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THE DIFFUSION OF DOCTRINAL INNOVATIONS IN TORT LAW

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This Article examines the spread of "successful" common-law doctrinal innovations in the law of torts. Its analysis reveals recurring influences upon and tendencies within the diffusion of novel tort doctrines across the states. The studied diffusion patterns also document a trend toward common-law doctrinal "stabilization" over the past quarter-century. As detailed herein, this stabilization owes in part to altered adoption dynamics associated with the ongoing shrinkage and fragmentation of the common-law tort dockets entertained by state supreme courts. Prevailing conditions will make it difficult, this Article concludes, for even well-received common-law doctrinal innovations of the future to match the rapid diffusion rates associated with tort-law innovations that spread during the 1960s, 1970s, and 1980s.

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I. INTRODUCTION

Tort law is perpetually in flux. At any given moment, some doctrinal innovations are still coalescing, others are finding their first few takers, and still others are well along in the diffusion process. In calendar year 2013, for example, the Alabama Supreme Court became the first state high court to apply a theory of "innovator liability" to drug manufacturers,[1] the Minnesota Supreme Court joined approximately half of its peers in recognizing the "loss of a chance" theory of recovery for medical malpractice,[2] and the Maryland Court of Appeals declined a plaintiff's request to bring the Old Line State in line with the forty-six other states that already had replaced contributory negligence regimes with comparative responsibility systems.[3]

Torts scholarship takes this change as a given, but spends little time considering the precise manner in which it occurs. This gap in the scholarship dovetails with Richard Posner and William Landes's thirty-year-old lament that "[o]nly a small proportion of the literature [on tort law] attempts a scientific study of the tort system, comparable to the

1. Wyeth, Inc. v. Weeks, No. 1:10-cv-602, slip op. at 50–52 (Ala. Jan. 11, 2013), *withdrawn and aff'd*, 159 So. 3d 649 (Ala. 2014).

2. Dickhoff *ex rel.* Dickhoff v. Green, 836 N.W.2d 321, 333–37 (Minn. 2013).

3. Coleman v. Soccer Ass'n of Columbia, 69 A.3d 1149, 1150 (Md. 2013).

study of organic systems by biologists or of the price system by economists."[4]

This Article undertakes an investigation of the sort described by Posner and Landes, namely, a propagation analysis that considers the diffusion of doctrinal innovations in tort law across the states.[5] This inquiry charts the spread of doctrinal developments in this field from the 1850s through 2014, and considers the patterns that emerge across innovations and eras. This analysis simultaneously illustrates the differences and similarities in diffusion patterns across innovations in tort law, illuminates the connections that exist between how and why particular common-law doctrines spread, and instantiates and updates the observation that the current era is one of doctrinal "stabilization."[6]

On the last of these points, this Article documents and examines the ongoing trend toward slower diffusion of common-law[7] doctrinal innovations across the states. Between the 1960s and the 1980s, several important changes in tort law were adopted by a large number of states.[8] State supreme courts served as a fulcrum for this movement as they cultivated a common agenda of doctrinal reform.[9] But since the early 1990s, after a "second wave" of doctrinal movement ran its course, innovations have not coursed through these courts as quickly as they once did.[10] The following chart,[11] depicting the diffusion of twenty

4. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 851 (1981).

5. The District of Columbia was not included among the studied jurisdictions because it only recently (in the 1970s) acquired truly "local" courts. *See generally* JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT (2001).

6. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 648–49 (1992).

7. The "common law" is "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions." *Common Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. *See* THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 50 (2001) (defining 1945–1980 as "The Progressive Era in American Tort Law"); Schwartz, *supra* note 6, at 605–20 (discussing this era).

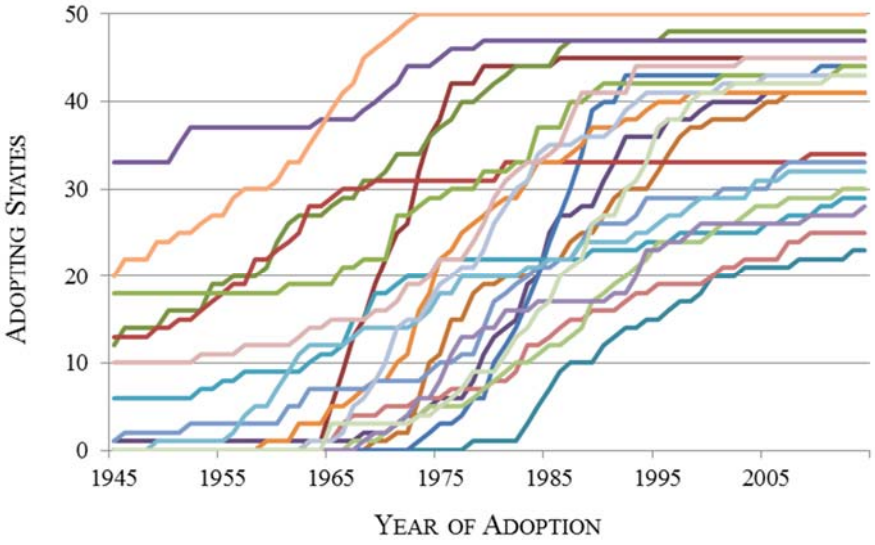
9. *See* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 34 (1988) ("[I]nnovations in tort law . . . constitute state courts' most important substantive contribution to legal development during the postwar era."); Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 133–35, 142–45 (1977) (finding a significant increase in the number and proportion (relative to the courts' overall docket) of tort cases heard by state supreme courts from the 1870–1900 period to the 1940–1970 period).

10. *See infra* Chart I.

11. *See infra* Chart I. This chart and all other line charts and tables within this Article

"successful" doctrinal innovations in tort law across state supreme courts in the period since World War II, reflects this broader trend toward stabilization:

CHART I: ADOPTION PATTERNS OF TORT INNOVATIONS, 1945 TO PRESENT



This Article draws from research on the diffusion of innovations, "herding behavior," and "cascade effects"[12] in describing the sources and significance of this stagnation. As detailed herein, the common-law tort caseloads of state supreme courts—the most important and influential "laboratories" of doctrinal innovation in this sphere[13]—are both contracting and fragmenting. These trends owe to several contributing factors, including the aforementioned exhaustion of

derive from data inputted within a Microsoft Excel file in the author's possession. The cases and statutes that comprise the data are reflected in *infra* Appendix B.

12. *See generally* Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87 (1999) (discussing the possibility of herding behavior among judges and associated effects in assessing the likelihood of "precedential cascades").

13. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, LABORATORIES OF TORT LAW: A THREE-YEAR REVIEW OF KEY STATE SUPREME COURT DECISIONS 1 (2014), http://www.instituteforlegalreform.com/uploads/sites/1/tort-labs.pdf [http://perma.cc/QE8Y-6KW2].

doctrinal reform priorities, the politicization of common-law tort doctrine, the increased attention that state high courts pay to issues arising under state-specific "tort reform" laws and civil-damages statutes, and the appearance of intermediate appellate courts in most states.[14] These developments have shrunk the number of adoption opportunities that appear and have made it difficult for any given innovation in tort law to gain the prominence and momentum that can lead to a swift rush of adoptions. In sum, current circumstances inhibit the dynamics that can catalyze and coordinate the review and disposition of common-law tort cases by state supreme courts, leading to slower diffusion rates.

This shift has at least three important consequences for the present and future of tort law. First, whereas some "successful" common-law innovations of the past experienced a surge of adoptions, either from the outset of their diffusion or upon reaching a "critical mass" of adherents, even the best received innovations of today and tomorrow will tend to be adopted at a slower, steadier rate. Going forward, judges and academics should incorporate substantial lag times into forecasts of doctrinal movement across state high courts. So too should the manufacturers and insurers of new technologies that some commentators assume will have a significant intersection with tort law, such as drones,[15] nanotechnology,[16] fracking,[17] cloning,[18] three-dimensional printing,[19] cloud computing,[20] and advances in

14. *See infra* Part IV.

15. *See generally* Geoffrey Christopher Rapp, *Unmanned Aerial Exposure: Civil Liability Concerns Arising from Domestic Law Enforcement Employment of Unmanned Aerial Systems*, 85 N.D. L. REV. 623 (2009) (addressing the possible tort consequences of increased use of aerial drones).

16. *See generally* J. Philip Calabrese & Stephanie E. Niehaus, *Nano-Torts on the Horizon: A Jack and Jill Story*, 9 NANOTECHNOLOGY L. & BUS. 156, (2012) (anticipating possible tort claims associated with nanotechnology); Lewis L. Laska, *What Every Personal Injury Lawyer Should Know About Nanotechnology*, TRIAL, Sept. 2012, at 26.

17. *See generally* Joe Schremmer, *Avoidable "Fraccident": An Argument Against Strict Liability for Hydraulic Fracking*, 60 U. KAN. L. REV. 1215 (2012) (considering whether "fracking" should be subject to strict liability).

18. *See* LORI B. ANDREWS, CLONING HUMAN BEINGS: THE CURRENT AND FUTURE LEGAL STATUS OF CLONING F-52–F-55 (1997), https://bioethicsarchive.georgetown.edu/nbac/pubs/cloning2/cc6.pdf [http://perma.cc/58TX-ATY6] (discussing "potential tort claims based on cloning").

19. *See generally* Nora Freeman Engstrom, Essay, *3-D Printing and Product Liability: Identifying the Obstacles*, 162 U. PA. L. REV. ONLINE 35 (2013) (assessing how modern products-liability law applies to three-dimensional printing technologies).

20. *See generally* Jay P. Kesan et al., *Information Privacy and Data Control in Cloud*

neuroscience.[21] All of these inventions and advances likely will occasion more gradual (if any) common-law doctrinal change across state supreme courts than one might project from diffusion rates of the past. And as this Article will discuss, legislatures, lower state courts, and federal courts cannot be relied upon to completely fill in all of the resulting gaps.

Second, slower diffusion rates may generate more splits of authority. A doctrinal innovation may experience only a relatively brief "policy window" in which surrounding circumstances align favorably for its adoption.[22] These apertures often close as economic and cultural climates change, and the drawbacks of and alternatives to a doctrinal innovation become more apparent. From the 1960s through the 1980s, the relatively robust tort dockets entertained by state supreme courts permitted the exploitation of even fairly brief policy windows.[23] New ideas could appear, undergo refinement by early adopters, and then attract a broad audience within a relatively short period.[24] Today's smaller, more fragmented dockets provide fewer opportunities for new ideas to capitalize upon hospitable environments.[25] Because only a limited number of states will have the opportunity to adopt an innovation before a policy window narrows or slams shut, the slower diffusion rates of today and tomorrow will generate more persistent splits of authority across the states than otherwise would be the case.

Third, the stagnation of the national torts docket may become self-perpetuating. Although decisions by lower state appellate courts and

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Computing: Consumers, Privacy Preferences, and Market Efficiency, 70 WASH. & LEE L. REV. 341 (2013) (addressing the legal consequences, in tort law and otherwise, of burgeoning reliance on "cloud" computing and data storage).

21. *See* Adam J. Kolber, *Will There Be a Neurolaw Revolution?*, 89 IND. L.J. 807, 833 (2014) (predicting significant changes in the types of proof used to establish damages in tort cases if a "technology-driven neurolaw revolution" occurs). Of course, speculation about the legal consequences of new technologies is nothing new. *See, e.g.*, Andrew F. Haley, *Space Vehicle Torts*, 36 U. DET. L.J. 294 (1959); Note, *Artificial Rainmaking*, 1 STAN. L. REV. 508 (1949); Note, *Crop Dusting: Legal Problems in a New Industry*, 6 STAN. L. REV. 69 (1953).

22. *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 165–95 (2d ed. 2011) (discussing "policy windows," periods in which circumstances are propitious for a policy change). For another discussion of policy windows tailored to the torts context, see generally Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise,"* 61 DEPAUL L. REV. 303 (2012) (applying the concept of a "policy window" to the evaluation and adoption of no-fault automobile-insurance schemes).

23. *See infra* Part III.

24. *See generally* EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS (5th ed. 2003).

25. *See infra* Part IV.

federal courts may tug tort law in a particular direction, state supreme courts remain the most important oracles of common-law tort principles.[26] The dearth of coordinated conversations across these entities on generic common-law topics lends itself to an impression of doctrinal lethargy. All else being equal, this perception may discourage litigants from pursuing the sorts of novel arguments that provide raw material for additional innovation and make judges less inclined to craft path-breaking opinions.

As a whole, the analysis presented within this Article provides insights into the patterns of common-law doctrinal change and confirms the existence of a new era in tort law. In developing and reflecting upon its subject of study, this Article proceeds in five additional parts. Following this Introduction, Part II considers the body of diffusion analysis that this Article builds upon and applies to the diffusion of innovations in tort law. Part III then presents an empirical analysis of the diffusion patterns associated with doctrinal innovations in this sphere. This assessment identifies and describes several recurring diffusion patterns and spots the modern slowdown in diffusion rates that, from that point forward in the text, will represent this Article's principal topic of discussion. Part IV considers the possible reasons for this deceleration in diffusion, and Part V then discusses its significance. Finally, by way of conclusion, Part VI suggests possible next steps for researchers interested in advancing the basic analysis presented within this piece.

II. DIFFUSION RESEARCH

In examining the spread of tort innovations across the states, this Article draws from a robust body of research into the diffusion of other types of innovations, from products to policies. The text below surveys this scholarship and discusses its pertinence to the diffusion of novel doctrines in tort law.

A. The Diffusion of Innovations

The diffusion of innovations—in other words, how and why consumers and other users adopt new products or ideas—is a well-

26. *See* Randall T. Shepard, *State High Courts as Central Figures in the Future of the American Legal System*, 72 NOTRE DAME L. REV. 1009, 1013 (1997) (discussing the influence that state supreme courts exert in certain areas of the law, including torts).

developed area of study.[27] The urtext in this field is Everett Rogers' *Diffusion of Innovations*,[28] first published in 1962 and now in its fifth edition.

Diffusion of Innovations identifies four factors as especially pertinent to the breadth and pace of an innovation's adoption: (1) the relative "innovativeness" of potential adopters, i.e., whether they are prone or hesitant to innovate;[29] (2) the existence and abilities of "change agents" and "opinion leaders"—individuals with the ability to encourage or discourage adoption by others;[30] (3) the presence and operation of communications channels and diffusion networks through which information regarding an innovation may be transmitted;[31] and (4) the attributes of the innovation at issue.[32] Concerning the last of these factors, *Diffusion of Innovations* casts five characteristics as particularly consequential in the adoption equation. The first of these traits is the innovation's perceived "relative advantage" compared to substitutes.[33] A second pertinent quality is the innovation's "complexity," with greater complexity being negatively correlated with adoption.[34] The three remaining traits are positively associated with enhanced diffusion prospects: an innovation's "compatibility" with existing attitudes, values, beliefs, knowledge, practices, and technologies;[35] its "trialability," meaning whether it can be auditioned at a reduced cost prior to wholesale adoption;[36] and its "observability," meaning whether

27. Frank M. Bass, *The Relationship Between Diffusion Rates, Experience Curves, and Demand Elasticities for Consumer Durable Technological Innovations*, 53 J. BUS. S51, S51 (1980); William Twining, *Social Science and Diffusion of Law*, 32 J.L. & SOC'Y 203, 239 (2005) ("There is a vast and varied literature on diffusion in the social sciences.").

28. ROGERS, *supra* note 24; *see also* Twining, *supra* note 27, at 219 (describing *Diffusion of Innovations* as having been recognized as "the basic handbook of the field" of diffusion research).

29. ROGERS, *supra* note 24, at 267–99.

30. *Id.* at 316–25, 366, 368–70, 373–80, 388–91, 394–401.

31. *Id.* at 204–08, 330–31, 333–35, 337–43.

32. *Id.* at 219–66.

33. *Id.* at 229 (defining "relative advantage" as the "degree to which an innovation is perceived as being better than the idea it supersedes").

34. *Id.* at 257 (defining "complexity" as "the degree to which an innovation is perceived as relatively difficult to understand and use").

35. *Id.* at 240 (defining "compatibility" as "the degree to which an innovation is perceived as consistent with the existing values, past experiences, and needs of potential adopters").

36. *Id.* at 258 (defining "trialability" as "the degree to which an innovation may be experimented with on a limited basis").

acceptance by others, and the success or failure of these adoptions, can be appreciated by other potential consumers.[37] Additional research has established that these five attributes represent only a starting point for analysis and that, in a given context, other characteristics of an innovation also may influence the adoption process.[38]

A great deal of diffusion research considers how the interplay among these factors can promote or enervate the diffusion process. These assessments often identify or presume a standard diffusion process for successful innovations that involves a slow initial pace of adoption, then a rapid increase in the adoption rate, and finally a leveling off as laggards either slowly come into the fold or remain holdouts.[39] When plotted with time on the x-axis and the number of adopters on the y-axis, this adoption pattern forms what is commonly known as an "s-curve."[40] Within an s-curve, the point of "critical mass" or "take-off" at which the adoption rate soars sometimes appears when an innovation reaches a threshold of users that causes its usefulness to skyrocket[41] or when an innovation, refined by earlier use, improves in quality, falls in price, or both.[42]

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37. *Id.* at 258 (defining "observability" as "the degree to which results of an innovation are visible to others").

38. *See, e.g.*, Gary C. Moore & Izak Benbasat, *Development of an Instrument to Measure the Perceptions of Adopting an Information Technology Innovation*, 2 INFO. SYS. RES. 192, 195 (1991) (adding "image" and "voluntariness of use" to the five characteristics identified in *Diffusion of Innovations*); Louis G. Tornatzky & Katherine J. Klein, *Innovation Characteristics and Innovation Adoption-Implementation: A Meta-Analysis of Findings*, EM-29 IEEE TRANSACTIONS ON ENGINEERING MGMT. 28, 33 (1982) (adding "cost," "communicability," "divisibility," "profitability," and "social approval" to the list of pertinent attributes).

39. GRAEME BOUSHEY, POLICY DIFFUSION DYNAMICS IN AMERICA 172 (2010); ROGERS, *supra* note 24, at 272; Peter N. Golder & Gerard J. Tellis, *Growing, Growing, Gone: Cascades, Diffusion, and Turning Points in the Product Life Cycle*, 23 MARKETING SCI. 207, 208 (2004). This curve does not describe the diffusion of all innovations, only some. Attendance at new "blockbuster" movies, for example, often declines dramatically after the first week of release. *See* Mohanbir S. Sawhney & Jehoshua Eliashberg, *A Parsimonious Model for Forecasting Gross Box-Office Revenues of Motion Pictures*, 15 MARKETING SCI. 113 (1996).

40. BOUSHEY, *supra* note 39, at 37–46; ROGERS, *supra* note 24, at 272–75.

41. *See* ROGERS, *supra* note 24, at 349–53; John Hauser et al., *Research on Innovation: A Review and Agenda for* Marketing Science, 25 MARKETING SCI. 687, 692 (2006).

42. Rajshree Agarwal & Barry L. Bayus, *The Market Evolution and Sales Takeoff of Product Innovations*, 48 MGMT. SCI. 1024, 1024–25, 1038 (2002); Bass, *supra* note 27, at S61 tbl.2 (charting the decreased prices over time of electric refrigerators, room air conditioners, dishwashers, black-and-white televisions, electric clothes dryers, and color televisions); Peter N. Golder & Gerard J. Tellis, *Will It Ever Fly? Modeling the Takeoff of Really New Consumer*

B. Policy Diffusion

While diffusion research is perhaps most closely associated with the marketing of new consumer products, political scientists also have applied diffusion theory to try to discern why governments adopt innovative policies.[43]

Several of these studies have examined the diffusion of legal rules across the fifty United States. These analyses have considered topics such as whether recurring diffusion patterns appear,[44] whether individual state legislatures or courts can be identified as relatively innovation prone or innovation phobic,[45] whether particularly effective communication channels or thought leaders appear with policy innovations,[46] and whether certain types of policies spread more quickly and broadly than others do.[47]

Most of this work has considered the diffusion of policies across state legislatures, as opposed to the spread of legal rules across courts.[48] These studies have identified several influences upon policy adoptions by legislators.[49] Some inquiries have emphasized the importance of "internal determinants," meaning "political, economic, and social

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Durables, 16 MARKETING SCI. 256 (1997).

43. *E.g.*, BOUSHEY, *supra* note 39; Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POLI. SCI. REV. 395 (1990); Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POLI. SCI. REV. 1174 (1973); Kim Quaile Hill & Patricia A. Hurley, *Uniform State Law Adoptions in the American States: An Explanatory Analysis*, 18 PUBLIUS 117 (1988); Todd Makse & Craig Volden, *The Role of Policy Attributes in the Diffusion of Innovations*, 73 J. POL. 108 (2011); Christopher Z. Mooney & Mei-Hsien Lee, *The Temporal Diffusion of Morality Policy: The Case of Death Penalty Legislation in the American States*, 27 POL'Y STUD. J. 766 (1999); Robert L. Savage, *Policy Innovativeness as a Trait of American States*, 40 J. POL. 212 (1978); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POLI. SCI. REV. 880 (1969).

44. *E.g.*, Gray, *supra* note 43.

45. *E.g.*, BOUSHEY, *supra* note 39, at 92–138; Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POLI. SCI. REV. 975 (1981).

46. Patricia K. Freeman, *Interstate Communication Among State Legislators Regarding Energy Policy Innovation*, 15 PUBLIUS 99 (1985); David L. Huff et al., *A Geographical Analysis of the Innovativeness of States*, 64 ECON. GEOGRAPHY 137 (1988); Alfred R. Light, *Intergovernmental Sources of Innovation in State Administration*, 6 AM. POL. Q. 147 (1978).

47. *E.g.*, BOUSHEY, *supra* note 39, at 62–91; Makse & Volden, *supra* note 43.

48. James M. Lutz, *Regional Leaders in the Diffusion of Tort Innovations Among the American States*, 27 PUBLIUS 39, 39 (1997).

49. Makse & Volden, *supra* note 43, at 108 (reviewing existing scholarship on policy diffusion).

characteristics internal to the state."[50] Other analyses have stressed geography and its consequences, with a common conclusion being that states tend to emulate their neighbors when deciding whether to adopt a given policy.[51] Still other researchers have assigned weight to adoptions by leading states[52] or the efforts of "policy entrepreneurs" in promoting new policies.[53] Finally, some authors have focused on the types of policies involved and their specific qualities (such as their perceived cost and salience),[54] with a common conclusion being that certain policies tend to diffuse more rapidly and broadly than others do, on account of their subject matter and other traits.[55]

Contemporary scholarship concerning policy diffusion generally recognizes that these determinants are not mutually exclusive and that, as to any single innovation, they can operate either in concert or at cross-purposes.[56] One leading study, which considered the adoption of lotteries by states, concluded that a given state's decision whether to adopt a lottery was influenced not only by the decisions already made by neighboring states but also by "internal" characteristics of the state, such as its fiscal health and the personal incomes and religiousness of its residents.[57] A more recent analysis of the diffusion of 133 different policies across state legislatures likewise concluded that multiple factors typically influence the adoption process.[58] This more extensive study found that the precise pace of diffusion tended to vary based on a policy's content, with "governance" polices (such as term limits) and "morality" policies (like restrictions on abortion) diffusing more rapidly than "regulatory" policies (e.g., licensing schemes).[59] From these discoveries, the author surmised that two diffusion tracks for policies exist, one of which involves a "gradual process of policy incrementalism" and the other "a rapid decision-making process typified by attention-driven choice."[60] Regardless of policy type, this study

50. *See* Berry & Berry, *supra* note 43, at 395–96 (discussing this approach).

51. *Id.* at 396; Lutz, *supra* note 48, at 40–41; Makse & Volden, *supra* note 43, at 117.

52. Huff, et al., *supra* note 46, at 144–45.

53. BOUSHEY, *supra* note 39, at 139, 174–80; Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POLI. SCI. 738 (1997).

54. *E.g.*, Makse & Volden, *supra* note 43.

55. *Id.* at 121–22.

56. Berry & Berry, *supra* note 43, at 410–11; Lutz, *supra* note 48, at 41.

57. Berry & Berry, *supra* note 43, at 410.

58. *See* BOUSHEY, *supra* note 39, at 169–79, 187–92.

59. *Id.* at 175.

60. *Id.* at 60.

found that successful policies tended to diffuse across jurisdictions more rapidly than the standard s-curve model would predict.[61]

C. Common-Law Diffusion Patterns

As compared to the robust body of literature that considers the diffusion of policies across legislatures, the adoption of innovations by state courts has received relatively little attention,[62] and the study of the diffusion of innovations in tort law even less.[63]

The studies of common-law diffusion that do exist often mine citation patterns in order to detect communication channels across, and change agents among, the courts.[64] These studies have identified shared legal reporting districts, geographic proximity, and "cultural linkages" between states as relevant to the diffusion of precedent.[65] The prestige of a state supreme court also has been identified as affecting the spread of its decisions, with studies suggesting that some state supreme courts are looked to as thought leaders while others are not.[66] On this point, a recent article found that decisions produced by the California Supreme Court generated by far the most "followed" Shepard's citations of any state high court.[67] This inquiry also discovered that the influence of specific state supreme courts waxed and waned over time.[68] The supreme courts of states such as Washington and Arizona attracted more "followed" citations as the studied time frame progressed, while

61. *Id.* at 55.

62. Lutz, *supra* note 48, at 42 ("Adoptions of innovations by state judiciaries have been less frequently analyzed than legislative adoptions.").

63. Canon & Baum, *supra* note 45, at 975 (discussing the dearth of scholarship on this point). Since Canon and Baum made this observation, there has been some additional work on the spread of tort doctrines, *e.g.*, Thomas Arthur Schmeling, The Dynamics of Legal Change: A Diffusion of Innovations Perspective (Feb. 19, 1999) (unpublished Ph.D. dissertation, the University of Wisconsin-Madison), but comprehensive scholarship on this subject remains sparse.

64. *See, e.g.*, Robert C. Bird & Donald J. Smythe, *Social Network Analysis and the Diffusion of the Strict Liability Rule for Manufacturing Defects, 1963–1987*, 37 LAW & SOC. INQUIRY 565 (2012).

65. *Id.*; Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870–1970*, 19 LAW & SOC'Y REV. 449, 476 (1985) (concluding that "cultural regionalism to be an increasingly important factor in the communication of precedent among state supreme courts").

66. *E.g.*, Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 191 (1985).

67. Jake Dear & Edward W. Jessen, *"Followed Rates" and Leading State Cases, 1940–2005*, 41 U.C. DAVIS L. REV. 683, 693 (2007).

68. *See id.* at 697.

other high courts fell behind.[69] That said, the most "followed" decision over the study's sixty-five-year time span attracted only twenty followers among state supreme courts,[70] suggesting that significant limits exist to the influence exerted by any single court.

Among common-law subjects, tort law provides particularly fertile ground for diffusion study.[71] State courts of last resort possess significant discretion when deciding which tort innovations to adopt and which to reject.[72] This discretion admits to a diverse range of potential influences, which the larger body of diffusion research may illuminate. Nevertheless, comprehensive studies of the diffusion of tort doctrines have been rare.[73] The most thorough such effort to date examined the diffusion of twenty-three "plaintiff-oriented" doctrines in the years prior to and including 1975.[74] This inquiry specifically sought to measure "the innovativeness of state judicial systems."[75] From its data, this study identified Minnesota, Texas, Kentucky, Washington, and California as the "most innovative" states, and Alaska, Maine, Vermont, Hawaii, and Wyoming as the least.[76] Looking solely at the post-World War II period, New Jersey claimed the crown as the most innovative state.[77] The authors concluded that a state's population was the most important

69. *Id.*

70. *Id.* at 708.

71. *See* Marshall S. Shapo, *Millenial Torts*, 33 GA. L. REV. 1021, 1021 (1999) (describing torts as "the quintessential common law subject").

72. Michael E. Solimine, *Activism and Politics on State Supreme Courts*, 57 U. CIN. L. REV. 987, 996 (1989) (reviewing TARR & PORTER, *supra* note 9) ("Unrestrained by most federal (or state) constitutional limitations, state courts generally have a free hand in developing common law in private party litigation.").

