Between Fraud Heaven and Tort Hell: The Business, Politics, and Law of Lawsuits

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Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of History in the Graduate School of Duke University

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ABSTRACT

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Abstract

In the 1970s, consumer advocates worried that Alabama’s weak regulatory structure around consumer fraud made it a kind of “con man’s heaven.” But by the 1990s, the battle cry of regulatory reformers had reversed, as businesspeople mourned the state’s decline into “tort hell.” Debates about the correct balance of power among consumers, businesses, and the state continue to shape political contests in both Alabama and on the broader national stage today, whether contextualized under the aegis of “consumer protection,” “access to justice,” “tort reform,” protecting “free enterprise,” or cultivating a positive “business climate.”

This dissertation argues for analyzing such matters in terms of a regulatory ecology, following the interconnections across institutions, including formal rules of civil procedure as well as informal codes of conduct, that shape the law of lawsuits within the American civil justice system. Drawing on case files, interviews, and archival sources, it traces the development of Alabama’s first consumer-protection law and regulatory agency in the early 1980s, the construction and deconstruction of a comprehensive state tort-reform package in 1987, the rise of tort lawsuits and its invigoration of Alabama’s trial-lawyer bar, and the transformation of the Alabama Supreme Court in the 1990s. It then analyzes how political narratives, fashioned in part by powerful business lobbies, molded the terms of the tort-reform debate at the state and national levels in ways that effectively swayed public opinion and created favorable conditions for successful tort reform legislation.
The dissertation does not propose a regulatory agenda; rather, it concludes that interdisciplinary perspectives on regulatory governance, drawing insights from legal, political, and business history as well as other social science disciplines, better frame problems than more simplistic assessments of tort reform. Tort lawsuits blossomed in Alabama where other avenues for resolving regulatory issues or expressing dissent closed. Tort reform is likely to unleash new pressures for addressing perceived instances of unfairness in the marketplace.
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<tbody>
<tr>
<td>ACJRC</td>
<td>Alabama Civil Justice Reform Committee</td>
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<td>ADAH</td>
<td>Alabama Department of Archives and History</td>
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<td>ADTPA</td>
<td>Alabama Deceptive Trade Practices Act</td>
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<td>AGCP</td>
<td>Alabama Attorney General Office’s Consumer Protection Case Files</td>
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<td>AIA</td>
<td>Associated Industries of Alabama</td>
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<td>ALEC</td>
<td>American Legislative Exchange Council</td>
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<td>ALFA</td>
<td>Alabama Farmers Federation</td>
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<td>APR</td>
<td>Annual Percentage Rate</td>
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<td>ATRA</td>
<td>American Tort Reform Association</td>
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<td>ATLA</td>
<td>Alabama Trial Lawyers Association</td>
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<tr>
<td>AVALA</td>
<td>Alabama Voters Against Lawsuit Abuse</td>
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<tr>
<td>BCA</td>
<td>Business Council of Alabama</td>
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<tr>
<td>CALA</td>
<td>Citizens Against Lawsuit Abuse</td>
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<tr>
<td>FTC</td>
<td>Federal Trade Commission</td>
</tr>
<tr>
<td>Mini-Code</td>
<td>Alabama Consumer Credit Act</td>
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<tr>
<td>NAM</td>
<td>National Association of Manufacturers</td>
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<tr>
<td>PAC</td>
<td>Political Action Committee</td>
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<tr>
<td>TILA</td>
<td>Truth in Lending Act of 1968</td>
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<tr>
<td>UA Law</td>
<td>University of Alabama School of Law</td>
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<td>UCC</td>
<td>Uniform Commercial Code</td>
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Introduction: Framing Fairness from the Marketplace to the Courthouse

In the Alabama Supreme Court’s case reporter for 1997, judicial opinions for two consumer-fraud cases appeared side-by-side. One case made national news and became anecdotal ammunition in heated battles over how legislators should structure laws that govern the filing and conduct of civil lawsuits. The other case received some press for a time, but soon disappeared from public comment. Taken together, these formal disputes highlight both the power of litigants to call upon the coercive powers of the state as well as the normative stakes involved in attempting to craft procedural rules that balance access to justice with the desire to minimize potential for litigation abuse.

The first of these controversies had begun seven years earlier when a life insurance agent visited the home of 84-year-old Daisey Johnson in Vinegar Bend, Alabama, a tiny, rural, almost entirely African-American settlement near the Mississippi border. Ms. Johnson had gone to school through only the third grade and had worked her entire life as a domestic worker. Emissaries from the same life insurance company had been coming to Ms. Johnson’s house for over twenty-five years to collect her monthly premiums, so Ms. Johnson “trusted its agents.” Even though the saleswoman “knew that it was illegal and against company policy to sell a Medicare supplement policy to Ms. Johnson because she was on Medicaid” (and the policy was therefore “worthless to her”), she convinced Ms. Johnson to buy a Medicare supplement policy by exploiting Johnson’s fear of needing to go to the hospital but being turned away because of an inability to pay. The agent collected the first premium on the spot. By 1992, the premium on this illegal policy had reached
$103 per month, a significant financial burden that consumed “almost one-third of Ms. Johnson’s fixed income.” Sometime thereafter, Ms. Johnson heard about another woman who had successfully sued the insurance company for selling the same policy under similar circumstances. In fact, there was evidence that the life insurance company’s agents had a pattern of targeting “elderly, uneducated, single black women” on fixed incomes for illegal sales of this type of insurance policy. Ms. Johnson subsequently found a lawyer and sued the insurance company for fraud.¹

The circumstances that produced the second consumer fraud case had begun at around the same time. This dispute arose out of an automobile purchase, when Dr. Ira Gore, a Birmingham oncologist and graduate of Harvard College and Duke Medical School, bought a new 1990 BMW sedan from a local car dealer for approximately $40,000. Dr. Gore drove his new car for nine months before taking it to a body shop for detailing to make the car look “snazzier.” Upon close inspection, the detailer discovered signs that someone had previously retouched the vehicle’s paint job; upon further research, Dr. Gore learned that the car had been damaged in transport from Germany to the United States by acid rain and partially repainted before sale. BMW’s internal company policy dictated that since the cost of repairs had been $601—less than three percent of the car’s retail value—the company did not have an obligation to inform either the car dealer or Dr. Gore of this repair. This nondisclosure policy was modeled on the requirements of other states’

consumer-protection laws as well as industry custom, which required disclosure only if the repairs cost more than three percent of the item’s retail value. At the time that Gore gained title to the vehicle, Alabama had no law on its books to address this type of issue. Outraged over his perceived mistreatment, Dr. Gore sued BMW for fraud.²

Both Daisey Johnson and Dr. Gore won their consumer-fraud lawsuits. The jury in Ms. Johnson’s insurance fraud case awarded her $250,000 to compensate for her mental anguish and $15 million in punitive damages to punish the company for its pattern of intentional and reckless fraud. The trial judge reduced the punitive damages part of the award to $12.5 million “so as not to exceed the largest punitive award” ever affirmed by the Alabama Supreme Court, even though the judge agreed that the insurance company’s behavior was egregious. The jury in Dr. Gore’s case awarded him $4,000 to compensate for the depreciation in value of his car and $4 million to punish BMW for its practice of nondisclosure to other car owners, which they found had amounted to “gross, malicious, intentional, and wanton fraud.” In each case, defendants appealed the punitive-damage awards to the Alabama Supreme Court, arguing that the multi-million-dollar awards were unjust and excessive—indeed, so out-of-proportion with any harm the companies had caused that forcing them to pay violated their rights to due process.³

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² BMW of North America, Inc. v. Ira Gore, Jr., 646 So.2d 619, 621–23 (Ala. 1994). The Alabama Legislature would pass a law in 1993 requiring that manufacturers disclose repairs when the damage exceeded the greater of three percent of the retail value or exceeded $500. Id.

These two cases represent the Janus-faced nature of the common-law tort system—the cluster of procedural rules and substantive doctrines that in Anglo-American countries govern civil (non-criminal) wrongdoing and allow recovery of money for successful plaintiffs. On one side stands Daisey Johnson, a symbol of the state’s most vulnerable citizens—poor, elderly, and uneducated. Such individuals were made doubly vulnerable by the business-friendly policy climate in low-regulation states like Alabama. As one Alabama Supreme Court Justice noted, “Alabama citizens who become the victims of fraud have little recourse other than through litigation,” because “the State Department of Insurance has little power to regulate agents, and we judicially know that litigation is often the only weapon defrauded citizens have.” The same conditions that made citizens vulnerable to fraud—age, poverty, infirmity, lack of education, and so on—also made them unlikely to be able to bring a suit. The value of money at stake in tort suits also may look very different to an aggrieved plaintiff and others with more resources; the amount swindled from Ms. Johnson held enormous significance for her and similarly situated policy-holders, yet it remained insignificant for the company. Thus, in cases like that of Ms. Johnson, high-dollar-value punitive damages served as “a populist weapon to help level the playing field between powerless plaintiffs and powerful defendants,” translated into a language that corporations grasped and calculated to make the judgment sting.4

Dr. Gore came from an entirely different, highly privileged social world—well educated, professional, and wealthy, with many connections. His economic injury, too,

4 Johnson, 684 So.2d at 693.
did not exactly pull at many heartstrings—a doctor’s luxury car received a new paint job, yet he was not informed. The car in every other way performed as inspected, and the new paint job remained invisible to Dr. Gore until inspected by an expert. The defendant company nonetheless received harsh punishment akin to that in the Johnson case, facing a judgment that far exceeded any economic harm done to Dr. Gore, even though Alabama had no law actually prohibiting BMW’s actions. In fact, under the settled law of most other states, BMW would have not needed to disclose the repairs because their costs were low in relation to the car’s value. To many observers inside the state and beyond its boundaries, Dr. Gore’s case made the Alabama judicial system seem unjust and arbitrary, like a legal lottery that plaintiffs could play in hopes of winning big at the expense of large companies. Indeed, the outcome in the Gore case unleashed a backlash across the state’s business community and beyond, with commentators mourning the moral decay of America’s “litigious society,” as represented by runaway juries and “jackpot justice” in states like Alabama. Alabama in particular became known as “tort hell.”

Across the United States in the latter decades of the twentieth century, private lawsuits became an increasingly common and visible means for regulating the relationships among individuals, businesses, and the state on subjects ranging broadly from health and safety to environmental protection to civil rights to fraud. The legal and regulatory frameworks that structure interactions in the consumer marketplace deserve careful

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attention because they reflect underlying societal conceptions of fairness, efficiency, accountability, and justice—the very values that define any society’s identity and set the terms of economic engagement.

