Note

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

Jed Handelsman Shugerman

In the standard historical interpretation of American tort law, the era of laissez-faire and pro-industry fault liability dominated the nineteenth and early twentieth centuries,[1] and the mid-twentieth century marked the gradual rise of strict liability.[2] Scholars and judges presenting this narrative have focused on the reception of *Fletcher v. Rylands*,[3] 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,[4] 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: The Historical Context of* Rylands v. Fletcher, 13 J. LEGAL STUD. 209, 209, 214-16 (1984); *cf.* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (examining the era of fault and arguing that fault prevailed as the most economically efficient doctrine). *Contra* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 927 (1981); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1720 (1981).

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 of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257 (1987); Rabin, *supra* note 1, at 961.

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

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

English courts held that proof of negligence was not required for "non-natural" or potentially "mischievous" activities.[5] 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.[6] 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.[7]

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*[8] 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.[9] Just after the turn

5. Fletcher v. Rylands, 1 L.R.-Ex. 265, 279-80 (Ex. Ch. 1866); Rylands v. Fletcher, 3 L.R.-E. & I. App. 330, 338-39 (H.L. 1868).

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 existance 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.

10. Kleebauer v. W. Fuse & Explosives Co., 69 P. 246, 247 (Cal. 1903).
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.[14] 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.[15] 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.[16] Perhaps the most

14. *Infra* Section II.D.

15. *See* Simpson, *supra* note 1.

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,[17] 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,"[18] 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.[19] 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*[20] 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,[21] 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

fears than English courts because many state judges were elected, rather than appointed. Prosser also comments that English courts restricted the application of *Rylands*, but his stance is much more moderate than Simpson's. *See* PROSSER, *supra* note 4, at 142.

17. *See* HORWITZ, *supra* note 1, at 85-99; Gregory, *supra* note 1. For the most persuasive historical refutation of the subsidization thesis, see Schwartz, *supra* note 1.

18. *Infra* text accompanying notes 340-342.

19. *Infra* notes 98-104 and accompanying text.

20. 304 U.S. 64 (1938).

21. Simpson, *supra* note 1, at 239 n.117.

coal mines owned by Thomas Fletcher.[22] The reservoir water flooded the interlocking maze of mines, causing Fletcher to abandon his coal mines permanently.[23]

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.[24] 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.[25]

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.[26]

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."[27]

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.[28] Massachusetts consistently expanded its application of the

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

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.

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

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

Rylands doctrine,[29] most notably in a decision by Oliver Wendell Holmes,[30] who otherwise championed the fault doctrine in his immensely influential writings.[31] Minnesota adopted *Rylands* in 1872 and continued to apply it extensively.[32]

This initially open reception ended in New York in 1873. In the case of *Losee v. Buchanan*,[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."[34] Six months later, New Hampshire weighed in against *Rylands* in *Brown v. Collins*.[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.[36] The New Jersey Supreme Court joined in the condemnation of *Rylands* in *Marshall v. Welwood*,[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."[38]

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

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

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

31. Holmes famously set forth his support for the fault doctrine in OLIVER WENDELL HOLMES, THE COMMON LAW (Boston, Little, Brown 1881).

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.

33. 51 N.Y. 476 (1873).

34. *Id*.

35. 53 N.H. 442 (1873).

36. *Id*. at 449-50; *see also* Garland v. Towne, 55 N.H. 55 (1874) (rejecting *Rylands* again).

37. 38 N.J.L. 339 (1876).

38. *Id.* at 343.

39. 86 Pa. 401 (1878) [hereinafter *Sanderson I*], *aff'd*, 94 Pa. 302 (1880) [hereinafter *Sanderson II*].

40. 6 A. 453 (Pa. 1886) [hereinafter *Sanderson III*].

41. *Id*. at 460.

42. *Id.* at 463.

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*.[44] 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."[45] 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*,[46] but he continued to support *Rylands*.[47] 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."[48]

While Holmes continued to support *Rylands*, other contemporary torts scholars repudiated it and reported its rejection.[49] The influential "legal science" scholars of the 1910s, including Francis Bohlen,[50] Ezra Ripley Thayer,[51] and Jeremiah Smith,[52] continued to rely almost exclusively on the Northeastern rejections of the 1870s and ignored the groundswell of acceptance.[53]

Scholars continued to assert that American courts rejected *Rylands* until 1953, when William Prosser published a study demonstrating that the

44. Scholars cite Holmes's major works that were pivotal in establishing the fault regime, for example, HOLMES, *supra* note 31. For a more recent edition, see OLIVER WENDELL HOLMES, THE COMMON LAW (Mark DeWolfe Howe ed., Little, Brown 1963). For in-depth, insightful discussions of Holmes and his ideas about *Rylands* and liability in general, see DAVID ROSENBERG, HIDDEN HOLMES (1995); and Clare Dalton, Losing History: Tort Liability in the Nineteenth Century and the Case of *Rylands v. Fletcher* 29-73 (unpublished manuscript, on file with *The Yale Law Journal*), which focuses mainly on the British perspective on *Rylands*.

45. Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 653 (1873).

46. 38 N.J.L. 339 (1876).

47. HOLMES, *supra* note 31, at 88, 116-19, 156-57.

48. Davis v. Rich, 62 N.E. 375, 377 (Mass. 1902) (citation omitted). Holmes also concurred in *Ainsworth v. Lakin*, 62 N.E. 746 (Mass. 1902), which endorsed *Rylands*.

49. THOMAS COOLEY, THE LAW OF TORTS 680 & n.2 (Chicago, Callaghan & Co. 1888) (rereading *Rylands* to require reasonable care, making it "a question of negligence"); FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 716-17, 723 n.4 (Philadelphia, Kay & Brother 1874).

50. Francis Bohlen, *The Rule in* Fletcher v. Rylands (pt. 2), 59 U. PA. L. REV. 373, 388 (1911) (citing *Sanderson III*, 6 A. 453 (Pa. 1886), as well).

51. Ezra Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 802 (1916).

52. Jeremiah Smith, *Tort and Absolute Liability: Suggested Changes in Classification*, 30 HARV. L. REV. 409, 413 (1917).

53. See *infra* Section IV.B for a discussion of legal science scholars and their agenda.

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.

56. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 548 (5th ed. 1984) (citing a passage from Prosser's 1971 edition).

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 *Rylands*.[61] This top-down, academia-centered theory suggests that legal scholars alone were responsible for the shift toward *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. *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 *Rylands*, and then a wave of courts in the West, Midwest, and South accepted *Rylands* or a similar rule in the mid-1880s: Wisconsin,[64] Michigan,[65] Illinois,[66] Iowa,[67] Nevada,[68] California,[69] Colorado,[70] and

principle."); BERNARD SCHWARTZ, THE LAW IN AMERICA: A HISTORY 124 (1974) ("American judges were most reluctant to accept the English imposition of absolute liability . . . . By the turn of the century, *Rylands v. Fletcher* was followed in only a handful of American courts . . . . A leading tort text headed its discussion: 'Rylands v. Fletcher Not Generally Approved in America.'"); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 16-19, 109-10 (1980) (emphasizing the rejection of *Rylands* in describing the "rise of negligence," which, according to White, began to yield to strict liability in the 1930s and 1940s); Jon G. Anderson, Comment, *The* Rylands v. Fletcher *Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?*, 1978 ARIZ. ST. L.J. 99, 100 ("More than a hundred years after the first court adopted it, the *Rylands* rule has finally come to be accepted by the great majority of states."). Richard Epstein more accurately describes a shift occurring in the "first half of the twentieth century," but he refrains from calling that shift an "adoption," and ambiguously describes its "*recent* reception" as "more favorable." RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 134-36 (6th ed. 1995) (emphasis added).

60. RESTATEMENT OF TORTS § 519 (1938).

61. For an example of scholars offering this theory, see Nolan & Ursin, *supra* note 2, at 258.

62. Hooper v. Wilkinson, 15 La. Ann. 497, 497 (1860). In *Hooper*, a water drainage and dam case, the Louisiana Supreme Court interpreted its Civil Code to embody a distinction between "natural" and "artificial" water use. The court cited the state code's restriction against raising "any dam, or to make any other work to prevent this running of the water." *Id*. at 497. After noting that landowners have a right to "natural" drainage, the court concluded that the law "recognizes the right of a proprietor to perform artificial drainage, but not so as to pervert the right of servitude, as originating from the natural situation of the place." *Id*. Without any question of fault or nuisance, the court then ruled that the artificial drainage ditches in question must be closed.

63. Phinizy v. City Council, 47 Ga. 260, 266 (1872). The Georgia Supreme Court ruled in *Phinizy* that a landowner is not liable for natural drainage or overflow, but he is liable without fault for drainage "by artificial means." *Id.* For a later adoption of *Rylands* itself, see *Holman v. Athens Empire Laundry Co.*, 100 S.E. 207, 210 (Ga. 1919).

64. Atkinson v. Goodrich Transp. Co., 18 N.W. 764, 775 (Wis. 1884) (citing *Rylands* as a valid precedent, but not applying it to make the defendant liable without fault).

65. Boyd v. Conklin, 20 N.W. 595, 598 (Mich. 1884). *Contra* Scott v. Longwell, 102 N.W. 230, 231 (Mich. 1905) (questioning *Rylands*'s validity). Because of *Scott*, this Note considers Michigan to be "leaning."

Alabama.[71] In the early 1890s, six Eastern courts jumped on the *Rylands* bandwagon: Maryland,[72] Ohio,[73] Vermont,[74] South Carolina,[75] and even two

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

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

68. Boynton v. Longley, 6 P. 437, 441 (Nev. 1885). In *Boynton v. Longley*, the Nevada Supreme Court held that a landowner was not liable for naturally flowing water.

> But 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.

Id. The court then cited Washburn, a legal scholar, explaining that the owner of an upper field may allow "naturally descend[ing]" water to flow into another's land, but not water from "artificial trenches, or otherwise . . . in unusual quantities." *Id*. Nowhere in the ruling against the defendant does the court find the defendant negligent, nor liable for nuisance. Rather, this holding is strict liability for unnatural water use, which is essentially a limited application of the rule found in *Rylands*.

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

70. G., B. & L. Ry. v. Eagles, 13 P. 696, 697-98 (Colo. 1887); *see also* Sylvester v. Jerome, 34 P. 760, 762 (Colo. 1893); Larimer County Ditch Co. v. Zimmerman, 34 P. 1111, 1112 (Colo. Ct. App. 1893). In *Garnet Ditch and Reservoir Co. v. Sampson*, 110 P. 79 (Colo. 1910), 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.

71. City of Eufaula v. 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.

Simmons, 6 So. at 48.

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

73. Columbus & Hocking Coal & Iron Co. v. Tucker, 26 N.E. 630, 633 (Ohio 1891); Defiance Water Co. v. Olinger, 44 N.E. 238, 239-40 (Ohio 1896) (not applying *Rylands* directly, due to the defendant's averred negligence, but commenting that the *Rylands* "doctrine would seem to be in exact accord with justice and sound reason"); Bradford Glycerine Co. v. St. Mary's Woolen Mfg., 54 N.E. 528, 530-31 (Ohio 1899).

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

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

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

76. For New York and New Jersey, see *infra* Subsection III.D.4.

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

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). *Contra* Murphy v. Gillum, 73 Mo. App. 487, 492-93 (Mo. Ct. App. 1898) (noting that other states generally reject *Rylands* and reinterpreting *Rylands* as requiring "due care"); Gannon v. Laclede Gaslight Co., 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"). Because *Murphy* and *Gannon* resisted *Rylands* while *Mathews* and *French* supported *Rylands* more decisively, this Note categorizes Missouri as "wavering."

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

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

81. Robb v. Carnegie Bros., 22 A. 649, 650-51 (Pa. 1891); Lentz v. Carnegie Bros., 23 A. 219, 220 (Pa. 1892); Hauck v. Tide Water Pipe-Line Co., 26 A. 644, 645 (Pa. 1893). For other cases, see *infra* Subsection III.D.2.

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.

Id. The court did not refer to *Rylands* and did not generalize from artificial water use to all "non-natural" mischievous uses, but the ruling never relied upon proof of fault and it closely resembled *Rylands*'s distinction between natural and artificial.

