The Alabama Way: Independent Courts and Policymaking in Alabama

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In 1921, the Alabama Supreme Court heard a case brought by Lula Jones, the wife of a mining company employee, G.W. Jones. Lula's husband had bought some coal from his employer, the Gulf States Steel Company, which operated a mine in the coal country north of Birmingham. After Lula put some of the coal onto the fire at home, it soon exploded and injured her. She filed a lawsuit against her husband's employer, contending that the company's employees had been negligent in selling coal with an imbedded explosive.[1]

However, the Alabama Supreme Court, in accord with the prevailing common law rules of the time, held that Mrs. Jones could not maintain a lawsuit against the mining company since she did not have a contractual relationship with the company. Her husband had purchased the coal. Lula was a third party, or "stranger," to the contract. Under Alabama law and the law of many other states at the time, a lawsuit against a seller of a negligently manufactured good could only be maintained if there was what the courts termed contractual "privity" between the maker and the buyer. There were exceptions to this rule, such as allowing liability for negligence regarding "obnoxious or dangerous" goods. Although explosives would certainly fall within this exception, the Alabama Supreme Court in an opinion authored by Justice Lucien D. Gardner held that the mining company was not in the business of selling coal to the

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[1] *Jones v. Gulf States Steel Company*, 205 Ala. 291, 88 So. 21 (Ala. 1921).

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"general public." Rather, this was an "isolated transaction," and the mining company had no duty to inspect the coal before selling it.[2]

The outcome of Lula Jones's case was not unusual in Alabama or much of the rest of America in 1921. This article will assess how the changes in products liability law throughout America in the twentieth century were received by Alabama institutions, namely the state's supreme court and legislature. The most dramatic changes in Alabama products liability law occurred in the 1960s and 1970s. However, in order to understand Alabama's response to the trends regarding tort liability in the 1960s and 1970s, it is important to understand the history of products liability legal reform in America since the nineteenth century. This article will review how Alabama's institutions responded to the changes in products liability in other states during the twentieth century and consider whether the South had a distinct regional history regarding these legal reforms.

Under the law of most states in the United States throughout the nineteenth century and well into the 1910s, the maker of a defective good was liable only to those with whom he had a contract of sale.[3] English courts provided precedents for American courts throughout much of the nineteenth century.[4] The English rule regarding the purchase of goods, which was adopted by American jurisdictions in the early nineteenth century, was *caveat emptor* ("buyer beware"), and Alabama followed this rule.[5] That is, consumers were responsible for inspecting and evaluating goods prior to agreeing to purchase them. This doctrine was praised in American courts of the nineteenth

[2] Ibid.

[3] The only caveat to this rule was the concept of inherent dangerousness. As will be discussed below, drugs, blasting activities, etc., were goods or activities considered inherently dangerous. In such cases, most states allowed for a third party—one without a contract with the manufacturer—to sue under a theory of absolute, or strict, liability. The concept of strict liability will be discussed in detail below.

[4] C. Sumner Lobingier, "Precedent in Past and Present Legal Systems," *Michigan Law Review* 44.6 (June 1946): 955, 962.

[5] Walton H. Hamilton, "The Ancient Maxim Caveat Emptor," *Yale Law Journal* 40.8 (June 1931): 1133, 1178–87; *H.C. Schrader Co. v. A.Z. Bailey Grocery Co.*, 15 Ala. App. 647, 652, 74 So. 749, 751 (1917).

century for accommodating the law to the practices of the marketplace. The rule was intended to allow for the inequality in knowledge and experience between parties to a contract and discouraged resort to courts to establish prices or otherwise second-guess a contract. In regard to contracts for the sale of goods, the leading *caveat emptor* case, *Seixas v. Woods*, which was issued by New York's highest appellate court in 1804, held that recovery was allowed against a merchant only if he *knowingly* sold defective goods.[6] Legal historian Morton J. Horwitz has contended that the *caveat emptor* rule was not merely the product of the evolving market economy of the English Industrial Revolution or the Early National Period in the United States. Rather, it was the product of a conscious policy choice by early nineteenth-century jurists to "overthrow" an equitable theory of contract, wherein a good was thought to have an objective value, which courts could determine, independent of the value placed on it by the parties to the contract. Thus, historians like Horwitz have interpreted the "buyer beware" rule as a "procommercial [*sic*] attack"—a conscious judicial policy choice to favor sellers over buyers—upon communal values, which essentially separated law from morals and created a harsher, more speculative, more individualistic, and combative marketplace.[7]

In products liability in the nineteenth century, an English case provided a precedent that greatly influenced American tort law. In *Winterbottom v. Wright* a postal employee was injured while riding on a defective carriage.[8] The carriage maker had sold the carriage to the employer, the post office. The English court held that the postal employee had no rights against the carriage maker because the employee was not the purchaser of the carriage. The employee lacked "privity of contract" with the manufacturer. Writing during the Progressive Era, legal scholar Francis Bohlen noted the court in *Winterbottom* did not specify whether the carriage was defective or was merely not kept in repair by the post office after it had purchased

[6] *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804).
[7] Morton J. Horwitz, *The Transformation of American Law 1780–1860* (Cambridge, 1977), 180–85, 330 n. 113. *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804), is cited in Horwitz at 180.
[8] 10 M&W 100 (1842).

the carriage. If the latter was the case, the post office-employer was the at-fault party. So, it was never clear whether this was truly a defective products case.[9] Additionally, legal historian Vernon Palmer has persuasively contended that the *Winterbottom* court used the privity requirement as a way of preventing concurrent actions. That is, the court did not want multiple actions for the same occurrence, such as one lawsuit for breach of contract and another for a tort claim, because that would allow a "double recovery" to the plaintiff. This would have been an administrative rule for courts and thereby served judicial economy. But it also prevented plaintiffs from using more favorable tort concepts of causation and recovering greater damages under a tort theory, when a contract theory was deemed (by the courts) to be sufficient. Thus, the rule for both contracts and torts was that a contractual relationship was needed in order to sue.[10] American courts and most scholars widely interpreted the *Winterbottom* case as a case about defective goods and used it as a precedent that demonstrated the need for contractual privity before any tort rights accrued to an injured plaintiff.[11] Alabama followed the *Winterbottom* rule, too.[12]

In America there was one exception to the privity of contract rule, and it was recognized shortly after the *Winterbottom* rule was recognized in the United States. The earliest instances in America of allowing suits against remote manufacturers of products were those related to drugs or poisons. During the latter half of the nineteenth and early twentieth century, state courts throughout the nation adopted an approach that considered these products to be distinct in character

[9] Francis H. Bohlen, "The Basis of Affirmative Obligations in the Law of Tort," *American Law Register* 53.5 (May 1905): 209, 273, 282.