This dissertation builds on the work of scholars in history, law, and other social sciences in order to explain how the law of lawsuits functions within a “regulatory ecology.” This approach considers the interlocking influences of not only codified laws and formal enforcement mechanisms but also: the intersections among public and private regulatory bodies; the evolving actions of institutions such as business lobbies, political parties, non-governmental organizations, and professional organizations; and the role of political narratives, informal norms, and relational networks in shaping legal practices and controversies. This methodology provides an attractive viewpoint for a scholar trained as both a lawyer and a historian because it illuminates the interlocking roles of legal doctrine and institutions as well as the agency of human actors and the impact of historical

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contingency. The description of a given regulatory-ecology and the reconstruction of its evolution falls squarely within the scholarly tradition of assessing “law-in-action” -- that is, focusing on the flesh-and-blood experiences of law, the way that people use law as a tool, and efforts to make or change the law. Law in action scholarship typically begins with a question or problem rather than a statute, abstract theory, or legal maxim. A regulatory-ecology approach provides a slightly wider lens, blending a study of the “law in action” with other institutions “in action”—from political parties to business lobbies to professional networks and beyond. Thus, the explanatory metaphor of an “ecology” is helpful, because such a study tracks multiple institutional “species,” including legal institutions and their relational networks over a policy field.  

Because the dissertation’s aim is primarily to analyze an evolving regulatory ecology around the law of lawsuits, it follows a narrative structure. The thesis stitches together a series of legal case studies that have formerly only appeared in isolation from one another. Most narrative accounts about Alabama’s shifting litigation climate take the

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8 This author has been particularly inspired by works that have successfully employed case studies in order to illuminate broader social, legal, and political developments. See, for example, Fleming, City of Debtors (linking ground-level stories of novel credit developments and reciprocal efforts to regulate them in New York with broader themes around America’s fraught relationship with small-dollar consumer credit); Shane Hamilton, Trucking Country: The Road to America’s Wal-Mart Economy (Princeton, NJ: Princeton University Press, 2008) (connecting stories about rural truck drivers to developments in the regulation of interstate commerce); Arlie Russell Hochschild, Strangers in Their Own
form of morality tales told from a single perspective—either tales about unscrupulous, greedy trial lawyers, or about the corrupt political motives of Big Business. In contrast, the pages that follow highlight the interconnectedness of multiple historical conditions, motives, and contingencies, demonstrating how the law acts as a regulatory ecosystem, and how state officials, litigants, and their attorneys all seek to operate within that ecosystem, bending its features toward their narrow interests or broader sense of justice and sometimes seeking to shift the contours of the ecosystem itself. Though there are clear winners and losers at every point in this story, my hope is to not portray simple heroes and villains. The policy prescriptions that emerge focus largely on the types of evidentiary standards and societal considerations that may be helpful in structuring future debates over changes in the law.

There is a rich historical scholarship on the evolution of American law, with most of that scholarship focusing on controversies within a topical area—such as discrimination or environmental protection. In this thesis, procedural rules take center stage, including

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the guidelines that govern who may file a private lawsuit to assert a civil wrong, as well as when they may do so, and how they may proceed. Some of these rules manifest as concrete, written texts, such as in formal Rules of Procedure. Others function more stealthily, such as the multi-factor balancing tests employed by appellate judges for determining when a certain amount of money awarded in a lawsuit exceeds a threshold of reasonableness to become “excessive.” The topical scope of the dissertation—consumer fraud—follows secondarily, as this happened to function as a particularly rich terrain for battles over the law of lawsuits, both in Alabama and throughout the United States. Such questions may seem dry, even dry as dust. But they can have a powerful impact on basic questions of access to justice, and the structuring of incentives for behavior by firms and consumers alike.

Alabama serves as an intriguing case study for retracing this regulatory ecology because of some characteristics that made the state an outlier or exemplar, as well as others that made Alabama a representative case for the experiences across the United States. On the one hand, many legal trends, including not only those spurring adoption of consumer-protection statutes or consumer-credit regulations, but also those involving tort-reform measures, came relatively late to this state in the Deep South. As a result, Alabama lawmakers and judges often had a menu of options from which to choose, alongside a host of policy outcomes and legal precedents to consider. Thus, a study of Alabama—as

opposed to a study set in a state like New York or California—offers a view of state lawmaking in action from a perspective other than that of the “pioneer,” which has a collateral effect of illuminating the networks that help diffuse legal innovations across jurisdictions, rather than just the dynamics that impel initial legal experimentation. In other words, if states are indeed “laboratories of democracy,” a study of a state like Alabama allows perspective on how an experiment has played out, not just how it has begun. Furthermore, many studies of law at the state or local levels focus on jurisdictions clustered on the coasts or that stand out as the country’s major metropolises. Thus, these examinations engage with states and cities that, since the late nineteenth-century, have had a policy ethos that incorporates substantial suspicion of corporations and significant faith in the effectiveness of public institutions. This focus obscures developments in many conservative-leaning states like Alabama, which instead exhibit low-taxation, low-regulation legal environments. The changes in the legal environment in Alabama recounted here, moreover, materialized in ways both swift and extreme, with the state swinging rapidly between different approaches to tort law within the period of a few decades. In this way, Alabama presents a more distilled version of the evolution in legal climate that was experienced by many other states in more gradual and thus less legible ways.\footnote{See, for example, Fleming, City of Debtors (exploring the law of consumer lending through a case study of New York); Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870 (Chapel Hill: University of North Carolina Press, 1983) (describing the development of the law of corporations through a case study of New York City); Reuel Schiller, Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism (New York: Cambridge University Press, 2015) (describing how tensions between labor and civil-rights movements shaped legal regimes of postwar liberalism through a case study set in the San Francisco Bay Area); Philip G. Schrag, Counsel for the Deceived: Case Studies in Consumer Fraud (New Orleans: Quid Pro Books, 2012}
Temporally, the dissertation primarily considers developments in the law and legal climate occurring from the 1970s through the early 2000s. In the 1970s, consumer advocates worried that Alabama’s weak regulatory structure made it a kind of “con man’s heaven.” But by the 1990s, the battle cry of regulatory reformers had reversed, as businesspeople mourned the state’s decline into “tort hell.” Debates about the correct balance of power among consumers, businesses, and the state continue to shape political contests in both Alabama and on the broader national stage, whether contextualized under the aegis of “consumer protection,” “access to justice,” “tort reform,” support for “free enterprise,” or the cultivation of a positive “business climate.”

The dissertation’s five chapters follow a topical organization, but also loosely track a chronological arc. The first chapter begins with the development of fraud-fighting tools in Alabama from the vantage point of the Alabama’s Office of the Attorney General by focusing on the drive to pass a consumer-protection statute in 1981—long after every other state and territory in the United States had done so. The chapter then assesses the structure and practical constraints of the statute that finally passed the state legislature. The core of the chapter explores the impact of this new law through three legal case studies derived


But also see, for example, Laura F. Edwards, The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South (Chapel Hill: University of North Carolina Press, 2009) (focusing on legal culture and the practical functioning of local legal institutions in the Carolinas while exploring tensions between “peace” and rights-based models); Martha A. Myers, Race, Labor & Punishment in the New South (Columbus: The Ohio State University Press, 1998) (describing Georgia’s leadership in the development of the convict lease system).
from an archive of the Alabama Attorney General’s Consumer Protection Division case files from the 1970s through 1990s. The first case describes the challenges of regulating fly-by-night operations through the story of a fraudulent home repair scheme. The second explores the challenges of regulating mail fraud across state lines through the story of a sleazy tabloid that sold subscriptions under the guise of being a reputable home-and-garden magazine. Finally, the third case explores the difficult task of crafting *ex post* remedies for consumers after a once-legitimate business goes bust, drawing on the story of a defunct health-spa chain. This chapter concludes that Alabama’s consumer-protection law empowered the Attorney General to act on behalf of consumers, but also revealed both significant structural limitations within the law’s construction and practical constraints generated by marketplace conditions and a federalist legal system. This chapter also investigates the state’s uneven regulatory capacity to police consumer fraud, which helps set the scene for the chapters that follow.

Chapter 2 examines a legislative drive to change the law of lawsuits in the 1980s. In Alabama, tort-reform proponents had tried (and failed) several times to change state laws in the early 1980s. But then, in 1987, a surprising confluence of historical, social, and political factors created favorable conditions for a tort-reform package to pass in the legislature. Most significantly, election of the state’s first Republican governor in a century raised questions about how solid the “Solid South” truly was, while a reconfiguration of the state’s business lobby breathed new life into business-centered identity politics. Here I argue that the 1987 tort-reform movement redistributed political clout and shifted political loyalties—effectively reshaping Alabama’s political landscape while a reconstituted
business lobby attempted to remake its legal code. This chapter not only establishes the preconditions for the more dramatic shifts to law and policy in the state on the horizon; it provides historical context for the rise of the modern Alabama Republican Party, which soon took a leading role on both state and national political stages.

The third chapter explores Alabama’s escalating litigation dynamic through the 1990s and its place within a larger national legal ecosystem, explaining the incentive structures and logics built into the civil legal system, including the contingent-feee model for legal representation. An extended engagement with an illustrative case study drawn from court records recovered from the Barbour County Circuit Court in Clayton, Alabama, demonstrates elements of Alabama’s legal system in action and raises ethical questions about the administration of justice for plaintiffs and defendants alike. Through a series of unfortunate events, Willie Ed Johnson, a young black man in rural Alabama, set off to own a car and instead ended up with a mountain of debt, no car, and a lawsuit against the company that financed the purchase. When Johnson’s jury returned a $50 million verdict, the case became anecdotal ammunition in “tort hell” debates that soon rocked state and national politics. The story of Alabama’s tort-law revolution highlights the dangers of predation in marketplace while simultaneously revealing widely shared anxieties about the parallel ascensions of the loan shark, the trial bar, and the nanny state in the late-twentieth century.

Chapter 4 describes a shift among tort-reform proponents from pursuing legislative aims to mobilizing an electoral strategy. The legislative tort reform package, described in chapter two, disintegrated within a few years because of strongly embedded institutional
opposition to tort reform, especially in the state’s Supreme Court. This chapter describes the construction of a conservative countermovement that challenged the institutional foundations of the existing political order, beginning with efforts to reconstitute the Court’s composition from Democrat to Republican over just a decade. The state’s newly reinvigorated business lobby and the formerly impotent Alabama Republican Party negotiated a political alliance through which the business lobby won a second chance at tort reform, the Republican Party won the right to rule in state politics, and Karl Rove established his national reputation as a masterful political architect. This chapter further develops an argument for an ecological view of legal developments formed within a crucible of law, politics, and public opinion.