83. For pro-*Rylands* decisions, see *Texas & Pacific Railway v. O'Mahoney*, 50 S.W. 1049, 1052 (Tex. Civ. App. 1899); *Texas & Pacific Railway v. O'Mahoney*, 60 S.W. 902, 904 (Tex. Civ. App. 1900); and *Texas & Pacific Railway v. Frazer*, 182 S.W. 1161, 1161-62 (Tex. Civ. App. 1916). For anti-*Rylands* decisions, see *Gulf, Colorado & Santa Fe Railway v. Oakes*, 58 S.W. 999, 1000 (Tex. 1900); and *Barnes v. Zettlemoyer*, 62 S.W. 111, 112 (Tex. Civ. App. 1901). For an explanation of why this Note categorizes Texas as "wavering" and Indiana as "adopting," see *infra* note 87.

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).

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

86. Brennan Constr. Co. v. Cumberland, 29 App. D.C. 554, 560-62 (1907).

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). *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 *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 *Rylands*. However, the Indiana Supreme Court ended the controversy in favor of *Rylands*, while in Texas, a lower court continued to cite *Rylands* even after the Texas Supreme Court's rejection, and it adopted a rule similar to *Rylands* in the 1910s. *See infra* notes 331-334.

Virginia[88] adopted *Rylands*. Over these years, only New Hampshire,[89] Washington,[90] and Kentucky[91] consistently rejected the English precedent. From the mid-1880s to the early 1910s, fifteen states and the District of Columbia solidly accepted *Rylands*,[92] nine more were leaning toward *Rylands* or its rule,[93] five states wavered over this period,[94] and only three states consistently rejected.[95] 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*,[96] but an equivalent number of states also adopted *Rylands*,[97] 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[98] and the

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*.

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

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. Massachusetts, Minnesota, Illinois, Iowa, California, Maryland, Ohio, Vermont, Oregon, South Carolina, Wyoming, Kansas, Tennessee, Montana, the District of Columbia, and Indiana, in chronological order.

93. Louisiana, Georgia, Wisconsin, Michigan, Nevada, Colorado, Alabama, Pennsylvania (1890-1916), and Utah, in chronological order.

94. New York (wavering 1890-1908), New Jersey (wavering 1895-1903), Missouri (wavering 1898-1913), Texas (wavering and leaning, 1899-1936), and West Virginia (temporarily rejecting 1902-1911, but thereafter solidly accepting). For an explanation of why this Note categorizes Texas as "wavering" and Indiana as "adopting," see *supra* note 87.

95. New Hampshire, Washington, and Kentucky, in chronological order.

96. 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).

97. 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[99] recognized *Rylands*, and the District of Tennessee rejected it.[100] In the 1910s and 1920s, the Fourth[101] and Sixth Circuits[102] adopted *Rylands*, the Third Circuit voiced mild approval,[103] and the Second Circuit temporarily rejected it.[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 *Rylands*.

II. PRECONDITIONS AND PRECIPITANTS

A. *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.[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 *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,

98. Burke v. Anderson, 69 F. 814, 818 (7th Cir. 1895) (adopting *Rylands* in an explosives case); *see also* Goodlander Mill Co. v. Standard Oil Co., 63 F. 400, 402 (7th Cir. 1894) (recognizing *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").

99. Parrott v. Barney, 18 F. Cas. 1236, 1242 (C.C. Cal. 1871).

100. Cumberland Tel. & Tel. v. United Elec. Ry., 42 F. 273, 280-81 (D. Tenn. 1890).

101. Norfolk & W. Ry. v. Amicon Fruit Co., 269 F. 559, 562 (4th Cir. 1920) (distinguishing *Jennings v. Davis*, 187 F. 703 (4th Cir. 1911)).

102. Memphis Consol. Gas & Elec. Co. v. Letson, 135 F. 969, 973 (6th Cir. 1905); *see also* Henderson v. Sullivan, 159 F. 46 (6th Cir. 1908) (applying *Rylands* in ruling explosives a nuisance).

103. Jacob Doll & Sons v. Ribetti, 203 F. 593 (3d Cir. 1913).

104. Actiesselskabet Ingrid v. Cent. Ry., 216 F. 72, 77-78 (2d Cir. 1914). The Second Circuit later approved of *Rylands* in 1931. Exner v. Sherman Power Constr. Co., 54 F.2d 510, 513-15 (2d Cir. 1931).

105. LAWRENCE STONE, THE CAUSES OF THE ENGLISH REVOLUTION 1529-1642, at 3-22 (1972).

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%.[106] 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.[107] Urban factories produced more than 90% of the industrial output of this era.[108] 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.[109] 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.[110] The leader in Eastern urban growth, Boston was the most rapidly growing city

106. *See* CARL N. DEGLER, THE AGE OF THE ECONOMIC REVOLUTION 1876-1900, at 50-51, 51 tbl. (1974).

107. BLAKE MCKELVEY, URBANIZATION OF AMERICA 43 (1963).

108. *Id.* at 45.

109. *See* DEGLER, *supra* note 106, at 51-52.

110. *See* Peter R. Knights, *Population Turnover, Persistence, and Residential Mobility in Boston, 1830-1860*, *in* NINETEENTH-CENTURY CITIES 258, 261 (Stephan Thernstrom & Richard Sennett eds., 1969).

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.[111] 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.[112]

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*,[113] 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 hazardously steep roof;[114] a public reservoir flooding a barn;[115] a collapsing wall;[116] a collapsing chimney;[117] a slab of zinc falling from a roof;[118] and, in a ruling by Oliver Wendell Holmes, a leaking pipe creating an icy sidewalk.[119] Minnesota shared the same concerns, imposing strict liability in urban contexts for ice and snow sliding off a steep roof in Minneapolis;[120] escaping petroleum in Minneapolis;[121] a bursting reservoir in another city;[122] and a collapsing awning in Minneapolis.[123] 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,[124] California,[125] Maryland,[126] South Carolina,[127] and

111. MCKELVEY, *supra* note 107, at 3-4 (1963).
112. *Id.* at 25, 35, 37.
113. 99 Mass. 582 (1868).
114. Shipley v. Fifty Assocs., 101 Mass. 251 (1869), *aff'd*, 106 Mass. 194 (1870).
115. Wilson v. New Bedford, 108 Mass. 261, 266 (1871).
116. Gorham v. Gross, 125 Mass. 232, 238, 239 (1878).
117. Gray v. Boston Gas Light Co., 114 Mass. 149 (1873) (citing *Shipley*, 101 Mass. 251).
118. Khron v. Brock, 11 N.E. 748 (1887) (citing *Gray*, 114 Mass. 149).
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. Wiltse v. City of Red Wing, 109 N.W. 114 (Minn. 1906).
123. Waller v. Ross, 110 N.W. 252 (Minn. 1907).
124. Phillips v. Waterhouse, 28 N.W. 539 (Iowa 1886).
125. Colton v. Onderdonk, 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).
127. Frost v. Berkeley Phosphate Co., 20 S.E. 280 (S.C. 1894).

