rather than the New Deal), Rylands also prevailed despite an even more decisive national turn toward pro-industry conservatism with McKinley’s sweeping victories. The more likely answer for why Rylands prevailed regardless of economic and political shifts is that a series of reservoir failures tapped into the public’s fears about rampant industrialization and “non-natural” accidents. This bottom-up social dynamic challenges both theories’ assumptions about the role of courts. Rather than listening to New Deal lawyers and scholars or reflecting upon long-term economics, state courts responded most clearly to immediate tragic events and public outcry. This pattern suggests that the Gilded Age state courts were much more responsive, fluid, and populist than previously thought.

This account also connects with a growing body of scholarship contending that dramatic events produce legal change by making risks more “salient” for the public. Dramatizing the use and abuse of nature, the Johnstown Flood focused attention on the risks of the industrial age and how industrialists sometimes failed to account for these risks to the public. The salience of such dramatic risks connected with an inchoate intuition that the cheapest cost avoider ought to bear liability. Of course, these courts never used the phrase “cheapest cost avoider,” but some did emphasize that the producer or owner has control over the hazardous activity and the choice to reduce or move it. The American Law Review note that called for the adoption of Rylands in the wake of the Flood focused on the decision of the South Fork Club to “maintain[] a vast reservoir of water behind a rotten dam, for the mere pleasure of using it for

338. See Nolan & Ursin, supra note 2, at 258.

339. See, e.g., Roger Noll & James Krier, Some Implications of Cognitive Psychology for Risk Regulation, 19 J. LEGAL STUD. 747 (1990) (arguing that many human perceptions of risk are shaped by “heuristic” short-cuts, such as dramatic events); Carol M. Rose, Environmental Lessons, 27 LOY. L.A. L. REV. 1023, 1026 (1994) (emphasizing that dramatic events, such as the Bhopal Union Carbide disaster, trigger legal change).

fishing pond, to the peril of thousands of honest people dwelling in the valley below.”341 While the writer was primarily expressing moral outrage, he was also conveying a belief that an owner has the responsibility to weigh the benefits against the costs, and to face the consequences for not avoiding those costs. In Robb v. Carnegie Bros., argued only months after the Flood, the Pennsylvania Supreme Court also emphasized that the producer controls the risks: “[T]he producer] may increase his business at will, or diminish it. He may transfer it to another person, or place, or state, or abandon it.”342

This point must not be overstated—these courts did not formulate an economic model, nor did they articulate the theory explicitly. Nevertheless, they did have a basic sense that those who created risk had an ability to reduce risk and had a responsibility for the costs. Each of the historical trends discussed in this Note contributed to this intuition: Urbanization, side by side with industry, increased the dangers to residential areas; economic growth gave the industrialists like Carnegie and Mellon deeper pockets and more leeway in reducing the risks; and populism shifted the perspective and sympathized more with those who faced the dangers. However, this intuition about cost avoidance did not become sufficiently salient until the Johnstown Flood.

While these tragic events captivated the public and transformed state common law, the federal courts generally resisted this change.343 This difference suggests that federal courts’ appointed life-term judges were more resistant to public outcry, while the judges of state courts, many of whom faced the pressures of reelection, were more attuned to the public and its fears. In the mid-nineteenth century, a majority of states rewrote their constitutions to create an elective judiciary,344 and every state that entered the Union after 1846 established at least a partially elective judiciary.345 Almost all of the states that adopted an elective judiciary in this period also adopted Rylands.346 The discrepancy between elected judges

341. See Note, The Law of Bursting Reservoirs, supra note 261, at 647.
343. See supra Section I.D.
345. FRIEDMAN, supra note 1, at 323.
346. Fifteen of the nineteen states that adopted an elective judiciary from 1846 to 1860 also adopted or leaned toward Rylands before 1911: Minnesota, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Missouri, Ohio, Pennsylvania, Tennessee, California, Kansas, Oregon, and Wisconsin. Of the four other states to adopt an elective judiciary in this period, New York and Texas wavered on Rylands in the midst of fears about dam collapses, Virginia adopted Rylands in 1918, and Kentucky was the only one to reject Rylands consistently. Of the states that entered the Union with an elective judiciary after 1860, five adopted Rylands (Utah, Colorado, Wyoming, Montana, and Nevada) and only one rejected (Washington). The only two states that convened constitutional conventions between 1846 and 1860 and retained an appointed judiciary were
adopting *Rylands* and appointed judges resisting *Rylands* may also explain why the English courts, whose judges are appointed, restricted the application of *Rylands* to reservoir accidents.\(^{347}\) The federal resistance to *Rylands* also demonstrates the impact of *Swift v. Tyson*,\(^{348}\) which established the power of a federal common law removed from state common law, and the importance of *Erie Railroad v. Tompkins*\(^{349}\) in resolving these conflicts and bringing federal common law in line with state common law.