The final chapter considers how the tort reform question saturated political debate in the latter half of the 1990s in both Alabama and across America. This chapter traces the evolution of arguments made on both sides of the tort-reform divide and investigates the efforts of stakeholders to mobilize popular support for their policy positions. Faced with state and federal political roadblocks, tort-reform proponents, including corporate and insurance interests as well as Big Tobacco, attempted to reconfigure legislative and electoral politics by molding public opinion on tort-reform. Trial lawyers attempted to counter these narrative strategies but were often outmaneuvered. As a sense of legal crisis evolved, so did the options available to strategists and lawmakers. This chapter reveals some of the ways that lobbying groups and think tanks working in political backchannels have subtly shaped public discourse, and it argues that shifting winds of political sentiment opened pathways for policy change that had been unavailable a decade before.
Before proceeding, some scene setting is in order to define the territory upon which Alabamians would fight their battles to frame fairness in both the marketplace and the courthouse. The fault-lines within Alabama politics, like elsewhere across America, had long been characterized more by race and place than political party. Regarding race, Alabama’s black citizens’ long history of disenfranchisement through poll taxes, literacy tests, and methods of outright terror has been well documented and widely denounced. Regarding place, an ongoing power struggle between urban and rural interests have traditionally defined state electoral politics and policy debates. And though the categories of race and place are distinct, the state’s politics of race and place have always overlapped and interconnected.12

Relatedly, concentrated economic power has long translated into political clout in Alabama, just as it has elsewhere. However, lines distinguishing the powerful from the weak have shifted over time. Through most of the twentieth century, Alabama politics were dominated by two powerful interests: Big Mules and Black Belt planters. Big Mules were urban industrialists—the owners of the railroads, mines, mills, and factories clustered mostly in the state’s industrialized north. These economic elites exerted tremendous power over their vast labor forces (sometimes literally controlling them with private police forces) and had access to both large stores of cash and broad political and economic networks, all of which buttressed their political influence. “Black Belt planters,” meanwhile, referred to

Alabama’s white agrarian elite, who hailed from a belt-shaped region running through the lower half of Alabama that takes its name from the rich, black topsoil that supported cotton cultivation. Sparsely populated, counties in this region have proportionally large African-American populations, a legacy of the region’s antebellum slave-labor plantation economy. Suppression of black votes in this area gave the smaller white voting population a disproportionately large voice in state politics.¹³

Alabama’s rural-urban balance shifted significantly after World War II, but the state’s rural elite maintained its grasp on state politics long into the twentieth century, in part through forces of political inertia and in part through fantastically unbalanced voting districts. By 1960, more Alabamians lived in urban areas than rural areas. Yet even as rural populations declined, Black Belt planters maintained significant power over state politics because Alabama’s state legislative districts, mapped out in 1901, had never since been redrawn by the legislature to account for urbanization and other population changes. The 1901 system also used city- and county-wide districts, which diluted the voting strength of both black Democrats and white Republicans. Under the legislative apportionment system in place circa 1970, a rural county with 16,000 people and an urban county of 600,000 people had the same representation in the Alabama Senate—one senator for each county—and wildly disproportionate representation in the Alabama House of Representatives—two representatives for the rural county and seven representatives for the

urban county, though the urban county’s population was more than thirty-seven times
greater.¹⁴

Under these political conditions, Black Belt planters and Big Mules occasionally
waged political battles on issues that pitted urban and rural interests against one another.
In the early twentieth century, for instance, Big Mules favored elimination of the convict-
lease system in favor of putting convicts to work on public roads projects and revision of
the tax code to eliminate penalties on out-of-state corporations, measures which Black Belt
planters opposed. But these two elite groups found common ground in the idea of class
and race hegemony, a cause for which they came together to block election reform,
essentially disenfranchising black and poor white voters, or alternatively encouraging
white yeoman and working classes to vote in ways that maintained these class- and race-
based hierarchies. Despite issues that periodically divided them, Black Belt planters and
Big Mules had little to gain from changing the electoral status quo.¹⁵

Accordingly, for the first three-quarters of the twentieth century, party ties were
“virtually irrelevant” in state-level races because “almost everyone was a Democrat,”
allowing Alabama to serve as “an integral part of what was known as the Solid
(Democratic) South.” Political party also intersected with considerations of race, as the

¹⁴ Hackney, Populism to Progressivism in Alabama, 164–65, 209–29; Flynt, Alabama in the Twentieth Century,
86–87; W. Letford, “House Seats, Constitution of 1901” (map), Alabama Department of Archives and History, June 26,
1961 (http://www.archives.state.al.us/legislat/ala_maps/hs_1901.html).

The urban county described in the example above is Jefferson County (which contains the city of Birmingham,
Alabama), and the rural county is Wilcox County (located in the Black Belt).

¹⁵ Rogers, et al., Alabama: The History of a Deep South State, 413, 416; Flynt, Alabama in the Twentieth
Democratic Party of Alabama promoted an explicit politics of white supremacy in the early and middle decades of the twentieth century. As a result, at least through the 1970s, votes in the Democratic Party primary mattered more than votes in the general election because “no one except a Democrat [had] been elected to statewide office in Alabama in more than a century.” Most voters who cared to have a voice, politics aside, voted as Democrats because a victory in the Democratic primary meant a de facto victory in the general election. However, identifying or voting as a Democrat in Alabama did not necessarily correlate to allegiance with the national Democratic Party, much less preference for liberal policies. In the words of political scientist V.O. Key, Alabama operated as a “no-party state,” not a one-party state. In a land where everyone ostensibly registered as a Democrat, having a “D” after one’s name on the ballot was more perfunctory than illuminating. However, that is not to say that the Republican Party in Alabama was completely silent through the early twentieth century; though it failed to serve as a viable opposition party in most electoral contests, it provided a political home for a sizeable minority of the state population that occasionally drew crossover support from a few disaffected Dixiecrats.


The 1978 gubernatorial election highlights the blurry political party lines in Alabama politics. Fob James, a millionaire barbell salesman and college football All-American, had until 1976 been a leading fundraiser for the Alabama Republican party and a member of the GOP state executive committee. Two years later, he became a “born-again Democrat” and won the Democratic gubernatorial primary (and thus the election). During James’s campaign, he declared a “War on Illiteracy” and, without directly criticizing Governor Wallace, gestured toward abandoning “the negative prejudices of the past.” James also called “for ‘basics’ in education, for more
The state’s political system changed very gradually and only after significant resistance. Transformation eventually came from both within and without. First, in trends common to so many American states, Alabama’s economy evolved in the postwar era, and urbanization began to reshape Alabama’s demography. Machinery began to replace farm labor, pushing agricultural workers to cities seeking work. The trend of urbanization continued decade by decade. The rural population that remained began to move away from Alabama’s traditional cash crop, cotton, as soils became depleted and prices fell, shifting to timber, soybeans, chickens, or cattle, or else moving to part-time production and taking industry or service jobs to supplement their incomes. As the century progressed, the mines, mills, factories, and railroads that generated so much of urban wealth and power in earlier decades gave way to a service-centered economy, gradually weakening the economic and political hold of the old Big Mule elite. At the same time, the focus of the state’s economic and better jobs, and for running the state’s government with ‘sound business principles. National political experts were “shocked” that Democratic voters would rally behind someone so superficially a Democrat. The Alabama GOP Chairman explained, “I’ve always said Alabama is a no-party state. By philosophy, Alabamians are Republican. They just don’t know it yet.” Another commentator more aptly described James’s victory as simply a “throw-the-rascals-out” vote. After all, James’s vague campaign slogan “It’s time for a new beginning in Alabama” spoke to renewal without specific policy content. “I’d like you to join me in the politics of unselfishness,” James declared; “I’d like you to join me in a renaissance of common sense.” While the other, more politically experienced Democratic candidates “savaged each other,” James “toured the state in a yellow school bus” and mostly ignored the other candidates and spoke of “opening up the government to the people.” James blended a few Democratic-leaning objectives with some Republican-leaning management principles, yet seemed to prevail mostly based on his credentials as a feel-good populist outsider free of the perceived taint of long political service. George Wallace returned to the governor’s mansion for yet another term four years later (he could not directly succeed himself in 1978) and for a while the South remained “solid.” However, by 1994, after dramatic changes to state politics in the 1986 election, James would go on to win a second term as governor—this time running as a Republican.

Thus, James’s campaigns exemplify the mismatch between political parties in Alabama and in national politics and demonstrate the important distinction between voters consistently selecting a candidate from one political party at the state level and voters consistently identifying with the policy positions of one political party at the national level. Alabamians may predictably swing red or blue, but that does not mean that voters’ actual policy preferences fit neatly into the categories defined by national political parties. A more detailed analysis of the evolution of Alabama political parties appears in chapter four. See Jeff Prugh, “James—A Fast Runner from Out of Nowhere,” Los Angeles Times, September 27, 1978. Bill Peterson, “Alabama’s Born-Again Democrats,” Washington Post, September 25, 1978; “Alabama: After Wallace,” Newsweek, October 9, 1978.
development office shifted toward attracting foreign direct investment; by the 1980s, the state boasted more than seventy foreign-owned manufacturing enterprises, up from only six in 1971. Accordingly, Alabama operated sales and promotion offices around the world—in Bern, London, Munich, Tokyo, and Hong Kong—to try to attract an ever-larger share of global industrial development. As the state’s economic fortunes rose, so did many Alabama citizens’ wages and standards of living—as well as their expectations.  

At the same time, federal lawsuits in the 1960s and 1970s upended electoral dynamics in the state by reforming both the apportionment of elected representatives and the power of individual voters, black and white. A panel of federal judges redrew Alabama’s district lines in 1972 to rebalance disparities based on place, thereby diluting the power of the Black Belt planters. Meanwhile, other federal lawsuits, including some brought under the Voting Rights Act of 1965, required state officials to redraw electoral districts to eliminate purposeful disenfranchisement based on race. Though battles over equality of voting rights in Alabama continue to this day, by the late 1970s, dramatic shifts in legislative district lines and meaningful enfranchisement of many blacks and poor whites were creating a completely new electoral map in Alabama and thus potential for a political reshuffling in the state’s elected offices.