New Jersey[128] applied *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 *Rylands* from the mid-1870s until the early 1890s and the general dormancy of *Rylands* in the 1870s and 1880s suggest that the urbanization boom was an insufficient background condition for nationwide adoption.

C. *Business Cycles and Industrial Dominance*

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

Massachusetts and Minnesota adopted *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.[129] However, despite widespread industrial success, only Massachusetts and Minnesota were willing to adopt *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 *Rylands*,[130] and New Hampshire followed suit in June 1873.[131] While there were signs of economic problems in 1872 and early 1873,[132] the Panic struck in the fall of 1873, months after these rejections. The most likely explanation for New York's resistance to *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 *Rylands*'s broader pronouncements.[133] Once New York had

128. Grey v. Mayor of Paterson, 42 A. 749 (N.J. Ch. 1899).

129. VICTOR S. CLARK, HISTORY OF MANUFACTURES IN THE UNITED STATES, 1860-1914, at 145-48 (1928).

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

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

132. Soon after Massachusetts and Minnesota adopted *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.

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)

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

(holding that interference with the natural flow of a stream is an actionable offense, even without proof of fault). New York continued to expand on these precedents, even after rejecting *Rylands* in 1873. *See* St. Peter v. Denison, 58 N.Y. 416 (1874) (rock blasting); Jutte v. Hughes, 67 N.Y. 267 (1876) (flow of sewage water); Noonan v. City of Albany, 79 N.Y. 470 (1880) (flow of drainage water); Heeg v. Licht, 80 N.Y. 579 (1880) (explosives). There were dissenters in New York who cited *Rylands*. *See* McCafferty v. Spuyten Duyvil & Port Morris R.R., 61 N.Y. 178 (1874).

134. *Id.* at 484-85.

135. *See, e.g.*, Marshall v. Welwood, 38 N.J.L. 339 (1876).

136. *Sanderson I*, 86 Pa. 401 (1878).

it continued to expand at an incredible pace.[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.[138] In the first years of this economic expansion, state courts were apparently still cautious and avoided the *Rylands* controversy. However, once the recovery had lasted several years, more and more state courts adopted *Rylands*: Michigan,[139] Illinois,[140] Iowa,[141] California,[142] and Colorado.[143] In addition, Nevada and Alabama adopted rules similar to *Rylands*,[144] and Wisconsin recognized its validity.[145] Whereas Massachusetts and Minnesota had focused mainly on common urban and distinctly nonindustrial hazards (like snow falling off roofs),[146] these other courts began applying strict liability to big industry, mining, and railways.[147]

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

137. *See* Gavin Wright, *The Origins of American Industrial Success, 1879-1940*, *in* 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., 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, 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, THE UNITED STATES SINCE 1865, at 189 (1946). By 1892, unemployment had dwindled to a miniscule 3.0%. WILLIAMS, *supra* note 132, at 358.

138. JACQUELYN DOWD HALL ET AL., LIKE A FAMILY: THE MAKING OF A SOUTHERN COTTON MILL WORLD 24, 26-27 (1987).

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

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

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

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

143. G., B. & L. Ry. v. Eagles, 13 P. 696, 697-98 (Colo. 1886).

144. Boynton v. Longley, 6 P. 437, 439 (Nev. 1885); City of Eufaula v. Simmons, 6 So. 47, 48 (Ala. 1889).

145. Atkinson v. Goodrich Transp. Co., 18 N.W. 764, 775 (Wisc. 1884) (citing *Rylands* as a valid precedent, but not applying it to make the defendant liable without fault).

146. *See supra* notes 113-120 and accompanying text. After 1890, Minnesota also began applying *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).

147. *See* Chi. & N.W. Ry. v. Hunerberg, 16 Ill. App. 387, 390-91 (1885).

148. *Sanderson III*, 6 A. 453, 460-65 (Pa. 1886).

149. *See* Sullivan v. Jones & Laughlin Steel Co., 57 A. 1065 (Pa. 1904).

150. Gavigan v. Atl. Ref. Co., 40 A. 834 (Pa. 1898); Green v. Sun Co., 32 Pa. Super. 521 (1907); Vautier v. Atl. Ref. Co., 79 A. 814 (Pa. 1911).

Rylands's rule in cases of gas explosions,[151] bursting water tanks,[152] and exploding nitroglycerine.[153] Ohio also adopted *Rylands* in a case of flooding caused by a coal company.[154] Stating its position in extremely clear language, the Ohio court declared that mining was unnatural and "destructive."[155] Maryland,[156] South Carolina,[157] and indeed, even New York[158] and New Jersey[159] 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.[160] 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.[161] 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

151. Ohio Gas-Fuel Co. v. Andrews, 35 N.E. 1059 (Ohio 1893).

152. Defiance Water Co. v. Olinger, 44 N.E. 238, 240 (Ohio 1896).

153. Bradford Glycerine Co. v. St. Mary's Woolen Mfg., 54 N.E. 528 (Ohio 1899).

154. Columbus & H. Coal & Iron Co. v. Tucker, 26 N.E. 630, 633 (Ohio 1891).

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).

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

158. Deigleman v. New York, L. & W. Ry. Co., 12 N.Y.S. 83 (Sup. Ct. 1890); Schmeer v. Gaslight Co., 42 N.E. 202 (N.Y. 1895); Duerr v. Consolidated Gas Co., 83 N.Y.S. 714 (App. Div. 1903).

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

160. 2 BERNARD BAILYN ET AL., THE GREAT REPUBLIC 596 (2d ed. 1981).