[10] Vernon Palmer, "Why Privity Entered Tort—An Historical Reexamination of *Winterbottom v. Wright*," *American Journal of Legal History* 27.1 (January 1983): 85, 89–90.

[11] *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865, 870 (8th COA, 1903); William L. Prosser, *Cases and Materials on Torts* 8th ed. (Westbury, New York, 1988), 700–01 n. 1.

[12] The rule was first explicitly followed in *Postal Telegraph Cable Co. v. Ford*, 117 Ala. 672, 674, 23 So. 684 (1897), wherein the Supreme Court held that "no cause of action arises in favor of a stranger to a contract because of a breach of duty growing out of the contract."

from other goods. The first step in construing drugs/poisons as different was to allow injured consumers to sue manufacturers for negligence, regardless of a contractual relationship. A leading case for courts across the nation was *Thomas v. Winchester*, wherein a drug manufacturer mislabeled a bottle of the poison belladonna as the medicinal weed dandelion. Thereafter, a local pharmacist unknowingly selected the mislabeled drug to treat a sick woman.[13] The Court of Appeals of New York held that although privity of contract was the general rule in cases of negligence, in the case of a "poisonous drug," where "death or great bodily harm of some person was the natural and almost inevitable consequence of the sale," then privity of contract was not needed in order to bring suit against a remote manufacturer. Since the drug manufacture intended the product to be used only by a remote purchaser, rather than any of the intermediaries to whom it was sold, then the drug presented an "immanent danger" to remote consumers. [14]

In terms of precedential value, *Thomas* stood as a case demonstrating that, at a minimum, drugs and poisons were different from other consumer goods in terms of legal duty. The duty the manufacturer owed regarding the wholesomeness and quality of the drug was not to the supply chain intermediary, but to the ultimate consumer. However, it is easy to see how a court could broaden this principle of duty defined by the harm presented to intended remote users. In fact, what made drugs different from other goods? Most manufacturers intended their products to be used by remote purchasers. The principle of *Thomas*—immanent dangerousness—might have been applicable to any good, not just drugs or poisons. Yet, it seems that the contract law principle of *caveat emptor*, although unstated in both *Winterbottom* and *Thomas*, may have influenced the courts. *Caveat emptor*

[13] Belladonna is a poison known since antiquity. It has been used for the medicinal purposes of stomach and intestinal problems. Margaret F. Roberts and Michael Wink, eds., *Alkaloids: Biochemistry, Ecology, and Medicinal Applications* (New York, 1998), 20–21. Dandelion has been used for a variety of gastrointestinal, liver, digestive, gallbladder and other health conditions. "Dandelion," University of Maryland Medical Center, http://www.umm.edu/altmed/articles/dandelion-000236.htm (accessed February 7, 2015).
[14] 6 N.Y. 397 (1852).

effectively required buyers to inspect goods prior to purchase. Failure to do so was a failure to live up to the obligation to protect one's self. At the time *Thomas* was decided, in 1852, the decision was not seen as a potential beginning of a slippery slope. The ability to inspect drugs was obviously limited. Drugs were "immanently dangerous" because if defective they would injure upon usage, whereas other defective products would not necessarily injure a person. They might not work as intended, but their use would not automatically lead to physical harm of a person.

Other state courts in the nineteenth century recognized the *Thomas* rule in drug cases.[15] The Alabama Supreme Court first cited *Thomas* in Lula Jones's case in 1921. *Thomas* was not seen as a rule of potentially broad application to all products meant for remote consumers. It was regarded more for its facts (concerning drugs) than for the abstract legal principle of a manufacturer's due care for remote purchasers. Only a couple of states' courts even held that goods beyond foodstuffs were subject to the rule.[16] Yet, these cases never led to a general rule that consumer goods manufacturers were liable for their negligence to the ultimate consumer. As the American economy was diversified and specialized in the post-Civil War industrialization period, manufacturers were increasingly selling goods to middlemen, such as wholesalers, suppliers, and retailers.[17] This contract-oriented rule prevented the manufacturer from being liable to any third party who was simply a bystander or even a subsequent purchaser. There were exceptions to the rule, such as a manufacturer could be liable to a third party injured by goods "of a dangerous or obnoxious character, [such as] unwholesome foods, etc."[18] Yet,

[15] *Blood Balm Co. v. Cooper*, 83 Ga. 857, 10 S.E. 118 (1889) (mislabeled instructions for drug's use); *Porter v. Johnson, Jackson & Co.*, 50 W. Va. 644, 41 S.E. 190 (1901) (mislabeled saltpeter); *Meshbesher v. Chamelene Oil Mfg. Co.*, 107 Minn. 104, 119 N.W. 428 (1909) (poisonous mineral oil; violation of statute).
[16] *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870) (naptha); *Lewis v. Terry*, 111 Cal. 39, 43 P. 398 (1896) (defective bed).
[17] Ernest Ludlow Bogart, *The Economic History of the United States*, 2nd ed. (New York, 1914), 428–34.
[18] *Birmingham Chero-cola Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64, 65 (Ala. 1921). This case concerned an exception to the rule, where a beverage contained a fly and was consumed by a remote purchaser.

for most commercial transactions in the early twentieth century the common law throughout the United States insulated manufacturers from injuries caused by their goods to the consuming public. The case that led to a change in states' laws regarding suits by remote consumers was a New York case in 1916.