73. One such study is Schmeling, *supra* note 63. Schmeling considered the diffusion of five doctrinal innovations (namely, recognition of claims for: (1) wrongful pregnancy or conception, (2) wrongful birth, (3) loss of a husband's consortium, (4) prenatal injuries, and (5) wrongful death of a stillborn fetus) across state appellate courts. *Id*. at 89–90. Other researchers have examined the spread of a single innovation in tort law across the states. *E.g.*, Bird & Smythe, *supra* note 64; Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of* Fletcher v. Rylands *in the Gilded Age*, 110 YALE L.J. 333, 358–68 (2000) (discussing the influence that the Johnstown Flood may have had on the diffusion of strict liability under the rule of *Fletcher v. Rylands*, 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)).

74. Canon & Baum, *supra* note 45.

75. *Id.* at 975.

76. *Id.* at 977 tbl.1.

77. *Id.*

single influence on its innovativeness.[78] Otherwise, they found "no strong consistency over time in the innovativeness of state court systems."[79] Instead, the authors concluded, "[b]ecause courts are dependent upon litigants' demands, a strong element of idiosyncrasy governs the diffusion of tort doctrines."[80] A similar study identified some "regional leaders" and "regional followers" among state judiciaries,[81] but otherwise determined that "[i]t is possible that the adoption of tort doctrines is more idiosyncratic than other types of judicial innovations."[82]

D. Issues in the Study of the Diffusion of Tort-Law Innovations

This idiosyncrasy makes it impossible to craft a model that perfectly describes and predicts the diffusion of tort doctrines. Certainly, several of the factors identified as pertinent to the diffusion of innovations in general, such as the presence or absence of change agents and effective communication channels, seem relevant to the diffusion of innovations in tort law.[83] The basic diffusion model runs into particular difficulty,

78. *Id.* at 980 tbl.2. This observation was later refined by another author who observed, based on an empirical study of the spread of five doctrinal innovations, that "population is more strongly associated with the production of cases than with adoption of the innovations" implicated by these cases. Schmeling, *supra* note 63, at 154.

79. Canon & Baum, *supra* note 45, at 982.

80. *Id*. at 985.

81. Lutz, *supra* note 48, at 56–57.

82. *Id.* at 58.

83. *See* Dear & Jessen, *supra* note 67, at 708 (observing that the two most-followed cases within the studied era were torts cases); *see also* Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 386–87 (2008) (discussing the important roles that "agents" sometimes play in the demise of tort theories); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (arguing that academics played an important role in laying the foundation for broad acceptance of strict products liability in tort). *But cf.* Duncan J. Watts & Peter Sheridan Dodds, *Influentials, Networks, and Public Opinion Formation*, 34 J. CONSUMER RES. 441, 454 (2007) ("Under most conditions, we would argue, cascades do not succeed because of a few highly influential individuals influencing everyone else but rather on account of a critical mass of easily influenced individuals influencing other easy-to-influence people."). Certainly, modern courts do not reflexively embrace the wisdom of their peers. For example, the California Supreme Court, responsible for the two most followed cases in the Dear and Jessen study, also hatched the tort of "bad faith denial of contract." Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. of California, 686 P.2d 1158, 1167 (Cal. 1984). This tort was roundly criticized. *See, e.g.*, Oki Am., Inc. v. Microtech Int'l, Inc., 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring) ("In inventing the tort of bad faith denial of a contract, the California Supreme Court has created a cause of action so nebulous in outline and so unpredictable in application that it more resembles a brick thrown from a third story window than a rule of law." (citation omitted)). This din of criticism grew so loud that that the

however, when one tries to pinpoint those characteristics of a tort innovation that will facilitate or hinder its diffusion.

These characteristics may overlap but not completely coincide with those identified as pertinent to the diffusion of other types of innovations. Some of these basic qualities—such as greater "compatibility" with the surrounding legal, social, and political culture[84]—intuitively would seem to affect the fate of novel tort doctrines as well. But the diffusion of common-law innovations also depends on traits that have less impact in other contexts.[85] For example, while the diffusion of other innovations often presumes an immediate and infinite supply of a product or (especially) an idea, adoption within the common-law process requires that litigants come before courts with cases that present the innovation in a proper posture.[86] The limitations of these litigants, and of the system within which they operate, mean that these opportunities cannot be taken for granted. Instead, one of the characteristics of a tort innovation seemingly most pertinent to its diffusion concerns the "frequency" with which an innovation will appear before courts of precedent. In other words, certain doctrinal innovations will generate more adoption opportunities than others do. An innovation may claim this advantage because it has a close

California Supreme Court, with a somewhat different cast of justices, would repudiate the tort just over a decade later. Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 670 (Cal. 1995). Likewise, even the most respected treatises and other secondary resources in this area have had their hits and misses. *See* Domagala v. Rolland, 805 N.W.2d 14, 25–26 (Minn. 2011) (discussing the tepid reaction courts afforded to the RESTATEMENT (SECOND) OF TORTS § 321 (AM. LAW INST. 1965)); Geoffrey Christopher Rapp, *Torts 2.0: The Restatement 3rd and the Architecture of Participation in American Tort Law*, 37 WM. MITCHELL L. REV. 1582, 1590 (2011) (describing some provisions of the Restatement (Second) of Torts as "spectacular failures").

84. ROGERS, *supra* note 24, at 240.

85. The "frequency" factor that will be discussed in the text above does not exhaust the set of qualities potentially pertinent to the diffusion of tort doctrines. James Henderson has identified the "comprehensibility" of a doctrine, among other features, as relevant to its acceptance by courts. James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 911–13 (1982). A lack of comprehensibility may explain why the prima facie tort theory has not been broadly accepted. *See* RESTATEMENT (SECOND) OF TORTS § 870 (AM. LAW INST. 1979) (defining the prima facie tort); Ellen M. Bublick, *Economic Torts: Gains in Understanding Losses*, 48 ARIZ. L. REV. 693, 705 (2006) (observing that "very few states have latched on to the prima facie tort at all, let alone placed it in a significant role"). The breadth and vagueness of this tort have been blamed for its failure to catch on; one scholar has written that, if recognized, the "tort, like an open-mouthed whale taking in plankton, would ingest too much." Bublick, *supra*, at 705.

86. *See* Canon & Baum, *supra* note 45, at 985.

connection with commonly arising controversies;[87] because it is highly "visible" to litigants, counsel, and courts at the point of injury, allegation, or judicial review;[88] or because it costs little to assert and promises significant rewards.[89]

A more intractable problem associated with application of the standard model to the adoption of innovations in tort law concerns the indeterminacy of the concept of "relative advantage" in this context. *Diffusion of Innovations* identifies an innovation's relative advantage over its substitutes as one of the most important factors in the diffusion calculus.[90] But in the law, relative advantage vis-à-vis the status quo or alternative approaches is very much in the eye of the beholder.[91] An

87. *See infra* Part III.A.1.

88. It is difficult to pin down the precise circumstances that make some innovations or issues more "visible" or salient than others. In addition to the frequency with which an issue arises, a nonexhaustive list of potentially pertinent factors would include: (1) whether there exists a custom of recognizing a certain issue as suitable for presentation to the courts, *see* DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 122–23 (1991) (finding a marked difference in claiming tendencies between persons injured in automobile accidents and persons injured in different circumstances); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980–1981); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1099–1103 (1996); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183–86 (1992) (reviewing several studies regarding injury awareness and claiming patterns among prospective and actual plaintiffs); (2) the costs and benefits associated with the presentation of an issue to the court; (3) procedural matters, such as whether the issue is classified as one of law or one of fact; (4) whether the issue has a close connection to a factually compelling, notorious, or socially significant event, *see*, *e.g.*, RACHEL MAINES, ASBESTOS AND FIRE: TECHNOLOGICAL TRADE-OFFS AND THE BODY AT RISK 20 (2005) (discussing how disasters may whet the public's appetite for regulation and spark claim consciousness); Shugerman, *supra* note 73, at 373 (referencing "a growing body of scholarship contending that dramatic events produce legal change by making risks more 'salient' for the public"); (5) whether a "signature" set of facts, a label, or some other organizing or attention-getting device makes the issue or innovation relatively easy to recognize and recall, *see generally* CHIP HEATH & DAN HEATH, MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE (2007); W. Caroline West & Phillip J. Holcomb, *Imaginal, Semantic, and Surface-Level Processing of Concrete and Abstract Words: An Electrophysiological Investigation*, 12 J. COG. NEUROSCIENCE 1024, 1024 (2000) (discussing the processing advantage that "concrete" words have over "abstract" words); (6) whether the innovation implicates the interests of groups more likely to appreciate its importance, and aggressively pursue their interests in the courts; and (7) whether an innovation is one of several competing approaches to a perceived problem, or stands alone as an alternative to the status quo.

89. *See* Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 593–600 (2014) (discussing the cost-benefit calculations associated with claims for strict products liability in tort).

90. ROGERS, *supra* note 24, at 233.

91. *See id.* at 265.

advantage to a defendant in a tort lawsuit commonly spells a disadvantage to the plaintiff, and vice versa. Likewise, courts may disagree about the qualities of an innovation that confer upon it an "advantage" relative to substitutes.

The common lack of a consensus as to any relative advantage, together with other gaps and contingencies within the diffusion process, introduce an irreducible amount of uncertainty into the diffusion of innovations in tort law. The shifting prospects of tort claims for spoliation of evidence illustrate this unpredictability.[92] Back in 1997, a leading torts scholar identified spoliation as a "semisuccessful" new tort.[93] The tort's association with intuitions ingrained within several areas of the law, not merely the law of torts, was identified as a reason for its (qualified) success.[94] This assessment seemed wholly plausible at the time. But since then, spoliation of evidence has not fared well[95]:

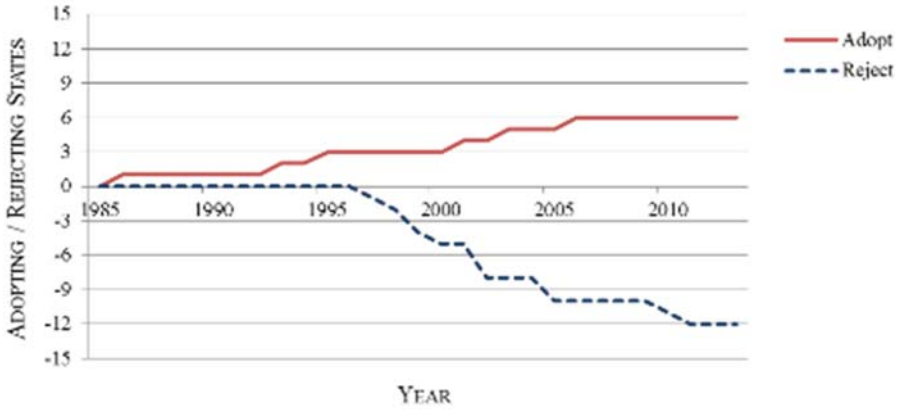
92. In general terms, a "spoliation of evidence" claim seeks damages for "the tampering with, loss of, or destruction of . . . potential evidence, when that destruction interferes with another party's civil action." Bart S. Wilhoit, Comment, *Spoliation of Evidence: The Viability of Four Emerging Torts*, 46 UCLA L. REV. 631, 633 (1998).

93. Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1549 (1997).

94. *Id.* at 1549–50.

95. *See infra* Chart II. Chart II reflects rejections by the supreme courts of Arizona (Lips v. Scottsdale Healthcare Corp., 229 P.3d 1008 (Ariz. 2010)); Arkansas (Goff v. Harold Ives Trucking Co., 27 S.W.3d 387 (Ark. 2000)); California (Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511 (Cal. 1998)); Florida (Martino v. Wal-Mart Stores, Inc., 908 So. 2d 342 (Fla. 2005)); Indiana (Gribben v. Wal-Mart Stores, Inc., 824 N.E.2d 349 (Ind. 2005)); Kansas (Superior Boiler Works, Inc. v. Kimball, 259 P.3d 676 (Kan. 2011)); Kentucky (Monsanto Co. v. Reed, 950 S.W.2d 811 (Ky. 1997)); Massachusetts (Fletcher v. Dorchester Mut. Ins. Co., 773 N.E.2d 420 (Mass. 2002)); Mississippi (Dowdle Butane Gas Co. v. Moore, 831 So. 2d 1124 (Miss. 2002)); Montana (Oliver v. Stimson Lumber Co., 993 P.2d 11 (Mont. 1999)); Nevada (Timber Tech Engineered Bldg. Prods. v. Home Ins. Co., 55 P.3d 952 (Nev. 2002)); and Texas (Trevino v. Ortega, 969 S.W.2d 950 (Tex. 1998)). (Montana does allow spoliation claims against third parties, however.) The adoptions that appear in the chart reflect the acceptance of these spoliation claims by the supreme courts of Alaska (Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986)); Connecticut (Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165 (Conn. 2006)); New Jersey (Rosenblit v. Zimmerman, 766 A.2d 749 (N.J. 2001)); New Mexico (Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995)); Ohio (Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993)); and West Virginia (Hannah v. Heeter, 584 S.E.2d 560 (W. Va. 2003)). Thus, the present scoreboard reads: six adopters, twelve rejecters, and only three adopters since 1995.

CHART II: JUDICIAL RECEPTION OF FIRST-PARTY INTENTIONAL SPOLIATION CLAIMS



Since 1997, more states have rejected the tort than have adopted it,[96] others have passed up opportunities to embrace it,[97] and the cause of action remains in limbo, with no pertinent high-court caselaw one way or the other, in many jurisdictions.[98] Regardless of the asserted virtues of the spoliation claim, its perceived drawbacks,[99] the availability of alternative sanctions for evidence destruction,[100] and a wait-and-see attitude among some jurisdictions have led to the stalled diffusion of this new tort.

E. This Study

Because of this inherent uncertainty, instead of offering a one-size-fits-all model for the diffusion of tort doctrines, the analysis presented here instead has the more modest goals of charting the diffusion

96. There exist four different types of recurring spoliation claims: negligent "first-party" spoliation; negligent "third-party" spoliation; intentional "first-party" spoliation; and intentional "third-party" spoliation. *See* Wilhoit, *supra* note 92, at 659–61 (discussing the various kinds of spoliation claims). None of these claims have found an especially broad audience.

97. *Cf.* Hills v. United Parcel Serv., Inc., 232 P.3d 1049, 1057–58 (Utah 2010) (declining to recognize a claim for *third*-party spoliation, at least on the facts of the case before it).

98. *E.g.*, Matsuura v. E.I. Du Pont De Nemours & Co., 73 P.3d 687, 706 (Haw. 2003).

99. *Cedars-Sinai Med. Ctr.*, 954 P.2d at 517–21 (discussing the perceived undesirable aspects of this tort).

100. *See Lips*, 229 P.3d at 1009–10 (discussing these alternatives).

patterns associated with numerous innovations, identifying trends that emerge from the studied data, and suggesting some explanations for and consequences of these tendencies. This analysis does not relate a wholesale endorsement or unalloyed application of diffusion research in the tort-law context. At the same time, the larger body of diffusion research, with some modifications to account for the circumstances and idiosyncrasies of common-law change, provides a basic framework and vocabulary for the task at hand.

As a starting point for its analysis, this Article maps the diffusion across the states of twenty "successful" common-law doctrinal innovations in tort law. The studied innovations consist of (1) strict products liability in tort;[101] (2) a "right to privacy" enforceable in tort;[102] (3) a cause of action for the negligent infliction of emotional distress, as triggered by witnessing physical harm befall another (also known as a "bystander" emotional-distress claim);[103] (4) a cause of action for wrongful discharge in violation of public policy;[104] (5) a claim for "loss of a chance" in the medical-malpractice context;[105] (6) the "learned intermediary" doctrine as a defense available to drug or medical-device manufacturers in a products-liability action;[106] (7) the "crashworthiness"

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101. As first recognized by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900 (Cal. 1963) and subsequently endorsed by the RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965). Since then, certain aspects of "strict" products liability have been reconciled with the same notions of "reasonableness" that inform the larger corpus of negligence law. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 reporters' note (AM. LAW INST. 1998).

102. Here, acceptance of one of the four privacy torts recognized in William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960), or an ancestor thereof, was regarded as an adoption.

103. A "bystander" claim for the negligent infliction of emotional distress involves recovery for "the mental distress which may result from the observation of a third person's peril or harm." Bovsun v. Sanperi, 461 N.E.2d 843, 846 (N.Y. 1984).

104. This sort of claim is "commonly predicated upon a specific and identifiable public policy against discharge on the particular facts of [a] case. . . . In most cases the employer fires the at-will employee for refusing to engage in illegal conduct, for blowing the whistle on the employer's illegal conduct, or for asserting her rights . . . ." DAN B. DOBBS, THE LAW OF TORTS § 454 (2000) (footnotes omitted).

105. One court has described this theory as follows:

> [T]he loss of chance doctrine views a person's prospects for surviving a serious medical condition as something of value, even if the possibility of recovery was less than even prior to the physician's tortious conduct. Where a physician's negligence reduces or eliminates the patient's prospects for achieving a more favorable medical outcome, the physician has harmed the patient and is liable for damages.

Matsuyama v. Birnbaum, 890 N.E.2d 819, 823 (Mass. 2008).

106. "Under the learned intermediary doctrine, the manufacturer of a pharmaceutical

doctrine in products-liability lawsuits;[107] (8) strict liability for damage associated with concussions from blasting operations;[108] (9) the "attractive nuisance" doctrine;[109] (10) the "Connecticut Rule," requiring that a premises owner exercise reasonable care when removing natural accumulations of snow and ice from their property;[110] (11) the "mode of operation" approach in slip-and-fall cases;[111] (12) the *MacPherson*

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product satisfies its duty to warn the end user of its product's potential risks by providing an adequate warning to a 'learned intermediary,' who then assumes the duty to pass on the necessary warnings to the end user." Centocor, Inc. v. Hamilton, 372 S.W.3d 140, 142 (Tex. 2012). A jurisdiction was regarded as having "adopted" this doctrine if it recognized the doctrine as available to the manufacturer of either a pharmaceutical product or a medical device.

107. "The 'second collision' or 'crashworthiness' doctrine allows an injured plaintiff to hold a manufacturer liable for a product defect that did not cause the initial accident but enhanced or aggravated the plaintiff's injuries." Barry Levenstam & Daryl J. Lapp, *Plaintiff's Burden of Proving Enhanced Injury in Crashworthiness Cases: A Clash Worthy of Analysis*, 38 DEPAUL L. REV. 55, 56–57 (1988) (footnote omitted).

108. *See* Dyer v. Me. Drilling & Blasting, Inc., 984 A.2d 210, 215–19 (Me. 2009) (discussing this rule).

109. This doctrine, as explained in the Restatement (Second) of Torts, provides that

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon land if:
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

RESTATEMENT (SECOND) OF TORTS § 339 (AM. LAW INST. 1965).

110. This rule requires possessors of land "to exercise reasonable care in preventing dangerous conditions in common areas due to accumulations of snow and ice," at least to invitees or others generally owed a duty of reasonable care. Papadopoulos v. Target Corp., 930 N.E.2d 142, 154 n.17 (Mass. 2010). Its nemesis is the so-called "Massachusetts Rule," which prescribes "that property owners owe no duty to remove natural accumulations of snow and ice." *Id.* at 146.

111. This approach provides that

> where an owner's chosen mode of operation makes it reasonably foreseeable that a

doctrine in products-liability cases;[112] (13) the "false light" privacy tort;[113] (14) abolition of the "completion and acceptance" rule;[114] (15) abolition or substantial modification of the "assumption of the risk" defense;[115] (16) repudiation of the "impact rule" limiting recovery for

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> dangerous condition will occur, a store owner could be held liable for injuries to an invitee if the plaintiff proves that the store owner failed to take all reasonable precautions necessary to protect invitees from these foreseeable dangerous conditions.

Sheehan v. Roche Bros. Supermarkets, Inc., 863 N.E.2d 1276, 1283 (Mass. 2007).

112. In *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), the New York Court of Appeals (through Justice Cardozo) rejected a "privity of contract" requirement in negligence actions involving defective products where "the nature of [the product] is such that it is reasonably certain to place life and limb in peril when negligently made." *Id.* at 1053. In this study, the Kentucky Supreme Court is regarded as the first adopter of this innovation, as that court previously had adopted a similar diminution of the privity requirement in products-liability lawsuits cast in negligence. *See* Olds Motor Works v. Shaffer, 140 S.W. 1047, 1051–52 (Ky. 1911).

113. The Restatement (Second) of Torts defines this tort as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

114. "Under the completion and acceptance doctrine, once an independent contractor finishes work on a project and the work has been accepted by the owner, the contractor is no longer liable for injuries to third parties, even if the work was negligently performed." Davis v. Baugh Indus. Contractors, Inc., 150 P.3d 545, 546 (Wash. 2007). In other words, "[h]istorically, after completion and acceptance, the risk of liability for the project belonged solely to the property owner." *Id.*

115. The Restatement of Torts defined assumption of the risk as follows:

> A person who knows that another has created a danger or is doing a dangerous act or that the land or chattels of another are dangerous, and who nevertheless chooses to enter upon or to remain within or permit his things to remain within the area of risk is not entitled to recover for harm unintentionally caused to him or his things by the other's conduct or by the condition of the premises, except where the other's conduct constitutes a breach of duty to him or to a third person and has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm.

RESTATEMENT OF TORTS § 893 (AM. LAW. INST. 1939). Beginning in the 1950s, courts began to abolish this doctrine, or significantly limit it. DOBBS, *supra* note 104, at § 211 (describing this development).

the negligent infliction of emotional distress;[116] (17) abolition of one or more of the distinctions drawn between invitees, licensees, and trespassers in premises-liability cases;[117] (18) abrogation of parental immunity, at least in connection with motor-vehicle accidents occasioned by negligence; (19) abrogation of interspousal immunity for negligence, in automobile cases or otherwise; and (20) the "economic loss" rule, as applied in cases involving defective or negligently made products.[118] Also, at appropriate junctures, this Article will consider the judicial adoption of other innovations, including but not limited to spoliation of evidence; the Restatement (Second) of Torts' formulation of the tort of intentional infliction of emotional distress;[119] the "discovery rule" for medical malpractice claims;[120] abrogation or limitation of governmental[121] and charitable immunities;[122] overturn of the rule barring recovery for injuries suffered *in utero*;[123] abolition of the

116. The "impact rule" bars recovery for the negligent infliction of emotional distress where said distress is not derived, in some way, from physical contact or injury to the plaintiff. *See* Osborne v. Keeney, 399 S.W.3d 1, 14–15, 14 n.39 (Ky. 2012) (discussing this rule).

117. Where recognized, these status-based classifications mean that possessors of land owe progressively diminishing duties to invitees, licensees, and trespassers. Some states have replaced these classifications with a "unitary" standard of reasonable care, while others have adopted a "modified" approach that regards only invitees and licenses as being owed a duty of reasonable care. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 cmt. a (AM. LAW. INST. 2012).

118. This rule "prevents the commercial purchaser of a product from suing in tort to recover for economic losses arising from the malfunction of the product itself, recognizing that such damages must be recovered, if at all, pursuant to contract law." Giddings & Lewis, Inc. v. Indus. Risk Insurers, 348 S.W.3d 729, 733 (Ky. 2011).

119. This provision provides, in pertinent part, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

120. "The discovery rule is the legal principle which, when applicable, provides that limitations run from the date the plaintiff discovers or should have discovered, in the exercise of reasonable care and diligence, the nature of the injury." Willis v. Maverick, 760 S.W.2d 642, 644 (Tex. 1988).

121. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 108 (1941) (discussing the broad recognition of this type of immunity as of 1941).

122. *See id.*

123. This rule has been summarized as follows:

> [A]t common law, in the absence of statute, prenatal injury affords no basis for an action in tort, in favor either of the child or its personal representative.
>
> This conclusion is predicated, it appears, on the assumption that a child en ventre sa mere has no juridical existence, and is so intimately united with its mother as to be a "part" of her and as a consequence is not to be regarded as a separate,

"heart balm" torts of alienation of affections,[124] criminal conversation,[125] and breach of promise to marry;[126] and the availability of "medical monitoring" damages based on as-yet unrealized increased risks of harm.[127] These innovations span several eras. Some first appeared in the mid-1800s, while others represent relatively recent developments. Most of these innovations benefitted tort plaintiffs, while a few aided defendants. All were adopted in most instances by courts, although other innovations, adopted primarily by legislatures, also will be discussed for purposes of reference and comparison. In all, this analysis considers the diffusion of more than thirty innovations in tort law—far from a complete recitation of the broad changes that have occurred in this field, but a respectable sample nevertheless.

Across the studied innovations, this analysis assigns specific meaning to three words: "successful," "innovation," and "adoption." Of these terms, the term "successful" is the simplest to define. As employed in this study, "successful" signifies an innovation that has been "adopted" (as that term is defined below) by twenty or more states.

As for "innovation," this Article uses a definition that other diffusion researchers have advanced: An innovation is a change or complement to existing doctrine "that is perceived as new by an individual or other unit of adoption."[128] Any study of "innovations" in tort law must concede some challenges in spotting when an innovation has emerged.[129] After all, "[t]he common law sometimes jumps, but often it creeps or bounces or slides incrementally; and the jumps (big

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distinct, and individual entity.

Bonbrest v. Kotz, 65 F. Supp. 138, 139 (D.D.C. 1946).

124. An alienation of affections claim alleges that the defendant has intentionally and wrongfully interfered with a marriage, thereby straining relations between the spouses. Graham, *supra* note 83, at 364.

125. This claim alleges that the defendant engaged in sexual intercourse with the plaintiff's spouse. No additional allegation of alienated affections is required for this claim to be actionable. *Id.* at 364, 364 n.22.

126. A plaintiff in a breach of promise to marry claim alleges that her or his former fiancé or fiancée failed to follow through upon an accepted promise of marriage. *Id.* at 364.

127. *See* D. Scott Aberson, Note, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 WM. MITCHELL L. REV. 1095 (2006) (explaining this theory of recovery).

128. ROGERS, *supra* note 24, at 12; *cf.* Hauser et al., *supra* note 41, at 687 (defining "innovation" as "the process of bringing new products and services to market.").

129. *See* ROGERS, *supra* note 24, at 12.

and small) are typically disguised as nonjumps."[130] Tort law is not exceptional in this respect, however. Incremental, erratic, and unpredictable development processes also appear with other ideas and products as to which diffusion research has proven useful. Just as a 20-mexapixel camera does not lose its status as an innovation simply because 10-mexapixel cameras already exist, an expressly "strict" theory of products liability in tort was regarded as innovative even by those judges who already had liberalized negligence doctrine so as to make it practically equivalent to strict liability in some situations.[131]

Finally, the word "adoption" admits to several possible definitions in this sphere.[132] This Article equates "adoption" with endorsement by a state's legislature or its highest court. Applying this definition, this Article does not include among a roster of adopters those jurisdictions where an innovation represents an accepted matter of trial-court practice, even without ratification by the state's legislature or its supreme court. Therefore, the analysis presented here likely undercounts the number of de facto adopters of many of the studied innovations. That said, this definition avoids the counting problems that would arise if some lesser standard, such as decisions by lower state courts or local federal courts (which are prone to conflict with one another, and are subject to review or reversal by state supreme courts), supplied the operative meaning for "adoptions."

This restrictive approach toward "adoption" reduces, but does not eliminate, the interpretive issues associated with this term. Ambiguities over whether and when an "adoption" has occurred can arise in numerous ways.[133] In each such instance, pinpointing the precise

130. Lawrence M. Friedman, *Losing One's Head: Judges and the Law in Nineteenth-Century American Legal History*, 24 LAW & SOC. INQUIRY 253, 255 (1999).

131. *See* Graham, *supra* note 89, at 573–79.

132. How one defines "adoption" can make a significant difference in the number of jurisdictions identified as adhering to a principle and when this acceptance is perceived as taking place. *See* State *ex rel.* Johnson & Johnson Corp. v. Karl, 647 S.E.2d 899, 903–05 (W. Va. 2007) (discussing discrepancies across various fifty-state surveys of the adoption of the "learned intermediary" doctrine).