Alabama has long had what historian Wayne Flynt calls “punt syndrome”: like a football team “backed up to its own goal line and unable to generate any offense” that “needed to punt the ball to the other team,” Alabama frequently
Thus, by the late 1970s, more Alabamians had moved to large towns and cities, and the state’s economy depended more on manufacturing and services than agriculture. At the same time, the drive to secure political rights for black voters and other disenfranchised groups had profoundly reshaped the state’s voting map. Simultaneously, however, Alabama continued to be marked by pockets of deep poverty, social and racial inequality, and political corruption. Against this backdrop of conflicting storylines, of economic development and political reform alongside ongoing stagnation and social injustice, our more particular narrative begins in Montgomery, the state’s capital, with the tale of a common swindler, an ordinary victim, and an understaffed bureaucracy charged with setting such matters right.

failed to solve its own problems and “simply punted the ball to federal courts.” Flynt, *Alabama in the Twentieth Century*, 86. State legislators then “loudly denounced meddling federal judges.” *Id.*

Chapter 1: The Last Consumer-Protection Frontier

In November 1977, the Alabama Department of Revenue spotted a suspected odometer rollback. A man named Daniel Masters had applied for a certificate of title for a two-year-old Chevrolet, but the mileage listed on the car’s bill of sale—37,700 miles—raised red flags. A different car dealer in Louisiana reported selling the same car months before to a Mississippi car dealer with an odometer reading of 55,000 miles. Somewhere along the way, from Louisiana through Mississippi to Alabama, over 15,000 miles rolled off the car’s odometer. The Department of Revenue’s Chief Title Examiner referred this case to the Attorney General’s office for investigation.¹

The investigators began at Spring Hill Toyota, the site of Masters’s purchase. The sales manager there revealed that he had purchased the car from a small, used-car lot a few blocks away owned by a man named Elvin Allday. Once the investigation was underway, Allday belatedly provided an odometer statement signed in blank by someone named “Dean Spivey,” whom Allday claimed was his bookkeeper, with a box checked to indicate “true mileage unknown.” Allday reportedly told one of the Spring Hill Toyota managers that he “could fill in the rest of the odometer statement the way he wanted.” The investigator’s notes memorialized his bewilderment: “What is [the] deal on this odometer statement that AA signed but Spring Hill Toyota filled in”?²

² Robert Sparks, letter to Tom Brassell, 15 February 1978, ADAH, AGCP, box SG018698; Handwritten investigation notes, 23 February 1978, ADAH, AGCP, box SG018698.
After months of investigation, the investigator determined that Allday, not Spring Hill Toyota, had rolled back the car’s odometer. So, in March 1979, the Attorney General’s office began sending Allday strongly—but vaguely—worded letters. The letters urged Allday’s attorney to call the Attorney General’s office to discuss “the odometer discrepancy,” noting that the office had the “full intent to prosecute,” if necessary. Such legal action would fall “under the Federal Statute”; Alabama did not at that time have a statute that directly addressed odometer rollbacks, even though most other states had laws specifically prohibiting the practice by 1979. Allday’s lawyer wrote back a few weeks later, enclosing a check for $1,500 made out to Masters, and a note: “I trust this concludes the matter to your satisfaction.”

After more than a year of investigatory work, a buyer received some compensation for an implicitly admitted consumer fraud, but whether this gesture adequately accounted for the time, effort, and hassle is harder to say. Did $1,500 accurately represent the difference in value between the car Masters thought he purchased and the car he actually received? Would Masters have still purchased the car if he had known the truth, even at a lower price? Could a letter from the Attorney General’s Office serve as a deterrent to future fraud, even without state-level enforcement authority or public notification of this mediation? Did Allday, aware of the state’s low level of consumer-protection regulation, view the $1500 payment as kind of license fee that would allow him to continue to defraud unsuspecting buyers by rolling back odometers?

3 Ellis D. Hanan, letters to Jim Brooks, 7 March and 15 March 1979, ADAH, AGCP, box SG018698; James Brooks, letter to Ellis Hanan, 10 April 1979, ADAH, AGCP, box SG018698.
As demonstrated by this incident, Alabama consumers in the 1970s had limited access to remedies for fraud. Most other jurisdictions had long since established consumer-protection agencies and passed laws to shield consumers from common swindles. But in Alabama, consumerism “blossomed” only at the end of the 1970s—“like a cotton field in late August” (which is to say: unseasonably late).4

By the time Alabama lawmakers adopted a consumer-protection statute in the early 1980s, these lawmakers could look to the experiences of forty-nine other states, the District of Columbia, and even several U.S. territories for guidance on what features to adopt and defects to avoid. However, political circumstances in Alabama that had forestalled earlier action still shaped the contours of the consumer law’s passage—perhaps even more than otherwise prevailing trends or what might have then been considered “best practices” in fraud-fighting. Once the bill passed into law, it expanded the tools available to the Attorney General and his team of investigators, but it still proved to be no panacea. The fraud-fighters tasked with enforcing the new legislation not only struggled against the ingenuity and flexibility of would-be fraudsters; they also grappled with more intangible challenges, such as volatile markets and vexing jurisdictional boundaries.

This chapter traces the development of consumer-protection law on consumerism’s last frontier, beginning with the drive to finally adopt a consumer-protection statute in Alabama, and then exploring the structure, features, and practical constraints of the law that finally passed the state legislature. One can best assess the impact of the law through

close attention to some illustrative cases; three enforcement actions brought under new statute by the Attorney General’s Consumer Protection Division receive particularly close attention. These case studies demonstrate both the ways in which the law empowered the Division to act on behalf of consumers and the significant structural limitations on the Division’s effectiveness. Some challenges arose due to limitations in the construction of the law itself, but others simply reflected practical realities in the marketplace or the broader legal system. This chapter thus offers not only perspective on the development and functioning of a consumer-protection office in a conservative Deep South state, but also the importance of situating any tailored state law within a fluid national marketplace.

**Alabama Builds a Fraud-Fighting Consumer-Protection Agency**

The regulatory aim of protecting consumers has long concerned governments. Rules designed to protect consumers from certain unscrupulous business practices—running along a continuum from the sharp to the deceptive to the clearly fraudulent—have emerged wherever merchants have incentives to cheat unsuspecting customers. In fifteenth-century France, King Louis XI purportedly mandated that vendors caught selling butter weighted with stones would be pilloried in the sun with their goods melting over their faces. As this example illustrates, the purpose of a consumer-protection law has often been not only to punish undesirable conduct but also to send a message to others thinking about taking up the fraudulent scheme. From another vantage point, however, the

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thrust of consumer-protection laws served businesses, too. By drawing a clear line between scrupulous and unscrupulous merchants, consumer-protection regulations aimed to protect the integrity of the marketplace while maintaining proper incentives for socially beneficial conduct.

At the federal level, a movement towards broad consumer-protection legislation in the wake of the New Deal spurred Congress to expand the authority of the Federal Trade Commission (the “FTC”) to police the consumer marketplace for unfair and deceptive business practices in the 1930s. Consumer protection also played a role in presidential administrations through the 1960s and 1970s. Presidents Kennedy, Johnson, and Nixon each reflected the burgeoning consumer movement through executive action. John F. Kennedy’s 1960 presidential campaign included a promise to create an executive advisor on consumer issues, and, in 1962, President Kennedy highlighted consumer protections in a speech to Congress in which he declared a “Consumer’s Bill of Rights.” Historian Lizabeth Cohen even credited this speech with having “launched . . . the consumer movement” of the 1960s and 1970s.

President Lyndon B. Johnson continued Kennedy’s emphasis on consumers’ rights, establishing a President’s Committee on Consumer Interests and a Consumer Advisory

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7 Balleisen, Fraud, 289–93.
9 Cohen, A Consumers’ Republic, 345. However, others have characterized Kennedy’s Consumer Advisory Council as “little more than window dressing”—a symbolic rather than pragmatic gesture towards consumer protection. Fleming, City of Debtors, 173.
Council within the executive branch. President Johnson’s War on Poverty initiative approached consumer protection and fraud prevention through the lens of poverty alleviation, as it aimed “to make poor persons more equal consumers.” Furthermore, Congress passed extensive consumer protective legislation during Johnson’s tenure, including legislation in 1966 establishing the National Highway Safety Bureau (today’s National Highway Traffic Safety Administration) within the Department of Transportation to set automobile safety standards, as well as the 1968 Truth In Lending Act, which empowered the Federal Reserve Board to set standards for consumer lending.

President Nixon further shaped federal consumer-protection by formalizing the organization of consumer-focused groups into an Office of Consumer Affairs within the Executive Office of the President in 1971. The Consumer Product Safety Commission was also created under Nixon’s tenure as a federal agency specifically tasked with regulating the safety of consumer products. In a 1971 speech, Nixon positioned the consumer at the center of American prosperity and consumer protection as a motor of free enterprise. “In today’s marketplace,” he explained, “the consumer often finds himself confronted with what seems an impenetrable complexity in many of our consumer goods, in the advertising claims that surround them, the merchandising methods that purvey them and the means available to conceal their quality.” This complex environment “often confounds the unwary, and too easily can be made to favor the unscrupulous.” Thus, “new safeguards

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12 Since 2010, the Truth in Lending Act has been administered by the Consumer Financial Protection Bureau.
are needed, both to protect the consumer and to reward the responsible businessman.”\textsuperscript{13} Nixon’s rhetoric drew on the common image of the pitfalls into which the unwary consumer might tumble. But his promise that consumer protection would “reward the responsible businessman” gave a nod towards businesspeople and conservative political outlets, which acknowledged the need for consumer protection while also fretting about the market impacts of “excessively ‘rigid and cumbersome’ antifraud legislation.” Instead, Nixon “preferred solutions that depended on mechanisms of business self-regulation” rather than governmental control. Thus, even as Nixon’s administration proclaimed the need to move beyond a regulatory structure premised on caveat emptor, he “drew distinctions between his views and those of many consumer activists and Democrats.”\textsuperscript{14} For example, the Magnuson-Moss Act created a standardized system for consumer warranties to increase transparency in the marketplace without explicitly requiring that businesses offer any particular type of warranty or remedy to consumers.

This national blossoming of consumerism through the 1960s and 1970s also led state and local governments to establish state agencies tasked specifically with enforcing consumer-protection objectives. Across the United States, as consumer-focused production rose in the post-World War II era, so did the emphasis in state and local governments on consumer-protection regulatory systems to protect the interests of both the


\textsuperscript{14} Balleisen, \textit{Fraud}, 303–04.
consumer and the honest businessperson.\textsuperscript{15} By the 1970s, New York’s Attorney General, Louis J. Lefkowitz, had become an outspoken proponent of consumer protection and its dual initiatives, condemning the “shocking scope of the chicanery and deceit which are used to dupe the consumer and defraud him of his money,” which victimized “even the businessman who carries on with integrity.” Overall, Lefkowitz explained, fraud served as a drag on the economy. One by one, states across the country established consumer-protection offices, most of which fell under the aegis of the state’s attorney general’s office. A few states also developed separate consumer-focused agencies. Furthermore, existing state agencies regulating sectors from energy to transportation to banking and insurance began to designate point people for consumer protection issues. Finally, large cities like New York City and Los Angeles developed consumer protection divisions of their own with branch offices in different neighborhoods.\textsuperscript{16}

However, in low-regulation states like Alabama, consumers could not always expect the state to intervene. Instead, consumers had to be vigilant. The message of Alabama’s Attorney General to consumers in the late 1970s was simple: “\textit{Caveat Emptor—Buyer Beware}.”\textsuperscript{17} Alabama was not the only state in which \textit{caveat emptor} reigned—in fact, the doctrine of caveat emptor reflected a policy preference that could be found across


\textsuperscript{17} “Attorney General’s Message,” \textit{Consumers’ Counsel} 2, no. 5 (March 1980): 2. All issues of \textit{The Consumers’ Counsel} cited below are available at the ADAH, Alabama Attorney General’s Office State Publications collection, box SG029991, folder 11.
America, especially in the most conservative states.\textsuperscript{18} When Alabama finally moved to establish a consumer-protection arm of government, it did so tentatively and within the context of its prevailing low-regulation ethos.