In the late nineteenth century, during the Progressive Era, reform-minded legal scholars sought to overturn the nineteenth-century legal regime of tort law, which placed the burdens of loss on individuals according to their degree of fault. Progressive legal theorists of the early twentieth century sought to shift the burdens of loss onto the broader society. One area of particular concern to reformers was products liability law.[19] Progressive legal scholars saw the contemporary world as dominated by industrialism, with consumers as integral players who were being trampled by the large forces of capitalist industry. The plight of workers in large, heavy-machinery industries also urged reforms. Workers injured on the job were often left with few means of compensation because prevailing legal rules prevented compensable lawsuits against their employers or fellow employees. The concern for workers eventually led to the enactment in the states of workers' compensation insurance laws, what one scholar has termed the "original tort reform."[20] Yet, it was the twentieth century that witnessed the legal reforms that sought to provide protection to consumers *per se*.

During the early decades of the twentieth century legal scholars and some judges began advocating for a reform of the tort law, particularly that governing sales of defective goods. In the years prior to World War I, some legal scholars argued that "social justice" required placing the risk of loss on those deemed by the courts or legislature to be best financially able to "bear the loss."[21] Such legal reformers

[19] George L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law," *Journal of Legal Studies* 14 (December 1985): 461–527; John Fabian Witt, "Speedy Fred Taylor and the Ironies of Enterprise Liability," *Columbia Law Review* 103 (January 2003): 1–49.
[20] Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Cambridge, 2008), 39.
[21] Roscoe Pound, "The End of Law as Developed in Legal Rules and Doctrines," *Harvard Law Review* 27.3 (January 1914): 233.

urged holding manufacturers liable regardless of fault for making, distributing and selling defective goods. The "absolute" or "strict" liability advocated by these reformers was one where an injured plaintiff would not need to prove any fault; rather the plaintiff would only need to prove the product was defective and the maker was indeed the manufacturer of the defective good in order to recover. However, this vision would only be realized—if only in part—on a national scale in the 1960s.

A "SOUTHERN" HISTORY OF PRODUCTS LIABILITY?

HISTORIANS HAVE USUALLY VIEWED the American South as a "region apart" from the rest of the United States. The cultural distinctiveness of the southern populace, white and black, the prominence of slavery well into the national period, and the post-Civil War industrialization and race relations in the region have contributed to historians' view that the American South is unique in the United States.[22] In terms of legal history, the American South has been viewed as less distinct. Some historians have seen southern courts and legislatures as products of a uniquely "southern society."[23] Yet, Paul Finkelman has noted a very northern-centric disposition among American legal historians, possibly due to the fact that legal changes in America were often first adopted in the North and subsequently followed by the rest of the nation. For example, Lawrence Freidman noted a study of state court citations between 1870 and 1970 that suggested that courts—even southern courts—were more inclined to cite the cases of northern courts than southern.[24] Those who have argued for a

[22] John B. Boles, ed., *A Companion to the American South* (Malden, Mass., 2004), x.
[23] David J. Bodenhamer and James W. Ely, Jr., *Ambivalent Legacy: A Legal History of the South* (Jackson, Miss., 1984); John W. Wertheimer, *Law and Society in the South: A History of North Carolina Court Cases* (Lexington, Ky., 2009), 1–4.
[24] Harris's unpublished dissertation was cited by Lawrence M. Friedman, "The Law Between the States: Some Thoughts on Southern Legal History," in *Ambivalent Legacy*, David J. Bodenhamer and James W. Ely, Jr., eds. (Jackson, Miss., 1984), 33.

distinctiveness of southern legal history have usually cited the topics of slavery, race, and segregation.[25]

The leading histories of American tort law have followed somewhat the "northern leadership" model, although the authors probably did not intend to reinforce a specifically northern-oriented view.[26] The cases cited most often to explain the causes of tort law change in the twentieth century are from the North and the West. For example, the case most often cited as the leading products liability case of the early twentieth century, *MacPherson v. Buick Motor Co.* (1916), was decided by New York's highest court.[27] Only a few jurisdictions had adopted the *MacPherson* approach by 1960, nevertheless most courts and scholars consider it a seminal case.[28] In the post-World War II period the leading cases that expanded plaintiffs' rights to recovery against defective products makers occurred in the 1960s and were decided in New Jersey and California.[29] Such later cases changed the nature of manufacturers' liability from contract-based liability to strict liability, "leapfrogging" negligence liability.[30] That is, the New Jersey and California cases went from a contract standard, which prohibited liability unless a contract existed between the manufac-

[25] For example, Paul Finkelman thought the South was distinct because of "race and racial separation." Finkelman, "Exploring Southern Legal History," *North Carolina Law Review* 65 (1985): 84.
[26] G. Edward White, *Tort Law in America: An Intellectual History* (New York, 2003).
[27] *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).
[28] Priest, "The Invention of Enterprise Liability," 461–62. A review of the Shepard's citation service in the Lexis database shows that, as of this writing, *MacPherson* has been cited in 998 law review articles and was a key subject of many of those articles and book chapters. The *MacPherson* opinion was written by Benjamin Cardozo, who was later appointed to the U.S. Supreme Court by President Hoover. No doubt Cardozo's authorship increased the apparent prominence and importance of the case for scholars and courts alike. Examples include Andrew L. Kaufman, *Cardozo* (Cambridge, 1998), and G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York, 1976), where Cardozo is featured in Chapter 10. James A. Henderson, Jr., "*MacPherson v. Buick Motor Co.*: Simplifying the Facts While Reshaping the Law," in Robert L. Rabin and Stephen D. Sugarman, eds., *Tort Stories* (New York:, 2003), 14–72.
[29] *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963).
[30] Priest, "The Invention of Enterprise Liability," 462.

turer and the injured party, to a standard that held the manufacturer "strictly liable" or "absolutely liable" to a remote consumer. The question of negligence—fault on the manufacturer's part—was of no consequence under the strict liability approach. Under strict liability, manufacturers were veritable insurers of their products' safety. Strict liability was designed to make recovery much easier for injured plaintiffs, because they only had to prove a product was defective rather than also proving the defect was due to the negligence of the manufacturer.