133. For example, a judicial decision may refer to an innovation favorably, but not expressly adopt it; a decision may adopt a closely related innovation; a series of decisions may adopt an innovation in piecemeal fashion; a decision may endorse a broad principle that encompasses the innovation, but leave the door open for exceptions; a decision may appear to adopt the innovation in text susceptible to characterization as dicta; a decision may imply that the court has adopted an innovation, but never make its reasoning clear; a decision may dubiously interpret an earlier statute or decision as having adopted an innovation long before; a decision may apply an innovation without expressly adopting it, making it unclear whether

moment of adoption can incorporate a dollop of subjectivity. Most of the studied innovations, therefore, involve at least a few debatable adoption dates, and some innovations, such as the rule of strict liability for abnormally dangerous activities, had adoption paths so twisted, obscure, or carved out in bits and chunks that they were rejected as potential subjects of study. To accommodate the ambiguities that arise on the "adoption" front, this Article avoids premising any of its conclusions on isolated and debatable adoption decisions and instead focuses upon the broader trends illuminated by the data.

III. THE DIFFUSION OF INNOVATIONS IN TORT LAW

The text below charts and analyzes the diffusion paths associated with twenty significant innovations in tort law. As will appear, these innovations have diffused along different routes, which permit a degree of aggregation and generalization.

A. Innovation Patterns

The following chart depicts how long it has taken each of the studied innovations to attract its current cast of adopters.[134] For each innovation, the timeline commences with its first adoption by any state supreme court or state legislature, which is plotted as having occurred in year one:

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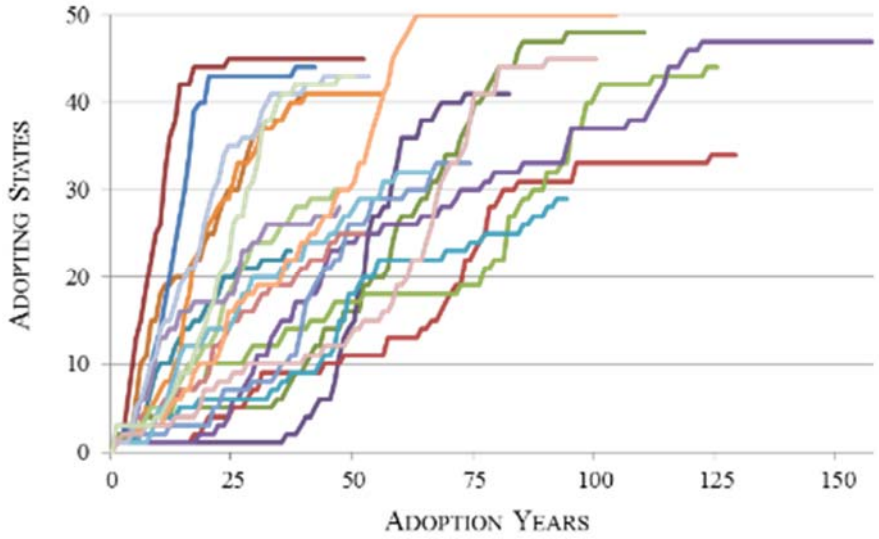
the adoption question was properly presented for review; a decision may decline to expressly adopt an innovation, but simultaneously refuse to repudiate case law from lower courts or local federal courts that accepted the reform; a decision may decline to adopt an innovation in a particular context, but use language that suggests that the court would endorse the innovation as applied elsewhere; a decision may say it has adopted an innovation, while the court's holding suggests otherwise; or it may do the opposite, claiming it has rejected an innovation, when its result seems to embrace the concept. Finally, in a few instances a state has adopted an innovation, then later rejected it (as where a statute effectively reverses an earlier court decision). In Colorado, for example, the legislature overturned the state supreme court's decision in *Mile High Fence Co. v. Radovich*, 489 P.2d 308, 314–15 (Colo. 1971), which had abrogated the invitee/licensee/trespasser classifications that had determined the duties owed to entrants upon the defendant's land. An Act Concerning Civil Actions Brought by Persons Injured While on the Property of Another, ch. 109, § 1, 1986 Colo. Sess. Laws 683. In this last sort of ambiguous "adoption" situation, due to this Article's focus upon the spread of ideas, an "adoption" is recognized upon the initial adoption and the later backtracking is ignored.

134. *See infra* Chart III. The data upon which this chart is based can be found in *infra* Appendix B.

CHART III: ADOPTIONS OVER TIME



This chart reveals the significant differences in adoption patterns across innovations. Strict products liability in tort represents the fastest-diffusing innovation within the sampled set. This doctrine took less than a quarter-century to attract its forty-five adherents.[135] At the other extreme lies the attractive nuisance doctrine, which first appeared in protean form as the "turntable doctrine" in the 1800s[136] and required more than a century to gain forty-five followers. The other innovations lie between these poles. The table below details how many years it took for each innovation to reach certain adoption milestones[137]:

135. A full recitation of these adoptions and their timing appears in Graham, *supra* note 89, at 577–78, 78 n.161.

136. The turntable doctrine was described this way by a contemporary court (which rejected the concept): "That a railroad company which maintains on its own ground a turntable, which, from its attractiveness to the eyes of children, or from its being adapted by its construction to provide for children an attractive thing to play upon, is bound to take reasonable care that they be not injured thereby." Turess v. N.Y., S. & W.R. Co., 40 A. 614, 614 (N.J. 1898); *see also* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 76 (1955) (discussing the doctrine); *Turn-Tables*, 27 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 344–49 (Charles F. Williams ed., 1895) (discussing the rule and citing decisions that applied it). For a memoir discussing the fun associated with turntable mischief, see R.L. DUFFUS, WILLIAMSTOWN BRANCH: IMPERSONAL MEMORIES OF A VERMONT BOYHOOD 99–100 (1958).

137. *See infra* Table I. The data upon which this table is based can be found in *infra*

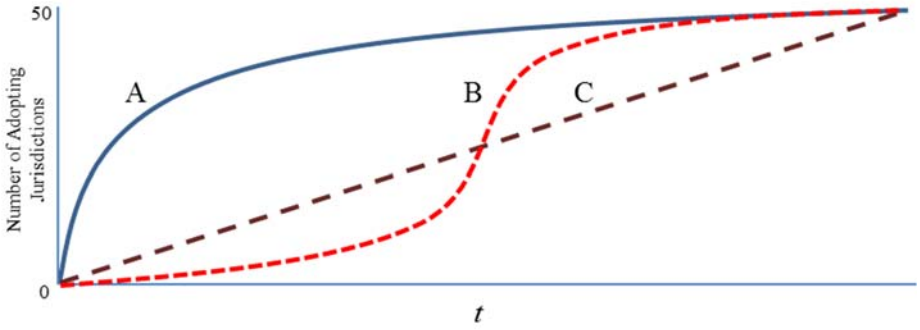
TABLE I: ADOPTIONS OF INNOVATIONS, IN YEARS

Innovation	**First Adoption**	**10 Adopters (Years)**	**20 Adopters (Years)**	**30 Adopters (Years)**
Attractive Nuisance	1858	30	44	72
Strict Liability (Blasting Concussions)	1886	44	73	81
Abrogation of Impact Rule	1890	20	76	86
Right to Privacy	1903	39	54	63
MacPherson Doctrine	1911	18	35	47
Abrogation of Interspousal Immunity	1914	28	61	68
Connecticut Rule (Premises Liability)	1921	43	52	N/A
Bystander NIED	1933	47	52	58
False Light	1941	35	43	61
Abrogation of "Completion and Acceptance" Rule	1949	14	29	56
Revision or Abolition of Assumption of the Risk Defense	1959	13	17	25
Strict Products Liability in Tort	1963	5	8	11
"Mode of Operation"	1963	21	38	N/A
Abrogation of Parental Immunity	1963	8	14	20
Economic Loss Rule	1965	17	22	28
Learned Intermediary (Drugs and Devices)	1967	16	26	46
Conflation of Invitee, Licensee, Trespasser Categories	1968	9	26	N/A
Crashworthiness	1969	6	13	24
Wrongful Discharge	1973	8	12	15
Loss of a Chance	1978	10	23	N/A

Appendix B.

The diffusion paths of the studied innovations can be disentangled to reveal three basic diffusion patterns. In idealized form, these patterns look like this:

CHART IV: BASIC ADOPTION CURVES



Each trajectory tells a different story. Curve A suggests a doctrinal invention that was quickly and widely accepted: an unqualified success. Curve B follows the "classic" s-curve model for the diffusion of innovations: slow acceptance at first, then a quickened pace as the concept reached and built upon a critical mass of adherents, and finally a leveling off as laggards either came into the fold, or did not. Finally, Line C depicts a doctrine that slowly, but steadily, gained broad acceptance.[138] The text below will discuss each of these patterns, and the innovations they pertain to, in more detail.

1. Rapid Diffusion

The first of these diffusion patterns (typified by Curve A as depicted in Chart IV) describes a sequence in which an innovation quickly attracts a large coterie of adherents. Among the studied common-law innovations, this pattern describes the diffusion trajectories of strict products liability in tort, the "crashworthiness" doctrine in automobile products-liability cases, the tort of wrongful termination in violation of public policy, the abolition or modification of the assumption of the risk defense, and the abolition of parental immunity for negligence in cases

138. Of course these patterns only depict the diffusion of successful innovations. Different patterns would appear if one also included *unsuccessful* innovations in the studied set.

involving motor vehicle accidents.[139] Each of these innovations collected at least twenty adopters within twenty years of its first adoption by a state supreme court.[140]

Even granting a significant degree of contingency within the diffusion process, each of these innovations also benefitted from circumstances and characteristics that predictably promoted its diffusion prospects. Among their beneficial qualities, all of these innovations admitted to numerous adoption opportunities. Sometimes this frequency owed to a close connection to commonly occurring events or accidents (such as car crashes) widely appreciated as providing grounds for a tort lawsuit.[141] Other quickly adopted doctrinal innovations cost little to pursue, promised substantial rewards, or both.[142] For example, the Restatement (Second) of Torts' definition of intentional infliction of emotional distress, which was not included within the studied set of innovations, also exhibited a rapid diffusion pattern.[143] One possible reason why many states quickly adopted the Restatement's approach involves the overlap between this tort (as styled by the Restatement) and other causes of action.[144] Because an intentional infliction of

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139. *See supra* Table I.

140. *See supra* Table I. This pattern is commonly found with the spread of successful statutory reforms with a bearing on tort law, such as workers' compensation laws, PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 103–04 tbl.4.3 (2000) (relating the enactment of workers' compensation statutes by every state between 1910 and 1948); "recreational use statutes" that limit the liability of landowners who make their property available for recreational uses, Stuart J. Ford, Comment, *Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges*, 1991 WIS. L. REV. 491, 498, 498–99 nn.24–26 (describing the adoption of recreational use statutes in all fifty states between 1953 and the 1980s); and automobile "guest statutes" that denied recovery to the non-paying "guests" of a negligent automobile driver, Stanley W. Widger, Jr., Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659, 659 (1974) (observing that these statutes were enacted in more than half of the states between 1927 and 1939). *See also* BOUSHEY, *supra* note 39, at 55 (describing the adoption trajectories of "successful" policy innovations that diffused through legislatures, as opposed to courts).

141. *See* HENSLER ET AL., *supra* note 88, at 121–23.

142. *See* Graham, *supra* note 83, at 388 (noting that some torts "incorporate procedural or substantive hurdles that make recovery almost impossible" and that litigants "turn their backs on claims that produce inadequate paydays").

143. More than thirty states adopted the Restatement (Second) of Torts' formulation of this tort between 1965 and 1984. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 reporter's note (AM. LAW INST. 2012) (discussing this trend).

144. Russell Fraker, *Refomulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 996–1000 (2008) (discussing the overlaps between intentional

emotional distress claim often arises out of facts that also generate other viable tort claims, it can be relatively cheap to "tack on" this cause of action to a tort lawsuit that would have been filed regardless.[145] This cost-effectiveness likely has increased the frequency with which this innovation has been alleged by plaintiffs and has appeared before courts of precedent.[146]

Fast-diffusing innovations also have tended to have good timing. Some capitalized upon the 1960–1980 window in which state supreme courts were particularly engaged with the reconstruction of tort doctrine.[147] Other innovations within this class represented important second-order responses to these changes.[148] For example, the adoption of comparative negligence by many states in the 1960s and the 1970s[149] necessitated the widespread reconceptualization of the assumption of the risk defense—a development that, as reflected on the chart below, swept through most of the states between the 1970s and the 1990s[150]:

infliction of emotion distress and other torts).

145. *See* Graham, *supra* note 83, at 388–89 (developing this argument).

146. *Cf.* Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 195–207 (2010) (discussing the problems associated with the integration of new torts into the ambient law and arguing that subtle integration issues loom especially large with "parasitic" torts that stand in the shadows of other claims).

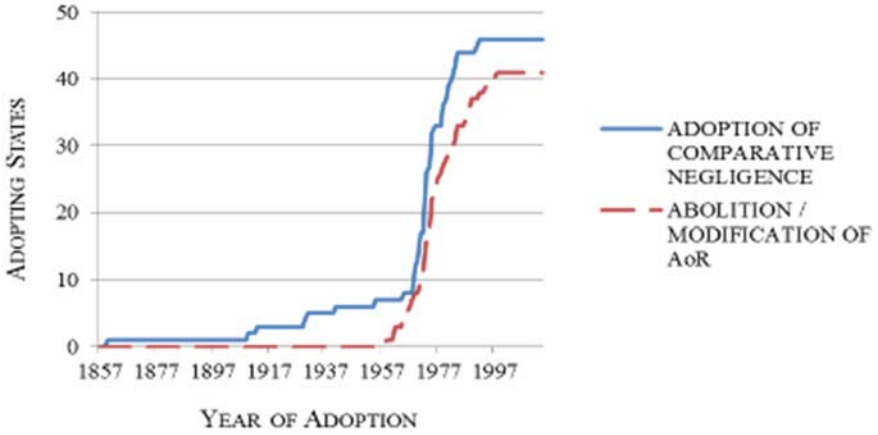
147. Schwartz, *supra* note 6, at 603.

148. *See, e.g.*, Graham, *supra* note 89, at 579; Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103 (2002).

149. *See* VICTOR E. SCHWARTZ & EVELYN F. ROWE, COMPARATIVE NEGLIGENCE §§ 1.04–1.05 (5th ed. 2010) (discussing the adoption of comparative negligence regimes by numerous states through statutes and court decisions during this span). The comparative negligence data within the chart in the accompanying text draws from the Schwartz text.

150. *See infra* Chart V. The data upon which this table is based appear in *infra* Appendix B.

CHART V: ADOPTION OF COMPARATIVE RESPONSIBILITY SCHEMES AND ABOLITION OR MODIFICATION OF THE ASSUMPTION OF THE RISK DEFENSE



With some of these innovations, several favorable circumstances aligned to promote rapid diffusion. Strict products liability in tort offers an example. This innovation benefitted from a lengthy incubation period between its conception in the early 1940s[151] and its first adoption by a court in 1963.[152] To borrow terminology from *Diffusion of Innovations*, during this period the ongoing liberalization of res ipsa loquitur doctrine in products cases and the erosion of the privity bar as it applied to warranty and negligence claims enhanced the "compatibility" of strict products liability in tort with existing law.[153] Meanwhile, William Prosser, Fleming James, and other academics acted as "change agents" throughout this era, using their scholarship to whet judges' appetites for doctrinal reform.[154] The Restatement (Second) of Torts served as an effective "communications channel" for Prosser's efforts.[155] Prosser used his pulpit as the reporter for the products-

151. *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 442–43 (Cal. 1944) (Traynor, J., concurring) (advocating a strict-liability approach in products cases); PROSSER, *supra* note 121, § 83 (same).

152. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963).

153. *See* Graham, *supra* note 89, at 568–79 (discussing these trends); *see also* Schwartz, *supra* note 6, at 641–42.

154. *See generally* Priest, *supra* note 83 (discussing the role that academics played in the development of the intellectual underpinnings for strict products liability in tort).

155. *See id.* at 512–18.

liability portion of this Restatement to compose a coherent set of strict-liability principles to govern these actions.[156] These rules took shape in a series of high-profile drafts that incrementally expanded the scope of tort liability as applied to products cases.[157] As ultimately promulgated within Section 402A of the Restatement (Second) of Torts, these provisions seemed to resolve the key practical problems that had been associated with the application of negligence and warranty law in lawsuits concerning defective products.[158] Meanwhile, by the mid-1960s, the notion of strict liability to the consumer dovetailed neatly with enhanced claim consciousness among prospective plaintiffs,[159] improved organization of the plaintiff's bar,[160] and an activist mindset prevalent among some state-court judges.[161] In other words, all of the relevant parties were relatively innovation prone.

As for the "relative advantage" of strict products liability, the perceived gains depended upon the viewer. As mentioned above, judges saw in strict products liability a possible solution to some of the nagging problems associated with the application of negligence and warranty law to the recurring case types of the 1950s and 1960s.[162] Judges also may have regarded adoption of a "pure" tort theory of strict products liability as signaling their participation in a common project involving the modernization of tort doctrine.[163] Plaintiffs' lawyers, meanwhile, appreciated the relatively low cost/high reward nature of the incremental products-liability tort claim. A claim alleging strict liability

156. *See* Graham, *supra* note 89, at 577–78.

157. *See id.* at 577–79. The history of strict products liability in tort hints that some rapid adoption patterns may be slightly modified versions of the s-curve diffusion sequence that will be discussed next. With strict products liability, two decades of discourse in the academic literature may have fulfilled the same "testing" or refinement purpose that other innovations have realized through adoption by a handful of pioneering states. In other instances, similar vetting can occur upon early adoption by a court not captured on the charts above, such as a lower state appellate court. The tort of wrongful discharge, for example, was first recognized by a California District Court of Appeal in 1959, Petermann v. Local 396, International Brotherhood of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959), fourteen years before its first adoption by a state supreme court. Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973).

158. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965); Graham, *supra* note 89, at 577.

159. Graham, *supra* note 89, at 585–92.

160. *Id*. at 593–600.

161. Schwartz, *supra* note 6, at 619.

162. Graham, *supra* note 89, at 600–13.

163. Priest, *supra* note 154, at 519; Schwartz, *supra* note 6, at 619, 641–42.

in tort could be added to an already viable warranty or negligence lawsuit, and thereby allow claimants to bring an additional defendant or defendants into the case, or otherwise enhance a plaintiff's odds of success.[164] For their part, defendants and their counsel were not necessarily enthusiastic about this development in the law but, by the early 1960s, may have regarded some doctrinal change as inevitable.[165] The confluence of these attitudes, attributes, and circumstances meant that even though it took some time for any state to take the initial leap and adopt strict products liability in tort, once the California Supreme Court became the first state to do so,[166] a tidal wave of adoptions soon followed.[167]

2. S-curve Diffusion

A second recurring diffusion pattern with tort innovations (as depicted by Curve B in Chart IV) resembles the pattern commonly associated with the spread of other types of innovations, from hybrid corn[168] to cell phones.[169] With this pattern, a slow initial diffusion rate picks up momentum once an innovation reaches a "critical mass" of adopters.[170] At that point, the adoption rate surges.[171] After a period of rapid diffusion, the pace of adoption tapers off, until only laggards and holdouts remain.[172] Within the studied cohort of innovations, this pattern describes the diffusion of "bystander" claims for the negligent infliction of emotional distress; strict liability for damage associated with concussions caused by blasting operations; recognition of a cause of action for infringement of a "right to privacy;" and a specific type of privacy claim, a "false light" cause of action.[173] This pattern also describes other innovations not included within the charted set of

164. Graham, *supra* note 89, at 598–99.

165. *See generally id.* at 593–600.

166. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963).

167. Graham, *supra* note 89, at 577–79 (discussing the timing of states' adoption of strict products liability in tort).

168. ROGERS, *supra* note 24, at 273.

169. *See Global ICT Developments*, INT'L TELECOMM. UNION, http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx [http://perma.cc/R3VR-49KP] (last visited Jan. 21, 2015) (depicting the growth in mobile-cellular telephone subscriptions between 2001 and 2014).

170. ROGERS, *supra* note 24, at 343–52.

171. *Id.* at 343–44.

172. *Id.* at 272–73.

173. *See supra* Table I.

innovations, such as the partial or wholesale rejection of charitable[174] and governmental[175] immunities and application of the "discovery rule" to medical malpractice claims.[176]

The diffusion of tort innovations can start slowly and then pick up pace for various reasons. Among them, the legal cultures or social, political, or economic circumstances of certain states may make them

174. A few states either reined in, or refused to recognize, charitable immunity in the early 1900s. Tucker v. Mobile Infirmary Ass'n, 68 So. 4 (Ala. 1915); St. Mary's Acad. v. Solomon, 238 P. 22 (Colo. 1925); Mulliner v. Evangelischer Diakonniessenverein of Minn. Dist. of German Evangelical Synod of N. Am., 175 N.W. 699 (Minn. 1920). A handful of states followed in the 1930s and 1940s. *E.g.*, Sheehan v. N. Country Cmty. Hosp., 7 N.E.2d 28 (N.Y. 1937); McLeod v. St. Thomas Hosp., 95 S.W.2d 917 (Tenn. 1936). A surge of similar decisions then appeared in the 1950s and 1960s. *See* Charles Glidden Johnson, *Charitable Immunity: A Diminishing Doctrine*, 23 WASH. & LEE L. REV. 109, 110 nn.4–5 (1966) (listing jurisdictions that had refused to recognize, or had limited or eliminated charitable immunity). It was only in this last period that a large cluster of states that had previously recognized charitable immunity decided to abolish the doctrine. *Id.* at 110 n.5.

175. This subject was rejected as a subject of close study because of the existence of numerous exceptions to the pre-existing rule of immunity (such as the so-called "propriety function" exception) and significant variation across the states regarding the scope of immunity that remains intact today. Even with these caveats, one can safely regard New York as a pioneer in the limitation of governmental immunity. There, a 1945 decision by the Court of Appeals construed a 1929 statute as limiting local governments' immunity from tort liability. Bernardine v. City of New York, 62 N.E.2d 604 (N.Y. 1945). A few states limited governmental immunity in the 1950s. *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Molitor v. Kaneland Cmty. Unit Dist., 163 N.E.2d 89 (Ill. 1959). But substantial movement on this front did not commence until 1961 when the supreme courts in California and Michigan took a similar step. Muskopf v. Corning Hosp. Dist., 359 P.2d 457 (Cal. 1961); Williams v. City of Detroit, 111 N.W.2d 1 (Mich. 1961). Over the next two decades, the supreme courts of more than twenty other states would pare back municipal immunity. Jackson v. City of Florence, 320 So. 2d 68 (Ala. 1975); Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962); Stone v. Ariz. Highway Comm'n., 381 P.2d 107 (Ariz. 1963); Parish v. Pitts, 429 S.W.2d 45 (Ark. 1968); Smith v. State, 473 P.2d 937 (Idaho 1970); Klepinger v. Bd. of Comm'rs, 239 N.E.2d 160 (Ind. Ct. App. 1968); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Davies v. City of Bath, 364 A.2d 1269 (Me. 1976); Whitney v. City of Worcester, 366 N.E.2d 1210 (Mass. 1977); Spanel v. Mounds View Sch. Dist., 118 N.W.2d 795 (Minn. 1962); Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977); Brown v. City of Omaha, 160 N.W.2d 805 (Neb. 1968); Walsh v. Clark Cty. Sch. Dist., 419 P.2d 774 (Nev. 1966); Merrill v. City of Manchester, 332 A.2d 378 (N.H. 1974); Hicks v. State, 544 P.2d 1153 (N.M. 1975); Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974); Ayala v. Phila. Bd. of Pub. Educ., 305 A.2d 877 (Pa. 1973); Becker v. Beaudoin, 261 A.2d 896 (R.I. 1970); Kelso v. City of Tacoma, 390 P.2d 2 (Wash. 1964); Long v. City of Weirton, 214 S.E.2d 832 (W. Va. 1975); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618, (1962); Oroz v. Bd. of Cty Comm'rs, 575 P.2d 1155 (Wyo. 1978). Other courts have since joined this trend, *e.g.*, McCall v. Batson, 329 S.E.2d 741 (S.C. 1985), while others have declined to do so, *e.g.*, Hillerby v. Town of Colchester, 706 A.2d 446 (Vt. 1997).

176. *See, e.g.*, Thatcher v. De Tar, 173 S.W.2d 760 (Mo. 1943) (rejecting the discovery rule in practice).

particularly susceptible to an innovation.[177] This small cadre of states may adopt the innovation well before others do.[178] S-curve patterns also may result from the impact that early adoptions can have on an innovation's prospects.[179] An initially rough-hewn doctrinal innovation may require the refinement that comes from vetting by multiple courts before it takes a form acceptable to a larger cohort of jurists.[180] Or a tort innovation may be too subtle to attract much attention until adopted by a leading court, or a substantial number of courts, at which point both litigants and courts may come to appreciate the innovation's existence and potential benefits.[181] A critical mass of adoptions also may kindle academic interest in a topic, a development that, on occasion, may produce scholarship that serves to clarify and publicize an innovation.[182]

Comparative negligence offers another example of an innovation with an s-curve diffusion pattern, albeit one where adoptions occurred mostly through state legislatures. Georgia enacted the first comparative negligence law in 1860.[183] This limited statute, applicable on its face only to claims brought against railroads,[184] was engrossed over time by the

177. *See* Canon & Baum, *supra* note 45, at 980–81.

178. *See* Appendix B.

179. *See* ROGERS, *supra* note 24, at 283 (observing that "[e]arly adopters help trigger the critical mass when they adopt an innovation").

180. This refinement may take the form of modifications that strip an innovation of its most objectionable features, that add new, ancillary innovations that temper the innovation's impact, or something else. For example, the "Connecticut Rule" has been blunted somewhat by recognition of the "storm in progress" doctrine, which provides a safe harbor to the Connecticut Rule's reasonable-care standard for the removal of natural accumulations of snow and ice by allowing landowners to postpone cleanup efforts for so long as a storm is ongoing. *See* Terry v. Cent. Auto Radiators, Inc., 732 A.2d 713, 717 (R.I. 1999); Connor Fallon, Note, *Premises Liability–Breaking News: It Snows in Massachusetts, and Snow is Slippery. Why Massachusetts Should Adopt the Storm in Progress Rule*, 34 W. NEW ENG. L. REV. 579 (2012).

181. *See* Schmeling, *supra* note 63, at 170 (observing that "as more courts adopt an innovation, attorneys become more likely to raise it in additional courts, and those courts become more likely to adopt the innovation").

182. *See id*. at 132 (observing that law review articles "may provide an important force in the diffusion of new legal doctrines to both attorneys and judges"). William Prosser's development of a taxonomy for the privacy torts represents perhaps the best example of a law professor imposing order on an unruly mass of judicial decisions, and thereby facilitating the adoption of newly clarified doctrines. *See generally* Prosser, *supra* note 102.

183. SCHWARTZ & ROWE, *supra* note 149, § 1.04[b][1]; *see also* Ernest A. Turk, *Comparative Negligence on the March* (pt. 2), 28 CHI.-KENT L. REV. 304, 327–28 (1950) (describing the murky history of this law).

184. As enacted, the law provided:

> No person shall recover damage from a railroad company, for injury to himself or

Georgia Supreme Court so as to create a general comparative negligence regime within that state.[185] Mississippi was the next state to adopt comparative negligence, in 1910.[186] As of 1968, only five other jurisdictions had followed these states' lead.[187] The shift to comparative negligence represented a major doctrinal leap, which many states were understandably hesitant to take. Over the next two decades, however, more than three dozen other states switched from contributory negligence to some sort of comparative negligence system.[188] This "take-off" occurred at a point at which earlier adoptions had "auditioned" the innovation sufficiently for other, more cautious courts and legislatures to better assess its benefits and drawbacks, allowing them to learn from the experiences of early adopters.[189] Courts and legislators also could weigh the advantages and disadvantages of the different types of comparative negligence frameworks that had emerged.[190] Furthermore, realization of a critical mass of adherents meant that individual states could draw from a collective pool of caselaw, produced by the courts of many states, addressing the numerous novel legal issues implicated by comparative negligence schemes.[191] The existence of this body of law reduced the disruption attendant in the switch to comparative fault and thereby muffled one argument for retaining the status quo.