### B. The Dynamics of Legal Scholarship

Finally, this Note offers a few brief thoughts about two historiographical questions, both focusing on the over-conceptualization of legal scholarship during the twentieth century. First, why did scholars in the early twentieth century continue to believe that *Rylands* had been spurned? Perhaps they relied too heavily on the treatises of earlier scholars, such as Wharton and Cooley, who wrote after the rejections by New York and New Hampshire. Courts around the country, however, were aware of the shift to *Rylands* in the 1890s and 1900s.\(^{350}\) Perhaps the scholars had an Eastern bias, and relied on the rejections of New York’s and New Hampshire’s prestigious courts, yet most Eastern states adopted *Rylands* in the 1890s, including the wavering of New York and New Jersey. The best explanation is that these “legal science” scholars were too committed to conceptualizing law and too enamored with the fault doctrine.\(^{351}\) Oliver Wendell Holmes, Francis Bohlen, Jeremiah Smith, and the “progressive” scholars had an impulse “to conceptualize law around a series of universal principles . . . from a diverse series of writs,”\(^{352}\) and focused on simplifying and modernizing tort law. Their self-styled “legal science” of discovering the common law demanded clean and clear categories. Though Holmes defended *Rylands*, his support was overshadowed by his almost universalist

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\(^{347}\) See *supra* notes 186-187 and accompanying text (discussing A.W.B. Simpson’s “new working hypothesis” that *Rylands* was about the unique features of bursting reservoirs). The Lord Chancellor, who heads the judiciary in England and Wales, recommends the highest judicial appointments to the Prime Minister, and lower judicial appointments to the Crown. He also appoints magistrates directly, not subject to ministerial direction or control.

\(^{348}\) 41 U.S. 1 (1841).

\(^{349}\) 304 U.S. 64 (1938).

\(^{350}\) *E.g.*, *Beach v. Sterling Iron & Zinc Co.*, 33 A. 286, 288 (N.J. Ch. 1895) (citing Ohio’s approval of *Rylands* in the 1890s); *Tex. & Pac. Ry. v. O’Mahoney*, 50 S.W. 1049, 1052 (Tex. Civ. App. 1899) (citing California’s adoption of *Rylands*).

\(^{351}\) *WHITE*, *supra* note 1, at 12-19.

\(^{352}\) *Id.* at 18.
formulation of the fault rule and his condemnation of strict liability as “offend[ing] the sense of justice.”\(^353\) In this way, the conceptualist legal science approach, which Holmes represents, prevented a closer examination of the case law’s nuances. Furthermore, Smith was a crusader for the fault doctrine, and Bohlen was a conservative polemicist who attacked the rising legal realists.\(^354\) The rejection of *Rylands* in the 1870s confirmed their intuitions and served their agenda, so they ignored the sweeping adoption of *Rylands* in their time. This failure calls into question the “conceptualist” scholarship of legal science.

Second, why have modern scholars overlooked the early adoption of *Rylands*? They too have over-conceptualized their field into clean categories. Just as the progressive legal scholars at the turn of the century sought uniform legal theory and doctrine, modern scholars have overemphasized uniform legal history. In a seminal piece that is still widely cited, Charles Gregory divided the last two hundred years of tort law into relatively clean historical eras: “Trespass to Negligence to Absolute Liability.”\(^355\) The rejection of *Rylands* fits all too neatly in the middle phase. Its rejection also fits the historical intuitions and agendas of both left and right: Richard Posner found a golden age of sound free market principles prevailing from 1875 to 1905.\(^356\) On the other side of the spectrum, Morton Horwitz perceived the mechanics of the class struggle and the rise of the bourgeoisie in nineteenth-century law, and probed no further.\(^357\) G. Edward White and Lawrence Friedman also overemphasized the categories of the era of fault as they, too, commented on *Rylands*’s rejection.\(^358\)

These assumptions have shaped important developments in constitutional theory as well. With some current scholarship inaccurately placing the turning point on *Rylands* around the New Deal, specifically with the *Restatement of Torts* in 1938,\(^359\) this mistaken conclusion confirms the prevailing beliefs about the New Deal’s deeply transformative legal power against a resistant judiciary. In their study of the New Deal Court, scholars have emphasized the tremendous transformation from the laissez-faire jurisprudence of the *Lochner* era to the New Deal regulatory era and have drawn theoretical conclusions from this change.\(^360\) Recently, some scholars

\(^{353}\) See *Holmes*, supra note 31, at 77-78.

\(^{354}\) *White*, supra note 1, at 38, 78.

\(^{355}\) *Gregory*, supra note 1.

\(^{356}\) See *Posner*, supra note 1.

\(^{357}\) *Horwitz*, supra note 1.

\(^{358}\) See *Friedman*, supra note 1, at 425-26; *White*, supra note 1, at 16-19, 109-10.

\(^{359}\) See Nolan & Ursin, supra note 2, at 258.

have begun to challenge these assumptions. While the New Deal unquestionably changed the course of legal and constitutional history, the fact that American courts actually embraced *Rylands* more than forty years before the New Deal demonstrates an earlier, more gradual transformation—one that underscores the nuances of legal change in American history. Understandably, historians and constitutional scholars seek broad trends and must present generalized accounts in order to make sense of our world, and torts scholars depend upon these generalizations in order to teach more effectively. However, this reliance on uniformity and generalized history is the long shadow of the progressive era. With their historical intuitions affirmed by the early rejection in the 1870s, torts scholars accepted the conventional wisdom about the Gilded Age courts.

In their current portrayal of nineteenth-century law, torts scholars have used the rejection of *Rylands*, along with cases from *Brown v. Kendall*[^362] to *Ives v. South Buffalo Railway*,[^363] to demonstrate how American courts consistently subsidized technology and industry in the nineteenth and early twentieth centuries. However, the fact that state courts accepted *Rylands* offers a different perspective on America’s response to the industrial revolution, when tragic events dramatized the revolution’s dark and destructive side. The adoption of *Rylands* as a result of these flooding disasters illustrates that elected state judges were particularly responsive to popular fears, and suggests that these courts were taking early and significant steps toward the era of strict liability.