Alabama’s first state-level consumer-protection departments emerged in parallel organizations—one formed in 1971 as an office in the Attorney General’s office, and the other as a consumer-affairs group established in 1972 by George Wallace to handle consumer-related correspondence to the governor. Both offices functioned more like customer service or mediation departments than regulatory agencies, answering letters and routing complaints without much in the way of concrete enforcement authority. Letters to concerned consumers might advise them of their rights under federal laws and direct them to an appropriate federal agency, or else recommend consultation with a private attorney. Occasionally, these communications simply offered sympathies to a consumer for whom there appeared to be no remedy or encouraged the consumer to write his or her state representatives to spur passage of a new law. In many ways, these early offices mirrored the efforts of Kennedy, Johnson, and Nixon to establish consumer advisory boards and consumer-education bodies, the purposes of which appeared more to extend the reach of political patronage than to serve as an arm of legal enforcement.

Major signs of change would come with the election of Charlie Graddick to the position of Alabama Attorney General in 1978. Graddick had put forward a law-and-order platform that highlighted his aggressive stances as a state prosecutor. As shown in figure

1, Graddick promoted himself as a “man of convictions” who boasted pursuit of tough, lengthy sentences for criminal offenders and a strong pro-death-penalty stance. He extended this disdain for criminal conduct to a commitment to fight fraud.

Shortly after taking office, Graddick consolidated the two consumer-protection departments into a single group within the Attorney General’s Office. This new Consumer Protection Division, he announced, would protect both “consumer and business interests.” “Every dollar that we can keep a consumer from spending in a deceptive transaction,” he proclaimed, “can be spent at an honest business.”19 In this way, Graddick echoed the sentiments of Louis Lefkowitz, New York’s Republican Attorney General—but two decades after Lefkowitz began to articulate them.

This consolidation of consumer protection endeavors did not radically change consumer-protection enforcement in Alabama overnight. Alabama still had no consumer-protection law, and like its predecessor organizations, this new Consumer Protection Division possessed extremely limited enforcement powers, serving as little more than a “clearinghouse for consumer complaints” with some authority to “conduct investigations of business practices where patterns of fraud appear.” It operated without the clear authority (much less the funding and resources) to actively prosecute much of the deceptive

conduct in the marketplace. Furthermore, the office was explicitly prohibited from handling any complaints dealing with insurance, real estate, banking, or utilities, because those complaints had to be directed at the relevant state agency.\textsuperscript{21} In its early days, Alabama’s Consumer Protection Division staff members aided consumers “primarily by mediating consumer disputes” and secondarily through consumer education, not through litigation.\textsuperscript{22} Thus, in ways that mirrored the progression of the Masters odometer rollback case, the Division’s most powerful tools rested on investigation of complaints, insinuation, and negotiation rather than prosecution.\textsuperscript{23}

The Alabama Attorney General’s newly minted Consumer Protection Division also operated on a shoestring budget and with a skeleton crew. In 1979, the Division’s entire budget amounted to a mere $200,000. The Division consisted of a single licensed attorney (occasionally two), a paralegal, a few multitasking staff members, and a few college-student interns. This tiny office monitored consumer fraud for a state of four-million people, each week receiving hundreds of written consumer complaints and fielding even more calls to the Division’s consumer-protection hotline. In contrast, Kansas—a state with half the population—allocted around $250,000 per year to its Consumer Protection Division. And the Department of Consumer Affairs for the city of Louisville, Kentucky, boasted a $150,000 budget and a ten-person staff.\textsuperscript{24}

\textsuperscript{21}Mark Stevenson, “How to Complain to Get Results,” \textit{Montgomery Advertiser}, September 15, 1984.
\textsuperscript{22}“Consumer Office Mediates Complaints for Alabamians,” \textit{Consumers’ Counsel} 2, no. 10 (October 1980): 1.
\textsuperscript{24}Attorney General’s Message,” \textit{Consumers’ Counsel} 2, no. 6 (June 1980): 2; Peggy Roberts, “Consumer Protection Division Understaffed, Fraud Law Weak,” \textit{Montgomery Advertiser and Alabama Journal}, June 20, 1987;
Much of the on-the-ground work fell on Alabama’s “Consumer Protection Specialists,” non-attorneys who took complaints by letter or telephone from consumers and then issued formal complaints to the business along with a business-response form. When consumers wrote in with complaints, an investigator reviewed the complaint and, if “mediation [was] practical,” the investigator submitted a copy of the complaint and a business response form to the relevant business “so that both parties will be on file” telling their side of the story.25

This set-up reflected a state-led consumer-protection ethos that was only quasi-legal in nature. In its early days, the Division was only marginally a “law enforcement” office. In fact, it more closely resembled the operations of a Better Business Bureau, which took consumer complaints on similar forms, submitted these complaints to businesses, and thereby helped mediate these disputes, though it lacked even the reputational remedies available to a Better Business Bureau. In part, the Division’s approach reflected the lack of any true “consumer-protection” laws to enforce. Fielding calls, writing letters, and mediating disputes, though conceptually simple, were also time- and resource-intensive. Yet these tasks could be implemented by a largely non-attorney work force and accomplished without expending the political capital necessary to move a bill through the legislature or the funding to staff a more vigorous enforcement enterprise. Thus, in its

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Richard Shank, letter to the editor, Garden City Telegram (Garden City, Kansas), October 20, 1978; Louise Cook, “Not All Consumer Heroes Are Named Ralph Nader,” San Bernardino County Sun, January 22, 1978.

early years, the Division served largely as a clearinghouse for consumer complaints, with the heaviest load falling on non-attorney staff. Though every state’s consumer protection office engaged in these types of activities to some degree, Alabama’s Division was notable in that its early mediation and investigation efforts were not supported with substantial legal enforcement activities.\textsuperscript{26}

Ella Boyd Martin was one such non-attorney staff member on whom the Division relied. Martin began as a volunteer in a temporary office that the Attorney General’s Office established in the destructive wake of Hurricane Frederic, a storm that caused a billion dollars of property damage in the coastal areas around Mobile, Alabama. With the hurricane came a corresponding rise in fraudulent activities, price gouging, and complaints against contractors and insurance companies, and staff members like Martin helped direct disgruntled consumers towards resources, where available. Martin must have enjoyed the experience; after graduating from Auburn University with a degree in consumer economics, Martin joined the office full time as a Consumer Protection Specialist. In this role, Martin recorded and tracked consumer complaints, advised consumers of their rights, and served as a liaison between consumers and businesses.\textsuperscript{27} Martin soon advanced to become the Division’s Public Information Specialist, which expanded her responsibilities


to include serving as the spokesperson for the office and directing the Division’s public outreach efforts.\(^{28}\)

With limited enforcement options, staff members like Martin helped the Division expand its consumer education and other self-help tools in its early years. In this way, Alabama benefited from policy experimentation in other jurisdictions’ consumer-protection offices. By the early 1970s, consumer education had already become “a primary, not ancillary, function” of most states’ consumer-protection offices, particularly because education promised to prevent fraud before it happened. New Mexico’s Attorney General, for example, published a monthly consumer-protection newsletter in both English and Spanish. In Washington State, funding from a federal grant allowed that state’s attorney general to go even further, supporting “a full-time ‘Consumer Education’ staff” that prepared a weekly newspaper column and even participated in both “a biweekly, half-hour television program, ‘Law in Action’” and local television stations’ newscasts on an ad hoc basis. In other states, consumer-protection offices created spot advertisements to run on television and radio—often without additional cost to taxpayers when free broadcasting time could be negotiated.\(^{29}\)

In a 1980 interview, Ella Martin echoed the motivation that inspired so many other states’ educational programs, even though Alabama’s small department could not always follow their methods. She explained: “The best way to help the consumer is not through mediation after the fact . . . but through education on how to avoid the situation before it


occurs.” Self-reliance, not state intervention, best served to police consumer fraud, according to Martin. The Attorney General’s Office could best help Alabama consumers who helped themselves.

To this end, Martin made herself available to newspaper journalists covering the consumer beat, and thus she became an oft-quoted figure in stories covering trends in consumer fraud. Emulating other consumer protection agencies, consumer groups, and Better Business Bureaus, the Division offered informational booklets, including one popular pamphlet called “20 Ways Not to Be Gypped,” with tips on how to identify and avoid different fraud schemes. Demand for the booklet exceeded initial production, and the Attorney General had to ask consumers to be patient pending a second printing. Martin hosted live educational events, too, such as presentations at annual consumer-education conferences at the U.S. Army’s Fort McClellan, which drew hundreds of curious consumers.

31 See, e.g., Karen Hartley, “More Alabamians Fall Victim to Failure-to-Render Scheme, Montgomery Advertiser, October 10, 1983.
HOW TO BE YOUR OWN CONSUMER ADVOCATE

In 1979 the Office of Consumer Protection received 8,000 hotline calls and 4,000 written complaints. Many of the consumers that sought the assistance of this office stated that they had not attempted to resolve their problem with the business in question. The Consumer Protection Office has found that a large number of businesses, particularly Alabama based businesses, are very responsive to a letter to that business formally registering the consumer's complaint.

A letter sent to the consumer representative, president or district manager of a reputable business oftentimes will produce a speedy resolution to the consumer's complaint. Of course such a letter is not possible when a consumer is defrauded by a fly-by-night business operator. But when the consumer deals with a permanently established business, the consumer can often serve as his own advocate by bringing the problem in issue to the attention of the appropriate person.

Included in this edition of The Consumers' Counsel is a sample complaint letter which could be used by the consumer to formally register a complaint with the business with which the consumer has dealt. Upcoming editions of The Consumers' Counsel will review appropriate steps to be taken by consumers when they receive unsatisfactory results from their complaint letters. Of course the Attorney General's Consumer Protection Office exists to assist consumers in their efforts to remedy any losses resulting from deceptive trade practices.