In other instances, an s-curve diffusion pattern has appeared when an innovation languished in obscurity until it was adopted by a leading court, or a large enough number of courts so as to raise its profile and trigger a spurt of additional adoptions. The s-curve pattern associated

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> his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him.

H. CLARK ET AL., THE CODE OF THE STATE OF GEORGIA § 2979 (1861). Though published in 1861, this code was approved by the legislature in 1860, to take effect in 1862. *Id.* at iv.

185. SCHWARTZ & ROWE, *supra* note 149, § 1.05[a][2].

186. Act of Apr. 16, 1910, ch. 135, § 1, 1910 Miss. Laws 125, 125.

187. These states were Wisconsin, South Dakota, Nebraska, Arkansas, and Maine. SCHWARTZ & ROWE, *supra* note 149, § 1.04[b][3]–[4], [6].

188. Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence*, 40 IND. L. REV. 1, 6 (2007).

189. *See* ROGERS, *supra* note 24, at 283.

190. *See* Best, *supra* note 189, at 11–15 (referencing the differences that existed across the comparative negligence regimes established by early adopters).

191. *See id.* at 6–7, 7 n.35.

with diffusion of the "discovery rule" for the accrual of a medical-malpractice cause of action, for example, began with the subtle initial unveiling of this innovation. This rule originated in 1917, when the Maryland Court of Appeals observed that a patient's cause of action for malpractice would accrue only when the patient knew, or reasonably should have known, of his or her injury.[192] But the court's decision in *Hahn v. Claybrook* discussed this point only in passing terms, and held that the plaintiff's claim failed in any event.[193] Unsurprisingly, other courts took little notice of such an offhand "adoption," which very well might have slipped off a thoughtless clerk's pen.[194] There also existed several other approaches to the statute of limitations problems addressed by the discovery method, a crowd that further diminished this innovation's profile.[195] As a result, as late as 1960, only two other state supreme courts had expressly adopted variants of this rule.[196]

In the 1960s, however, the discovery approach became the subject of an apparent "trend," with several states adopting this principle in rapid succession. A 1961 decision by the New Jersey Supreme Court specifically and conspicuously adopted an accrual date for medical malpractice claims tied to the patient-plaintiff's actual or constructive discovery of his or her harm and its cause.[197] A barrage of decisions from other state high courts soon followed. Nebraska[198] and Oklahoma[199] adopted a discovery-based approach in 1962 (though the

192. Hahn v. Claybrook, 100 A. 83 (Md. 1917).

193. *Id.* at 86.

194. Only in 1957 did an enterprising law student read *Hahn* carefully and identify it as the first decision to apply a discovery-based approach to the accrual issues that often arose in malpractice cases. John E. Stanfield, Note, *The Statute of Limitations in Actions for Undiscovered Malpractice*, 12 WYO. L.J. 30, 34 (1957).

195. Other jurisdictions favored alternative approaches to accrual problems when they arose in medical-malpractice cases (with cases implicating this problem often involving the deposit of a foreign object in the plaintiff during or after surgery), such as reliance upon the continuing violations doctrine or the doctrine of fraudulent concealment. *E.g.*, Morrison v. Acton, 198 P.2d 590, 595–96 (Ariz. 1948); Gillette v. Tucker, 65 N.E. 865, 870 (Ohio 1902). In yet another approach, a few courts allowed plaintiffs to allege malpractice as a breach of contract and thereby avail themselves of a longer limitations period. *E.g.*, Sellers v. Noah, 95 So. 167 (Ala. 1923).

196. Huysman v. Kirsch, 57 P.2d 908, 910–13 (Cal. 1936); City of Miami v. Brooks, 70 So. 2d 306 (Fla. 1954). In 1943, the Missouri Supreme Court suggested that the discovery rule was consistent with its state's statute of limitations but more fulsomely endorsed the continuing, wrong approach. *See* Thatcher v. De Tar, 173 S.W.2d 760 (Mo. 1943).

197. Fernandi v. Strully, 173 A.2d 277, 285–86 (N.J. 1961).

198. Spath v. Morrow, 115 N.W. 2d 581 (Neb. 1962).

199. Seitz v. Jones, 370 P.2d 300 (Okla. 1962).

Oklahoma decision also sounded in fraudulent concealment); Kansas,[200] Louisiana,[201] and Michigan[202] did the same in 1963. The last of these decisions also became the first to describe the plaintiff's-knowledge approach as the "discovery rule."[203] In 1964, the Idaho Supreme Court conducted a thorough survey of all the approaches taken to the statute of limitations issue in medical malpractice cases, and chose to adopt the discovery rule.[204] In 1965, the West Virginia Supreme Court would write, "We believe that the 'discovery rule' . . . represents a distinct and marked trend in recent decisions of appellate courts throughout the nation."[205] Between 1966 and 1969, this increasingly palpable "trend" would attract another ten states.[206]

The rapid diffusion of the discovery rule upon "take-off" hinged on the existence of a substantial volume of malpractice cases that presented this issue for review, and the availability and willingness of state high courts to entertain this issue. As detailed below, these circumstances are not always present with tort innovations, leading to slower and steadier diffusion patterns.

3. Steady Diffusion

A third pattern (Curve C in Chart IV) reflects diffusion at a steadier rate than that found in the other sequences. This pattern may result from persistently rare adoption opportunities, evenly pitched arguments for and against an innovation, or other circumstances that prevent a burst of adoptions within a short window.[207]

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200. Act of Feb. 27, 1963, ch. 303, § 60-513, 1963 Kan. Sess. Laws 601, 695.

201. Phelps v. Donaldson, 150 So. 2d 35 (La. 1963).

202. Johnson v. Caldwell, 123 N.W.2d 785 (Mich. 1963).

203. *Id.* at 791.

204. Billings v. Sisters of Mercy of Idaho, 389 P.2d 224, 227–32 (Id. 1964).

205. Morgan v. Grace Hospital, Inc., 144 S.E.2d 156, 162 (W. Va. 1965).

206. Layton v. Allen, 246 A.2d 794 (Del. 1968); Yoshizaki v. Hilo Hospital, 433 P.2d 220 (Haw. 1967); Chrischilles v. Griswold, 150 N.W.2d 94 (Iowa 1967); Flanagan v. Mount Eden Gen. Hosp., 248 N.E.2d 871 (N.Y. 1969); Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968); Berry v. Branner, 421 P.2d 996 (Or. 1966); Wilkinson v. Harrington, 243 A.2d 745 (R.I. 1968); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967); Christiansen v. Rees, 436 P.2d 435 (Utah 1968); Fraser v. Weeks, 456 P.2d 351 (Wash. 1969).

207. Relatively steady diffusion patterns also appear with innovations not included within the studied set. For example, between 1964 and 2005, more than twenty states rejected one or more of the exceptions, as found at the RESTATEMENT (SECOND) OF TORTS §§ 413–416, 427 (AM. LAW INST. 1965) to the general rule that the hirer of an independent contractor is not vicariously liable to an employee of the contractor. *See* Morris v. City of Soldotna, 553 P.2d 474 (Alaska 1976); Jackson v. Petit Jean Elec. Co-op., 606 S.W.2d 66 (Ark. 1980);

Some innovations simply do not generate enough adoption opportunities to allow for rapid diffusion across the states. One innovation that may have relatively low "frequency" in this respect is the "loss of a chance" theory for recovery for medical malpractice.[208] This theory recognizes a lost chance of a better patient outcome as a cognizable injury, even if the physical harm complained of by the plaintiff more likely than not would have occurred even without the doctor's negligence.[209] About twenty state supreme courts have adopted "loss of a chance,"[210] while approximately half as many have rejected it.[211] In other words, more than thirty-five years after its first adoption in 1978,[212] almost half of all state high courts have yet to decide whether

Privette v. Superior Court, 854 P.2d 721 (Cal. 1993); Fla. Power & Light Co. v. Price, 170 So. 2d 293 (Fla. 1964); Peone v. Regulus Stud Mills, Inc., 744 P.2d 102 (Idaho 1987); Dillard v. Strecker, 877 P.2d 371 (Kan. 1994); King v. Shelby Rural Elec. Coop. Corp., 502 S.W.2d 659 (Ky. 1973); Rowley v. Mayor of Baltimore, 505 A.2d 494 (Md. 1986); Vertentes v. Barletta Co., 466 N.E.2d 500 (Mass. 1984); Conover v. N. States Power Co., 313 N.W.2d 397 (Minn. 1981); Zueck v. Oppenheimer Gateway Props., Inc., 809 S.W.2d 384 (Mo. 1991); Wells v. Stanley J. Thill & Assocs., Inc., 452 P.2d 1015 (Mont. 1969); Anderson v. Nashua Corp., 519 N.W.2d 275 (Neb. 1994); Sierra Pac. Power Co. v. Rinehart, 665 P.2d 270 (Nev. 1983); Whitaker v. Norman, 551 N.E.2d 579 (N.Y. 1989); Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445 (N.D. 1994); Curless v. Lathrop Co., 583 N.E.2d 1367 (Ohio Ct. App. 1989); Wilson v. Portland Gen. Elec. Co., 448 P.2d 562 (Ore. 1968); Metzger v. J.F. Brunken & Son, Inc., 169 N.W.2d 261 (S.D. 1969); Thompson v. Jess, 979 P.2d 322 (Utah 1999); Tauscher v. Puget Sound Power & Light Co., 635 P.2d 426 (Wash. 1981); Peneschi v. Nat'l Steel Corp., 295 S.E.2d 1 (W. Va. 1982); Wagner v. Cont'l Cas. Co., Wis.2d 379, 421 N.W.2d 835, 143 (1988); Jones v. Chevron U.S.A., Inc., 718 P.2d 890 (Wyo. 1986); *see also* PSI Energy, Inc. v. Roberts, 829 N.E.2d 943 (Ind. 2005) (following this trend); DeShambo v. Nielsen, 684 N.W.2d 332 (Mich. 2004) (same). Likewise, since the early 1970s, more than twenty state supreme courts have recognized a cause of action against hospitals for "negligent credentialing." Brookins v. Mote, 292 P.3d 347, 361 n.6 (Mont. 2012).

208. *See* Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 LAW & SOC'Y REV. 105 (1990); Frank A. Sloan & Chee Ruey Hsieh, *Injury, Liability, and the Decision to File a Medical Malpractice Claim*, 29 LAW & SOC'Y REV. 413 (1995).

209. Matsuyama v. Birnbaum, 890 N.E.2d 819, 828–35 (Mass. 2008) (discussing this theory of recovery).

210. *See infra* Appendix B.

211. Gooding v. University Hosp. Bldg., Inc. 445 So. 2d 1015 (Fla. 1984); Manning v. Twin Falls Clinic & Hosp., Inc., 830 P.2d 1185 (Idaho 1992); Fennell v. S. Md. Hosp. Ctr., Inc., 580 A.2d 206 (Md. 1990); Ladner v. Campbell, 515 So. 2d 882 (Miss. 1987); Pillsbury-Flood v. Portsmouth Hosp., 512 A.2d 1126 (N.H. 1986); Jones v. Owings, 456 S.E.2d 371 (S.C. 1995); Kilpatrick v. Bryant, 868 S.W.2d 594 (Tenn. 1993); Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397 (Tex. 1993); Smith v. Parrott, 833 A.2d 843 (Vt. 2003).

212. Some authors have identified the United States Court of Appeals for the Fourth Circuit's decision in *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966), as the wellspring of the loss-of-a-chance doctrine. In that medical malpractice case brought under the Federal Tort Claims Act, the court observed:

they accept the doctrine, including the courts of last resort in California and New York.[213]

The diffusion of "loss of a chance" has not been unusually slow for a common-law innovation, but it has been much slower than, for example, the diffusion of strict products liability in tort.[214] And it seems unlikely that loss of a chance could ever trigger a series of rapid-fire adoptions in the same manner that strict products liability in tort once did. This difference owes in part to a relative lack of opportunities for adoption of the loss of a chance theory, a circumstance that may be associated with the subtlety of the lost-chance claim in the eyes of would-be plaintiffs. Given that this doctrine's utility lies in situations where the plaintiff's or decedent's tangible injury *already* was more probably than not going to occur even without any negligence on the part of the defendant-physician,[215] it seems likely that some potential plaintiffs, already conditioned to accept a bad outcome, overlook the possibility of this sort of claim.[216] Other facts also limit this issue's "observability." A loss-of-a-chance claim requires fairly precise probabilistic estimates of survival (or of a more positive result) with and without the doctor's negligence.[217] These figures may not exist in a given case, or they may be available but be consistent with a "normal" malpractice claim that

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> When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable.

Id. at 632. But it took a while for this idea to pique the interest of very many courts. The first significant cluster of courts to adopt the doctrine did so in the early 1980s, shortly after the *Yale Law Journal* published an article on the topic. Joseph H. King, Jr., *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981).

213. *See* Bromme v. Pavitt, 7 Cal. Rptr. 2d 608, 618 (Cal. App. 1992) ("California does not recognize a cause of action for wrongful death based on medical negligence where the decedent did not have a greater than 50 percent chance of survival had the defendant properly diagnosed and treated the condition." (footnote omitted)); Wild v. Catholic Health System, 991 N.E.2d 704, 706 (N.Y. 2013) (regarding a party as having forfeited the opportunity to have the court consider this issue).

214. *See supra* Table I.

215. Matsuyama v. Birnbaum, 890 N.E.2d 819, 829–30 (Mass. 2008).

216. For discussions about patients' ability to recognize and act upon malpractice claims, see May & Stengel, *supra* note 208; Sloan & Hsieh, *supra* note 208.

217. *See* Fennell v. S. Md. Hosp. Ctr., Inc., 580 A.2d 206, 213–14 (Md. 1990) (describing the evidence associated with "loss of a chance" claims).

plaintiffs regard as preferable to pursuit of a more contentious and uncertain theory.

With other innovations, slow diffusion may represent the result of a wait-and-see attitude among courts. Unlike "loss of a chance," there has been no shortage of premises-liability claims that state supreme courts could use as vehicles to jettison the tripartite invitee/licensee/trespasser framework for ascertaining the duties owed to entrants.[218] Yet this innovation also has had a relatively slow and steady diffusion rate.[219] The California Supreme Court was the first state high court to wholly reject these classifications in its 1968 decision in *Rowland v. Christian*.[220] Most courts in other states responded cautiously to the *Rowland* decision.[221] The categorization of entrants was well-established in the law, and the tiered standards of care it prescribed for possessors of land resonated with many judges.[222] And so, only about half of the states have adopted either the *Rowland* approach, or even a compromise rule that eradicates only the distinction between invitees and licensees (a result achieved by elevating the duty

218. *See* CAROL J. DEFRANCES ET AL., BUREAU OF JUSTICE STATISTICS, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 2 (1995), http://www.bjs.gov/content/pub/pdf/cjcavilc.pdf [http://perma.cc/B22X-YTXX] (showing that premises-liability cases were the second most common type of tort case disposed of across a 75-county set between July 1991 and June 1992).

219. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 reporter's note (AM. LAW. INST. 2012) (relating state-by-state adoption dates for what the Restatement describes as the "unitary" and "modified" approaches to premises liability).

220. 443 P.2d 561, 568 (Cal. 1968). *Rowland* was not the first authority to reject at least portions of the invitee/licensee/trespasser classification. As far back as 1957, a decision by the Louisiana Court of Appeals repudiated the distinction between invitees and licensees—albeit in dicta. Alexander v. Gen. Accident Fire & Life Assurance Corp., 98 So. 2d 730, 734 (La. Ct. App. 1957). Later, a 1959 United States Supreme Court decision refused to engraft these classifications upon admiralty law, Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631 (1959), and a 1963 Connecticut statute eliminated the distinction that had been drawn between social invitees and business invitees, An Act Concerning Duty of Reasonable Care to Social Invitee, Pub. Act No. 575, 1963 Conn. Pub. Acts 812.

221. *See*, *e.g.*, Werth v. Ashley Realty Co., 199 N.W.2d 899, 907 (N.D. 1972) (declining to endorse the *Rowland* approach "until additional time has elapsed in which experience can be gained"). Other courts flatly rejected *Rowland*. Mooney v. Robinson, 471 P.2d 63, 65 (Idaho 1970); Astleford v. Milner Enters., Inc., 233 So. 2d 524, 525–26 (Miss. 1970).

222. *E.g.*, *Mooney*, 471 P.2d at 65; *Astleford*, 233 So. 2d at 525–26; Carter v. Kinney, 896 S.W.2d 926, 930 (Mo. 1995) ("We are not persuaded that the licensee/invitee distinction no longer serves.").

owed to the latter to one of reasonable care).[223] No "take-off" in adoptions has ever emerged.[224]

Judicial circumspection on this subject has been facilitated by the exceptions that most states recognize to the invitee, licensee, and trespasser classifications.[225] By invoking an exception, a hesitant court can accommodate its sympathy to a plaintiff in a particular premises-liability case, while ducking the broader issue of whether to retain or reject the classifications—safe in the knowledge that cases that turn on these distinctions are common enough that additional opportunities to revisit the issue certainly will appear in the future.[226] This escape valve has drawn out the adoption process in some states. The Iowa Supreme Court, for example, avoided the *Rowland* issue in at least four separate cases before it ultimately abolished the invitee-licensee distinction, and only that distinction, in 2009.[227] In a 1971 case, the issue was not properly presented for review, although one justice still would have considered it;[228] in a 1972 case, the judges found that the child-trespasser exception applied to the case before them, obviating the classification issue;[229] in a 1977 case, the court dodged the issue as not having been raised appropriately;[230] and in 1998, a plurality would have eliminated all three classifications, replacing them with a general duty of reasonable care,[231] but the court could not muster a majority on the issue.[232] Ultimately, in eradicating the divide between invitees and licensees, the Iowa court seized on a refinement that other courts had made to the *Rowland* approach.[233] So modified, this innovation continues to slowly attract adherents, the most recent being Vermont in 2014.[234]

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223. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 51 reporter's note (AM. LAW. INST. 2012).

224. *See id.*

225. *See* DOBBS, *supra* note 104, at §§ 232, 236 (discussing these exceptions).

226. *E.g.*, Gildo v. Caponi, 247 N.E.2d 732, 736 (Ohio 1969) (noting the issue but remaining "convinced that a just measure of judicial restraint requires that this question be deferred to a later day and to another case").

227. Koenig v. Koenig, 766 N.W.2d 635, 641–43 (Iowa 2009).

228. Ives v. Swift & Co., 183 N.W.2d 172, 178–79 (Iowa 1971) (Becker, J., concurring).

229. Rosenau v. City of Estherville, 199 N.W.2d 125, 135–36 (Iowa 1972).

230. Champlin v. Walker, 249 N.W.2d 839, 842 (Iowa 1977).

231. Sheets v. Ritt, Ritt & Ritt, Inc., 581 N.W.2d 602, 606 (Iowa 1998).

232. *See id.* at 607 (Ternus, J., concurring in the result).

233. The first state supreme court to adopt this modified form of the *Rowland* innovation was *Peterson v. Balach*, 199 N.W.2d 639 (Minn. 1972).

234. Demag v. Better Power Equip., Inc., 102 A.3d 1101, 1110 (Vt. 2014).

Finally, an absence of a sustained surge in adoptions across the states may owe to the fact that with some innovations, express adoption by all states may be unnecessary to create what is recognized as a nationwide rule. When an innovation overturns an existing rule, for example, the number of potential adopters may be no greater than the headcount of jurisdictions that formerly subscribed to the superseded principle.[235] Furthermore, when an apparent consensus on behalf of an innovation has emerged through an unbroken stretch of adoptions across several states, the tail end of a diffusion pattern can lag as litigants in other jurisdictions incorporate the rule into courtroom practice even without an express endorsement of the principle by their local appellate courts. For example, the *MacPherson* doctrine, which drastically limited the need for privity of contract as a prerequisite for a negligence claim in a products-liability action, was widely understood to represent a universal rule well before several states expressly adopted it.[236] Once this

235. This sort of dynamic appeared with judicial rejection of the old rule that no remedy lay for injuries suffered by a fetus *in utero*. Once the twenty or so states that had adopted this rule backtracked from it, it was clear that no other state court, for which the issue was one of first impression, would somehow turn back the clock and embrace a principle roundly repudiated elsewhere. Huskey v. Smith, 265 So. 2d 596 (Ala. 1972); Tucker v. Howard L. Carmichael & Sons, Inc., 65 S.E.2d 909 (Ga. 1951); Amann v. Faidy, 114 N.E.2d 412 (Ill. 1953); Hale v. Manion, 368 P.2d 1 (Kan. 1962); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Damasiewicz v. Gorsuch, 79 A.2d 550 (Md. 1951); Keyes v. Constr. Serv., Inc., 165 N.E.2d 912 (Mass. 1960); Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949); Steggall v. Morris, 258 S.W.2d 577 (Mo. 1953); Poliquin v. MacDonald, 135 A.2d 249 (N.H. 1957); Smith v. Brennan, 157 A.2d 497 (N.J. 1960); Woods v. Lancet, 102 N.E.2d 691 (N.Y. 1951); Mallison v. Pomeroy, 291 P.2d 225 (Or. 1955); Sinkler v. Kneale, 164 A.2d 93 (Pa. 1960); Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966); Shousha v. Matthews Drivurself Serv., Inc., 358 S.W.2d 471 (Tenn. 1962); Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); Seattle-First Nat'l Bank v. Rankin, 367 P.2d 835 (Wash. 1962); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107, 110 (1967). The decision in *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946) is generally recognized as the leading case in this reform movement, but two state appellate courts previously had recognized a right to recover for injuries suffered *in utero*. Scott v McPheeters, 92 P.2d 678 (Cal. Dist. Ct. App. 1939); Cooper v. Blanck, 39 So. 2d 352 (La. Ct. App. 1923). The *Cooper* decision, oddly enough, was not published until 1949, a circumstance that obviously limited the visibility of its holding.

236. *Compare* William L. Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) (stating that the *MacPherson* decision had "swept the country" and "with the barely possible but highly unlikely exceptions of Mississippi and Virginia, no American jurisdiction now refuses to accept it" (footnotes omitted)), *with* R.D. Hursh, Annotation*, Privity of Contract as Essential to Recovery in Negligence Action Against Manufacturer or Seller of Product Alleged to Have Caused Injury*, 74 A.L.R.2d 1111, 1205–26 (1960) (surveying the law of the fifty states as to the *MacPherson* rule, finding that multiple states (e.g., Colorado and South Dakota) had no decisions squarely on point by state appellate courts, and omitting certain states altogether (e.g., Alaska, North Dakota, and Wyoming), apparently due to a lack of pertinent decisions).

principle had diffused fairly broadly, litigants in laggard states no doubt assumed that their own courts would come into the fold when they had the opportunity to do so. These parties may have incorporated this assumption into their litigating positions, with defendants in products-liability actions conceding that a lack of privity of contract would not defeat the plaintiff's negligence claims.[237] These concessions tended to delay the explicit adoption of the *MacPherson* rule by late-coming states because the issue was not often presented by litigants.[238] In fact, in some states the *MacPherson* rule ultimately was adopted only *sub silentio* by a court's adoption of a broader, superseding innovation—strict products liability to the consumer.[239]

4. Other Patterns

Another diffusion trajectory does not appear within the studied set, but also occurs from time to time. A few innovations have a "tiered" diffusion pattern, which incorporates multiple surges in adoption rates. The abolition of the "heart balm" torts of alienation of affections, criminal conversation, and breach of promise to marry all exhibit this pattern[240]:

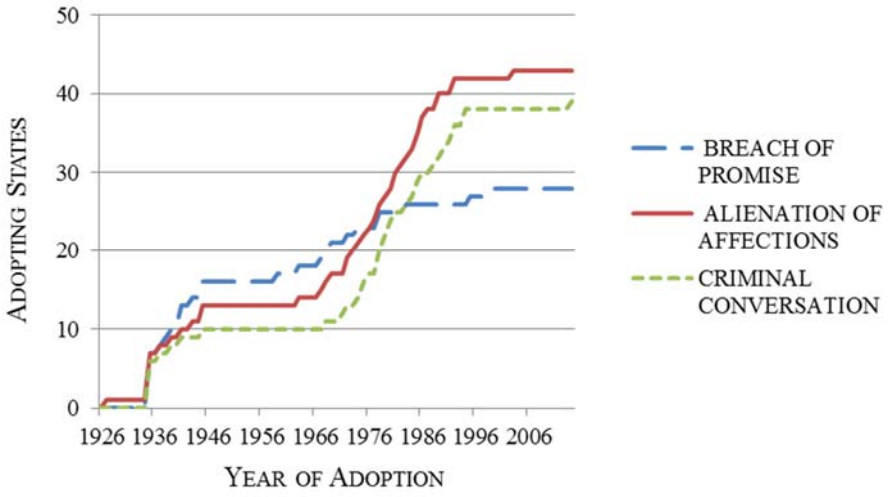
237. *Cf. Egbert v. Nissan N. Am., Inc.* 167 P.3d 1058, 1063 (Utah 2007) (noting the defendant's concession regarding the applicability of the "crashworthiness" doctrine").

238. *See*, *e.g.*, *id.*

239. *E.g.*, Engberg v. Ford Motor Co., 205 N.W.2d 104, 109 (S.D. 1973) (adopting strict products liability in tort).

240. *See infra* Chart VI. The data upon which this chart is based appear in *infra* Appendix B.

CHART VI: ABOLITION OF ALIENATION OF AFFECTIONS, CRIMINAL CONVERSATION, AND BREACH OF PROMISE TO MARRY



The patterns in Chart VI bespeak two policy windows in which conditions aligned in favor of these torts' abolition. The first such movement coalesced in the 1930s.[241] This campaign allied critics of these causes of action who saw the torts as shovels in the hands of greedy "gold diggers" (a perception fostered by several well-publicized cases)[242] with female legislators who regarded the torts as perpetuating the stereotype of women as helpless victims in romantic affairs.[243] These activists secured the abolition of at least one of these torts in more than a dozen states through legislation enacted between 1935 through 1945.[244] Legislative interest in this topic soon waned, however, leading to a slower pace of diffusion through the mid-1960s.[245] By the end of this

241. *See* Graham, *supra* note 83, at 412–16 (discussing the circumstances that led to the first campaign against these torts). In that piece, these torts, together with the action for seduction, were referred to as "heart balm" torts. *E.g.*, *id*. at 406. There appears to be a division of opinion as to whether "heartbalm" (one word) or "heart balm" (two words) represents the correct term to describe these torts. *Compare* Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935), *with* Note, *Avoidance of the Incidence of the Anti-Heartbalm Statutes*, 52 COLUM. L. REV. 242 (1952). To indicate the author's neutrality on this topic, this Article uses "heart balm."

242. Graham, *supra* note 83, at 417.

243. *Id.* at 416–18.

244. *Id.* at 418–19, 419 n.382.

245. *Id.* at 419–22.

span, lawsuits alleging heart balm torts had become uncommon in the diminished set of jurisdictions that still recognized these claims.[246]

The second, more recent push to abolish the heart balm torts has capitalized upon their increasing rarity and obscurity. This second drive, more gradual and less headline-driven than the first, has condemned the torts as archaic relics of an earlier age in which wives represented their husbands' property, divorces were difficult to obtain, a woman was spoiled by premarital sex, and you could indeed put a price tag on love.[247] Upon these arguments, since the mid-1960s more than two dozen states have abolished the tort of alienation of affections, almost as many have eliminated criminal conversation, and about half as many have rid themselves of claims for breach of promise to marry.[248] In other states, these torts (especially criminal conversation) are moribund without ever having been formally abolished.[249] In these jurisdictions, litigants and lawyers either have forgotten about the heart balm torts, or anticipate that local judges will follow the broader trend toward abolition if given the opportunity and therefore decline to pursue seemingly dead-on-arrival causes of action.[250]

5. Conclusions: Interactive Aspects of the Diffusion Process

The discussion above establishes a few points concerning the diffusion of doctrinal innovations in tort law. First, "successful" innovations in this sphere diffuse along different trajectories. Second, although the basic model for the diffusion of innovations cannot be transplanted wholesale into this context, various aspects of this framework nevertheless can provide a useful vocabulary in accounting for the contours of specific adoption sequences. Third, it seems likely that the idiosyncrasies of the common-law process tend to inhibit, although they do not necessarily prevent, realization of the s-curve pattern often associated with the diffusion of other types of successful innovations, or the even steeper diffusion curve often associated with the diffusion of successful statutory policy innovations.