The expansion of liability happened quickly in the mid-1960s.[31] Yet, this rapid expansion occurred without apparent regard to regional boundaries. Torts scholar William Prosser, writing in the mid-1960s in the midst of the dramatic and rapid expansion of products liability law, kept a tally of cases and legislation in states where the law had changed and the trend toward expansion was not defined by region.[32] Also, the standard histories of the expansion of products liability law do not indicate that the adoption of expanded torts rules occurred along regional lines.[33] For example, torts scholar William Prosser documented state cases adopting strict liability in both the North and South during the 1960s.[34]

This article will endeavor to demonstrate that Alabama's products liability history was neither a wholesale rejection of trends in other regions nor an automatic endorsement of those trends. Alabama sought to forge its own path in regard to products liability law. Alabama did not simply follow the examples of tort law reform set by New Jersey and California in the 1960s. The institutions of the state—the state supreme court and the legislature—sought their own paths toward legal reform. Yet, these institutions did not wholly reject the trend toward expanded tort liability.

[31] Robert E. Keeton noted the change was quite "abrupt." *Venturing to Do Justice: Reforming Private Law* (Cambridge, 1969), 3.
[32] William L. Prosser, "The Fall of the Citadel," *Minnesota Law Review* 50. 5 (1965–66): 791.
[33] Priest, "The Invention of Enterprise Liability," 461–528; G. Edward White, *Tort Law in America.*
[34] Prosser, "The Fall of the Citadel."

From the late 1950s through the early 1960s, state supreme courts began expanding liability for manufacturers. The two landmark cases noted above, *Henningsen v. Bloomfield Motors, Inc.* (1960) from New Jersey and *Greenman v. Yuba Power Products, Inc.* (1963) from California, served as models for other state courts and state legislatures that sought to change their tort laws. By 1966, courts in eighteen states and the District of Columbia had adopted strict liability, and six states' legislatures had adopted some restrictions on the privity requirement or adopted a strict liability-like regime under their states' commercial law. The courts that adopted strict liability or broadened warranty claim rights usually cited *Henningsen* and/or *Greenman*. In four states, federal courts had assumed the states' courts would apply a strict liability standard. In two states, courts wrote dicta indicating a move toward strict liability; two other states' courts remained at the level of applying strict liability for products of intimate bodily use; and six others' courts remained at the level of applying strict liability to food and drink. Thirteen states' supreme courts had either rejected strict liability or had not yet passed upon the issue. Most of those states, however, had enacted the Uniform Commercial Code, which allowed for expansion of sellers' warranties to those beyond the initial purchaser of goods.[35] Nevertheless, within six years of the *Henningsen* decision, thirty-nine states had moved toward expanding tort liability for manufacturers of defective products beyond the common law rules that had theretofore prevailed regarding warranties and negligence.

In order to understand how Alabama's legislature and supreme court responded to the trend toward expanded products liability, we must understand how Alabama's approach differed from that of other states. In *Henningsen v. Bloomfield Motors* (1960) the New Jersey Supreme Court held that manufacturers owed an "implied warranty of merchantability" to consumers, so that the manufacturer could be

[35] Prosser, "The Fall of the Citadel," 794–99. By the mid-1970s, additional states had expressly adopted ALI's *Restatement (Second) of Torts*, §402A (which provided for strict liability in general products cases) and/or the *Greenman* and/or *Henningsen* rule.

sued under a contractual theory, without having to prove fault under tort law rules.[36] The New Jersey Court held the implied warranty of merchantability ran from the manufacturer to the ultimate consumer and *anyone else who would be likely to be injured* by a defective product. The *Henningsen* case involved a defective automobile, and the Court stated, "We see no rational distinction between a fly in a bottle of beverage and a defective automobile."[37] The Court, in an opinion authored by associate Justice John J. Francis, used progressive language in justifying its decision. Francis proclaimed that "modern marketing conditions" justified the extension of an implied warranty to the "ultimate purchaser" and any family members or other authorized users of the goods, regardless of contractual privity. Additionally, the Court was motivated by what Francis termed the "gross inequality of bargaining position occupied by the consumer in the automobile industry." Even more to the point, the court saw its function as "administer[ing] the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer."[38]

Next came the California Supreme Court's case of *Greenman v. Yuba Power Products, Inc.* (1963), which held that manufacturers were strictly liable for their defective goods.[39] The case involved a defective wood lathe machine that was a Christmas gift from the initial purchaser to her husband, who was the injured plaintiff. A unanimous California Supreme Court, in an opinion under Justice Roger Traynor's name, decided in favor of the injured plaintiff. The plaintiff had brought the suit under both a breach of warranty claim (à la *Henningsen*) and a negligence claim. The Supreme Court ruled in the plaintiff's favor on two different bases. Since the Court noted that the jury's verdict did not specify which legal claim—the warranty claim or the negligence claim—was the claim upon which the jury

[36] *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).
[37] 32 N.J. at 383; 161 A.2d at 83.
[38] 32 N.J. at 403, 161 A.2d at 73.
[39] 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963).

based its verdict, the Supreme Court rendered a decision allowing Greenman a victory on both claims. The decision is famous for how the Court handled the negligence claim. However, it is important to first review the Court's holding and supporting reasoning regarding the warranty claim.