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.[162] 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.[163] 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.[164] 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.[165] 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.[166] 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.[167] 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,[168]

162. *See* HACKER & KENDRICK, *supra* note 137, at 88-89.

163. *See generally* DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR (1987); ELIZABETH SANDERS, THE ROOTS OF REFORM (1999).

164. SANDERS, *supra* note 163, at 39 tbl.3.1.

165. HACKER & KENDRICK, *supra* note 137, at 263.

166. *Id.* at 274.

167. ROBERT H. WIEBE, THE SEARCH FOR ORDER 52 (1967).

168. Chi. & N.W. Ry. v. Hunerberg, 16 Ill. App. 387 (1887).

Colorado,[169] Missouri,[170] and Texas,[171] and in cases against railroads and oil companies in New York,[172] 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,[173] Henry Demarrest Lloyd,[174] and Edward Bellamy[175] advanced the Populist agenda in the 1880s, and a coalition of Westerners, Southerners, and Northern labor emerged by the mid-1890s.[176] 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,[177] 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

169. G., B. & L. Ry. v. Eagles, 13 P. 696 (Colo. 1886).

170. Mathews v. St. Louis & S.F. Ry., 24 S.W. 591 (Mo. 1893).

171. *See infra* Section III.E.

172. *See infra* Subsection III.D.4.

173. HENRY GEORGE, PROGRESS AND POVERTY (n.p., Robert Schalkenbach Found. 1879).

174. HENRY DEMARREST LLOYD, WEALTH AGAINST COMMONWEALTH (New York, Harper & Bros. 1894).

175. EDWARD BELLAMY, LOOKING BACKWARD (Penguin 1960) (1888).

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

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.

183. Simpson, *supra* note 1, at 225-26.

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.

186. *Id.* at 209. For other interpretations, see ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 105-10 (1923); Francis Bohlen, *The Rule in* Rylands v. Fletcher (pts. 1 & 2), *supra* note 50, at 298, 318-21, 373, 386; and compare Clarence Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952). For a rejection of Bohlen's interpretation, see Robert Thomas Molloy, Fletcher v. Rylands*: A Reexamination of Juristic Origins*, 9 U. CHI L. REV. 266 (1941).

187. Simpson, *supra* note 1, at 216.

188. PROSSER, *supra* note 4, at 142.

189. NORRIS HUNDLEY, JR., THE GREAT THIRST: CALIFORNIANS AND WATER, 1770S-1990S, at 76 (1992).

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.[190]

After a series of failed legal battles over this damage,[191] 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.[192] 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.[193] 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."[194] 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."[195] 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."[196] 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.[197]

Severe floods struck California regularly, about once every ten years throughout the nineteenth century.[198] 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

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.

192. ROBERT KELLEY, BATTLING THE INLAND SEA: AMERICAN POLITICAL CULTURE, PUBLIC POLICY, AND THE SACRAMENTO VALLEY 1850-1986, at 211-17 (1989).

193. *Id.* at 217.

194. *Notable Dam Failures of the Past*, 100 ENGINEERING NEWS-REC. 472, 472 (1928).

195. Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753, 797 (C.C. Cal. 1884).

196. *Id.*

197. Moulton v. Parks, 6 P. 613, 616-17 (Cal. 1883); HUNDLEY, *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."[199] In February 1886, a similarly severe flood washed away more homes and drowned two people.[200] Just one month later, the California Supreme Court adopted *Rylands* in *Colton v. Onderdonk*.[201]

Severe floods inundated California again in 1889 to 1890 and in 1891, drowning a family of three.[202] In the midst of these floods, the court reaffirmed its commitment to the rule in *Rylands*. In *Parker v. Larsen*,[203] 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."[204] The opinion cited no cases, but one can assume that this rule came directly from *Rylands*. Thereafter, California remained committed to its doctrine.[205] Around the same time, Michigan adopted *Rylands* with similar concerns about water use and reservoir floods,[206] and two other Western states, Nevada[207] and Colorado,[208] 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,[209] with 20,000,000 tons of water across 450 acres.[210] 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

199. *Id.* at 377.

200. *Id.*

201. 10 P. 395 (Cal. 1886) (filed Mar. 26, 1886). The California Supreme Court had leaned toward accepting *Rylands* in two coal mining cases in 1875 and in 1881, when plaintiffs' counsel relied heavily upon *Rylands*, and the court held for the plaintiffs. Robinson v. Black Diamond Coal Co., 50 Cal. 460 (1875); Robinson v. Black Diamond Coal Co., 57 Cal. 412 (1881). Neither opinion mentioned *Rylands*, but the 1875 opinion reasoned that defendant was liable because the damage "was not the result of mere natural causes." *Robinson*, 50 Cal. at 461.

202. 1 GUINN, *supra* note 198, at 377.

203. 24 P. 989 (Cal. 1890).

204. *Id.* at 989.

205. *E.g.*, Kleebauer v. W. Fuse & Explosives Co., 69 P. 246, 247 (Cal. 1902); Sutliff v. Sweetwater Water Co., 186 P. 766, 767 (Cal. 1920); Kall v. Carruthers, 211 P. 43 (Cal. Dist. Ct. App. 1922).

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

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

208. Sylvester v. Jerome, 34 P. 760, 762 (Colo. 1893) (citing section 2272 of Mills' Annotated Statutes of Colorado as the basis for strict liability for damage caused by reservoirs); Larimer County Ditch Co. v. Zimmerman, 34 P. 1111, 1112 (Colo. Ct. App. 1893) (citing the same statute).