The data also disclose some basic parameters for the diffusion of innovations in tort law. For example, the fastest-diffusing common-law

246. *Id.* at 422–25.
247. *Id.* at 425–29.
248. *Id.* at 425–28.
249. *Id.* at 429.
250. *Id.* at 428–30.

innovation, strict products liability in tort, spread at a rate of approximately three states per year for a decade and a half before its diffusion tapered off. Given the almost perfect combination of surrounding circumstances that facilitated the diffusion of this doctrine, this rate may represent a best-case scenario for the long-term diffusion of tort doctrines through the courts.

Perhaps most interestingly, these diffusion patterns reveal certain dynamic qualities of common-law change, whereby early adoptions of tort innovations can influence the choices made by other potential adopters later in the diffusion process. To collect and build upon observations made in the preceding text, early acceptances of an innovation may encourage emulation by later actors in a variety of ways. Among them, these adoptions may (1) reshape the innovation into a more attractive form;[251] (2) create a pool of caselaw regarding the innovation from which multiple jurisdictions can draw; (3) reduce the available caselaw elaborating alternative approaches; (4) assure laggard courts that the innovation does not produce unwelcome or unanticipated consequences when put in practice;[252] (5) raise the innovation's profile among both litigants and courts;[253] (6) enhance the reputational risks associated with rejecting an innovation, and decrease the analogous perils tied to acceptance (such as limiting the risk that

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251. *See* Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115 J. POL. ECON. 43 (2007) (developing the "Cardozo Theorem" for beneficial legal evolution through the refinement of a rule by biased judges).

252. *See* Osborne v. Keeney, 399 S.W.3d 1, 18 (Ky. 2012) (observing, in the course of abandoning the "impact rule" for recovery for the negligent infliction of emotional distress, "that there has been no noticeable flood of litigation in other jurisdictions that have adopted a similar rule"). Similarly, in 1972 the Supreme Court of North Dakota declined to abolish the distinctions between invitees, licensees, and trespassers. The court observed:

> [W]e are of the opinion that until additional time has elapsed in which experience can be gained in California, Hawaii, Colorado, and other states which may have abandoned the distinctions based upon the status of the entrant upon the land, we should not abandon those distinctions which in our state have been reasonably useful in the past.

Werth v. Ashley Realty Co., 199 N.W.2d 899, 907 (N.D. 1972). Five years later, that court eliminated the distinctions between invitees and licensees but (following the emerging trend) retained the distinct trespasser classification. O'Leary v. Coenan, 251 N.W.2d 746 (N.D. 1977).

253. As one study of state supreme courts has observed, "the respectability that doctrinal changes gain through their acceptance by sister courts requires a state supreme court to hear the cases in which they are proposed and to give the changes serious consideration." TARR & PORTER, *supra* note 9, at 243.

members of an adopting court will be perceived as "judicial activists");[254] and (7) increase the actual, as opposed to merely reputational, costs of holdout status.[255]

Early adoptions also may create an "informational cascade" said to arise "when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others."[256] Such a cascade is associated with "herding behavior" among courts, whereby later actors view the acceptance of innovations by peer courts as bespeaking information not otherwise apparent to them. Specifically, prior adoptions may be regarded by latecomers as

254. With "a reputational cascade," "individuals do not subject themselves to social influences because others may be more knowledgeable. Rather, the motivation is simply to earn social approval and avoid disapproval." Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685–86 (1999); *see also* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13, 15 (1993) ("[P]restige is unquestionably an element of the judicial utility function," and "a potentially significant element in the judicial utility function is reputation, both with other judges . . . and with the legal profession at large."). This dynamic would tend to draw courts toward an emerging consensus, for "a judge may fear that he is not as skilled as his [peers], and therefore may attempt to 'hide' within existing precedent, believing that if the policy it represents is eventually exposed as improvident, it is much better to fail within a group than to do so alone." Talley, *supra* note 12, at 128.

255. In *Blankenship v. General Motors Corporation*, for example, the West Virginia Supreme Court felt compelled to adopt the "crashworthiness" principle for automobile design because so many other jurisdictions already had done so:

> In light of the fact that all of our sister states have adopted a cause of action for lack of crashworthiness, General Motors is *already* collecting a product liability premium every time it sells a car anywhere in the world, including West Virginia. West Virginians, then, are already paying the product liability insurance premium when they buy a General Motors car, so this Court would be both foolish and irresponsible if we held that while West Virginians must pay the premiums, West Virginians can't collect the insurance after they're injured.

Blankenship v. Gen. Motors Corp., 406 S.E.2d 781, 784–85 (W. Va. 1991) (citation omitted); *see also* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1386–87 (2006) (discussing "spillover effects" associated with the adoption of rules by state courts).

256. Kuran & Sunstein, *supra* note 254, at 685–86; *see also* Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 992 (1992) ("An informational cascade occurs when it is optimal for an individual, having observed the actions of those ahead of him, to follow the behavior of the preceding individual without regard to his own information."); Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158 (1999) (explaining herding behavior among peer courts); Sophie Harnay & Alain Marciano, *Judicial Conformity Versus Dissidence: An Economic Analysis of Judicial Precedent*, 23 INT'L REV. L. & ECON. 405 (2004); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAVIOR & ORG. 31 (1994).

increasing the odds that adoption represents the "correct" result.[257] While the precise influence of these cascades is debatable,[258] the diffusion data reveal that it has been rare for a late-coming court to break from an emerging consensus regarding an issue of first impression.[259] When the West Virginia Supreme Court became the first state high court to snub the "learned intermediary" doctrine in 2007,[260] for example, it felt compelled to downplay the number of past adopters, perhaps to make its decision seem at least slightly less aberrant.[261]

Less often, a contrary dynamic also can appear whereby early adoptions repel or deter emulation. The above analysis explains why adoption dynamics can cause the law of the fifty states to converge.[262] It therefore may come as a surprise that most innovations claim persistent "holdouts"—jurisdictions that have refused to adopt an otherwise well-accepted doctrinal change. Even if one recognizes a "holdout" only where a state has squarely rejected an innovation (as opposed to never having expressly considered it), holdouts presently exist to otherwise widely adopted innovations such as comparative negligence,[263] strict products liability in tort,[264] the "false light" privacy tort,[265] claims for

257. Daughety & Reinganum, *supra* note 256, at 180–81 (relating a model of herding behavior).

258. Talley offers a skeptical assessment of informational cascades, concluding that "[w]hile it is certainly *possible* for precedent to manifest some cascade-like characteristics, the necessary conditions for such phenomena to occur appear somewhat implausible." Talley, *supra* note 12, at 92. Talley cites to "long-standing institutional practices within the judiciary—such as long judicial tenures, written opinions, and . . . hierarchical appeals process" as "tend[ing] to reduce the likelihood of a 'bad' precedential cascade." *Id.*

259. There are exceptions, of course, such as the recent rejection of the otherwise well-accepted "baseball rule," which limits the liability of the proprietors of baseball teams for spectator injuries, by the supreme courts of Idaho, Rountree v. Boise Baseball, LLC, 296 P.3d 373, 377–79 (Idaho 2013), and Indiana, S. Shore Baseball, LLC v. DeJesus, 11 N.E.3d 903, 909 (Ind. 2014).

260. State *ex rel.* Johnson & Johnson Corp. v. Karl, 647 S.E.2d 899, 914 (W. Va. 2007).

261. *See id.* at 903–04.

262. For a thoughtful discussion of doctrinal convergence as it pertains to states' decisions to adopt or reject "no-fault" automobile insurance schemes, see Engstrom, *supra* note 22, at 371–79.

263. *See* SCHWARTZ & ROWE, *supra* note 149, § 1.01 (identifying Alabama, Maryland, North Carolina, and Virginia as states that continue to apply contributory negligence).

264. *See* DAVID G. OWEN, PRODUCTS LIABILITY LAW 281–85 (2d ed. 2008) (discussing the status of Delaware, Massachusetts, Michigan, North Carolina, and Virginia as holdouts against strict products liability in tort).

265. *E.g.*, Denver Publ'g Co. v. Bueno, 54 P.3d 893, 901–03 (Colo. 2002); Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1105–14 (Fla. 2008).

wrongful discharge,[266] the "attractive nuisance" doctrine,[267] and the learned intermediary rule,[268] among others.[269] Other holdout jurisdictions have refused to join trends to abolish rules such as the "completion and acceptance" doctrine;[270] the "impact" requirement for recovery for negligent infliction of emotional distress;[271] charitable,[272] inter-spousal,[273] and parental immunities;[274] assumption of the risk;[275] and the tort of alienation of affections.[276]

These holdouts can appear for any of several reasons. Most obviously, courts may have principled and adamant disagreements with the majority of their peers over the desirability of an innovation, either in general[277] or as applied to their state.[278] Or these courts may disagree

266. Scott Rosenberg & Jeffrey Lipman, *Developing a Consistent Standard for Evaluating a Retaliation Case Under Federal and State Civil Rights Statutes and State Common Law Claims: An Iowa Model for the Nation*, 53 DRAKE L. REV. 359, 395–414 (2005) (surveying state law on wrongful discharge and identifying Alabama, Florida, Georgia, Maine, New York, and Rhode Island as holdouts that have not yet recognized, or refuse to recognize, a cause of action for wrongful discharge).

267. *See*, *e.g.*, Baisley v. Missisquoi Cemetery Ass'n, 708 A.2d 924, 926 (Vt. 1998) (observing that Vermont has never recognized the attractive nuisance doctrine); Herring v. Christensen, 249 A.2d 718, 719 (Md. 1969) (declining to recognize the attractive nuisance doctrine).

268. State *ex rel.* Johnson & Johnson Corp. v. Karl, 647 N.E.2d 899, 914 (W. Va. 2007).

269. Such as the "firefighter rule," Ruiz v. Mero, 917 A.2d 239, 245–46 (N.J. 2007); Christensen v. Murphy, 678 P.2d 1210, 1218 (Or. 1984); Minnich v. Med-Waste, Inc., 564 S.E.2d 98, 103 (S.C. 2002), and strict liability under the rule of *Rylands v. Fletcher*, Moulton v. Groveton Papers Co., 289 A.2d 68, 72 (N.H. 1972); Turner v. Big Lake Oil Co., 96 S.W.2d 221 (Tex. 1936).

270. Bragg v. Oxford Constr. Co., 674 S.E.2d 268, 269 (Ga. 2009) (retaining this rule).

271. *See* Osborne v. Keeney, 399 S.W.3d 1, 14 n.39 (Ky. 2012) (listing jurisdictions that continue to recognize the "impact" requirement).

272. Picher v. Roman Catholic Bishop, 974 A.2d 286, 290–94 (Me. 2009) (surveying the law of other states regarding charitable immunity).

273. GA. CODE ANN. § 19-3-8 (LexisNexis 2014).

274. *See* Mitchell v. Davis, 598 So. 2d 801, 803–04 (Ala. 1992) (describing the state's acceptance of the doctrine of parental immunity as applied to negligence claims).

275. *See* Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 482 S.E.2d 569, 573 (S.C. Ct. App. 1997) (identifying holdouts against abolition or substantial modification of the assumption of the risk defense), *aff'd*, 508 S.E.2d 565 (S.C. 1998).

276. Fitch v. Valentine, 959 So. 2d 1012, 1035–36 (Miss. 2007) (Dickinson, J., concurring) (listing the states that have abolished and retained the tort of alienation of affections).

277. State *ex rel.* Johnson & Johnson Corp. v. Karl, 647 S.E.2d 899, 914 (W. Va. 2007) (declining to adopt the learned-intermediary exception to the duty to warn of a danger associated with a product).

278. *See* Turner v. Big Lake Oil Co., 96 S.W.2d 221, 225–26 (Tex. 1936) (explaining its rationale for rejecting the strict-liability rule of *Rylands v. Fletcher*).

as to whether it is proper for the judiciary, as opposed to the legislature, to adopt an innovation.[279] Holdouts also may result from aleatory circumstances, such as inopportune timing.[280] A jurisdiction may reject a principle at an early stage of its diffusion, and then either lack opportunities to revisit this stance or feel bound by stare decisis or reliance interests to maintain this objection. And some holdouts simply involve jurisdictions that have selected a somewhat different doctrinal solution to a commonly recognized problem, as sometimes occurs when pioneers in one generation of reform become laggards in the next.[281]

Finally, some jurisdictions embrace holdout status as symbolically significant. In certain instances, broad acceptance of an innovation elsewhere may enhance the salience, or alter the meaning, of an issue within straggler states. For instance, North Carolina has not abolished the tort of alienation of affections, as all of its neighbors have.[282] The Tar Heel State likely could have made this leap without much fuss a few decades ago, around the time South Carolina,[283] Virginia,[284] and Tennessee[285] did. But for whatever reason it did not. Meanwhile, the repudiation of alienation of affections by other states drew attention to the tort in the handful of jurisdictions where it remained in place.[286] Ensuing efforts to justify the tort's existence imbued it with meaning

279. *Compare* Coleman v. Soccer Ass'n of Columbia, 69 A.3d 1149, 1156–57 (Md. 2013) (declining to abolish contributory negligence in the face of legislative inaction), *with* Li v. Yellow Cab Co., 532 P.2d 1226, 1232 (Cal. 1975) (abolishing contributory negligence).

280. *See Coleman*, 69 A.3d at 1157–58.

281. *See* Graham, *supra* note 89, at 614–18 (discussing how several states that adopted broad warranty protections at a relatively early juncture lagged in recognizing strict products liability in tort).

282. Jean M. Cary & Sharon Scudder, *Breaking up Is Hard to Do: North Carolina Refuses to End Its Relationship with the Heart Balm Torts*, 4 ELON L. REV. 1, 2, 16–19 (2012) (discussing efforts to abolish alienation of affections); *Infidelity & Alienation of Affection*, ROSEN LAW FIRM, http://www.rosen.com/divorce/divorcearticles/alienation-of-affection-and-criminal-conversation/?hvid=4mwM3F [http://perma.cc/8R66-5XTQ] (last visited Jan. 21, 2015) (estimating that approximately two hundred alienation of affections lawsuits are filed annually in North Carolina).

283. Act of Mar. 21, 1988, No. 391, § 1, 1988 S.C. Acts 2783, 2783 (abolishing the tort of criminal conversation); Russo v. Sutton, 422 S.E.2d 750, 754 (S.C. 1992) (abolishing the tort of alienation of affections).

284. Act of Apr. 5, 1968, ch. 716, § 1, 1968 Va. Acts 1259, 1259 (abolishing the torts of alienation of affections, criminal conversation, and breach of promise to marry).

285. Act of May 1, 1990, ch. 1056, § 1, 1990 Tenn. Pub. Acts 773, 773–74 (abolishing the tort of criminal conversation); Act of June 2, 1989, ch. 517, § 1, 1989 Tenn. Pub. Acts 902, 902 (abolishing the tort of alienation of affections).

286. *See* JOHN RUSTIN & JERE Z. ROYALL, PROTECTING MARRIAGE: 10 GOOD REASONS TO PRESERVE MEANINGFUL TORT LAWS (2002).

that was not so apparent or deeply felt when many other states also recognized this cause of action.[287] Today, efforts to abolish alienation of affections within North Carolina are condemned as contrary to the "family values" that this formerly picayune tort supposedly protects.[288] By retaining the tort, North Carolina can express (at modest cost) its devotion to an ideal seemingly rejected almost everywhere else.[289]

B. Diffusion Patterns over Time

At this point, this Article will transition into a discussion of the diffusion patterns of the studied innovations across historical eras. When plotted over the period from 1857 (the year before the first adoption of one of the studied innovations) to the present, the diffusion patterns of the twenty studied doctrines look like this[290]:

287. Bland v. Hill 735 So. 2d 414, 422 (Miss. 1999) (Smith, J., concurring).

288. *See* Tracy Rose, *The Price of Illicit Love*, MOUNTAIN XPRESS (Mar. 29, 2000), https://mountainx.com/news/community-news/0329alienation-php/ [http://perma.cc/7JQH-3YGX] (discussing the perception that legislators who would vote to abolish alienation of affections within that state would be cast as hostile to "family values").

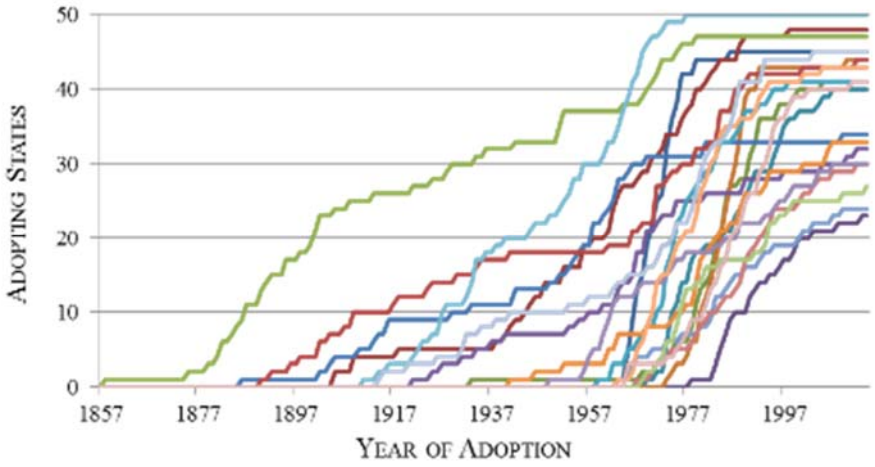
289. Similarly, when in 1999 the Mississippi Supreme Court rejected a plaintiff's plea to add Mississippi to the roster of states that had abolished the tort of alienation of affections, one justice wrote a special concurrence to convey his dismay with the path taken in many other states. *Bland*, 735 So. 2d at 421 (Smith, J., concurring). The justice wrote, "The traditional family is under such attack both locally and nationally these days that this Court should not retreat now from the sound view of the tort of alienation of affections." *Id*. at 422. Referencing the dissent's call for abolition of the tort, he later added:

> The dissent states that this tort serves no legitimate purpose whatsoever in modern society, but rather, has simply been extended past its time. This is somewhat akin to the view that "everybody else is doing it, so should I." While I agree that it appears society's moral values have changed during modern times, I do not believe Mississippi should get aboard this runaway train.

Id.

290. *See infra* Chart VII. The data upon which this chart is based appear in *infra* Appendix B.

CHART VII: AGGREGATE ADOPTION PATTERNS, 1857 TO PRESENT



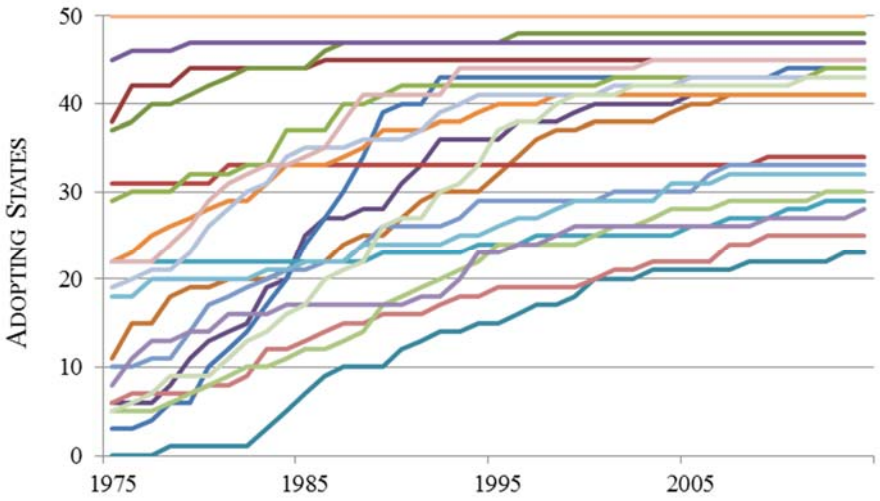
This chart illustrates the importance of opportune historical moments in the evolution of tort doctrine. The chart reflects a significant upsurge in adoption rates from the 1960s through the 1980s, the period in which state courts were particularly engaged with the reform of tort doctrine through the overturn of hoary rules and the subsequent reevaluation of several "second-order" principles, such as the assumption of the risk defense.[291]

This trend toward faster diffusion has since slowed down. A closer focus upon the period from 1975 to the present reveals that the diffusion of the studied innovations has leveled off[292]:

291. *See* Green, *supra* note 148 (using the phrase "ripple effects" in discussing the various second-generation issues raised in jurisdictions that switched from contributory to comparative negligence).

292. *See infra* Chart VIII. The data upon which this chart is based appear in *infra* Appendix B.

CHART VIII: ADOPTIONS OVER TIME, 1975 TO PRESENT



To quantify this pattern, the period from 1975 to 1984 saw 177 adoptions of the studied innovations; from 1985 to 1994, 145; from 1995 to 2004, 55; and from 2005 to 2014, only 25.[293]

This slowdown has affected more than merely the studied cluster of innovations. The slower diffusion rates observed within the cohort of innovations discussed above could be attributed to the simple fact that many of these innovations were adopted by a significant number of states long ago, limiting the number of recent adoption opportunities. But the trend toward slower diffusion is affecting more than merely the innovations of yesteryear. Going beyond the sampled set, even the most "successful" common-law innovations of recent vintage also have spread only slowly. In addition to spoliation of evidence, discussed earlier, the innovations and issues most commonly addressed by state high courts over the past two decades include the viability of freestanding "medical monitoring" claims,[294] the proper measure of damages for medical

293. Although few commentators identify the 1980s as a period of substantial doctrinal change, many of the studied innovations gained more than ten new adopters during this decade. These adoptions often involved laggard states coming into the fold, adopting an innovation that already qualified as "successful" due to a large number of earlier adoptions.

294. Decisions by state supreme courts that have ruled one way or the other on this issue include Hinton *ex rel.* Hinton v. Monsanto Co., 813 So. 2d 827 (Ala. 2001); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795 (Cal. 1993); Wood v. Wyeth-Ayerst Labs., 82

expenses when billed rates are subject to negotiated discounts within health-insurance compacts,[295] the "any exposure" rule in asbestos cases,[296] whether an employer or premises owner owes a duty to a family member of an employee or visitor when the family member becomes sick due to asbestos that the employee or visitor brought home with them,[297] and the status of the "sophisticated user" defense in products-liability actions.[298] Of these issues, since 2000 only the dispute over accounting for negotiated health-insurance discounts has generated an

S.W.3d 849 (Ky. 2002); Bourgeois v. A.P. Green Indus., Inc., 783 So. 2d 1251 (La. 1998) (overturned by statute, 1999 La. Acts 2661); Exxon Mobil Corp. v. Albright, 71 A.3d 44 (Md. 2013); Donovan v. Philip Morris USA, Inc., 914 N.E.2d 891, 901–03 (Mass. 2009); Henry v. Dow Chem. Co., 701 N.W.2d 684 (Mich. 2005); Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1 (Miss. 2007); Meyer v. Fluor Corp., 220 S.W.3d 712 (Mo. 2007); Badillo v. Am. Brands, Inc., 16 P.3d 435 (Nev. 2001); Ayers v. Township of Jackson, 525 A.2d 287 (N.J. 1987); Caronia v. Philip Morris USA, Inc., 5 N.E.3d 11 (N.Y. 2013); Lowe v. Philip Morris USA, Inc., 183 P.3d 181, 187 (Or. 2008); Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993); Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424 (W. Va. 1999).

295. The courts that have addressed this issue this millennium include Stayton v. Del. Health Corp., 117 A.3d 521 (Del. 2015); Kenney v. Liston, 760 S.E.2d 434 (W. Va. 2014); Tri-Cty. Equip. & Leasing, LLC v. Klinke, 286 P.3d 593 (Nev. 2012); Howell v. Hamilton Meats & Provisions, Inc., 257 P.3d 1130 (Cal. 2011); Haygood v. De Escabedo, 356 S.W.3d 390 (Tex. 2011); Martinez v. Milburn Enters., Inc., 233 P.3d 205 (Kan. 2010); Law v. Griffith, 930 N.E.2d 126 (Mass. 2010); Swanson v. Brewster, 784 N.W.2d 264 (Minn. 2010); Stanley v. Walker, 906 N.E.2d 852 (Ind. 2009); White v. Jubitz Corp., 219 P.3d 566 (Or. 2009); Wills v. Foster, 892 N.E.2d 1018, 1030 (Ill. 2008); Leitinger v. DBart, Inc., 2007 WI 84, 302 Wis. 2d 110, 736 N.W.2d 1; Robinson v. Bates, 857 N.E.2d 1195 (Ohio 2006); Bozeman v. State, 879 So. 2d 692 (La. 2004); Slack v. Kelleher, 104 P.3d 958, 967 (Idaho 2004); Covington v. George, 597 S.E.2d 142 (S.C. 2004); Acuar v. Letourneau, 531 S.E.2d 316 (Va. 2000); *see also* Montgomery Ward & Co. v. Anderson, 976 S.W.2d 382 (Ark. 1998) (holding that a customer's negotiated discount for her medical care fell within the collateral source rule).

296. CertainTeed Corp. v. Dexter, 330 S.W.3d 64 (Ky. 2010); Gorman-Rupp Co. v. Hall, 908 So. 2d 749 (Miss. 2005); Holcomb v. Ga. Pac., LLC, 289 P.3d 188 (Nev. 2012); Betz v. Pneumo Abex, LLC, 44 A.3d 27 (Pa. 2012); Bostic v. Ga.-Pac. Corp., 439 S.W.3d 332 (Tex. 2014); Ford Motor Co. v. Boomer, 736 S.E.2d 724 (Va. 2013).

297. Price v. E.I. DuPont De Nemours & Co., 26 A.3d 162 (Del. 2011); CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005); Simpkins v. CSX Transp., 965 N.E.2d 1092 (Ill. 2012); Van Fossen v. MidAmerica Energy Co., 777 N.W.2d 689 (Iowa 2009); Ga. Pac., LLC v. Farrar, 69 A.3d 1028 (Md. 2013); Miller v. Ford Motor Co. (*In re* Certified Question from the Fourteenth Dist. Court of Appeals of Tex.), 740 N.W.2d 206 (Mich. 2007); Olivo v. Owens-Ill., Inc., 895 A.2d 1143 (N.J. 2006); *In re* N.Y.C. Asbestos Litig., 840 N.E.2d 115 (N.Y. 2005); Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448 (Ohio 2010); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347 (Tenn. 2008).

298. Johnson v. Am. Standard, Inc., 179 P.3d 905 (Cal. 2008); Vitanza v. Upjohn Co., 778 A.2d 829 (Conn. 2001); Hoffman v. Houghton Chem. Corp., 751 N.E.2d 848 (Mass. 2001); Miss. Valley Silica Co. v. Eastman, 92 So. 3d 666 (Miss. 2012); Gray v. Badger Mining Corp., 676 N.W.2d 268 (Minn. 2004); Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170 (Tex. 2004); Haase v. Badger Mining Corp., 2003 WI App 192, 266 Wis. 2d 970, 669 N.W.2d 737.

average of one or more state supreme court decisions per year.[299] Meanwhile, none of these issues have produced even one adoption per year of any particular approach that plausibly could be characterized as an "innovation."[300]

This slowdown perpetuates a trend toward doctrinal "stabilization" in tort law detected by some commentators as far back as the early 1990s. In 1992, the late Gary Schwartz observed:

> By the early 1980s, a new tort era had begun. Undeniably, in dozens of cases contemporary courts have routinely applied the strong liability rules inherited from preceding years; moreover, in some instances those courts have actually extended liability. Yet in many recent cases, courts have also rejected particular strict liability proposals, refused to recognize certain negligence-based causes of action, affirmed no-duty rules, narrowly interpreted the negligence concept, asserted the application of certain affirmative defenses, conservatively ruled on a number of damage issues, and rejected legal doctrines that might have subjected employers to tort liability on account of workers' injuries. This recent period can hence be described in terms of the stabilization and the mild contraction of doctrine.[301]

Schwartz then added, "An important question concerns whether these tendencies are likely to continue into the future. (Otherwise, the

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299. As of writing (September 2015), sixteen state supreme courts have addressed this issue since 2000. *See supra* note 295.