![Sample Complaint Letter]

Figure 2: A Model Consumer Complaint Letter with Instructions
The Division also circulated a newsletter through the 1980s called *The Consumers’ Counsel*. Though the newsletter’s title highlighted the Division’s concern for the Alabama consumer, its logo featured scales of justice and belied a delicate balancing act between consumer and business interests. (See the upper left corner of figure 2.) The multi-tasking Martin served as editor of the publication through its first years of operation. The *Consumers’ Counsel* not only spread awareness of the recently established Division and its accomplishments but also sought to steer consumers away from fraudulent schemes and to give consumers tools to address problems themselves.

A 1980 feature article (also shown in figure 2), for example, offered consumers tips on how to write effective complaint letters to businesses. This letter template reproduces an identical sample complaint letter published in the 1979 edition of the *Consumer’s Resource Handbook* published by the White House Office of the Special Assistant for Consumer Affairs. The sample letter modeled necessary elements of a properly written complaint, including details about the buyer, information about the purchase, a clear statement of the consumer’s complaint, and a requested remedy. However, the text surrounding the sample letter in the Alabama newsletter communicated a different level of urgency than the original sample letter published by the Special Assistant for Consumer Affairs. The Alabama newsletter stressed that properly written complaint letters addressed to “a permanently established,” “reputable business oftentimes will produce a speedy resolution to the customer’s complaint,” even without the intervention of the—impliedly understaffed and overwhelmed—Division, which by 1980 fielded thousands of these types of complaints per year. The wording of the article also suggests that the Division hoped to
divert more easily resolved consumer complaints and thereby allow Division staff to focus on the more nefarious dealers in the marketplace. After all, as the article acknowledged, “such a letter is not possible when a consumer is defrauded by a fly-by-night operator.”

Fly-by-night operators posed a serious problem in the Alabama marketplace because they were immune from both complaint letters and mediation efforts—the two tools available in the Division’s arsenal to provide a fraud remedy. Without statutory authority to pursue fly-by-night fraudsters and prosecute them efficiently, Graddick’s Consumer Protection Division could do little to influence these types of businesses. In fact, Graddick estimated that the newly consolidated Consumer Protection Division could resolve only about half of the consumer complaints received in the late 1970s, primarily because Alabama still lacked a consumer-protection law.

**Toward Alabama’s First Consumer-Protection Law**

Without a comprehensive state consumer-protection law, a variety of deceptive activities, such as the odometer rollback discussed above, were not categorically illegal in Alabama. The legal avenues available for attacking consumer deception either came from broad, all-purpose, rules—such as common-law fraud and breach of contract, or criminal false pretenses allegations—or narrower, more specific laws that were merely consumer-fraud “adjacent”—such as licensing requirements for contractors. Of these, the broader rules, like common-law fraud, posed problems because they did not specify actions that
were per se illegal; they also required demanding evidentiary standards of proof. For example, in an odometer rollback case brought as an ordinary civil fraud suit, it would not be enough to prove that someone tampered with the odometer; one would also need to prove that the person rolled back the odometer with the intention of tricking another person, that the purchaser relied on the odometer reading in deciding to purchase the car, and that the purchaser was in fact fooled by the false reading. Ordinary breach-of-contract claims, meanwhile, applied only to a narrow band of schemes in which a valid contract existed.\textsuperscript{35}

On the other hand, narrower rules were easier to pursue but often had unsatisfactory penalties. Using the example of a contractor licensing requirement, a fly-by-night builder who performed shoddy work for a high price could more easily be pursued for failing to obtain a contractor’s license than punished for performing the shoddy work. But the penalties for failure to obtain a license rarely exceeded modest fines, and the authority to pursue such offenses rested with the relevant licensing agency, not the Division. Furthermore, Alabama did not have a comprehensive licensing requirement that covered all home builders and remodelers until 1992.\textsuperscript{36}

In addition, as demonstrated through the odometer-rollback example above, civil enforcement actions typically only allowed the recovery of damages to compensate the victim—not for the recovery of attorney’s fees to recuperate the Attorney General’s costs in trying the lawsuit or other penalties to deter deceptive conduct.\textsuperscript{37} Thus, even if the


Division was able to locate a con artist and provide the necessary proof that he defrauded 100 people out of $10 each, the con artist might only be required to pay back the $1000. No other penalties were likely to be imposed, except for perhaps a court order formally prohibiting the fraudster from operating in the state in the future.

Thus, the enforcement side of consumer protection in Alabama remained a paper tiger, leading Alabama Attorney General Charlie Graddick to complain that existing statutory arrangements made Alabama “a prime target for consumer fraud” and “a haven for crooks and thieves.” Every year in the Alabama Legislature from 1971 to 1980, some lawmaker had proposed some type of consumer-protection bill. Yet year after year, no such bill moved out of committee. “Fraudulent business schemes are rampant in Alabama,” Graddick complained on the campaign trail, “because it is the only state in the nation without a consumer protection law.” Upon taking office in 1979, the new Attorney General intensified the fight for the passage of Alabama’s first consumer-protection law. Only then would the state finally remove the stigma of being a legal outlier.

At the federal level, of course, several organizations had long policed consumer fraud. Chief among these was the FTC, which since the 1910s had exercised broad fraud-fighting powers by statute. The passage of the Wheeler-Lea Act in 1938 extended that authority by giving the FTC the power to police regulating “unfair or deceptive acts or

practices” in interstate commerce, whether or not they had clearly damaged the standing of competing firms.\textsuperscript{39} This change reflected contemporary concerns with shady business practices and harms to consumers that might not hurt identifiable competitors, as well as anticipation of the ingenuity of fraudsters. The statute omitted specific standards for unfair conduct because “[i]t is impossible to frame definitions which embrace all unfair practices,” and “[t]here is no limit to human inventiveness in this field.”\textsuperscript{40} Instead, the statute merely prohibited broad fields of duplicitous marketing that crossed state lines and tasked the FTC with shaping the contours of what specific business conduct would run afoul of the statute.

The FTC, however, had limited resources for investigation and enforcement, and even the amended FTC Act still permitted only the FTC itself to bring legal actions to enforce the statute, which meant that only as many suits could be filed or enforcement actions taken as the FTC had resources to pursue them.\textsuperscript{41} The FTC’s enforcement capacity never matched its caseload, and with the growth in interstate commerce over the twentieth century, its backlog worsened, while criticism of the FTC’s ability to adequately police consumer fraud mounted. By the late 1960s, both consumer advocate Ralph Nader and the American Bar Association “criticized [the FTC] for failing to set rational priorities, for becoming bogged down in protracted, often pointless administrative proceedings, for over-


\textsuperscript{40} S. REP. No. 74-1705, at 2 (1936).

\textsuperscript{41} In legal terminology, the FTC Act did not create a “private right of action.” In other words, private citizens could not sue to enforce the Act; only the government could enforce its provisions.
emphasizing voluntary compliance techniques and under-utilizing formal complaint proceedings, and for failing to police the behavior” of past offenders. Further, the federal FTC Act could not serve as “the legislative panacea for protecting the consumer from unfair or deceptive practices” because it could only reach deceptive behaviors that crossed state lines. Its jurisdiction simply did not extend to “purely intrastate activities.”

In light of the FTC’s enforcement challenges—and with strong encouragement from the FTC itself—states began to enter the consumer-protection arena. States rapidly adopted these consumer-protection laws, which were called “Little FTC Acts” for the way they mimicked the mechanisms of the original FTC Act. These statutes authorized the states’ attorneys general to enforce their provisions, and some state statutes also allowed individual citizens to file suits in state courts to remedy the unfair or deceptive practices they encountered in the marketplace. The National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), a nonprofit legal association, crafted a model consumer-protection law for states based on the FTC Act in 1964 and 1966. Eight state legislatures had adopted some version of the model law already by 1968. The City of New York enacted its own strong consumer-protection law and established a city-wide consumer-protection agency to enforce the law by 1970. By 1973, forty-four states had adopted consumer-protection laws. And by 1980, the tally of states with consumer-protection laws rose, until “forty-nine states, the District of Columbia, Guam, Puerto Rico,

43 Dole, “Consumer Class Actions,” 1104, 1104 n.22.
44 Schrag, Counsel for the Deceived, 1–25.
and the United States Virgin Islands” had each adopted some type of “Little FTC Act” to outlaw unfair and deceptive practices. By 1981, Alabama was the outlier—the sole state or territory that had failed to enact such a law.45

As America’s economic climate shifted through the 1970s, though, so did perceptions about consumer protection. Signs of “stagflation,” characterized as conditions of rising unemployment accompanied by inflation, were evident as early as 1971 and continued through the end of the 1970s.46 Sky-high interest rates, designed to slow inflation, also squeezed the indebted and pushed some businesses into bankruptcy. The oil embargo and subsequent oil crises threatened the oil supply and raised energy prices for consumers. As America’s economy flagged and consumers suffered, the country’s leaders from both parties puzzled over how to make sense of new economic challenges and how to frame effective responses to them. In this strained economic environment, the political will for robust consumerism gradually faded. Across the country, newspaper columnists asked, “Is it twilight for consumer protection?” In Alabama, too, there was speculation “that consumerism had ended” or at least was experiencing a lull. In the 1980s, “Americans were examining a basic economic principle—the cost of raw materials, energy, labor,


machinery, and taxes incurred by producers must be reflected in the price of the goods and services,” and anything perceived to add to this cost, including the cost of consumer-protection measures, threatened to price products out of consumers’ reach.47

Such arguments found favor with a growing proportion of consumers, who came to view regulatory measures with skepticism, even when these measures offered benefits in terms of health, safety, or fairness. Political observers, journalists, and ordinary citizens alike perceived the election of Ronald Reagan in 1980, “who campaigned on a platform of deregulation and decreased government spending,” to be a referendum on the public’s tolerance for incurring costs for protective regulation. In other words, Reagan’s election was “an indication that economic problems had superseded other concerns.”48 Reagan’s election thus “solidified the influence of market-based predispositions in American government” and symbolically served as a bookend on the regulation-focused consumerism of the 1960s and 1970s. Even before Reagan’s election, a multi-year effort to create a federal Consumer Protection Agency had stalled, as Democrats could not marshal sufficient votes in their own caucus to create the proposed new bureaucracy.49

Yet just as consumerism across the nation approached its denouement, consumer protection finally began to get traction in Alabama. Being the national straggler in the consumer-protection trend came not only with practical limitations on the Attorney

49 Balleisen, Fraud, 342.
General’s ability to police and prosecute fraud; it also projected an image of the state’s legal system as hopelessly backward.