A warranty is a promise from a seller or manufacturer of a good to the consumer, which usually covers how the product will perform. Warranties can be implied or express. Implied warranties are those imposed by law upon the seller/manufacturer by virtue of engaging in the sale of a product. Express warranties are promises that result from statements made by the manufacturer in advertisements or during the pre-sale discussions between employees or representatives of the seller/manufacturer and the buyer. In Greenman's case, prior to his wife's purchase of the Shopsmith tool, he had seen a demonstration of the tool by the retailer and had "studied" (presumably meaning he had read) a brochure made by Yuba Power Products.[40] The Supreme Court concluded that the jury could have determined the brochure statements were express warranties that turned out to be untrue. However, Yuba defended itself under the provisions of the Uniform Sales Act, the model sales law enacted in California and many other states that governed the contractual relations between buyers and sellers, distributors, or manufacturers of goods. Yuba claimed that Greenman had failed to give Yuba timely notice of the alleged breach of warranty in accord with the statute and, therefore, Greenman should have been barred from being able to assert the claim at all. The Court conceded that Yuba retained rights under the Sales Act and that a failure of a buyer to give proper notice of a claim under the Act would bar any suit. *However*, the Court then

[40] 59 Cal.2d 59, 377 P.2d 898, 27 Cal.Rptr. 698. As the Supreme Court noted, "the trial court limited the jury to a consideration of two statements in the manufacturer's brochure. (1) 'When Shopsmith Is in Horizonal Position—Rugged construction of frame provides rigid support from end to end. Heavy centerless-ground steel tubing insures perfect alignment of components.' (2) 'Shopsmith maintains its accuracy because every component has positive locks that hold adjustments through rough or precision work.'" 59 Cal.2d at 60, 377 P.2d at 899, 27 Cal.Rptr. at 699, fn.1.

sidestepped the Sales Act by holding that Greenman retained a right to assert his warranty claim because it arose out of an agreement that had "independent" legal meaning. Thus the agreement fell within the purview of the Act, but it also was an agreement—according to the Court—with "common-law" ramifications. The Court held that Greenman's rights were not limited to those granted by the legislature under the Sales Act; he held other rights by virtue of "common-law decisions."[41]

The Court's reasoning in support of this "independent" warranty right was somewhat confusing. Traynor, writing for a unanimous Court, cited two law review articles, one by Fleming James and the other by William Prosser, both recognized scholarly authorities in tort law, who argued that the doctrine of notice was a "sound commercial rule" that protected sellers from dilatory claimants. However, as Prosser had argued, the notice requirement was often onerous for the consumer, especially one without a lawyer. James and Prosser were arguing that the consumer was rightly put out of court if he had had a face-to-face dealing with a seller but was wrongly put out of court if he had had no contact with the defendant, such as was the case with a remote manufacturer. This reasoning, which Traynor wholly endorsed, was rather weak. James and Prosser contended that the consumer was ignorant of the rule and therefore needed legal counsel in order to know how to protect his rights.[42] However, this ignorance remains the same regardless of whether the defendant was a retailer (with whom the buyer had had actual contact) or a manufacturer (with whom the buyer never had contact). How a notice requirement can be a "sound commercial rule" against a retailer but not against a manufacturer is difficult to rationalize. Nevertheless, the California Supreme Court adopted these policy-oriented arguments in rejecting Yuba's contention that Greenman had failed to give timely notice of his warranty claim.

[41] 59 Cal.2d at 61, 377 P.2d at 899, 27 Cal.Rptr. at 699.
[42] 59 Cal.2d at 61, 377 P.2d at 900, 27 Cal.Rptr. at 700 (citing Fleming James, Jr., "Products Liability," *Texas Law Review* 34 (1955–56): 44, 192, 197 and William L. Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)," *Yale Law Journal* 69, No. 7 (June 1960): 1099, 1130).

This is a clear example of the California Supreme Court seeing itself as a policy-making institution separate from the state legislature, with its own competencies in the areas of tort and contract law. As will be explained below, the Court's contention that Greenman possessed rights independent of the warranty rights created by the legislature, when combined with the no-fault doctrine of strict liability, demonstrated not only the creation of a new, potentially powerful tort doctrine but also the weakening of the legislature's attempt to govern contractual relations.

It is important to recognize that the California Court reasoned that, "Implicit in the machine's presence on the market … was a representation that it would safely do the jobs for which it was built."[43] This conclusion suggests that the case could have been decided upon a holding that the trial court had erred by not submitting the case to the jury with an implied warranty claim. Yet, the Supreme Court was not seeking to merely remedy William Greenman's claim. It wanted to establish a new public policy of strict liability for *all manufacturers, wholesalers, distributors,* and *retailers* of products. The implied warranty theories, whether statutory or common law, were obstacles or at least distractions from achieving this policy goal. Accordingly, the Court did not decide *Greenman* in accord with the rules of construction, which held that cases should be decided on the narrowest grounds possible.[44] If the Court agreed with Greenman's express warranty claim, that alone should have been the basis for deciding the case.

[43] *Greenman*, 59 Cal. 2d 57, 64; 377 P.2d 897, 901 (1963).

[44] Karl Llewellyn noted that, although courts are able to legitimately use multiple rules of statutory and common law construction in order to achieve what the court deems a just result, there are norms understood by courts that encompass legitimate decision making, one of which includes the rule that a case should be decided on a narrow basis and not multiple bases. Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed," *Vanderbilt Law Review* 3 (1949–50): 395. Also, Llewellyn noted that courts often chose a narrow ground for their rulings, even though the members were attracted to a broader ground for the ruling but remained unconvinced of its applicability in the instant case. Llewellyn, *The Common Law Tradition* (Boston, 1960), 388–89, 427–29. Also, Robert Keeton referred in 1969 to the principle that when a court acts "creatively [it] should adopt the narrowest possible ground of departure that will cover the case at hand." Keeton, *Venturing to Do Justice*, 29.

Similarly, if the Court agreed with Greenman's implied warranty claim, then *that* should have been the basis for reversing the trial court. Instead the Court wanted to reach the issue of negligence and find an opportunity for imposing strict liability upon the manufacturer.

Justice Traynor later admitted, "I was prompted in *Greenman* . . . to have no more truck with warranty and to forthrightly state that recovery is based on strict liability with no contract, warranty overtones at all."[45] Yet, he included the warranty explanation as an acknowledgement of the trend in other states to allow recovery based on an implied warranty. As Traynor noted, the real importance of *Greenman* was the creation of strict liability in defective products suits.