300. Furthermore, some of the innovations associated with this period met with such lukewarm or hostile receptions as to cause early adopters to backtrack. In abandoning its "bad faith denial of contract" tort, the California Supreme Court noted a "tide of critical or contrary authority." Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 678 (Cal. 1995). Quoting an earlier decision, the court observed that "[a]lthough holdings from other states are not controlling, and we remain free to steer a contrary course, nonetheless the near unanimity of agreement . . . indicates we should question the advisability of continued allegiance to our minority approach." *Id.* (quoting Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58, 64 (Cal. 1988)).

301. Schwartz, *supra* note 6, at 700; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 521–22 (3d ed. 2005) (discussing the "liability explosion" of the second half of the Twentieth Century and then the "backlash and counterrevolution" of the 1980s); James A. Henderson, Jr., *Why the Recent Shift in Tort?*, 26 GA. L. REV. 777, 777 (1992) (agreeing with Schwartz's observations regarding doctrinal stabilization but only concurring in part with his explanations for this trend); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 488–99 (1990) (discussing judicial reevaluation of broad products liability in the 1980s); Robert L. Rabin, Rowland v. Christian*: Hallmark of an Expansionary Era*, *in* TORTS STORIES 73, 91–95 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

recent period may merely be a respite, which could soon give rise to a new growth in liability.)"[302]

The data suggest that the trend toward doctrinal stabilization that Schwartz spotted has continued over the last two decades. The remainder of this Article considers the possible reasons for this shift and its consequences for the present and future of tort law.

IV. THE SOURCES OF SLOWER DIFFUSION

Professor Schwartz offered four reasons for the stabilization he perceived: (1) the exhaustion of the reform agenda that had consumed courts from the 1960s through the early 1980s;[303] (2) an increasingly conservative judiciary that was growing disinclined to adopt liability-enhancing innovations;[304] (3) an enhanced awareness of the costs, drawbacks, limitations, and unintended consequences of previously adopted doctrinal reforms, and a resulting hesitance to adopt additional innovations;[305] and (4) criticisms and concerns that some academics had directed toward certain liability-expanding innovations.[306]

These factors still ring true, but they require some updating. When Schwartz wrote, courts were retreating from endorsement or extension of far-reaching innovations, such as market-share liability and truly "strict" liability for warning defects on products.[307] Most of the innovations at issue today, almost a quarter-century later, are more incremental in nature and, thus, perhaps less likely to elicit a harsh reaction among conservative jurists. Meanwhile, the justices who sit on state supreme courts today, taken as a whole, are neither overwhelmingly conservative nor solidly liberal. On the contrary, a recent study that used the sources of campaign donations as a proxy for ideological leanings revealed an almost even ideological split (171 liberal, 165 conservative, and 4 "other") across 340 state supreme court justices.[308] A related study found that the members of specific courts

302. Schwartz, *supra* note 6, at 700.

303. *Id.* at 683–84.

304. *Id.* at 685–87.

305. *Id.* at 687–93.

306. *Id.* at 693–99.

307. *Id.* at 618–19, 688–89, 697–98.

308. *Political Outlook of State Supreme Court Justices*, BALLOTPEDIA, http://judgepedia.org/Political_outlook_of_state_supreme_court_justices [http://perma.cc/KM3G-D55W] (last visited Aug. 22, 2015).

were relatively ideologically cohesive, suggesting that ideology varies more across courts than within them.[309]

These updates to Schwartz's observations do not necessarily render his analysis obsolete, however. An ideological split across courts may be more detrimental to broad acceptance of innovations than either lockstep conservatism or a liberal consensus would be. Tort law has become increasingly politicized over the past few decades.[310] If roughly half the courts (with a majority of justices leaning "conservative" per the latter study described above) are disinclined to adopt innovations perceived as favoring plaintiffs, the other half (those leaning "liberal") disfavor innovations that benefit defendants, and many or most innovations involve a palpable pro-defendant or pro-plaintiff valence, opportunities for precedent cascades across broad swaths of courts become quite limited.

Yet even when updated, the factors Schwartz identified do not provide a complete explanation for the current stagnation. Something else, more structural and systemic than the forces Schwartz spotted, also appears to be at work. The discussion below therefore builds upon the diffusion analysis presented in Parts II and III to explain how changes within the dockets of state supreme courts and in the interactions between these courts are partially responsible for the stifled spread of common-law doctrinal innovations.

Specifically, this analysis tethers this trend to several developments that are shrinking the common-law tort dockets of the fifty state supreme courts and driving these caseloads apart. This shrinkage and fragmentation of the national torts docket, the Article goes on to argue, has important consequences for the future of tort law.

A. The Declining Common-Law Tort Dockets of State Supreme Courts

Overall, state supreme courts are deciding fewer common-law tort cases today than they did a few decades ago.[311] This trend owes to

309. Adam Bonica & Michael Woodruff, State Supreme Court Ideology and "New Style" Judicial Campaigns 17–18 (Oct. 31, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169664 [http://perma.cc/GV83-5LFW].

310. Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483 (2005) (discussing the political connotations and consequences of recent tort-reform proposals, especially insofar as these proposals affect the election of state-court judges); F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 529–30 (2006).

311. *See infra* Table II.

circumstances that include the general decrease in the total number of cases entertained by state supreme courts, a decline in tort filings and trials, a burgeoning number of statutory causes of action and defenses, the enhanced roles that intermediate state appellate courts and federal courts play in resolving tort cases, and changes in the litigation strategies of plaintiffs and defendants.

The decline in common-law tort cases heard by state supreme courts has been pervasive and, in some states, marked. The following chart compares the number of these cases decided in 1970 and in 2010 by the state supreme courts of California, which one study identified as the "most followed" state supreme court;[312] Minnesota, recognized as the "most innovative" state by another inquiry;[313] New Jersey, which the latter study tagged as the "most innovative" state in the 1945–1975 period;[314] and seven other randomly selected states. The totals below reflect the number of cases decided by each court in calendar years 2010 and 1970 that involved the review of common-law tort claims, or defenses to these claims[315]:

TABLE II: COMMON-LAW TORT CASES BY STATE SUPREME COURT, 2010 AND 1970

Year	CA	NJ	MN	ME	WA	UT	NY	OH	GA	MO
2010	4	5	5	13	3	5	8	6	11	5
1970	9	12	59	8	10	23	18	20	7	49

While the number of tort cases decided by the supreme courts of Maine and Georgia increased slightly, the volume of these cases decided in the eight other states declined, in some instances precipitously.[316] When a state supreme court decides the merits of a claim or defense in only three, four, five, or six common-law tort cases a year, the output of

312. Dear & Jessen, *supra* note 67, at 693.

313. Canon & Baum, *supra* note 45, at 977 tbl.1.

314. *Id.* at 978 tbl.1.

315. *See infra* Table II. In compiling this table, judgment calls were made as to whether the court was reviewing a claim, a defense, or an evidentiary matter somehow related to the merits of a claim (all of which were included within Table II), or a procedural issue sufficiently distinct from a merits review as to warrant exclusion from the dataset. For formatting reasons, the citations for each state and year appear in *infra* Appendix A.

316. *See supra* Table II.

a majority of these courts in 2010,[317] this limited docket provides only a small aperture for the embrace of tort innovations.

Several trends have contributed to this diminution of the torts docket across state supreme courts. For starters, these courts tend to decide fewer cases altogether today than they did just a few years ago.[318] The decade between 2003 and 2012 saw a 12% decline in cases accepted by state supreme courts,[319] a decrease that perpetuated a longer trend.[320] This decline partly owes to the appearance of intermediate appellate courts in many states and the associated growth of discretionary jurisdiction across state supreme courts.[321] As recently as 1968, only nineteen states possessed intermediate appellate courts.[322] Today, this number has more than doubled, with intermediate appellate courts functioning in forty states[323] (soon to become forty-one, as Nevada voters recently approved a ballot measure that called for the creation of an intermediate appellate court).[324] States that have created these

317. *See supra* Table II.

318. Gerald F. Uelmen, *The Fattest Crocodile: Why Elected Judges Can't Ignore Public Opinion*, CRIM. JUST., Spring 1998, at 4, 5–6.

319. *Appellate Court Caseloads: Appellate Court Caseload Trends 2003–2012*, COURT STATISTICS PROJECT, http://www.courtstatistics.org/Appellate/2014Appellate.aspx [http://perma.cc/XUC7-9TQX] (last visited Jan. 21, 2015).

320. *See* Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 964–65, 981 (1978) (discussing this trend); Uelmen, *supra* note 318, at 5–6.

321. Project, *The Effect of Court Structure on State Supreme Court Opinions: A Re-Examination*, 33 STAN. L. REV. 951, 959 (1981) (observing that after a state creates an intermediate appellate court, the volume of tort cases heard by the state's supreme court tends to fall); *see also* Paul Brace & Brent D. Boyea, *State Supreme Courts, State Constitutions and Civil Litigation*, 73 ALB. L. REV. 1441, 1445 (2010) ("The presence of lower appellate courts seemingly provides wide latitude for state supreme courts to structure their docket."); Paul Brace, et al., *Judges, Litigants, and the Design of Courts*, 46 LAW & SOC'Y REV. 497, 502 (2012) (relating that as of 1998, sixteen state supreme courts had complete discretion over what tort cases they would take); Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1649 (2010) ("[M]ost state supreme courts retain substantial discretion over which cases to hear.").

322. Daryl R. Fair, *State Intermediate Appellate Courts: An Introduction*, 24 W. POL. Q. 415, 415 & n.2 (1971).

323. COUNCIL OF CHIEF JUDGES OF THE STATE COURTS OF APPEAL, THE ROLE OF INTERMEDIATE APPELLATE COURTS: PRINCIPLES FOR ADAPTING TO CHANGE 2–4 (2012), http://www.sji.gov/wp/wp-content/uploads/Report_5_CCJSCA_Report.pdf [http://perma.cc/C9F4-W3TN].

324. Nev. Sec'y of State, *Ballot Questions*, SILVER STATE ELECTION, http://www.silverstateelection.com/ballot-questions/ [http://perma.cc/R2ZQ-H3YQ] (last visited Jan. 21, 2015) (reflecting the passage of 2014 State Question No. 1, "Shall the Nevada Constitution be amended to create a Court of Appeals that would decide appeals of District

intermediate appellate courts commonly see a significant decline in the number of decisions issued by their state supreme courts.[325] In these states, intermediate appellate courts often produce precedential opinions that their respective state supreme courts regard as adequate statements of law on the subjects involved.

Meanwhile, recent years have seen a drop in tort filings and trials. Several surveys of civil case filings have detected a slow but steady drop in tort cases brought since 1990.[326] The decrease in tort trials has been even more pronounced; a study of the nation's 75 largest counties detected a 40% decline in tort trials between 1992 and 2005.[327] Although there may be several reasons behind this decrease, as a general matter, fewer trials means fewer appeals,[328] and fewer appeals means less fodder for innovation.

Yet these trends have not dictated a decline in the number of compelling common-law tort cases heard by state supreme courts. A smaller number of filed and contested tort cases could, in theory, still generate a substantial volume of cases that present interesting issues worthy of high-court attention.[329] And a drop-off in tort cases decided

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Court decisions in certain civil and criminal cases?").

325. Kagan, et al., *supra* note 320, at 981.

326. R. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 27 (2010), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx [http://perma.cc/5G8R-9AT2] (identifying a 25% decline in tort filings in surveyed state courts between 1999 and 2008); BRIAN J. OSTROM ET AL., EXAMINING THE WORK OF STATE COURTS, 2003: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 23 (2004) (relating data showing a 5% drop in tort filings across 17 states between 1993 and 2002, and adding that tort filings appear to have peaked in 1990); *see also* Patricia W. Hatamyar, *The Effect of "Tort Reform" on Tort Case Filings*, 43 VALP. U. L. REV. 559, 572–74 (2009) (documenting a decline in tort filings in Oklahoma following the enactment of tort reform legislation in the early 2000s); Thomas B. Marvell, *Tort Caseload Trends and the Impact of Tort Reforms*, 17 JUST. SYS. J. 193, 195–96 (1994).

327. LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 8 (2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf [http://perma.cc/DS52-Q3NJ]; *see also* Marc Galanter & Angela M. Frozena, *A Grin Without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, DAEDALUS, Summer 2014, at 115, 118 (discussing this decline).

328. Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEG. STUD. 659, 660 (2004) (observing an appeal rate of 39.6% in tried cases and 10.0% in nontried cases in federal cases terminating between 1988 and 2000, with an appeal rate of 19.0% in untried cases that led to a judgment [and 40.9% in tried cases leading to a judgment]).

329. *See* Kagan et al., *supra* note 9, at 133–35, 142–45 (finding a significant increase in

by state supreme courts may simply reflect the disappearance of docket dross, mandatory-review cases that present no particularly important or novel issues.

Therefore, additional forces must tether together the shrinkage of the common-law tort docket and the observed slowdown in diffusion rates for significant tort-law innovations. One potential influence involves the depressed salience of common-law tort issues relative to other topics that also compete for state supreme courts' limited bandwidth. As Professor Schwartz observed, the exhaustion of the reform agenda of the 1960s through the early 1980s meant that there were fewer hot-button issues for state courts to resolve in the years that followed.[330] The absence of high-profile issues percolating through the courts became particularly pronounced after most states resolved several key "second-order" issues connected to their earlier, transformative decisions to adopt comparative fault and strict products liability in tort.[331] For example, by 2000 most states already had addressed, through caselaw or statute, whether a plaintiff's negligence could represent a full or partial defense to a claim that alleges strict products liability in tort.[332]

The dearth of engaging tort issues before state supreme courts also can be attributed in part to the fact that much of the creative energy presently directed toward tort reform courses through state legislatures, Congress, and federal courts. Modern defendants and their advocates have grown increasingly sophisticated and vocal in directing arguments for reform toward state legislatures and federal outlets, in effect bypassing state courts.[333] In response to these calls, the legislatures of many states have modified the rule of joint-and-several liability,[334] imposed caps on noneconomic damages,[335] altered the collateral source

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the number and proportion (relative to the courts' overall docket) of tort cases heard by state supreme courts from the 1870–1900 period to the 1940–1970 period).

330. Schwartz, *supra* note 6, at 683–84.

331. *See* Green, *supra* note 148 (discussing the second-order doctrinal issues generated by the repudiation of contributory negligence).

332. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17, reporter's note (AM. LAW INST. 1998) (discussing this body of law).

333. *See* Hubbard, *supra* note 310, at 469–73 (discussing the development of the modern tort reform movement).

334. *See Joint and Several Liability Rule Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/joint-and-several-liability-rule-reform [http://perma.cc/3NH6-C52U] (last visited Jan. 21, 2015) (listing state laws adopting these measures).

335. *See Noneconomic Damages Reform*, AM. TORT REFORM ASS'N,

rule,[336] and limited the availability and extent of punitive damages,[337] just to name a few common topics of tort-reform campaigns.[338] Other state and federal laws have limited or eliminated certain types of claims or lawsuits.[339] Two relatively recent examples of liability-limiting laws are the "commonsense consumption" measures that swept through about half of the states in the mid-2000s in a swift reaction to so-called "obesity lawsuits,"[340] and a 2005 federal law, the Protection of Lawful Commerce in Arms Act,[341] that strangled in its crib an emerging effort to hold firearm manufacturers liable for gun violence.[342] Concurrently, tort defendants have obtained several significant victories from the United States Supreme Court, most notably in cases where the Court construed federal statutes as preempting the assignment of tort liability under state law.[343]

Meanwhile, issues associated with damages claims brought under

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http://www.atra.org/issues/noneconomic-damages-reform [http://perma.cc/D4RW-J6AW] (last visited Jan. 21, 2015) (listing state laws adopting these measures).

336. *See Collateral Source Rule Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/collateral-source-rule-reform [http://perma.cc/MBC5-JYDC] (last visited Jan. 21, 2015) (listing state laws adopting these measures).

337. *See Punitive Damage Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/punitive-damages-reform [http://perma.cc/4CQE-2MV2] (last visited Jan. 21, 2015) (listing state laws adopting these measures).

338. *See* Mark Thompson, *Letting the Air Out of Tort Reform*, ABA J., May 1997, at 64 (remarking upon the "remarkable gains" that "proponents of limitations on personal injury lawsuits" had made in state legislatures).

339. *See Medical Liability Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/medical-liability-reform [http://perma.cc/9522-X36L] (last visited Jan. 21, 2015) (listing state laws adopting measures that put limits on medical malpractice claims); *Product Liability Reform*, AM. TORT REFORM ASS'N, http://www.atra.org/issues/product-liability-reform [http://perma.cc/P257-HB72] (last visited Jan. 21, 2015) (listing state laws adopting measures that limit product-liability claims).

340. *See* Graham, *supra* note 83, at 399–405.

341. 15 U.S.C. §§ 7901–03 (2006).

342. *See* R. Clay Larkin, *The "Protection of Lawful Commerce in Arms Act": Immunity for the Firearm Industry is a (Constitutional) Bulls-Eye*, 95 KY. L.J. 187, 189–91 (2006) (discussing the impetus for this law).

343. *See* PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2569–70 (2011) (holding that federal drug regulations preempt state-law failure-to-warn claims against the manufacturers of generic drugs); Bruesewitz v. Wyeth, LLC, 562 U.S. 223, 243 (2011) (holding that the National Childhood Vaccine Injury Act preempts design-defect claims against vaccine manufacturers); Riegel v. Medtronic, Inc., 552 U.S. 312, 330 (2008) (holding that the preemption clause within the Medical Device Amendments of 1976 preempts certain state-law tort claims); Geier v. Am. Honda Motor Co., 529 U.S. 861, 865 (2000) (holding that a Federal Motor Vehicle Safety Standard promulgated under federal law had a preemptive effect on certain state-law tort claims).

federal and state statutes have been prevailing over common-law tort issues in the battle for space on state supreme courts' dockets.[344] The cases likely having the greatest cannibalistic effect in this respect involve private causes of action conferred under state consumer-protection,[345] wage-and-hour,[346] whistle-blower,[347] and antidiscrimination[348] laws. These statutes, many of which are of relatively recent vintage, have generated a large volume of litigation and many important interpretative issues of first impression.[349] To the extent that state high courts may deliberately or unconsciously dedicate only a certain share of their dockets to non-contractual damages claims brought by private parties, grants of review in cases arising under these statutes come at the expense of matters that emerge out of the common law.

The California Supreme Court's docket illustrates this transition. As noted earlier, only four opinions issued by that court in 2010 involved the substantive review of common-law tort claims, or defenses to these claims, whereas nine opinions issued in 1970 had this posture.[350] But the court's 2010 output also included decisions rendered in cases that involved damages claims brought under wage-and-hour,[351] antitrust,[352] civil-rights,[353] unfair-competition,[354] anti-spam,[355] and whistleblower-

344. *See The Effect of Court Structure on State Supreme Court Opinions: A Re-Examination*, *supra* note 321, at 959 (observing that after intermediate appellate courts were created in Michigan and North Carolina, the state supreme courts in these states heard more criminal, constitutional, and public law cases, and fewer private business, property, and tort law cases).

345. *See* 3 AMERICAN BAR ASSOCIATION, THE INFORMATION PRIVACY LAW SOURCEBOOK 2297–3179 (2014) (relating state laws pertaining to unfair and deceptive acts by businesses); Edward W. Crane et al., *U.S. Consumer Protection Law: A Federalist Patchwork*, 78 DEF. COUNS. J. 305, 326–28 (2011) (discussing these statutes).

346. *See* 1 GREGORY K. MCGILLIVARY, WAGE AND HOUR LAWS: A STATE-BY-STATE SURVEY (2d ed. 2010).

347. *See* MICHAEL DELIKAT & RENÉE PHILLIPS, CORPORATE WHISTLEBLOWING IN THE SARBANES-OXLEY ERA/DODD-FRANK ERA, app. F at F-1–F-66 (2d ed. 2014) (summarizing state whistle-blower protection laws).

348. *See* Jarod S. Gonzalez, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 116 (2007) ("The vast majority of states . . . have their own antidiscrimination statutes that, like federal law, prohibit discrimination based on race, sex, age, religion, national origin, and disability.").

349. *See infra* notes 353–59 and accompanying text.

350. *See supra* Table II.

351. Pineda v. Bank of Am., N.A., 241 P.3d 870 (Cal. 2010); Lu v. Hawaiian Gardens Casino, Inc., 236 P.3d 346 (Cal. 2010); Martinez v. Combs, 231 P.3d 259 (Cal. 2010).

352. Clayorth v. Pfizer, Inc., 233 P.3d 1066 (Cal. 2010).

353. Chavez v. City of Los Angeles, 224 P.3d 41 (Cal. 2010).

354. Clark v. Superior Court, 235 P.3d 171 (Cal. 2010).

protection statutes.[356] Given the California Supreme Court's substantial criminal-law docket[357] and its ongoing engagement with other areas of state law, the justices could be forgiven if they believed that this array of cases filled any unspoken quota or target for civil-liability matters.

The aforementioned trends have shrunk the common-law tort dockets of the state supreme courts, limiting the opportunities for doctrinal reform. As will be discussed next, a second trend, the fragmentation of the national tort docket, also has contributed toward the stifled diffusion of doctrinal innovations in this sphere.[358]

B. The Divergence of the Tort Dockets of State Supreme Courts

The tort dockets of state supreme courts have diverged as they have shrunk. To the extent that these courts are still granting review in common-law tort cases, the topics presented for decision often are of a state-specific nature. The provincial nature of these issues frustrates the development of a national conversation over the present and future of tort law.

The parochial nature of courts' common-law dockets represents, to a degree, a consequence of the success of the "tort reform" movement discussed above. As previously mentioned, over the past several decades a bevy of tort-reform statutes have appeared that confer a defense or limit liability.[359] These statutes can present significant interpretive issues that clamor for courts' attention. Thus, when state supreme courts grant review in a tort action these days, the specific issue presented for review often concerns the interpretation of one of these statutes. And because many of these laws contain idiosyncratic terms, these decisions commonly do not carry across state lines. Almost two decades ago, one commentator noted the resulting divergence of state tort law:

> The fact is that over the past twenty years state tort law has grown further apart, not closer together. The advent of so-called "tort reform" has augmented this trend. This year alone,

355. Kleffman v. Vonage Holdings Corp., 232 P.3d 625 (Cal. 2010).

356. Runyon v. Bd. of Trustees, 229 P.3d 985 (Cal. 2010).

357. *See* Gerald F. Uelmen, *Justices United*, CAL. LAW., Sept. 2012, at 30 (calculating that "[f]ully one-third of [the preceding] year's published opinions [from the California Supreme Court] involved death penalty appeals").

358. *See infra* Part IV.B.

359. *See, e.g.*, Hatamyar, *supra* note 326.

> approximately one dozen states have enacted tort reform statutes; yet none of them are the same. A nuance in any one of them could be major and outcome determinative.[360]

A return to the California Supreme Court's recent tort-law docket serves to highlight these statutes' impact. In 2012, that court addressed the merits of a claim or a defense in six cases in which the plaintiffs alleged common-law tort claims.[361] One of these cases, *DiCampli-Mintz v. County of Santa Clara*, turned on the interpretation of the claim-presentation provision of the state's Government Claims Act.[362] Another, *LeFiell Manufacturing Co. v. Superior Court*, held that the state's worker's compensation scheme preempted a spousal consortium claim.[363] And still another, *Quarry v. Doe I*, concerned the application of a statute of limitations to claims against the Catholic Church.[364] In other words, half the court's torts oeuvre in 2012 was concerned with the evaluation of defenses or procedural prerequisites associated with state statutes. In each of these cases, the court's ruling represented an important clarification of state law, but had little to no resonance outside of California.

The California Supreme Court's grant of review in the *Quarry* case also bespeaks another, related trend that has fractured the national torts docket. Some tort plaintiffs today still press the frontiers of common-law doctrines of general application.[365] But modern litigation campaigns

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360. Victor E. Schwartz, *'Class Action' Reform: Endless Clashes of Values of Constructive Results?*, MASS TORT LITIG. REP., Aug. 1995, at 24; *see also* Thomas M. Reavley & Jerome W. Wesevich, *An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases*, 71 TEX. L. REV. 1, 3 n.4 (1992) ("Tort reform is currently in vogue, and differences among the paces and directions of the reform movements in the various states account for the growing divergence among states' substantive tort laws."); Mark C. Weber, *Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues*, 48 DEPAUL L. REV. 463, 472 (1998) ("At one time, tort law in the United States may have been converging towards a set of common principles, with differences among states falling into predictable categories . . . . [H]owever, the wave of tort reform legislation in the 1980s and 1990s has shattered any emerging tort law consensus.").

361. Nalwa v. Cedar Fair, L.P., 290 P.3d 1158 (Cal. 2012); DiCampli-Mintz v. County of Santa Clara, 289 P.3d 884 (Cal. 2012); LeFiell Mfg. Co. v. Superior Court, 282 P.3d 1242 (Cal. 2012); Quarry v. Doe I, 272 P.3d 977 (Cal. 2012); O'Neil v. Crane Co., 266 P.3d 987 (Cal. 2012); C.A. v. William S. Hart Union High Sch. Dist., 270 P.3d 699 (Cal. 2002).

362. *DiCampli-Mintz*, 289 P.3d at 885.

363. *LeFiell Mfg. Co.*, 282 P.3d at 1243–44.

364. *Quarry*, 272 P.3d at 979–80.

365. *See* VICTOR E. SCHWARTZ & CARY SILVERMAN, U.S. CHAMBER INST. FOR LEGAL REFORM, LAWSUIT ECOSYSTEM II: NEW TRENDS, TARGETS AND PLAYERS 6 (2014), http://www.instituteforlegalreform.com/uploads/sites/1/evolving.pdf [http://perma.cc/5NQT-

tend to focus on the pursuit of claims against certain classes of defendants, with broad doctrinal overhaul representing a secondary, instrumental goal.[366] These operations often involve lawsuits brought against "deep pockets" such as government agencies, product manufacturers, tobacco companies, the Catholic Church, or a company somehow connected to asbestos.[367] The visibility of these cases, the large number of claims often at stake, and the influence of the defendants involved often commend these disputes for high-court review.[368] Yet the legal issues presented for review in these matters can be quite narrow, and commonly concern a defendant's effort to invoke a defense prescribed by a state statute.[369] Once again, since these defenses commonly hinge on the interpretation of non-uniform state laws, their resolution only occasionally generates opinions that transcend state boundaries.[370]

The discussion above does not exhaust the array of potential explanations for the slower diffusion of tort innovations across state supreme courts, even when coupled with the (updated) factors discussed

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MB4U] ("Plaintiffs' lawyers routinely ask courts to push the limits on liability.").

366. Hence the common modern practice of describing groups of potential defendants as collectively "big," such as "Big Tobacco." *See, e.g.*, *Stephanie Strom, Lawyers from Suits Against Big Tobacco Target Food Makers*, N.Y. TIMES, Aug. 19, 2012, at 1, http://www.nytimes.com/2012/08/19/business/lawyers-of-big-tobacco-lawsuits-take-aim-at-food-industry.html?_r=0 [http://perma.cc/82L9-6926] (discussing how plaintiffs' lawyers are "searching for big paydays in business"). Meanwhile, the litigation groups organized by the American Association for Justice, a leading professional organization for the plaintiff's bar, often are organized around particular products or industries. *Litigation Groups*, AM. ASS'N FOR JUSTICE, https://www.justice.org/membership/litigation-groups [http://perma.cc/3EE4-S3WJ] (last visited Sept. 25, 2015).