209. DISASTER, DISASTER, DISASTER: CATASTROPHES WHICH CHANGED LAWS 17 (Dougles Newton ed., 1961) [hereinafter DISASTER].

210. DAVID G. MCCULLOUGH, THE JOHNSTOWN FLOOD 41 (1968).

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

211. *Id.* at 57.
212. *Id.* at 58-59.
213. *Id.* at 54.
214. *Id.* at 55, 247.
215. *Id.* at 63-65.
216. *Id.* at 65.
217. *Id.* at 73.
218. *Id.* at 74.
219. *Id.*
220. *Id.* at 76-77.
221. *Id.* at 247.
222. *See* DISASTER, *supra* note 209, at 18.
223. *Id.* at 36.
224. MCCULLOUGH, *supra* note 210, at 264.
225. *Id.* at 205-08, 215, 218 (listing the *Philadelphia Press* and *Record*, five Pittsburgh papers, six New York papers, the *Chicago Inter-Ocean*, the Associated Press, and national magazines, including *Harper's Weekly*).

damage. The Flood turned into "the biggest news story since the murder of Abraham Lincoln."[226] On June 3, President Harrison called upon the nation to assist Johnstown, and the governors of Pennsylvania and New York also pleaded for support.[227] The journalists' horrific tales of death and destruction,[228] also recounted in several books within two years of the flood,[229] 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."[230]

As the cause of the dam collapse became clearer, the public focused its anger on the South Fork Club and its wealthy members.[231] The nation turned its attention to the club's membership list, and expected the club members to compensate the Johnstown victims.[232] 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.[233] 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 . . . .[234]

A *New York World* headline screamed, "THE CLUB IS GUILTY,"[235] and the *Chicago Herald* proclaimed that there was "no question whatever" that the dam collapse involved criminal negligence.[236] An expert journal, *Engineering News*, concluded that the club constructed the dam "with

226. *Id.* at 203.

227. WILLIS FLETCHER JOHNSON, HISTORY OF THE JOHNSTOWN FLOOD 249, 260-61 (Philadelphia, Edgewood Publ'g Co. 1889).

228. See, for example, articles published in the N.Y. SUN, June 1-2, 1889, and N.Y. WORLD, June 2, 1889, which are reprinted in DISASTER, *supra* note 209, at 18-36.

229. *E.g.*, DAVID J. BEALE, THROUGH THE JOHNSTOWN FLOOD (Boston, Philadelphia, Hubbard Bros. 1890); HERMAN DIECK, THE JOHNSTOWN FLOOD (Philadelphia, n.p. 1889); JOHNSON, *supra* note 227; J.J. MCLAURIN, THE STORY OF JOHNSTOWN (Harrisburg, James M. Place 1890).

230. MCCULLOUGH, *supra* note 210, at 224-25; *see also* JOHNSON, *supra* note 227, at 266-80 (noting donations from twenty-five states, and from London, Germany, Belfast, and Turkey). The donations totaled almost $4 million in cash, plus food and other necessities. MCCULLOUGH, *supra* note 210, at 225.

231. *Id.* at 237.

232. *See id.* at 241.

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

234. *Id.* at 246.

235. *The Club Is Guilty*, N.Y. WORLD, June 7, 1889, *cited in* MCCULLOUGH, *supra* note 210, at 246.

236. MCCULLOUGH, *supra* note 210, at 246.

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

237. *Id.* at 247.

238. *Id.* at 254.

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

240. *See supra* Section III.A.

241. Simpson, *supra* note 1, at 221, 226.

242. Long v. Penn. Ry., 23 A. 459, 460 (Pa. 1892).

243. *In re* Gaffney's Estate, 23 A. 163 (Pa. 1892); Overbeck v. Overbeck, 25 A. 646 (Pa. 1893); *In re* Ree's Estate, 92 A. 126, 127 (Pa. 1914).

244. Maneval v. Township of Jackson, 21 A. 672, 673 (Pa. 1891); Lang v. Penn. Ry., 26 A. 370, 371 (Pa. 1893); Jones v. Penn. Canal Co., 35 A. 925, 925 (Pa. 1896); Brown v. Pine Creek Ry., 38 A. 401, 401 (Pa. 1897); Saylor v. Penn. Canal Co., 38 A. 598, 598 (Pa. 1897); Silliman v. Whitmer, 46 A. 489, 490 (Pa. 1900); Book v. Penn. Ry., 56 A. 352, 354 (Pa. 1903); Braine v. N. Cent. Ry., 66 A. 985, 985 (Pa. 1907).

245. Elder v. Lykens Valley Coal Co., 27 A. 545, 545 (Pa. 1893); Dent v. Huntley, 38 A. 505, 505 (Pa. 1897); Blauch v. Johnstown Water Co., 93 A. 169, 169 (Pa. 1915).

246. Jackson v. Pittsburg Times, 25 A. 613, 613 (Pa. 1893).

highest court also confronted numerous cases related to the Flood,[247] and described the event as "[t]he great and disastrous flood which caused such widespread and appalling destruction."[248] Courts around the country referred to the Johnstown Flood, either in direct discussions of its damage, or as a paradigmatic catastrophe: New York,[249] Tennessee,[250] Illinois,[251] Missouri,[252] Texas,[253] West Virginia,[254] Minnesota,[255] Iowa,[256] Kansas,[257] Alabama,[258] and Washington.[259] The Illinois Supreme Court even noted a show entitled "The Johnstown Flood" touring the area in 1905 and 1906.[260] 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*.[261] The *American Law Review* was a bimonthly publication regarded as "the most influential legal periodical of the nineteenth century,"[262] 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.[263] In the *Review*'s early years, its editorial staff resembled an all-star team of legal scholars and practitioners,

247. State v. Brown, 21 A. 374, 375 (Md. 1891) (destroyed canal); Cowman v. Rogers, 21 A. 64, 65 (Md. 1891) (deaths of two parents and two children); Piedmont & Cumberland Ry. v. McKenzie, 24 A. 157, 157-58 (Md. 1892) (destroyed bridge); Sentman v. Baltimore & Ohio Ry., 27 A. 1074 (Md. 1893) (damages to property from flood); Shaw v. Davis, 28 A. 619, 623 (Md. 1894) (destroyed road); State v. Cowen, 35 A. 354, 367 (Md. 1896) (damage to canal).

248. The Canal Company's Case, 35 A. 161 (Md. 1896).

249. Stone v. State, 33 N.E. 733, 734 (N.Y. 1893).

250. Adams Express Co. v. Jackson, 21 S.W. 666, 667 (Tenn. 1893).

251. Wald v. Pittsburg, Chi., Cincinnati & St. Louis Ry. 44 N.E. 888, 889 (Ill. 1896).

252. Kansas City v. Bacon, 48 S.W. 860, 876 (Mo. 1898); Supreme Council of Royal Arcanum v. Kacer, 69 S.W. 671, 676 (Mo. Ct. App. 1902) (Bland, P.J., concurring).