The California Supreme Court was not content to decide in favor of William Greenman on the basis of the warranty claim. Instead, the Court agreed with Traynor to provide an additional decisional basis: the question of whether Yuba Power Products had been negligent. The *Greenman* case is rightly famous for the nature of the liability imposed by the court upon Yuba Power Products—strict liability. *Greenman* served as the opportunity to implement Justice Traynor's views, first articulated almost twenty years before in a concurring opinion he wrote in *Escola v. Coca Cola Bottling Co. of Fresno.*[46] In Escola, a waitress stocking a refrigerator at work had a bottle explode and cut her hand. Although the waitress recovered on another basis, Traynor set forth his opinion on what the tort law should be. He argued that manufacturers should have "absolute liability" solely by virtue of placing a good into commerce, regardless of negligence. He contended strict liability would provide an incentive to manufacturers to make safer (or safe) goods. The "risk of injury [would] be insured by the manufacturer and distributed among the public as a cost of doing business." All of this was done in the name of the "public interest." He thought manufacturers were "best situated" to

[45] Roger J. Traynor, Speech to the Virginia Trial Lawyers Association, p. 5, Box 8, File 24 (April, 1970), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.
[46] 59 Cal.2d at 63, 377 P.2d at 901, 27 Cal.Rptr. at 701.

afford financial protection because they could socialize the costs by raising prices. Traynor thought warranty theories of recovery were "needlessly circuitous" because they "engender[ed] wasteful litigation." Traynor explicitly disposed of any misapprehension that this proposed rule was the product of incremental, interstitial common law development. He declared that "public policy demands" strict liability. The source of this "demand" was not identified.

Traynor explained that modern "mass production," marketing conditions, and transportation mechanisms had altered the theretofore "close relationship between the producer and consumer." Consumers were ill educated and incompetent to "investigate . . . the soundness of a product." Also, consumers' "erstwhile vigilance" had been "lulled" by manufacturers' "advertising and marketing devices." Traynor blamed trademarks for persuading consumers to "accept … on faith" the quality of a product.[47] Of course, this usage was the inherent legal purpose of trademarks, which had been in existence under English law since the sixteenth century, long before the Industrial Revolution.[48] Traynor concluded by proclaiming that the law "must keep pace with the changing relationship between" the manufacturer and consumer.[49]

Traynor's concurrence in *Escola* is reminiscent of Benjamin Cardozo's sociological method of judging. G. Edward White has characterized Cardozo's common law jurisprudence as one where judges are frequently "free to shape the course of the law." That is, Cardozo was cognizant of the *perception* of common law judging as an internalist enterprise: a development of doctrine by its application to novel factual situations. Traynor, like Cardozo, was quite an externalist in his own judicial performance. He was concerned with the effects of rulings beyond the parties to a given case. He looked to the complex modern industrial state and saw problems that could be ameliorated by changes in legal doctrine. White's description of Cardozo applied

[47] *Escola*, 24 Cal.2d at 461–68, 150 P.2d at 440–44 (J. Traynor, concurring).
[48] The first adjudication of a trademark claim was in 1584 in *J.G. v. Samford* (1584) B. & M. 615, cited in J.H. Baker, *An Introduction to English Legal History,* 3d ed., (London, 1990), 522 n. 68.
[49] *Escola*, 24 Cal.2d at 461–68, 150 P.2d at 440–44 (J. Traynor, concurring).

equally to Traynor. Traynor believed in the common law tradition of "the adaptability of previous common law principles to new situations," but combined with a competing belief that "common law courts should be responsive to social or economic change." When faced with a conflict between these beliefs, a judge could "appeal to contemporary social values" to resolve the conflict. Cardozo would, in White's words, "search for a means of making novel results *appear* to be the logical products of established doctrines, so that changes in the common law *seemed* to underscore common law continuity."[50] By contrast, Traynor would forthrightly see what he thought was a changing social landscape and openly proclaim the necessity of altering the law to conform to it.

In expressly adopting the strict liability standard in *Greenman*, Justice Traynor wrote, "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[51] Thus, the manufacturer's liability was no longer based upon fault (*e.g.*, negligence or misfeasance). Rather it was premised upon the fact it was the manufacturer, the product was found to have been defective, and such defect caused an injury or property damage. That is, the status of being a manufacturer of a defective product that injured a "human being" (not restricted to the buyer) was sufficient to impose liability. This rule of law effectively made a manufacturer an insurer of its product.

Notwithstanding this rationale, which sought to divorce product liability law from fault-based concepts—especially from moral fault—and create a no-fault compensation system, only a couple of years later Traynor contended that, "The reasons justifying strict liability emphasize that there is something *wrong*, if not in the manner of

[50] G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York, 1976), 256, 258, 277 (emphasis added). Traynor "like … Cardozo in his innovative decisions, was to create an impression that flows naturally from a canvass of available sources and arguments" in order to reach a decision. White, *Tort Law in America: An Intellectual History*, Expanded Edition (New York, 2003), 189–90.

[51] 59 Cal.2d at 62, 377 P.2d at 900, 27 Cal.Rptr. at 700.

the manufacturer's production, at least in his product."[52] Traynor himself could not escape the moral basis for his policy position. Traynor sought to make compensation easier (assured) for injured consumers, but also to deter *wrongful, negligent* conduct by manufacturers.

THE ALABAMA WAY

IN RESPONSE TO THE EMERGING legal trends of *Greenman* and *Henningsen*, Alabama cut its own path. One policy route was to make product liability law more consumer-friendly by providing plaintiffs with an easier standard against manufacturers (and others in the distribution chain), but to allow defendants to retain the ability to raise common law defenses. Such a system retained fault and adhered to the individual rights understanding of the common law tradition.