367. For example, recent decisions of the California Supreme Court have touched all of these bases. *See DiCampli-Mintz*, 289 P.3d 884 (government defendant); *Quarry*, 272 P.3d 977 (Catholic Church); C.A. v. William S. Hart Union High Sch. Dist., 270 P.3d 699 (Cal. 2012) (government); O'Neil v. Crane Co., 266 P.3d 987 (Cal. 2012) (products manufacturer; asbestos); Pooshs v. Philip Morris USA, Inc., 250 P.3d 181 (Cal. 2011) (tobacco).

368. *Cf.* Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1122 (1988) (proposing that "U.S. Supreme Court justices attempt to select cases for plenary review with the greatest potential social, economic, or political significance consistent with their own ideological preferences"); Kent L. Richland, *Taming the Odds: Increasing the Chances of Getting Relief from the Supreme Court*, CAL. LITIG., Winter 1992, at 3, 8 (describing how amicus letters, reflecting a case's importance to a broad audience, can improve the odds that the California Supreme Court will grant a petition for review).

369. *See, e.g.*, cases cited in *supra* note 361.

370. In other instances, these cases are ripe for removal to federal court, either because of their status as putative class actions or the prospect of a federal preemption defense.

by Professor Schwartz.[371] But whatever the reason or reasons, this trend is occurring. This transition might not provide grounds for comment or concern if doctrinal innovation across legislatures, intermediate appellate courts, and federal courts perfectly countered this retreat. But on the contrary, as the next section of this Article explains, the ebbing involvement of state supreme courts will have important consequences for the present and future of tort law.

V. THE SIGNIFICANCE OF SLOWER DIFFUSION

It remains to discuss the significance of the slowdown in doctrinal diffusion. Toward this point, the text below will consider the unique role that state supreme courts play in the spread of tort innovations, and then explain some consequences of these courts' diminished engagement with common-law tort doctrine.

A. State Supreme Courts and the Adoption of Innovations

One might accept all of the developments described above, but nevertheless respond with a shrug. Even granting changes in the dockets of state supreme courts, perhaps this shift simply means that lower state courts, federal courts, and legislatures bear greater responsibility for the diffusion of tort innovations today than they did in the past, and these policymakers represent fine substitutes for less-involved state supreme courts.[372]

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371. Another possible explanation for the slower diffusion of tort innovations would distinguish between *issues* and *innovations*. It is possible that the pace at which *issues* work their way across state supreme courts has not declined quite as precipitously as the rate of adoption of particular *innovations* that provide a rule or standard applicable to these issues. Such a trend might arise from ideological polarization across state courts or a multiplicity of "decision points" upon which cases that present innovations can be resolved. *See* JOHN P. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 65–70, 85 (1969) (discussing the growing number of "decision points" within the law). Either circumstance would hinder courts from rallying around particular solutions (i.e., innovations) to similar issues. This fragmentation would then frustrate the development of bandwagon effects.

372. With some innovations, lower-court and federal authority do supply the law in many jurisdictions without a state supreme court decision on point. For example, the United States Court of Appeals for the Sixth Circuit recently surveyed state law relating to so-called "innovator liability," whereby brand-name drug manufacturers may be held liable for deficient warnings on their generic equivalents. In this review, the court cited federal cases as the lead authorities on state law in the vast majority of the twenty-two states surveyed. *In re* Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig., 756 F.3d 917, 941–54 (6th Cir. 2014); *see also* Vitanza v. Upjohn Co., 778 A.2d 829, 838 n.11 (Conn. 2001) (counting the number of states deemed to have adopted the "learned intermediary" doctrine, and relying upon federal-court decisions for fifteen of these adoptions, and lower state appellate decisions for

With legislatures, the first assertion is certainly true; the second, certainly false. This Article will not rehash the long-running debate over whether the common law is to be preferred over statutes as a source of legal rules.[373] For now, it suffices to state the obvious: Legislatures and courts have different competencies and limitations;[374] the legislative process differs from the methods of common-law adjudication; and the content of tort-law rules that have been adopted by state legislatures (inclusive of the tort-reform measures discussed above) recently has diverged from the substance of rules that have emerged from the courts.[375] These hopefully uncontroversial premises make the necessary point—that regardless of whether legislatures try to fill the policymaking gap left by the withdrawal of state supreme courts, the fruits of any such efforts will not be the same in their pacing and content as those produced by judges.

There also is reason to believe that other courts are not filling the vacuum left by state supreme courts. The slowdown in the diffusion of tort doctrines across state supreme courts may be a reflection of, and contributing to, a dwindling or at best stagnant conversation regarding generic common-law tort principles across *all* courts, be they state or federal, ultimate or inferior. On this point, consider the following chart, which reflects "hits" on a Westlaw search for references (not judicial citations, merely references) to the first, second, and third Restatements of Torts within published decisions issued by state supreme courts, federal courts of appeals, and federal district courts from 1960 to 2013[376]:

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seven adoptions). That said, no comparably extensive body of lower-court or federal-court precedent exists as to other innovations. *See* Sheehan v. Roche Bros. Supermarkets, Inc., 863 N.E.2d 1276, 1282 n.5 (Mass. 2007) (identifying only five lower appellate court decisions as providing the prevailing state endorsements of the "mode of operation" approach).

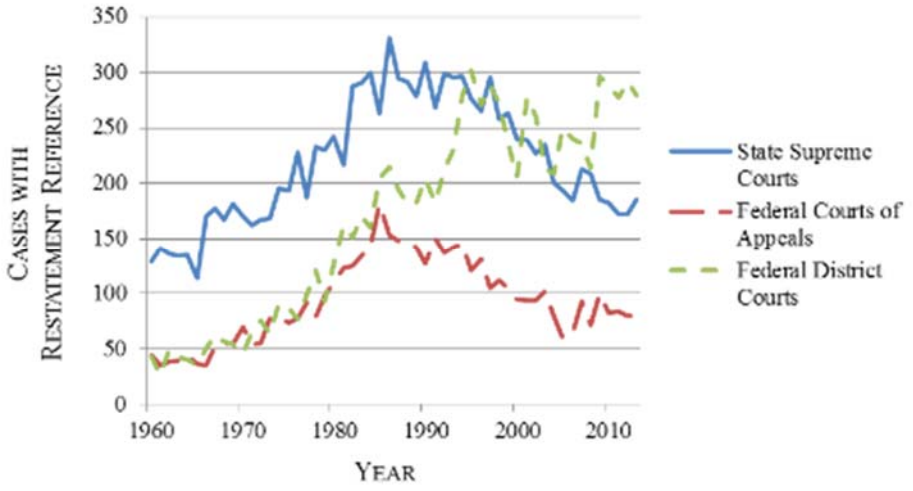
373. *See generally* Giacomo A.M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379 (2008) (observing that the comparative merits of legal rulemaking through legislation and judicial decisions "have been debated since antiquity").

374. *See, e.g.*, Peter H. Schuck, *Why Regulating Guns Through Litigation Won't Work*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 225, 230 (Timothy D. Lytton ed., 2005) (listing the institutional capabilities necessary for the effective generation and implementation of policies).

375. For a discussion of differences that tend to exist between rules related in statutes and those developed through the common law, see generally M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L. REV. 555, 560–72 (1996).

376. Given the different phrasings used in references to these sources (e.g., "Restatement of Torts," "Restatement (Second) of Torts," "Restatement (Third) of Torts," "Second Restatement of Torts," etc.), this search was performed using the parameter

Chart IX: Published Cases Containing References to the Restatements of Torts, 1960–2013



As the chart reveals, references to these Restatements in published opinions by state supreme courts and federal courts of appeals have declined markedly since their apex in the mid-1980s, and references in published federal district-court opinions has been essentially flat since the early 1990s. State intermediate appellate courts were not included in the above chart because the ever-growing number of these entities makes historical comparisons difficult. Nevertheless, the data from published opinions by these tribunals also show a decline in Restatement references similar to that which appears in published opinions produced by state supreme courts and federal courts of appeal. A total of 443 cases published by state intermediate appellate courts in 1985 were returned as "hits" on the (Restatement /3 Torts) search parameter, while only 237 cases published in 2010 appeared.[377] There is certainly some noise within the data, especially given the rudimentary

(Restatement /3 Torts), thereby identifying opinions that used any of these phrasings within their text. This parameter may have swept in a handful of other usages of these two words in close proximity to one another, in which no reference to a Restatement was made, but the author's review of samples of cases returned through this search indicates that any such overcounting would be minor.

377. If one counts both published and unpublished intermediate appellate court decisions, the number of hits for the (Restatement /3 Torts) search parameter goes from declining to merely static (from 462 hits in 1985 to 465 in 2010).

search parameter that was used.[378] Nevertheless, the results indicate a broad stagnation or decline in published references to the most-often-invoked secondary source of generic common-law tort principles, the timing of which dovetails with the slowdown in diffusion of tort doctrines.

This stagnation may owe to the fact that federal and lower state courts provide an imperfect substitute for state supreme courts as sources of tort law. One obvious reason being, absent unusual circumstances, lower state courts and federal courts cannot reverse a state supreme court's prior interpretation of state law.[379] Reliance on these alternative authorities as sources of innovation, therefore, limits the creative universe to concepts that build upon (instead of overturn) existing doctrine, at least absent statutory intervention. Alternative sources of caselaw also tend not to provide the certainty and clarity associated with opinions issued by state supreme courts. Lower state courts and federal courts can, and sometimes do, disagree with each other, generating confusion as to the governing law.[380] And, of course, decisions issued by these courts remain subject to reversal or disapproval from the pertinent state supreme court.[381]

More importantly, adoptions of tort-law innovations by a medley of federal and lower state courts will not necessarily encourage emulation across states in the same manner that a cluster of adoptions by a comparable number of state supreme courts can. State supreme courts' longtime leadership in the development of tort law means that their

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378. Inclusion of references found in unpublished federal court of appeals decisions would not alter the downward trend. If one sums the references found in published and unpublished decisions produced by these courts, references to the Restatements reached their high-water mark in 1993, a year that saw 192 such references and have since gradually declined to 118 references in 2013. With district court cases, Westlaw's capture of an increased volume of unpublished decisions as the studied time span has progressed would make the juxtaposition of 1960 data, early 1990s data, and 2013 data akin to a comparison of apples, oranges, and an ocean liner.

379. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1921 (2011).

380. *See* Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235 (2014) (discussing the frequency and significance of intrajurisdictional splits of authority between lower federal courts and state courts).

381. State supreme courts can overrule their own decisions, of course. For a discussion on this topic, see Stefanie A. Lindquist & Kevin Pybas, *State Supreme Court Decisions to Overrule Precedent, 1965–1996*, 20 JUST. SYS. J. 17, 23 (1998) (discussing the frequency with which a sampled set of state supreme courts overruled their precedent).

voices echo particularly loudly in the adoption calculus across states. The clarity and finality associated with the adoption of an innovation by state supreme courts amplifies several of the dynamics, discussed earlier in this Article, which can contribute to herding and cascade effects across courts.[382] By providing an especially clear reflection of where a doctrinal innovation stands across jurisdictions, decisions by state supreme courts can make it obvious whether a state is lagging behind its peers by failing to join an emerging consensus. Meanwhile, state supreme courts often look to the dockets of their counterparts when deciding whether to grant review in a discretionary matter.[383] When a sufficient number of state supreme courts have considered a topic, pressure may build for the high courts of other states to do likewise.

The slowdown in diffusion across state supreme courts also may decrease the quality of rules that eventually get adopted. The contributions of "many minds" may or may not improve decision-making.[384] At a minimum, however, the engagement of many state supreme courts with a particular issue facilitates a robust dialogue. The seriatim review of a particular innovation by numerous courts can present the issue in a variety of factual and procedural postures, permit contributions from many parties as well as amicus, prompt critical thinking from a larger pool of jurists, and provide iterative opportunities to assess and potentially refine the rules adopted by earlier decision-makers. A similar dynamic can evolve through the presentation of an issue to numerous lower courts or federal courts. But a dialogue among state supreme courts may be superior, at least in certain respects. Among these benefits, within state court systems, amici curiae who can broaden and enlighten the dialogue that surrounds an issue often get involved with a case only after it attracts the attention of a state high court.

Abdication to federal courts, in particular, may lead to elephantine rules standing on small pedestals of authority. A federal judge, sitting in diversity, must guess as to how a state supreme court would rule on a state-law issue of first impression.[385] Article III judges with this

382. *See supra* text accompanying notes 256–61.

383. *See* Tarr & Porter, *supra* note 9, at 243.

384. *See generally* Adrian Vermuele, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (2009) (distinguishing among and evaluating different types of "many minds" arguments).

385. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see also* Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 328 (2005–2006) (discussing the

responsibility often assume that, all else being equal, the state's high court would follow whatever approach presently represents the majority view regarding the issue.[386] As Judge Posner has written, "When state law on a question is unclear, . . . the best guess is that the state's highest court, should it ever be presented with the issues, will line up with a majority of the states."[387] This "diversity amplification" of a majority rule can have two undesirable effects.[388] First, it may lead to inadequate vetting of the current majority approach, which gets adopted simply because it is the prevailing rule. Second, it may lock a state into the less-than-optimal approach selected by the federal court. If a state court that confronts the same issue later regards the rule chosen by the federal court as an inferior option, but believes that the costs associated with a switch to a different rule[389] would outweigh the benefits of this transition, the state court may resign itself to the status quo.

B. The Diffusion of Innovations and the Future of Tort Law

What do these trends mean for the future of tort law? Predictions regarding tort law's direction often miss the mark.[390] Nevertheless, the text below will venture three forecasts.

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challenges associated with this process).

386. *See, e.g.*, Wammock v. Celotex Corp., 835 F.2d 818, 820 (11th Cir. 1988) ("In the absence of evidence to the contrary, we presume that the Georgia court would adopt the prevailing rule if called upon to do so."); Grossman v. Johnson, 89 F.R.D. 656, 662 (D. Mass. 1981) ("It is appropriate, therefore, to consider decisions from other jurisdictions, in an effort to divine a majority trend which Maryland would likely follow.").

387. Vigortone AG Prods., Inc. v. PM AG Prods., Inc., 316 F.3d 641, 644 (7th Cir. 2002).

388. *But cf.* Glassman, *supra* note 386, 239 (opining that federal courts, when required to develop state law, "must exercise their own independent judgment in resolving state-law issues according to their own calculations of best outcomes").

389. *See generally* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002) (discussing the types of "switching costs" that can arise in connection with a change in legal rules or norms).

390. *See* Robert L. Rabin, *Past as Prelude: The Legacy of Five Landmarks of Twentieth-Century Injury Law for the Future of Torts*, *in* EXPLORING TORT LAW 52, 76 (M. Stuart Madden ed., 2005) (observing that "it is hazardous to look too far into the future" when trying to predict the long-term impact of past and ongoing changes in the tort system). Yesterday's torts scholarship is littered with predictions that failed to materialize. Professor Francis Bohlen, the reporter for the Restatement of Torts, opined in 1937 that "[i]t is safe to predict that whatever relief is to be granted for mental distress will be confined to cases in which the defendants intended to cause it." Francis H. Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 733 (1937). This observation arguably misstated the law at the time it was written and is plainly incorrect today. Likewise, Professor Fleming James, the father of "enterprise liability," once predicted that if negligence "should retain its present extensive role in accident law, it is likely to be further diluted until it becomes 'negligence in name

First, if current trends hold, the pace of common-law change will remain slow, and perhaps grow even more sluggish as a dearth of broadly accepted common-law innovations reinforces an impression of doctrinal torpor. Legal cultures can change fairly quickly. The shift toward more conservative (both politically and in their willingness to innovate) courts that Schwartz identified as a source of doctrinal "stabilization" in the 1980s and 1990s[391] could easily lurch back toward a more innovation-prone judiciary in the decades to come. But at least some of the structural limits on diffusion identified within this Article represent substantial barriers to rapid doctrinal change. It seems likely that for the foreseeable future, the supreme courts of many states will decide only a handful of common-law tort cases each year. This ceiling on their output will delay and in some cases frustrate doctrinal movement. It remains possible that new controversies, theories, trends, or technologies will arise that will rally courts around a doctrinal innovation not yet conceived, or already in existence but not widely accepted. But such a move would represent a break from, rather than a continuation of, present circumstances.

Second, the stagnation of the national common-law tort docket may

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only,' or 'negligence without fault.'" Fleming James, Jr., *The Future of Negligence in Accident Law*, 53 VA. L. REV. 911, 917 (1967) (footnote omitted). This forecast has flopped, with negligence exhibiting "unexpected persistence" as the core framing device in tort law. G. Edward White, *The Unexpected Persistence of Negligence, 1980-2000*, 54 VAND. L. REV. 1337, 1341 (2001). And when perhaps the most prescient torts scholar of all, William Prosser, was asked to peer into his crystal ball in 1955, he accurately foresaw the continuation of ongoing trends but failed to anticipate novel developments such as mass-tort litigation, federal preemption, and the "tort reform" push that began in the 1970s and continues to the present day. William L. Prosser, *Recent Developments in the Law of Negligence*, 9 ARK. L. REV. & BAR ASS'N J. 81 (1955). Other scholarly works that have offered predictions about the future of tort law include KOENIG & RUSTAD, *supra* note 8, at 206–36; Jay M. Feinman, *Unmaking and Remaking Tort Law*, 5 J. HIGH TECH. L. 61 (2005); Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883 (2007); William E. Knepper, *About Tomorrow's Tort Trends*, 18 SYRACUSE L. REV. 1 (1966); Thomas F. Lambert, Jr., *Law in the Future: Tort Law 2003* (pt. 2), TRIAL, July 1983, at 90; Thomas F. Lambert, Jr., *Law in the Future: Tort Law 2003* (pt. 3), TRIAL, Aug. 1983, at 62; Robert A. Leflar, *Accident Law – Twenty-Five Years from Now: A Panel Discussion Technique*, 12 J. LEGAL EDUC. 123 (1959); Clarence Morris, *Law and the Future: Torts*, 51 NW. U. L. REV. 273 (1956); Willard H. Pedrick, *Does Tort Law Have a Future*, 39 OHIO ST. L.J. 782 (1978); Orville Richardson, *Law in the Future Part One: A Glimpse of Justice to Come*, TRIAL, June 1983, at 36; Michael L. Rustad, *Forward to the Thomas F. Lambert, Jr., Symposium Issue on Sophisticated New Tort Theories*, 5 J. HIGH TECH. L. 1 (2005); Marshall S. Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 STAN. L. REV. 330 (1970); Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CALIF. L. REV. 2403, 2433–36 (2000); Gary Wilson et al., *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85 (2000).

391. Schwartz, *supra* note 6, at 648, 700.

become self-perpetuating. The common dialogue regarding tort law that crossed jurisdictional lines in the 1960s and 1970s contributed to a sense of excitement and coordination in this field,[392] which in turn encouraged further experimentation. As Professor Schwartz noted, this atmosphere has disappeared.[393] The modern reality that generic common-law principles lie in relative stasis, with changes occurring mostly on the margins, discourages would-be and actual litigants from pressing novel arguments and gives judges pause about accepting significant innovations. The shrinkage and fragmentation of the national torts docket, meanwhile, has made it difficult to kindle the coordinated conversations among courts that could catalyze the diffusion of innovations and revive a sense that tort law represents an area of significant doctrinal fermentation. These trends will translate into even less fodder and enthusiasm for innovation in tort law going forward.

A third, and final, prediction builds on the first by returning to the idea of a "policy window" for legal innovations.[394] This concept connotes that, while favorable conditions sometimes align for the adoption of an innovation, these circumstances are often only temporary. The longer it takes for an innovation to diffuse, the fewer states will fit within the prime window of opportunity.[395] As pertinent here, the shrinking and fragmented common-law dockets of today's state supreme courts make it difficult for any innovation to sweep through these bodies in the same way that strict products liability in tort did in the 1960s and 1970s, or the tort of wrongful discharge did in the 1970s and 1980s. Instead, the delays attendant to modern diffusion will allow alternative approaches to blossom, slow down any momentum that an innovation might otherwise generate, and alter the environment that had been conducive to reform. For these reasons, not only will the diffusion of innovations likely remain slow, or grow even slower, but

392. *Id.* at 641 (describing the "excitement" shared by those judges who engaged in "public-policy innovation" by adopting strict products liability in tort).

393. *Id.* at 603.

394. *See supra* text accompanying note 22.

395. This window may widen slightly in situations where an innovation's shortcomings are what cause the window to close, and these drawbacks only become well-known upon application in adopting jurisdictions. Also, there may be a lingering gravitational pull toward a majority rule, at least across indifferent jurisdictions, in scenarios where a sufficient number of states adopted a rule during the window. On the whole, however, the delayed nature of diffusion today threatens to impede an innovation's ability to capitalize upon opportune circumstances.

new ideas also may not spread as widely as they once did, i.e., more holdouts will appear.

VI. CONCLUSION

This Article merely provides a first take on the diffusion of innovations in tort law. It does not purport to create a comprehensive model for this process, similar to those that marketing scholars have prepared to describe and forecast the spread of new products.[396] Rather, the text above has detailed the basic features of a diffusion model used in other contexts,[397] discussed its possible application to the diffusion of innovations in tort law,[398] and then invoked aspects of that model, as appropriate, in charting and examining the diffusion of innovations in tort law.[399] As this Article has observed, the basic framework for describing the diffusion of innovations requires several important adjustments to make sense and lend value in this context.

At the same time, perhaps tort scholars can draw a useful lesson or two from other branches of diffusion research. Companies that market new products commonly use diffusion models to help forecast the success or failure of these innovations. In emphasizing the idiosyncratic nature of the development of tort doctrine, researchers may have overlooked the possibility that this process also has some predictable features. Put another way, just because the diffusion of tort doctrines *tends* to be unpredictable does not necessarily mean that *nothing* can be foreseen about this process.

While the sort of predictive precision sought by product marketers seems unrealistic in the common-law context, very basic probabilistic estimates of doctrinal diffusion are not totally out of the question. It may be impossible to ascertain whether a particular doctrinal innovation will succeed or fail. But one can venture rough parameters for how quickly a "successful" innovation will attract adherents. For instance, even the simple analysis presented above makes it apparent that common-law innovations almost never spread at a rate of more than three jurisdictions per year, with some flagging near the point of full diffusion. Hence, in predicting the diffusion of a new doctrine in tort

396. *E.g.*, Frank Bass, *A New Product Growth for Model Consumer Durables*, 15 MGMT. SCI. 15 215 (1969).

397. *See supra* Part II.

398. *See supra* Part III.

399. *See supra* Parts IV, V.

law, a twenty-year-minimum estimate for "full" diffusion may represent a best case scenario. Other similar rules of thumb may emerge from closer study by other researchers. Tort law is a complex system, but so too are weather patterns, political campaigns, sporting contests, and other contexts that admit to probabilistic predictions. Even if one acknowledges the especially chancy character of the diffusion of tort doctrines, it remains possible that further research can make the future of tort law at least slightly less blurry.

APPENDIX A

The text below relates the cases associated with the data in *supra* Chart VIII at note 292.

California 2010: Ruiz v. Podolsky, 237 P.3d 584 (Cal. 2010); Klein v. United States, 235 P.3d 42 (Cal. 2010); Tverberg v. Fillner Constr., 232 P.3d 656 (Cal. 2010); Boeken v. Philip Morris USA, Inc., 230 P.3d 342 (Cal. 2010).

California 1970: Bardessono v. Michels, 478 P.2d 480 (Cal. 1970); Haft v. Lone Palm Hotel, 478 P.2d 465 (Cal. 1970); Bozanich v. Kenney, 477 P.2d 142 (Cal. 1970); Hinman v. Westinghouse Elec. Co., 471 P.2d 988 (Cal. 1970); Dailey v. Los Angeles Unified Sch. Dist., 470 P.2d 360 (Cal. 1970); Grudt v. City of Los Angeles, 468 P.2d 825 (Cal. 1970); Pike v. Frank G. Hough Co., 467 P.2d 229 (Cal. 1970); Price v. Shell Oil Co., 466 P.2d 722 (Cal. 1970); Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61 (Cal. 1970).

New Jersey 2010: Ryan v. Renny, 999 A.2d 427 (N.J. 2010); Salzano v. N.J. Media Grp. Inc., 993 A.2d 778 (N.J. 2010); Dean v. Barrett Homes, Inc., 8 A.3d 766 (N.J. 2010) (Products Liability Act, but applying common-law principles); Stelluti v. Casapeen Enters., LLC, 1 A.3d 678 (N.J. 2010); Hubner v. Spring Valley Equestrian Ctr., 1 A.3d 618 (N.J. 2010).

New Jersey 1970: Yerzy v. Levine, 271 A.2d 425 (N.J. 1970); France v. A.P.A. Transp. Corp., 267 A.2d 490 (N.J. 1970); Immer v. Risko, 267 A.2d 481 (N.J. 1970); Grove v. Seltzer, 266 A.2d 301 (N.J. 1970); McLaughlin v. Rova Farms, Inc., 266 A.2d 284 (N.J. 1970); Gallas v. Pub. Serv. Elec. & Gas. Co., 265 A.2d 377 (N.J. 1970); Black v. Pub. Serv. Elec. & Gas Co., 265 A.2d 129 (N.J. 1970); Zamel v. Port of N.Y. Auth., 264 A.2d 201 (N.J. 1970); Willis v. Dep't of Conservation & Econ. Dev., 264 A.2d 34 (N.J. 1970); Fritsche v. Westinghouse Elec. Corp., 261 A.2d 657 (N.J. 1970); Di Giovanni v. Pessel, 260 A.2d 510 (N.J. 1970); Germann v. Matriss, 260 A.2d 825 (N.J. 1970).

Minnesota 2010: Booth v. Gades, 788 N.W.2d 701 (Minn. 2010); Zutz v. Nelson, 788 N.W.2d 58 (Minn. 2010); J.E.B. v. Danks, 785 N.W.2d 741 (Minn. 2010); Swanson v. Brewster, 784 N.W.2d 264 (Minn. 2010); Lickteig v. Kolar, 782 N.W.2d 810 (Minn. 2010).