253. Males v. Sovereign Camp Woodmen of the World, 70 S.W. 108, 109 (Tex. Civ. App. 1902).

254. UHL v. Ohio River R.R., 49 S.E. 378, 384-85 (W. Va. 1904).

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

256. Green-Wheeler Shoe Co. v. Chi. R.I. & P. Ry., 106 N.W. 498, 498 (Iowa 1906).

257. Rodgers v. Mo. Pac. Ry., 88 P. 885, 890 (Kan. 1907).

258. Ala. Great So. R.R. v. J.A. Elliott & Son, 43 So. 738, 739 (Ala. 1907).

259. State *ex rel*. Golden Valley Irrigation Co. v. Superior Court, 122 P. 19, 22 (Wash. 1912) (Chadwick, J., concurring).

260. Merle v. Beifeld, 114 N.E. 369, 378 (Ill. 1916).

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

262. THOMAS A. WOXLAND & PATTI J. OGDEN, LANDMARKS IN AMERICAN LEGAL PUBLISHING 48 (1989).

263. ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 192 (1990).

including Oliver Wendell Holmes, Arthur Sedgwick, John C. Ropes, and John C. Gray.[264] 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."[265]

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.[266] Commenting with understatement that "water can do a great deal of mischief," the writer refers to the Johnstown Flood's aftermath: a pile of "a great mass of earth, stones, trees, houses, railway locomotives, cars, human bodies, and what not . . . very deep and . . . very solid."[267] 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."[268] 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."[269] 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.[270] 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*

264. *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.

265. *American Law Periodicals*, *supra* note 264, at 447.

266. Note, *supra* note 261, at 646.

267. *Id.* at 646.

268. *Id.* at 646-47.

269. *Id.* at 647.

270. *Id.*

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.[273] In 1886, the Pennsylvania Supreme Court strained itself in *Sanderson*[274] to repudiate *Rylands*. The court referred to mine-water runoff or to mining in general as "natural" twenty-six times,[275] 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.[276] 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."[277] 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.[278]

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.*,[279] 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.[280] 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.[281] One of these judges was Judge Clark, the author of *Sanderson*, whose home was in

273. *See* Note, *The Absolute Nuisance Theory in Pennsylvania*, 95 U. PA. L. REV. 781, 783-85 (1947).
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).
280. Robb v. Carnegie Bros. & Co., 145 Pa. 324, 336 (1891).
281. *Id.* The reversing judges were Clark, Green, and Paxson.

western Pennsylvania near Johnstown.[282] The *Robb* ruling limited "natural activities" to the natural "develop[ment of] the resources of his property," which sharply distinguished *Sanderson*.[283] The key distinction between *Sanderson* and *Robb* rested on the natural/unnatural dichotomy: Coal mining itself was natural, but any further development or manufacturing of the coal was not natural.[284] *Robb* further eviscerated *Sanderson* in reversing *Sanderson*'s dicta about the supreme importance of industrial development:

> [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.[285]

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 *Sanderson* extolling the public service of the capitalists. In *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.[286] However, in *Robb*, the court gave the Carnegie Company no privileges for enriching the region. And interestingly, the *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.[287] Surely, then, the Pennsylvania

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

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

284. *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 . . . .").

285. *Id.* at 651.

286. *Sanderson III*, 6 A. 453, 464-65 (Pa. 1886).

287. *See Robb*, 145 Pa. at 324.

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

288. George Wharton Pepper, *The Natural Use of Land:* Robb v. Carnegie, 40 AM. L. REG. 26, 39 (1892).

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).

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

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."[294]

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*.[295] Three years later, the court applied *Rylands* to a large collection of water that had escaped.[296] 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.[297] 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.[298] In a defiant stance similar to Pennsylvania's, the Ohio court declared that mining was unnatural and "destructive."[299] From this beginning, Ohio then applied *Rylands* to a series of industrial "non-natural uses."[300]

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.[301] 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[]."[302] In 1893, the Oregon Supreme Court applied *Rylands* in enjoining the construction of a dam because of fears of flooding.[303] In addition, five other states[304] accepted or leaned toward *Rylands* in the 1890s.[305]

Commonwealth v. Russell, 33 A. 709 (Pa. 1896); Robertson v. Youghiogheny River Coal Co., 33 A. 706 (Pa. 1896); *Gavigan*, 40 A. 834; Keppel v. Lehigh Coal & Navigation Co., 50 A. 302 (Pa. 1901); Campbell v. Bessemer Coke Co., 23 Pa. Super. 374, 380 (1903); Sullivan v. Jones & Laughlin Steel Co., 57 A. 1065 (Pa. 1904); Green v. Sun Co., 32 Pa. Super. 521 (1907); Vautier v. Atl. Ref. Co., 79 A. 814 (Pa. 1911); Welsh v. Kerr Coal Co., 82 A. 495 (Pa. 1912); Mulchanock v. Whitehall Cement Mfg., 98 A. 554 (Pa. 1916).

294. *Sullivan*, 57 A. at 1068. *Contra* Harvey v. Susquehanna Co., 50 A. 770 (Pa. 1902). Pennsylvania eventually distanced itself from *Rylands* and reembraced *Sanderson* in the midst of World War I and the conservative 1920s. *See* Alexander v. Wilkes-Barre Anthracite Coal Co., 98 A. 794, 795-96 (Pa. 1916); Householder v. Quemahoning Coal Co., 116 A. 40, 41 (Pa. 1922).

295. 20 A. 900, 900-01 (Md. 1890).

296. Baltimore Breweries' Co. v. Ranstead, 28 A. 273, 274 (Md. 1894).

297. Huff v. Austin, 21 N.E. 864, 865 (Ohio 1889).

298. Columbus & H. Coal & Iron Co. v. Tucker, 26 N.E. 630, 633 (Ohio 1891).

299. *Id.* at 632.

300. *See supra* Section II.C.

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

302. Frost v. Berkeley Phosphate Co., 20 S.E. 280, 284 (S.C. 1894).

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.

307. McKee v. Delaware & H. Canal Co., 4 N.Y.S. 753 (App. Div. 1889).

308. Deigleman v. New York L. & W. Ry., 12 N.Y.S. 83 (Sup. Ct. 1890). In *Cosulich v. Standard Oil Co*., 25 N.E. 259, 259-60 (N.Y. 1890), however, the New York Court of Appeals relied upon *Losee v. Buchanan* in another boiler explosion case and required proof of fault for recovery.