**An Anatomy of Alabama’s Deceptive Trade Practices Act**

In 1981, with Alabama’s Attorney General Graddick providing an unprecedented level of political coordination, the state legislature finally enacted a consumer-protection law—on the tenth attempt. Alabama’s “Deceptive Trade Practices Act” (the “ADTPA”) passed through the House early in the 1981 session, but only over the strong opposition of some business-minded legislators. One state representative complained that the “business community [had not] seen the bill” and, in fact, did not know “that it exists.” In particular, he predicted that the consumer-protection bill would be “a great problem for automobile dealers,” as the bill not only explicitly outlawed odometer rollbacks but also prohibited misrepresentations about reasons for a price reduction and tightened the requirements for salesmen’s truthfulness when it came to a product’s condition, quality, or need for repairs. The same state representative proposed an amendment to create a one-year grace period to give businesses “a chance to prepare for its implementation.” But another representative retorted, “What you are saying is, ‘OK, all of you rip-off artists, have another year to come in here and do what you want to do.’” In the end, the consumer-protection bill passed the House without the proposed one-year grace period and with “overwhelming approval.”

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But overwhelming approval in the House did not translate into easy passage in the Senate. Chaos prevailed in the Senate during the 1981 legislative year, and for months the consumer-protection bill waited on a back burner. After opponents had stalled the bill’s progress for several months, it seemed unlikely to pass, especially since other legislative battles were raging at the same time over controversies ranging from the application of the state’s liquor laws to a radical change in the state’s property-tax regime.\textsuperscript{51} But one state senator “halted a Senate filibuster of [the] property tax bill at 4:30 a.m.” in April 1981 to quickly push the consumer-protection bill through to a vote (all “while standing at the microphone in bare feet” because some “jokester had hidden [the senator’s] shoes”).\textsuperscript{52} On the bill’s final passage through the state legislature, it passed unanimously through both houses.

Thus, in 1981, Alabama finally joined the forty-nine states and various territories with some statutory framework for consumer protection. When the news broke, Graddick proclaimed, “Hurrah! . . . At long last we have removed the stigma of being the only state in the Union without such protection.”\textsuperscript{53} Yet the Alabama law diverged in important respects from that of its sister states, reflecting the context of its time and place—in the cost-conscious ‘80s (instead of amid the optimism of the ‘60s or early ‘70s) and in Alabama, a conservative, low-tax, low-regulation state. The prudential impact of the bill’s passage was yet to be tested, but at least the symbolic stain on the state’s (and more

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specifically the Attorney General’s) legal reputation had been swept away. Alabama had
at least achieved a minimum standard of respectability in its consumer-protection regime.\footnote{Sam Duvall, “House OKs Bill to Up Pay Floor in Ethics Law,” \textit{Montgomery Advertiser}, February 27, 1981.}

At first glance, the ADTPA opened tremendous opportunities for policing consumer deception in the marketplace. The Attorney General gained far more real power under the statute than the individual consumer, even though the statute contained several consumer-empowering provisions. Careful scrutiny of the ADTPA’s provisions shows how the new law empowered the Attorney General (and, to a lesser extent, private citizens) to police fraud in the consumer marketplace, as well as ways that the legislation failed to add real, meaningful tools to the consumer-protection toolkit. Closer inspection also reveals ways in which the structure of the law created both incentives and disincentives for the ADTPA’s enforcement.

First, the ADTPA included many powerful incentives for enforcement. It prohibited twenty-one discrete deceptive acts, from pyramid schemes to using bait-and-switch advertising methods. Like most other state consumer protection laws, the Act also included a general catch-all provision that prohibited “[e]ngaging in any other unconscionable, false, misleading or deceptive act” not explicitly covered by the statute.\footnote{Ala. Deceptive Trade Practices Act [hereinafter ADTPA] §5, No. 81-355, 1981 Ala. Acts 510–21.} The Act granted clear enforcement authority to the Attorney General, and it also created a private right of action, meaning that private citizens could sue others under the Act for deceptive practices.\footnote{ADTPA §10(a).} Consumers who won a suit were guaranteed a minimum of $100 in

\footnote{Sam Duvall, “House OKs Bill to Up Pay Floor in Ethics Law,” \textit{Montgomery Advertiser}, February 27, 1981.}
damages, even if they were swindled out of a lesser amount, and a court could triple the amount of damages awarded if, in the court’s discretion, the circumstances warranted a harsher punishment.\textsuperscript{57} Successful litigants would also have their attorney’s fees and court costs paid by the defendant.\textsuperscript{58}

These types of incentive-creating mechanisms had appeared in consumer-protection laws across the county, as they sought to remedy some of the greatest barriers to the provision of practical legal remedies for consumer fraud. How much time, effort, and expense would one consumer expend to seek a legal remedy for being swindled out of $5, $50, or even $500? How many individuals would be willing or able to take a day off from work, much less pay court filing fees or hire a lawyer, to adjudicate a dispute for only a few dollars? Under the Act, a consumer successfully suing for even a single dollar would receive no less than $100, and a consumer who sued for $100 could receive $300. By design, this part of the statute rewarded consumers for policing the marketplace and sought to diffuse legal power from the state to the citizen.

The Attorney General could impose even more severe penalties for serious or repeat offenders, including the ability to prosecute \textit{continuous} or \textit{willful} violations of the Act as Class A misdemeanors (the most serious type of non-felony crime), punishable by up to a year in prison or a hefty fine.\textsuperscript{59} Those who \textit{knowingly} violated the Act could be fined an additional civil penalty of up to $2,000 per violation.\textsuperscript{60} A court could also suspend or

\textsuperscript{57} ADTPA §11(a)–(b).
\textsuperscript{58} ADTPA §10(a)(3).
\textsuperscript{59} ADTPA §12.
\textsuperscript{60} ADTPA §11(a).
revoke a guilty party’s business license or enjoin the person from doing business in Alabama altogether, and those who violated a court order or injunction issued under the Act could face fines up to $25,000 and civil contempt proceedings.\textsuperscript{61} Furthermore, the Act directed that violators would have to pay all civil penalties to the State Treasurer, with these sums going to the office that initiated the suit.\textsuperscript{62} This provision, which mirrored consumer protection schemes elsewhere, gave the Attorney General an incentive to go after serious offenders, as any penalties incurred could expand the department’s budget.\textsuperscript{63} The Act also provided that the defendant would pay all attorney fees and costs incurred by the Attorney General in any successful lawsuit brought under the Act.\textsuperscript{64}

These measures were critical to the Act’s enforcement because the Consumer Protection Division ran on an extremely tight budget, and the Deceptive Trade Practices Act provided the Division with neither additional budget appropriations nor an increase in staff.\textsuperscript{65} Recuperating court costs and attorney’s fees for these cases would allow the Division to preserve its limited resources for other initiatives such as its educational programs, publications, correspondence, and mediation services. These features of the Act also focused the Attorney General’s attention on cases in which a strong evidentiary base increased the likelihood of legal success (so the Office could recover its costs and fees for

\textsuperscript{61} ADTPA §8(c), 11(b).
\textsuperscript{62} ADTPA §11(f).\textsuperscript{63} See, for example, Ark. Rev. Stat. § 44-1531.01 (establishing the “consumer protection-consumer fraud revolving fund”); Fla. Stat. § 501.2101 (directing payment of penalties into the Legal Affairs Revolving Trust Fund if the Department of Legal Affairs initiated the successful action, or to the Consumer Frauds Trust Fund if a state attorney brought the successful action).
\textsuperscript{64} ADTPA §11(e).
brining the suit) and in which egregious conduct might justify steep penalties and fines (to bring additional monetary resources to the department). The structure of the legislation assured that the Division would metaphorically “eat” whatever it could “kill.”

The Act also granted significant investigatory and enforcement powers to the Attorney General, which facilitated flexible, swift action. His office now enjoyed wide subpoena power, and the capacity to file a lawsuit and either request a court order (in the form of a temporary restraining order or injunction) to stop the suspect from disposing of or transferring his assets, or by having the court appoint a receiver for the assets where they could be held while the lawsuit proceeded. 66 Such measures allowed a savvy Attorney General to prevent a defendant from moving, hiding, or spending contested assets during a lawsuit, assuring that assets remained by the end of trial both to compensate consumers and pay the Attorney General’s costs, fees, and civil penalties.

At the same time, the ADTPA also included several structural limitations that severely curtailed its effectiveness and disincentivized its enforcement. First, the law exempted industries already regulated by state and federal agencies from its coverage, including banks, insurance companies, railroads, utilities, and financial institutions. 67 By design, then, the statute filled gaps but did not overlap with existing regulatory structures, even when the state’s regulation was relatively weak, as was the case with the Insurance Commission’s oversight of that sector. 68 This design feature aided the bill’s passage into

66 ADTPA §9, §§8(a)–(b).
67 ADTPA §7, especially §7(c)–(e).
law by making it less controversial to many of the most powerful business groups in the state. But it also meant that the Attorney General lacked the authority to go after fraud and deception in consumer-credit arrangements, one of the most fraught areas of the consumer marketplace and thus an area that served as a focus for enforcement efforts at the federal level and in many states. In Alabama, regulation of the consumer-credit space would fall to other state or federal regulators—or to private attorneys.

Second, though consumers could file individual lawsuits under the authority of the Act, the Act prohibited consumers from bringing class-action lawsuits. The Act reserved

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69 See generally Schrag, Counsel for the Deceived (recounting tales of the enforcement efforts related to abusive or fraudulent credit arrangements in New York City in the 1960s and 1970s); Fleming, City of Debtors, especially chapter 5 (detailing attempts to regulate consumer lending across many decades in New York State). See also Rowena Olegario, Engine of Enterprise: Credit in America (Cambridge, MA: Harvard University Press, 2016), 148, 164, 167, 191, 211 (for examples of federal regulation of consumer credit).

70 See later chapter for discussion of private lawsuits as a tool for policing consumer fraud.

71 The consumer class-action suit potentially empowered aggrieved consumers by allowing a group, or “class,” of people injured in the same way by the same activity to bring a single lawsuit against the party or parties that had harmed them. This mechanism served as a counterbalance to the widely observed collective-action problem of organizing consumers, as economist Mancur Olson explained in an influential work during the 1960s, “consumers are at least as numerous as any other group in . . . society, but they have no organization to countervail the power of organized or monopolistic producers.” Gunnar Trumbull, Strength in Numbers: The Political Power of Weak Interests (Cambridge, MA: Harvard University Press, 2012), 33; Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups (Cambridge, MA: Harvard University Press, 2002 [1965 and 1971]), 166. By creating a legal mechanism to consolidate many consumers’ claims into a single large lawsuit, consumer-protection statutes in many states helped forge a strong consumer response to harms in the marketplace in spite of forces favoring weakness and disunity.