Minnesota 1970: Raymond v. Baehr, 184 N.W.2d 14 (Minn. 1970); McDonald v. Stewart, 182 N.W.2d 437 (Minn. 1970); Seivert v. Bass, 181 N.W.2d 888 (Minn. 1970); Mulder v. Parke Davis & Co., 181 N.W.2d 882 (Minn. 1970); Heveron v. Village of Belgrade, 181 N.W.2d 692 (Minn. 1970); Emerson v. Eystad, 181 N.W.2d 337 (Minn. 1970); Olson v. Hartwig, 180 N.W.2d 870 (Minn. 1970); Holkestad v. Coca-Cola Bottling Co. of Minn., Inc., 180 N.W.2d 860 (Minn. 1970); McDonald v. Vokaty, 180 N.W.2d 648 (Minn. 1970); Elm v. St. Joseph's Hosp., 180 N.W.2d 262 (Minn. 1970); Granley v. Crandall, 180 N.W.2d 190 (Minn. 1970); Swang v. Hauser, 180 N.W.2d 187 (Minn. 1970); Christy v. Saliterman, 179 N.W.2d 288 (Minn. 1970); Holmboe v. Cook, 179 N.W.2d 276 (Minn. 1970); Conroy v. Kleinman Realty Co., 179 N.W.2d 162 (Minn. 1970); Smith v. Lafortune, 179 N.W.2d 136 (Minn. 1970); A & J Builders Inc. v. Harms, 179 N.W.2d 98 (Minn. 1970); Edwards v. Engen, 178 N.W.2d 731 (Minn. 1970); Kluger v. Gallett, 178 N.W.2d 900 (Minn. 1970); Tschannen v. Hillsheim, 178 N.W.2d 878 (Minn. 1970); Mjos v. Village of Howard Lake, 178 N.W.2d 862 (Minn. 1970); Holmgren v. Heisick, 178 N.W.2d 854 (Minn. 1970); Mathews v. Mills, 178 N.W.2d 841 (Minn. 1970); Wallace v. Nelson, 178 N.W.2d 698 (Minn. 1970); Beier v. Int'l Harvester Co., 178 N.W.2d 618 (Minn. 1970); Anderson v. St. Thomas More Newman Ctr., 178 N.W.2d 242 (Minn. 1970); Augustine v. Hitzman, 178 N.W.2d 227 (Minn. 1970); Synnott v. Midway Hosp., 178 N.W.2d 211 (Minn. 1970); Thoen v. Hatton, 177 N.W.2d 815 (Minn. 1970); Schwab v. Soldner, 177 N.W.2d 799 (Minn. 1970); Hovey v. Wagoner, 177 N.W.2d 796 (Minn. 1970); DeWitt v. Schuhbauer, 177 N.W.2d 790 (Minn. 1970); Holland v. Hedenstad, 177 N.W.2d 784 (Minn. 1970); Fiwka v. Johannes, 177 N.W.2d 782 (Minn. 1970); Smith v. Rekucki, 177 N.W.2d 410 (Minn. 1970); B.F. Griebenow, Inc. v. Anderson, 177 N.W.2d 395 (Minn. 1970); May v. Lemmon, 177 N.W.2d 298 (Minn. 1970); Thole v. Noorlun, 177 N.W.2d 295 (Minn. 1970); Dubbs v. Trimont Cmty. Hosp., 177 N.W.2d 56 (Minn. 1970); Strandjord v. Exley, 177 N.W.2d 48 (Minn. 1970); Erschens v. County of Lincoln, 177 N.W.2d 28 (Minn. 1970); Bossons v. Hertz Corp., 176 N.W.2d 882 (Minn. 1970); Johnson v. Callisto, 176 N.W.2d 754 (Minn. 1970); Shafer v. Gaylord, 176 N.W.2d 745 (Minn. 1970); Soltis v. Geary, 176 N.W.2d 633 (Minn. 1970); Rochester Wood Specialties, Inc. v. Rions, 176 N.W.2d 548 (Minn. 1970); Grams v. Independent Sch. Dist. No. 742, 176 N.W.2d 536 (Minn. 1970); Kloos v. Soo Line R.R. 176 N.W.2d 274 (Minn. 1970); Weiss v. Great N. Ry. Co., 176 N.W.2d 109 (Minn. 1970) Ray v. Wagner, 176 N.W.2d 101 (Minn. 1970); Jones Press, Inc. v. Motor Travel Servs., Inc., 176 N.W.2d 87 (Minn. 1970); Lyman v. Recreational

Activities, Inc., 175 N.W.2d 498 (Minn. 1970); Berryman v. Riegert, 175 N.W.2d 438 (Minn. 1970); Schultz v. Chi. & Nw. Ry. Co., 175 N.W.2d 177 (Minn. 1970); McCarty v. Village of Nashwauk, 175 N.W.2d 144 (Minn. 1970); Pierson v. Edstrom, 174 N.W.2d 712 (Minn. 1970); Reese v. Henke, 174 N.W.2d 690 (Minn. 1970); Eicher v. Jones, 173 N.W.2d 427 (Minn. 1970); Schmidt v. Beninga, 173 N.W.2d 401 (Minn. 1970).

Maine 2010: Lyman v. Huber, 10 A.3d 707 (Me. 2010); *In re* Hannaford Bros. Co. Customer Data Sec. Breach Litig., 4 A.3d 492 (Me. 2010); Searle v. Town of Bucksport, 3 A.3d 390 (Me. 2010); Reardon v. Larkin, 3 A.3d 376 (Me. 2010); Belyea v. Shiretown Motor Inn, LP, 2 A.3d 276 (Me. 2010); Tibbetts v. Dairyland Ins. Co., 999 A.2d 930 (Me. 2010); Rainey v. Langen, 998 A.2d 342 (Me. 2010); Ma v. Bryan, 997 A.2d 755 (Me. 2010); Johnston v. Me. Energy Recovery Co., Ltd. P'ship., 997 A.2d 741 (Me. 2010); Estate of Fortier v. City of Lewiston, 997 A.2d 84 (Me. 2010); State Farm Mut. Auto. Ins. Co. v. Koshy, 995 A.2d 651 (Me. 2010); Smith v. Cent. Me. Power Co., 988 A.2d 968 (Me. 2010); Wahlcometroflex, Inc. v. Baldwin, 991 A.2d 44 (Me. 2010).

Maine 1970: Gagnon v. Turgeon, 271 A.2d 634 (Me. 1970); Thompson v. Johnson, 270 A.2d 879 (Me. 1970); Ashemore v. Litsinberger, 270 A.2d 448 (Me. 1970); St. Pierre v. Houde, 269 A.2d 538 (Me. 1970); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Rodway v. Wiswall, 267 A.2d 374 (Me. 1970); Collett v. Bither, 262 A.2d 353 (Me. 1970); Jamieson v. Lewiston-Gorham Raceways, Inc., 261 A.2d 860 (Me. 1970).

Washington 2010: Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 243 P.3d 521 (Wash. 2010); Curtis v. Lein, 239 P.3d 1078 (Wash. 2010); Clayton v. Wilson, 227 P.3d 278 (Wash. 2010).

Washington 1970: Johnson v. Marshall Field & Co., 478 P.2d 735 (Wash. 1970); Cresap v. Pac. Island Navigation Co., 478 P.2d 223 (Wash. 1970); Shasky v. Burden, 470 P.2d 544 (Wash. 1970); Sorensen v. Estate of McDonald, 470 P.2d 206 (Wash. 1970); Egan v. Morris, 468 P.2d 681 (Wash. 1970); Crowe v. Prinzing, 468 P.2d 450 (Wash. 1970); Miles v. St. Regis Paper Co., 467 P.2d 307 (Wash. 1970); Pate v. Tyee Motor Inn, Inc., 467 P.2d 301 (Wash. 1970); Wells v. City of Vancouver, 467 P.2d 292 (Wash. 1970); Bjorvatn v. Pac. Mech. Constr., Inc., 464 P.2d 432 (Wash. 1970).

Utah 2010: Jensen v. Young, 245 P.3d 731 (Utah 2010); Peak Alarm Co., Inc. v. Salt Lake City Corp., 243 P.3d 1221 (Utah 2010); Achuleta v. St. Mark's Hosp., 238 P.3d 1044 (Utah 2010); Egbert v. Nissan Motor Co., Ltd., 228 P.3d 737 (Utah 2010); Clegg v. Wasatch County, 227 P.3d 1243 (Utah 2010).

Utah 1970: Stevens v. Salt Lake County, 478 P.2d 496 (Utah 1970); Stratton v. Nielsen, 477 P.2d 152 (Utah 1970); Hill v. Grand Cent., Inc., 477 P.2d 150 (Utah 1970); Willden v. Kennecott Copper Corp., 476 P.2d 687 (Utah 1970); Morgan v. Pistone, 475 P.2d 839 (Utah 1970); Davis v. Mulholland, 475 P.2d 834 (Utah 1970); Pollick v. J.C. Penney Co., 473 P.2d 394 (Utah 1970); Brown v. Johnson, 472 P.2d 942 (Utah 1970); Rhiness v. Dansie, 472 P.2d 428 (Utah 1970); Keller v. Patrakis, 471 P.2d 159 (Utah 1970); Simpson v. Gen. Motors Corp., 470 P.2d 399 (Utah 1970); Brigham v. Moon Lake Elec. Ass'n, 470 P.2d 393 (Utah 1970); Ujifusa v. Nat'l Housewares, Inc., 469 P.2d 7 (Utah 1970); Velasquez v. Union Pac. R.R. Co., 469 P.2d 5 (Utah 1970); Stevens v. Colo. Fuel & Iron, 469 P.2d 3 (Utah 1970); Nauman v. Harold K. Beecher & Assocs., 467 P.2d 610 (Utah 1970); Christensen v. Cordova, 467 P.2d 405 (Utah 1970); Melich v. Schelin, 465 P.2d 1017 (Utah 1970); Bramel v. Utah State Road Comm'n, 465 P.2d 534 (Utah 1970); Middleton v. Cox, 465 P.2d 530 (Utah 1970); Calahan v. Wood, 465 P.2d 169 (Utah 1970); Carr v. Bradshaw Chevrolet Co., 464 P.2d 580 (Utah 1970); Thompson v. Jacobsen, 463 P.2d 801 (Utah 1970).

New York 2010: San Marco v. Village/Town of Mount Kisco, 944 N.E.2d 1098 (N.Y. 2010); Roddy v. Nederlander Producing Co. of Am., Inc., 941 N.E.2d 1155 (N.Y. 2010); Geraci v. Probst, 938 N.E.2d 917 (N.Y. 2010); Simmons v. Sacchetti, 934 N.E.2d 877 (N.Y. 2010); Brandy v. Eden Cent. Sch. Dist., 934 N.E.2d 304 (N.Y. 2010); Estate of Schneider v. Finmann, 933 N.E.2d 718 (N.Y. 2010); Adams v. Genie Indus., Inc., 929 N.E.2d 380 (N.Y. 2010); Trupia *ex rel.* Trupia v. Lake George Cent. Sch. Dist., 927 N.E.2d 547 (N.Y. 2010).

New York 1970: Barrett v. McNulty, 266 N.E.2d 823 (N.Y. 1970); Biberias v. N.Y.C. Transit Auth., 265 N.E.2d 775 (N.Y. 1970); Ritto v. Goldberg, 265 N.E.2d 772 (N.Y. 1970); Nussbaum v. Lacopo, 265 N.E.2d 762 (N.Y. 1970); Green v. Downs, 265 N.E.2d 68 (N.Y. 1970); Rindfleisch v. State, 263 N.E.2d 663 (N.Y. 1970); Meagher v. Long Island R.R. Co., 261 N.E.2d 384 (N.Y. 1970); Shiles v. News Syndicate

Co., 261 N.E.2d 251 (N.Y. 1970); Miles v. R&M Appliance Sales, Inc., 259 N.E.2d 913 (N.Y. 1970); Stanton v. State, 259 N.E.2d 494 (N.Y. 1970); Trs. in Office N.Y. Shipping Ass'n-Int'l Longshoremen's Ass'n (IND) Welfare Fund v. S.T. Grand, Inc., 259 N.E.2d 493 (N.Y. 1970); Peters v. Gersch, 259 N.E.2d 488 (N.Y. 1970); Manzitto v. Jack Parker Constr. Corp., 259 N.E.2d 487 (N.Y. 1970); Doyle v. Jennings, 258 N.E.2d 924 (N.Y. 1970); Hayes v. Malkan, 258 N.E.2d 695 (N.Y. 1970); Potter v. Furniture Mfrs. Bldg., Inc., 258 N.E.2d 196 (N.Y. 1970); Rivers v. Sauter, 258 N.E.2d 191 (N.Y. 1970); Nader v. Gen. Motors Corp., 255 N.E.2d 765 (N.Y. 1970).

Ohio 2010: Banford v. Aldrich Chem. Co., Inc., 932 N.E.2d 313 (Ohio 2010); State *ex rel.* Sawicki v. Lucas Cty. Court of Common Pleas, 931 N.E.2d 1082 (Ohio 2010); Boley v. Goodyear Tire & Rubber Co., 929 N.E.2d 448 (Ohio 2010); Pratte v. Stewart, 929 N.E.2d 415 (Ohio 2010); Jaques v. Manton, 928 N.E.2d 434 (Ohio 2010); Beckett v. Warren, 921 N.E.2d 624 (Ohio 2010).

Ohio 1970: Deming v. Osinski, 265 N.E.2d 554 (Ohio 1970); Krupp v. Poor, 265 N.E.2d 268 (Ohio 1970); Dean v. Angelas, 264 N.E.2d 911 (Ohio 1970); Mikula v. Tailors, 263 N.E.2d 316 (Ohio 1970); Pryor v. Webber, 263 N.E.2d 235 (Ohio 1970); Hasapes v. Drake, 262 N.E.2d 870 (Ohio 1970); Rohde v. Farmer, 262 N.E.2d 685 (Ohio 1970); Darnell v. Eastman, 261 N.E.2d 114 (Ohio 1970); Agnew v. Porter, 260 N.E.2d 830 (Ohio 1970); Briere v. Lathrop Co., 258 N.E.2d 597 (Ohio 1970); Wholesale Elec. & Supply, Inc. v. Robusky, 258 N.E.2d 432 (Ohio 1970); Durham v. Gabriel, 258 N.E.2d 236 (Ohio 1970); Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230 (Ohio 1970); Crowe v. Bumford, 258 N.E.2d 110 (Ohio 1970); Braun v. Styles, 258 N.E.2d 109 (Ohio 1970); Morris v. First Nat'l Bank & Trust Co., 254 N.E.2d 683 (Ohio 1970); Hake v. George Wiedemann Brewing Co., 262 N.E.2d 703 (Ohio 1970); Mann v. Lewis, 259 N.E.2d 116 (Ohio 1970); Burwell v. Maynard, 255 N.E.2d 628 (Ohio 1970); Robert Neff & Sons, Inc. v. City of Lancaster, 254 N.E.2d 693 (Ohio 1970).

Georgia 2010: Robinson v. Boyd, 701 S.E.2d 165 (Ga. 2010); Deen v. Stevens, 698 S.E.2d 321 (Ga. 2010); Cowart v. Widener, 697 S.E.2d 779 (Ga. 2010); Grammens v. Dollar, 697 S.E.2d 775 (Ga. 2010); Walker v. Cromartie, 696 S.E.2d 654 (Ga. 2010); Opensided MRI of Atlanta, LLC v. Chandler, 696 S.E.2d 640 (Ga. 2010); Gliemmo v. Cousineau, 694

S.E.2d 75 (Ga. 2010); Hicks v. Heard, 692 S.E.2d 360 (Ga. 2010); Holmes v. Grubman, 691 S.E.2d 196 (Ga. 2010); Summerlin v. Ga. Pines Cmty. Serv. Bd., 690 S.E.2d 401 (Ga. 2010); Broda v. Dziwura, 689 S.E.2d 319 (Ga. 2010).

Georgia 1970: Cooper v. Plott, 177 S.E.2d 82 (Ga. 1970); Morgan v. Reeves, 177 S.E.2d 68 (Ga. 1970); Thompson v. Ingram, 177 S.E.2d 61 (Ga. 1970); Buckhead Glass Co. v. Taylor, 174 S.E.2d 568 (Ga. 1970); Chrysler Motors Corp. v. Davis, 173 S.E.2d 691 (Ga. 1970); Nobles v. H.W. Durham & Co., 173 S.E.2d 200 (Ga. 1970); Kiker v. Anderson, 172 S.E.2d 835 (Ga. 1970).

Missouri 2010: Renaissance Leasing, LLC v. Vermeer Mfg. Co., 322 S.W.3d 112 (Mo. 2010); D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co., 316 S.W.3d 899 (Mo. 2010); Spradling v. SSM Health Care St. Louis, 313 S.W.3d 683 (Mo. 2010); Hayes v. Price, 313 S.W.3d 645 (Mo. 2010); Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81 (Mo. 2010).

Missouri 1970: Bower v. Hog Builders, Inc., 461 S.W.2d 784 (Mo. 1970); Grothe v. St. Louis-San Francisco Ry. Co., 460 S.W.2d 711 (Mo. 1970); Silberstein v. Berwald, 460 S.W.2d 707 (Mo. 1970); McWilliams v. Wright, 460 S.W.2d 699 (Mo. 1970); Katz v. Slade, 460 S.W.2d 608 (Mo. 1970); Wors v. Glasgow Vill. Supermarket, Inc., 460 S.W.2d 583 (Mo. 1970); Stover v. Patrick, 459 S.W.2d 393 (Mo. 1970); Young v. Grotsky, 459 S.W.2d 306 (Mo. 1970); Burns v. Owens, 459 S.W.2d 303 (Mo. 1970); Furlow v. Campbell, 459 S.W.2d 284 (Mo. 1970); Falke v. Snyder, 459 S.W.2d 281 (Mo. 1970); Erny v. Revlon, Inc., 459 S.W.2d 261 (Mo. 1970); Rooney v. Lloyd Metal Prods. Co., 458 S.W.2d 561 (Mo. 1970); Friederich v. Chamberlain, 458 S.W.2d 360 (Mo. 1970); Moore v. Parks, 458 S.W.2d 344 (Mo. 1970); Mathes v. Trump, 458 S.W.2d 297 (Mo. 1970); Dalby v. Hercules, Inc., 458 S.W.2d 274 (Mo. 1970); Pruneau v. Cain, 458 S.W.2d 265 (Mo. 1970); Cochran v. Johnson, 458 S.W.2d 254 (Mo. 1970); Blackburn v. Swift, 457 S.W.2d 805 (Mo. 1970); Feinstein v. Edward Livingston & Sons, Inc., 457 S.W.2d 789 (Mo. 1970); Claridge v. Watson Terrace Christian Church of St. Louis, 457 S.W.2d 785 (Mo. 1970); Markman v. Bi-State Transit Sys., 457 S.W.2d 769 (Mo. 1970); Slusher v. United Elec. Coal Cos., 456 S.W.2d 339 (Mo. 1970); Cover v. Phillips Pipe Line Co., 454 S.W.2d 507 (Mo. 1970); Creager v. Chilson, 453 S.W.2d 941 (Mo. 1970); Barnett v. Schumacher, 453 S.W.2d 934 (Mo. 1970); Frogge v. Nyquist Plumbing & Ditching Co., 453 S.W.2d 913

(Mo. 1970); Green v. Sutton, 452 S.W.2d 200 (Mo. 1970); McCarthy v. Wulff, 452 S.W.2d 164 (Mo. 1970); Salanski v. Enright, 452 S.W.2d 143 (Mo. 1970); Miller v. Higgins, 452 S.W.2d 121 (Mo. 1970); Denny v. Mathieu, 452 S.W.2d 114 (Mo. 1970); S. Agency Co. v. Hampton Bank of St. Louis, 452 S.W.2d 100 (Mo. 1970); Piepmeyer v. Johnson, 452 S.W.2d 97 (Mo. 1970); Arbogast v. Terminal R.R. Ass'n of St. Louis, 452 S.W.2d 81 (Mo. 1970); Thompson v. Sw. Bell Tel. Co., 451 S.W.2d 147 (Mo. 1970); Brewer v. Swift & Co., 451 S.W.2d 131 (Mo. 1970); Stahlheber v. Am. Cyanamid Co., 451 S.W.2d 48 (Mo. 1970); Gormly v. Johnson, 451 S.W.2d 45 (Mo. 1970); Kerr v. Grand Foundries, Inc., 451 S.W.2d 26 (Mo. 1970); Brownridge v. Leslie, 450 S.W.2d 214 (Mo. 1970); Gaston v. Coop. Farm Chems. Ass'n, 450 S.W.2d 174 (Mo. 1970); Headrick v. Dowdy, 450 S.W.2d 161 (Mo. 1970); Zipp v. Gasen's Drug Stores, Inc., 449 S.W.2d 612 (Mo. 1970); Noel v. Roberts, 449 S.W.2d 572 (Mo. 1970); Joly v. Wippler, 449 S.W.2d 565 (Mo. 1970); Heberer v. Duncan, 449 S.W.2d 561 (Mo. 1970).

APPENDIX B

This appendix relates the cases and statutes that supply the data in the charts within the main Article text, except as provided in accompanying footnotes.

Strict Products Liability in Tort: Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963); Garthwait v. Burgio, 216 A.2d 189 (Conn. 1965); Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965); Dealers Transp. Co. v. Battery Distrib. Co. 402 S.W.2d 441 (Ky. 1965); Santor v. A & M Karagheusian, Inc., 207 A.2d 305 (N.J. 1965); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Lonzrick v. Republic Steel Corp., 218 N.E.2d 185 (Ohio 1966); Webb v. Zern, 220 A.2d 853 (Pa. 1966); Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966); McCormack v. Hankscraft Co., 154 N.W.2d 488 (Minn. 1967); Heaton v. Ford Motor Co., 435 P.2d 806 (Or. 1967); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); O.S. Stapley Co. v. Miller, 447 P.2d 248 (Ariz. 1968); Act of Apr. 9, 1968, No. 1085, § 1, 1968 Ga. Laws 1166, 1166–67; Clary v. Fifth Ave. Chrysler Ctr., Inc., 454 P.2d 244 (Alaska 1969); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111 (N.H. 1969); Ulmer v. Ford Motor Co., 452 P.2d 729 (Wash. 1969); Stewart v. Budget Rent-A-Car Corp., 470 P.2d 240 (Haw. 1970); Hawkeye-Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); Ginnis v. Mapes Hotel Corp., 470 P.2d 135 (Nev. 1970); Weber v. Fidelity & Cas. Ins. Co., 250 So. 2d 754 (La. 1971); Kohler v. Ford Motor Co., 191 N.W.2d 601 (Neb. 1971); Ritter v. Narragansett Elec. Co., 283 A.2d 255 (R.I. 1971); Stang v. Hertz Corp., 497 P.2d 732 (N.M. 1972); Act of Feb. 13, 1973, Act 111, § 1, 1973 Ark. Acts 331, 331–32; Ayr-Way Stores, Inc. v. Chitwood, 300 N.E.2d 335 (Ind. 1973); Act of Oct. 3, 1973, ch. 466, § 1, 1973 Me. Laws 822, 822; Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 513 P.2d 268 (Mont. 1973); Codling v. Paglia, 298 N.E.2d 622 (N.Y. 1973); Engberg v. Ford Motor Co., 205 N.W.2d 104 (S.D. 1973); Shields v. Morton Chem. Co., 518 P.2d 857 (Idaho 1974); Johnson v. Am. Motors Corp., 225 N.W.2d 57 (N.D. 1974); Kirkland v. Gen. Motors Corp., 521 P.2d 1353 (Okla. 1974); Act of July 9, 1974, No. 1184, § 1, 1974 S.C. Acts 2782, 2782; Higel v. Gen. Motors Corp., 544 P.2d 983 (Colo. 1975); Zaleskie v. Joyce, 333 A.2d 110 (Vt. 1975); Atkins v. Am. Motors Corp., 335 So. 2d 134 (Ala. 1976); West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976); Brooks v. Dietz, 545 P.2d 1104 (Kan. 1976); Phipps v. Gen. Motors Corp., 363

A.2d 955 (Md. 1976); Ernest W. Hanh, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979); Morningstar v. Black & Decker Mfg. Co., 253 S.E.2d 666 (W. Va. 1979); Ogle v. Caterpillar Tractor Co., 716 P.2d 334 (Wyo. 1986).

Right to Privacy: Act of Apr. 6, 1903, ch. 132, § 2, 1903 N.Y. Laws 308, 308; Act of Mar. 7, 1904, ch. 66, § 2, 1904 Va. Acts 111, 112; Pavesich v. New England Life Ins., 50 S.E. 68 (Ga. 1905); Itzkovitch v. Whitaker, 39 So. 499 (La. 1905); Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909); Act of Mar. 11, 1909, ch. 61, § 3, 1909 Utah Laws 83, 83; Kunz v. Allen, 172 P. 532 (Kan. 1918); Flake v. Greensboro News Co., 195 S.E. 55 (N.C. 1938); Holloman v. Life Ins., 7 S.E.2d 169 (S.C. 1940); Hinish v. Meier & Frank Co., 113 P.2d 438 (Or. 1941); Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942); Cason v. Baskin, 20 So. 2d 243 (Fla. 1944); Reed v. Real Detective Publ'g Co., 162 P.2d 133 (Ariz. 1945); State *ex rel.* Mavity v. Tyndall, 66 N.E.2d 755 (Ind. 1946); Smith v. Doss, 37 So. 2d 118 (Ala. 1948); Pallas v. Crowley, Milner & Co., 33 N.W.2d 911 (Mich. 1948); Gill v. Curtis Publ'g Co., 239 P.2d 630 (Cal. 1952); Welsh v. Pritchard, 241 P.2d 816 (Mont. 1952); Bremmer v. Journal-Tribune Publ'g Co., 76 N.W.2d 762 (Iowa 1956); Housh v. Peth, 133 N.E.2d 340 (Ohio 1956); *In re* Mack, 126 A.2d 679 (Pa. 1956); Roach v. Harper, 105 S.E.2d 564 (W. Va. 1958); Peterson v. Idaho First Nat'l Bank, 367 P.2d 284 (Idaho 1961); Olan Mills, Inc. v. Dodd, 353 S.W.2d 22 (Ark. 1962); Carr v. Watkins, 177 A.2d 841 (Md. 1962); Hubbard v. Journal Publ'g Co., 368 P.2d 147 (N.M. 1962); Barbieri v. News-Journal Co., 189 A.2d 773 (Del. 1963); Truxes v. Keneo Enters., Inc., 119 N.W.2d 914 (S.D. 1963); Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964); Act of July 9, 1965, ch. 431, § 2, 1965 Okla. Sess. Laws 850, 850; Martin v. Senators, Inc., 418 S.W.2d 660 (Tenn. 1967); Fergerstrom v. Hawaiian Ocean View Estates, 441 P.2d 141 (Haw. 1968); Rugg v. McCarty, 476 P.2d 753 (Colo. 1970); Leopold v. Levin, 259 N.E.2d 250 (Ill. 1970); Act of May 5, 1972, ch. 281, § 1, 1972 R.I. Pub. Laws 1091, 1091–92; Act of Oct. 23, 1973, ch. 941, 1973 Mass. Acts 968, 968; Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973); Estate of Berthiaume v. Pratt, 365 A.2d 792 (Me. 1976); Deaton v. Delta Democrat Publ'g Co., 326 So. 2d 471 (Miss. 1976); Act of May 1. 1979, Legis. B. 394, §§ 2–4, 1979 Neb. Laws 1130, 1130–31; Hirsch v. S. C. Johnson & Son, Inc., 90 Wis. 2d 379, 80 N.W.2d 129 (1979); Mark v. Seattle Times, 635 P.2d 1081 (Wash. 1981); Goodrich v. Waterbury Republican-Am., Inc., 448 A.2d 1317 (Conn. 1982); Montesano v. Donrey Media Grp., 668 P.2d 1081 (Nev. 1983); Lemnah v. Am. Breeders Serv., Inc., 482 A.2d 700 (Vt. 1984);

Romaine v. Kallinger, 537 A.2d 284 (N.J. 1988); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998).

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Inc., 849 P.2d 320 (Nev. 1993); Dumont v. Shaw's Supermarkets, Inc., 664 A.2d 846 (Me. 1995); Gump v. Wal-Mart Stores, Inc., 5 P.3d 407 (Haw. 2000); Owens v. Publix Supermarkets, Inc., 802 So. 2d 315 (Fla. 2001); Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431 (Ky. 2003); Sheehan v. Roche Bros. Supermarkets, Inc., 863 N.E.2d 1276 (Mass. 2007); Kelly v. Stop & Shop, Inc., 918 A.2d 249 (Conn. 2007); Rallis v. Demoulas Super Mkts., Inc., 977 A.2d 527 (N.H. 2009).

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Corp., 390 A.2d 398 (Vt. 1978); Brittain v. Booth, 601 P.2d 532 (Wyo. 1979); Kopischke v. First Cont'l Corp., 610 P.2d 668 (Mont. 1980); Rutter v. Ne. Beaver Cty. Sch. Dist., 437 A.2d 1198 (Pa. 1981); Act of Apr. 21, 1983, P.L. 317-1983, § 1, 1983 Ind. Acts 1930, 1930; Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983); Anderson v. Ceccardi, 451 N.E.2d 780 (Ohio 1983); Uniform Contribution Among Tortfeasors Act, ch. 237, § 1, 1984 Ariz. Sess. Laws 878, 880; Jackson v. City of Kansas City, 680 P.2d 877 (Kan. 1984); Act of May 23, 1986, ch. 107, § 3, 1986 Colo. Sess. Laws 677, 679; Mizushima v. Sunset Ranch, Inc., 737 P.2d 1158 (Nev. 1987); Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988); King v. Kayak Mfg. Corp., 387 S.E.2d 511 (W. Va. 1989); Knight v. Jewett, 834 P.2d 696 (Cal. 1992); Koutoufaris v. Dick, 604 A.2d 390 (Del. 1992); Perez v. McConkey, 872 S.W.2d 897 (Tenn. 1994); Horton v. Am. Tobacco Co., 667 So. 2d 1289 (Miss. 1995); Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 508 S.E.2d 565 (S.C. 1998).

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