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

310. *Id.* at 348.

311. *Deigleman*, 12 N.Y.S. at 85 (quoting *Vanderweile*, 65 N.Y. at 347).

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.

313. Schmeer v. Gaslight Co., 42 N.E. 202, 205 (N.Y. 1895).

naturally grew on the land.[314] 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,[315] and for the "artificial accumulation of water."[316] However, *Rylands* disappeared from New York opinions after 1908.[317]

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."[318] 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*.[319] 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*."[320] The court also cited *Rylands*[321] and enjoined the mining company from polluting the stream.[322] One year later, New Jersey's highest appellate court affirmed this decision.[323] 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.[324] New Jersey's brief acceptance of *Rylands* starting in 1895 suggests that its courts were not directly reacting to Johnstown, but rather were following

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

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

316. Duerr v. Consol. Gas Co. 83 N.Y.S. 714, 718 (App. Div. 1903). Another New York opinion cited a passage of *Rylands* in support of the "ordinary" use of land, with the implication that an owner would be liable for extraordinary and unnatural use. Tucker v. Mack Paving Co., 70 N.Y.S. 688, 693 (App. Div. 1901).

317. *E.g.*, McNulty v. Ludwig & Co., 109 N.Y.S. 703, 703 (App. Div. 1908). In McNulty, plaintiff's council cited *Rylands* together with *Shipley v. Fifty Associates*, 101 Mass. 251 (1869), one of the early adoptions of *Rylands* that imposed strict liability for ice falling from a steep roof. The court then cited *Shipley*, not *Rylands*, and distinguished the accident in *Shipley* from a sign falling from a building's entrance in *McNulty*. The court then required proof of negligence. *McNulty*, 109 N.Y.S. at 703.

318. Ex'rs of Lord v. Carbon Iron Mfg. Co., 6 A. 812, 813, 825-26 (N.J. 1886).

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

320. *Id.* at 288-89.

321. *Id.* at 289.

322. *Id.* at 293.

323. Sterling Iron & Zinc Co. v. Sparks Mfg. Co., 41 A. 1117, 1117 (N.J. 1896).

324. Grey v. Mayor of Paterson, 42 A. 749, 752 (N.J. Ch. 1899).

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,[325] and its disapproval thereafter.[326]

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.[327] 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.[328] 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.[329] After this tragedy, Texas abandoned the project for forty years.

While scholars point to Texas as a prominent rejecting state,[330] 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,[331] and in upholding this decision one year later, the same court added more citations to *Rylands* cases.[332] Around the same time, the Texas Supreme Court and a lower court sharply criticized *Rylands*,[333] 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.[334] Texas's mixed rulings on

325. DeGray v. Murray, 55 A. 237, 238 (N.J. 1903).

326. O'Hara v. Nelson, 63 A. 836, 839 (N.J. Ch. 1906); Lightcap v. Lehigh Valley R.R., 101 A. 187 (N.J. 1917).

327. 1 LOUIS C. HUNTER, A HISTORY OF INDUSTRIAL POWER IN THE UNITED STATES, 1780-1930, at 242-47 (1979).

328. *Id.* at 246.

329. *Notable Dam Failures of the Past*, *supra* note 194, at 472.

330. *E.g.*, FRANKLIN & RABIN, *supra* note 59, at 449-50; KEETON ET AL., *supra* note 54, at 549; PROSSER, *supra* note 4, at 151. For Texas adopting nuisance law, see William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942).

331. Tex. & Pac. Ry. v. O'Mahoney, 50 S.W. 1049 (Tex. Civ. App. 1899).

332. Tex. & Pac. Ry. v. O'Mahoney, 60 S.W. 902 (Tex. Civ. App. 1900).

333. Gulf, Colo. & Santa Fe Ry. v. Oakes, 58 S.W. 999, 1000 (Tex. 1900); Barnes v. Zettlemoyer, 62 S.W. 111, 112 (Tex. Civ. App. 1901).

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*

ANN. art. 5011t (Vernon Supp. 1918)). In 1916, the Texas Court of Civil Appeals returned to the cases that had adopted *Rylands*, and held the owner of a reservoir, or "*artificial* lake," liable for flooding, despite his lack of fault. Tex. & Pac. Ry. v. Frazer, 182 S.W. 1161, 1161 (Tex. Civ. App. 1916) (emphasis added). The court cited *Texas & Pacific Railway v. O'Mahoney*, 50 S.W. 1049, for rejecting the negligence requirement as "unsound." *Frazer*, 182 S.W. at 1162. In 1924, *Anderson v. Highland Lake Co.* interpreted the 1915 statute as imposing strict liability for the escape of impounded water. *Anderson*, 258 S.W. at 218. In 1936, the Texas Supreme Court rejected *Rylands* decisively. Turner v. Big Lake Oil Co., 96 S.W.2d 221 (Tex. 1936).

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.[338] 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.[339] 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.[340] 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).

340. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 135-73 (1970); Guido Calabresi & John T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1083 (1972).

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: "[The 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.

342. 22 A. 649, 651 (Pa. 1891).

343. *See supra* Section I.D.

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

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

Massachusetts and New Hampshire. Intriguingly, Massachusetts was the first state to adopt *Rylands* and never wavered after 1868, while New Hampshire was the most consistent rejecting state. This pattern suggests that Massachusetts and New Hampshire were the most decisive and least swayed by political trends and disasters, at least in part because of their appointed judiciary. For a list of states adopting an elective judiciary, see Hall, *supra* note 344, at 337-38. For a list of states adopting *Rylands* between 1868 and 1911, see Section I.D.

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.
360. *See, e.g.*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); *see also* PAUL R. BENSON, JR., THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970 (1970); BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 10-25 (1957); William E.

have begun to challenge these assumptions.[361] 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.

Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, *in* ESSAYS ON THE NEW DEAL 69 (Harold M. Hollingsworth & William F. Holmes eds., 1969).

361. *See, e.g.*, Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994); William I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B. SUP. CT. HIST. SOC. 53. For a particularly insightful reinterpretation of the Lochner Court's political and ideological origins, see William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767.

362. 60 Mass. 292 (1850).

363. 94 N.E. 431 (N.Y. 1911).