Shortly after *Greenman* was decided in California in 1963, the Alabama legislature enacted a "non-uniform" version of the Uniform Commercial Code (UCC), which is a statute that governs contractual rights regarding sales of goods.[53] The legislature expanded liability under the "Sale of Goods" article—thereby creating greater consumer protection rights—to allow for consequential damages in cases of personal injury, prohibited sellers from limiting their liability in the case of personal injuries from goods, made the damages for personal injury claims under the act the same as those at common law, expanded liability to include any expected user or consumer of a good, and extended the statute of limitations on such actions.[54] The most significant modification of the model act was the prohibition on sellers attempting to exclude liability for personal injury damages arising "in the case of consumer goods."[55] At the time, these

[52] Roger J. Traynor, "The Ways and Meanings of Defective Products and Strict Liability," *Tennessee Law Review* 32.3 (Spring 1965): 363 (emphasis added).
[53] *Atkins v. American Motors Corp.*, 335 So. 2d 134, 141–42 (Ala., 1976). The U.C.C. was a model act and deviations from the provisions of the model act were referred to as "non-uniform."
[54] Alabama Act No. 549, §§ 2-316, 2-318, 2-714(2), 2-715(2)(b), 2-719(4), 2-719(2) (1965, effective 1967) as cited in *Atkins*, 335 So. 2d at 141–42.
[55] Code of Ala. § 7-2-316(5) (2008). As the Official Alabama Comment on the provision notes, this prohibition "does not appear in the [model] Uniform Commercial Code."

provisions convinced a leading torts scholar, William Prosser of the University of Minnesota Law School, that Alabama had enacted the equivalent of strict liability by statute.[56]

In 1965, the Alabama Supreme Court cited *Henningsen* for the first and only time in the 1960s. The Court was not following the chief holding of *Henningsen* but merely citing it to support an interpretation of the Alabama version of the Sales Act.[57] A decade later the Alabama Supreme Court adopted what it referred to as a "negligence per se" standard, or what it officially termed the "Alabama Extended Manufacturer's Liability Doctrine,"[58] citing the pro-strict liability *Restatement (Second) of Torts*, § 402A[59] provision on strict liability as its

[56] Prosser, "The Fall of the Citadel," 796.
[57] *Vinyard v. Duck*, 278 Ala. 687, 692, 180 So. 2d 522, 526 (1965).
[58] *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128, 134 (Ala., 1976).
[59] The American Law Institute's *Restatement (Second) of Torts* (1965) was a publication that was considered a scholarly, often authoritative, "restatement" of the common law of torts. It was often viewed by courts that sought to adopt its sections as law in their state as an authoritative statement of the law of the various states. However, some sections of the *Restatement* were actually statements of how its authors thought the common law *should* be construed. The *Restatement (Second)*'s section on strict liability was not based on any case authority when it was originally proposed and included in the *Restatement (Second)*. After *Greenman*, the strict liability section of the *Restatement (Second)* cites *only Greenman* as authority for the strict liability rule. This was the only time a section was based solely on the existence of a single case. Nevertheless, *Restatement (Second) of Torts*, § 402A was cited as authoritative when many courts adopted its standard of strict liability. The section provided:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

theoretical guide.[60] However, the Court claimed it was *not* adopting strict liability because such was a no-fault liability, which did not allow for common law defenses. The "negligence per se" rule the Alabama Court adopted still entertained "affirmative defenses not recognized by the *Restatement* [*(Second)*'s] no-fault concept of liability."[61] Also, the Court noted that negligence principles still controlled.[62] The Court claimed the negligence per se doctrine was concerned with the manufacturer's "methods" and "processes" of production rather than the strict liability standard's concern with the "characteristics of the end product." The Court noted a defendant manufacturer, supplier, or seller could assert the common law defenses of no causal relation, assumption of the risk, and contributory negligence.[63] These defenses were not allowed under the rule in *Greenman* or the *Restatement (Second)*.

The Alabama Supreme Court developed a "third way" approach to the products liability problem. The Court appears to have taken on the policymaking role the justices thought was required by the modern industrial economy. The argument for altering the prevailing fault-based rule was based on the "two obstacles to consumers' recovery against suppliers of defective" goods: "(1) the intricacies of the law of sales (such as privity, disclaimer of warranty, and notice of breach)

[60] *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala., 1976) (defective manufacture and design) and *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128 (Ala., 1976) (defective design). Both cases were decided on the same day, May 21, 1976, and largely dealt with the same policy issues.

[61] *Atkins*, 335 So. 2d at 137.

[62] The "marketing" of a product by a "manufacturer, or supplier, or seller" that was dangerous when applied to its "intended use" was "negligence as a matter of law." *Casrell v. Altec Industries, Inc.*, 335 So. 2d at 132.

[63] *Atkins*, 335 So. 2d at 140–43. The Court listed the "allowable defenses" as follows: (a) general denial (defendant can present evidence refuting the plaintiff's prima facie case, usually involving whether there was a defective condition at all) and (b) affirmative defenses, including (b)(1) no causal relation (defendant did not know nor should have known of defective condition and did nothing to contribute to the defective condition); (b)(2) assumption of the risk (the plaintiff was adequately warned of the "unavoidably unsafe" condition of the product or the condition was apparent to the consumer); and (b)(3) contributory negligence (the plaintiff contributed to his/her injury by his own negligent conduct). *Atkins*, 335 So. 2d at 143; *Casrell*, 335 So. 2d at 134.

which thwarted consumer recovery under the theory of warranty, and (2) the difficulty of proving standards of care and negligence within the complex manufacturing system which brings most consumer goods to the market place."[64] The Court argued that it was preserving tort law's distinction from contract law, specifically warranty law.

Additionally, the Court rejected the moral argument that the fact of "distribution" of a defective product was the harm that strict liability sought to prevent. Rather, the Court contended, the moral argument was best made in holding manufacturers, suppliers, or sellers liable for their "fault" in regard to the design or manufacture and subsequent sale of a product. Therefore, the Court suggested that under their approach, non-contributory, non-negligent parties in the vertical distribution chain (i.e., marketers and retailers) could not be held liable for the fault of the manufacturer. From the Court's point of view, their rule placed the moral culpability on the proper party—the manufacturer—instead of simply roping in all possible monetary contributors. (However, it is important to note that the Court expressly forbade the manufacturer to avail itself of the tort defenses of adhering to the standard of care in making the product. As the Court stated, "the care with which a defective product is manufactured and sold is immaterial."[65]) Unlike the *Greenman* court's policy, which was created for socializing the risk of loss across all parties in the distribution chain, the Alabama Court claimed it sought to retain a modified fault-based standard that targeted only those at fault but made the chances of recovery higher than under the old common law standard.[66] The policy of socializing risk *per se* was not one of the Alabama court's objectives. Rather the Court was socializing risk

[64] *Atkins*, 335 So. 2d at 137.
[65] *Atkins*, 335 So. 2d at 139–40.
[66] The *Atkins* court stated that "selling a dangerously unsafe chattel is negligence within itself." 335 So. 2d at 140. It is hard to see how this preserves the at-fault concept, since the standard is a per se standard once the character of the product as defective has been determined. Presumably the only causal defense a manufacturer retained under this new approach was to prove that *when* it sold the product it was not defective and was only defective by some subsequent, post-sale occurrence. *Atkins*, 335 So. 2d at 140–41.

among *at-fault* parties in the distribution chain by making it easier to successfully sue manufacturers.

Was the Court's disposition regarding products liability reflective of what one scholar of the Alabama Supreme Court once termed a "defined 'Southern' sub-culture"?[67] Since 1868, the Alabama Supreme Court has been an elected body. The Court that decided *Atkins* was a relatively new court, with three of its nine justices having been appointed just the year before.[68] Associate Justice Richard L. Jones, who authored the *Atkins* opinion for a unanimous court, had served on the Court since 1973. Then-Chief Justice Howell Heflin, who would be elected as a Democrat to the U.S. Senate in 1978, had served in that capacity since 1971. Of the members of the *Atkins* court, only one, Justice Pelham J. Merrill, had been a member of the Court for more than eight years.[69] Some of the justices had previously served as circuit court, city, or county judges, which indicates that some justices had had prior trial court experience.[70] Perhaps the Alabama Court's disposition should be compared to the rest of the southern states' supreme courts' responses to the then-emergent strict liability doctrine.

As scholar Gerald Rosenberg has noted, courts can effectuate (or contribute to) social change when certain conditions are met in the wider society, which allow for the courts as institutions to initiate the structural changes (*i.e.,* changes in rules) that other institutions, groups, and individuals are willing to follow.[71] In the case of the Alabama legislature's rapid move to enact reforms that supported the policy approach begun by the *Greenman* case, the state legislature's

[67] Robert J. Frye, *The Alabama Supreme Court: An Institutional View* (Birmingham, 1969), 29.
[68] The three new justices were Reneau P. Almon, Janie L. Shores, and T. Eric Embry. Justice Shores was the first woman to serve as a justice on the state's supreme court. George Earl Smith and Bilee Cauley, *A History of the Alabama Judicial System, 1819–1991* (1991), 5–6 http://judicial.alabama.gov/docs/judicial_history.pdf (accessed February 7, 2015).
[69] Smith and Cauley, *History of the Alabama Judicial System*, 9–10.
[70] Ibid., 7. Justices Bloodworth, Maddox, and Almon had served as circuit judges; and Justice Faulkner had been a city and county judge.
[71] Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, 1991), 35–36.

action indicates that a significant degree of support (or at least little organized opposition) existed among the populace to effectuate the consumer-oriented protections sought in *Greenman*. However, the Alabama Supreme Court's subsequent adoption of an alternative to the *Greenman* rule shows not only the Court's attempt to formulate a public policy regarding tort law and its goals but to do so independent of the state legislature. The Court saw the legislature's adoption of the UCC as merely a form of "guidance."[72] The Alabama Supreme Court was formulating a political-economic policy for the citizens of Alabama and for manufacturers who made products sold or used in Alabama.[73] The Court was playing an activist role—altering the common law to meet its policy goals in a case that could otherwise have been decided under then-existing common law rules. The Court noted that it had "not attempted to answer all the questions which may arise on the trial of every products liability case."[74] Yet the

[72] *Atkins*, 335 So. 2d at 141.

[73] Under the U.S. Supreme Court's decisions regarding the Fourteenth Amendment's Due Process Clause, of course, only a manufacturer who had established "minimum contacts" with the state of Alabama could be sued in Alabama state courts, depending on the state's long-arm jurisdiction statute. *International Shoe v. Washington*, 326 U.S. 310, 319 (1945) and *Hanson v. Denckla*, 357 U.S. 235, 253–54 (1958). These were the most pertinent U.S. Supreme Court precedents in effect at the time of the Alabama Supreme Court's *Atkins* decision. However, in 1980 the U.S. Supreme Court decided *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, a product liability case wherein the Court held that New York state residents could not sue a New York corporation in Oklahoma just because the motor vehicle incident occurred in Oklahoma. The Court held that "if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297–98. However, any suit between an Alabama resident and a manufacturer from another state who lacked minimum contacts might be brought in federal district court under federal diversity jurisdiction, assuming the amount in controversy requirement was met. 28 U.S.C. § 1332.

[74] *Atkins*, 335 So. 2d at 144.

Court saw itself as an independent actor, neither following nor deferring to the state legislature's policy decisions and refusing to wholly adopt the rationale of the California Court's *Greenman* case or the ALI's *Retstatement (Second).*

Alabama had a distinct experience with modifying and developing new judicial and legislative approaches to modern products liability law. Although other states in the North and South followed the paths marked by New Jersey and California, some states sought to forge their own approaches to changing tort law. Alabama's "third-way" approach avoided the extremes of contract-based liability, wherein persons injured by defective products were unable to recover, and strict liability, wherein businesses were often responsible even if they were not guilty of any fault. Alabama sought to adapt its tort law to the industrial world of the postwar period, while maintaining a commitment to a legal regime premised upon moral culpability. Such an approach demonstrates the policymaking capacity of common law courts to create policies that are responsive to the changing modes of commercial interaction, while simultaneously adhering to time-tested legal principles