With consumer class actions, a judge first defined and certified the boundaries of the “class,” and assigned a person to represent that class. Then, the class representatives could adjudicate the dispute on behalf of all other people that fell into that class, even people not participating directly in the lawsuit. For example, a class might contain all residents in one state who purchased a defective product within a defined time period. Even if the financial harm to each person in the class were relatively minor, by aggregating these claims, the class could present a much larger legal threat. In the hypothetical situation of a class action involving a defective product, a class of 1,000 people who each paid $10 for such a product would generate a lawsuit worth at least $10,000 to the plaintiff class. This imagined group would never file 1,000 individual lawsuits claiming $10 each, since the filing fees alone would exceed the amount an individual plaintiff could ever hope to recover. By contrast, class-action lawsuits generate economies of scale. Since potential claimants can adjudicate all of their claims at once, the lawsuit could be less costly for the plaintiffs than many individual lawsuits, and the potential for a large court award might encourage more experienced lawyers to take these cases. In addition, the threat associated with significant legal damages could bring defendants to the bargaining table to settle the suit in lieu of going to trial. And because the class-action mechanism could incentivize people to file lawsuits for relatively minor individual harms, their mere existence could deter others from conducting small-scale but pervasive frauds in the consumer marketplace.

A class-action lawsuit thus offers “economic, psychological, and procedural” advantages over individual lawsuits. James E. Starrs, “The Consumer Class Action—Part II: Considerations of Procedure,” Boston University Law
the right to bring a consumer class action solely to the Attorney General or a District Attorney.72 This feature distinguished Alabama’s Act from that of other states and constrained the Act’s ability to influence business behavior. Each gubernatorial administration’s enforcement priorities would determine whether consumer class actions would be initiated—which might serve as an advantage or a flaw, depending on the perspective of a particular stakeholder.

Finally, although the ADTPA created a few new legal remedies for consumers, these remedies came at a high cost. Consumers could take advantage of the protections created in the Act, including the Act’s sweeping prohibition of deceptive business practices, and take advantage of the Act’s financial incentives, such as minimum damages of $100 and of the possibility of treble damages in the judge’s discretion. But if they did so, they also forfeited the ability to bring any other legal claims, including claims for common-law fraud, breach of contract, or though other existing legal avenues. The ADTPA offered an “either/or” legal option, explaining that “[t]he civil remedies provided herein and the civil remedies available at common law, by statute or otherwise . . . are mutually exclusive,” and “election to pursue the civil remedies prescribed in this Act shall exclude and be a surrender of all other rights and remedies.”73

72 ADTPA §10(f).
73 ADTPA §15 (emphasis added).

Review 49 (1969): 408–09. Since legal actions based on deceptive trade practices and consumer fraud often involved schemes whereby many individuals had lost relatively small amounts, consumer advocates had long championed consumer class-actions as the best way to assure enforcement of consumer-protection laws. In the words of two proponents of the consumer class-action mechanism, “it is not enough to pass a law prohibiting or requiring certain conduct; some mechanism must be provided to secure compliance.” Travers and Landers, “The Consumer Class Action,” 811.

The ADTPA prohibited broad categories of conduct but failed to offer individuals this powerful class-action mechanism to secure compliance.
In practice, this provision made it unlikely that a consumer would take advantage of the protections offered by the Act. At the time plaintiffs file lawsuits, they had to outline the laws under which they believed they were legally entitled to a remedy. At this stage, an individual plaintiff usually would not have interviewed the defendant or reviewed relevant documents and would know only his or her own side of a larger story that would emerge over the course of the controversy. However, once the lawsuit was underway, the plaintiff would lose the opportunity to raise new claims against the defendant not raised in the first filing. For this reason, a first filing often included several alternative, plausible theories that would justify legal relief based on the situation as initially understood, even if the plaintiff could not win on all of them or did not yet have all of the evidence to prove each claim. For example, claims of fraud and negligent misrepresentation each involve a false statement, but the former requires proof that the defendant made the statement with intent to deceive the plaintiff. A plaintiff who laid out both claims in the first filing reserved the right to argue either of them when all evidence was in hand.

Thus, while the Deceptive Trade Practices Act created another possible legal remedy for deceived consumers, it was an all-or-nothing option. Though an ADTPA action allowed a plaintiff to petition the court for three times the compensation for money lost, a successful plaintiff in a fraud suit might ask for compensation plus non-economic damages (such as for mental anguish) and possibly punitive damages as well. For a small cohort of consumers who formerly had no other remedy under the law, the new law offered an avenue towards compensation under the law. But for consumers with a plausible claim for
common-law fraud or other claims, the Act changed nothing and provided no additional relief.

The Attorney General and his Consumer Protection Division, by contrast, gained new room for maneuver under the new ADTPA, including significant new enforcement powers. The Attorney General could prosecute more than a dozen new deceptions in the marketplace, and the Division had investigatory tools, such as subpoena powers, and enforcement tools, including court orders, to assure recovery. The Attorney General could bring class-action lawsuits, adding more economic efficiency and deterrent power to this legal enforcement scheme. Furthermore, the costs and fees of these lawsuits, plus any penalties recovered, would be recycled into the department’s budget. The legislature thus hoped that consumer protection in Alabama would be funded by the fraudsters themselves instead of taxpayers, a proposition popular in most political climates but especially so amid the cost-conscious 1980s and in the low-regulation state of Alabama. Legal power on paper, though, does not translate precisely to legal power in practice. Patterns of the Act’s enforcement, not merely its passage through the Legislature, would determine the Act’s actual impact.

Alabama’s Deceptive Trade Practices Act in Action

Following the bill’s passage in 1981, Graddick “praised the Alabama Legislature for passing the bill,” noting that “Alabama consumers [had] suffered at the hands of unscrupulous businesses and fly-by-night operators far too long.”74 He also emphasized

the Act’s pro-business angle, explaining in his Attorney General’s Annual Report that the statute might as well be called the “Reputable Business Protection Act,” as it would “protect consumers and legitimate Alabama businesses from unethical practices in the marketplace.”

“My Consumer Protection Division now has a tool – or better put, a hammer – with which they can operate,” he proudly declared. Graddick certainly intended to summon an image of power in this declaration—a metaphor that would have comported well with the tough-guy image he projected in his campaign materials (see figure 1). But Alabama’s consumer protection bill proved to be a “hammer” less in the sense of being a powerful weapon and more in the sense of being a blunt instrument, not a precise tool. Although the consumer-protection statute did allow the Consumer Protection Division to more actively pursue fraud in the marketplace, it hardly proved a panacea for the ills created by consumer deception.

The sections below illustrate three types of enforcement action made possible by the ADTPA, each highlighted by a specific case that the Division pursued in the years following the enactment of the ADTPA. These cases demonstrate a variety of harms that the Division sought to remedy and of tools at the Division’s disposal to accomplish its goals; they also highlight the significant legal barriers to meaningful consumer protection that still confronted the department. The first arena of action features the Division’s efforts to police fly-by-night operators performing illegal home repairs, activity that was clearly

fraudulent but that presented significant enforcement trade-offs. The second enforcement domain involves an out-of-state company that reached into Alabama through the mail to entice consumers with a “too-good-to-be-true” offer, which presents a stark contrast between the fluidity of business activities in a national consumer marketplace with the Division’s geographically limited jurisdiction. Finally, the third case shows how the Act only imperfectly empowered the Division to protect consumers from the failure of legitimate businesses. The focus here lies not with the relative savviness and effectiveness of the state agents who sought to enforce the law, but rather the wide margin that can emerge between legal aspiration and legal practice. Together, these case studies emphasize both the constrained operations of a tiny, modestly funded consumer-protection office in a Deep South state, and the imperative of considering consumer-protection law in action.

Centennial Pest Control & Construction: The Challenge of Fly-by-Night Operators

On the Monday after Thanksgiving in 1983, men from the Centennial Pest Control Company traveled through the sleepy town of Andalusia, Alabama, knocking on doors and offering free home pest inspections. At least three homeowners accepted this offer. In each case, the inspector emerged from under the house’s foundations with bad news—severe damage from termites and powder post beetles! The worried homeowners agreed to pay Centennial Pest Control to immediately spray their foundations to kill the pests and
stave off further foundation damage. The cost for each of these pest-control services totaled around $500.77

Conveniently, the same men also represented the Centennial Construction Company. In the weeks that followed, the crew reappeared at each of these homeowners’ doors, offering to repair the damage done by the destructive pests. Dot Carrington was the first homeowner to get a return visit from the pest-control-cum-construction team. Carrington was a seventy-two-year-old retired saleswoman who had lived in the same house in Andalusia since the 1950s—first with her widowed mother until her mother’s death in 1967, and then, it appears, alone.78 The workmen returned a week after the “free pest inspection” and claimed that her home was in a “hazardous condition.” Carrington recalled that one of the men even came into her home and jumped on the floor to make the house shake, “telling her that the foundation had settled onto some of her water pipes” and that her home and was “in danger of collapsing” unless she immediately repaired the damage. Shaken and fearful that her home was unsafe, Carrington paid Centennial Construction $2,000 to complete the foundation repairs. A few days later, the men returned with even worse news. The foundation was more severely damaged than expected, and the additional foundation work would cost an additional $1,350. Likely feeling that she had

no other choice, Carrington agreed to these repairs, making several checks out to individual workmen “so they could use the money to buy the materials for the work here,” since they claimed to be from out-of-town. A week later, the men returned with still more bad news. The damage was not confined to the foundation; her roof also “badly needed” reinforcement and repair because it “was in danger of collapsing.” Those additional repairs cost another $5,000. 79

![Figure 3: Former Home of Dot Carrington in Andalusia, Alabama, c. 2013](image)

Carrington did not have the cash on hand to pay for this last costly but essential project, so she cashed a Certificate of Deposit at her bank to cover the costs. In all, these repairs to Carrington’s home totaled $9,350—the equivalent of more than $22,000 in 2017 dollars. Though data on Carrington’s personal income in these years is unknown, the average annual income for an Alabamian in 1982 was $8,649 (in 1982 dollars), which means the cost of repairs exceeded the average annual per capita income by $700. These

80 Image of 208 West Watson Street, Andalusia, Ala., from Google Maps Street View (accessed May 9, 2017).
charges were especially out of proportion considering the modest size and construction of Carrington’s home (figure 3). The elderly woman had been scammed out of a significant amount of money.81

After completing work on Carrington’s home, the construction crew returned to the home of seventy-seven-year-old James L. Mason, where they performed “immediately necessary” foundation work for $900. The group then visited Lena Mae Williams, the eighty-year-old widow of a Baptist preacher, who also needed “urgent” foundation repair. As they had done for Carrington, one worker demonstrated the damage to the foundation by jumping on Williams’s floor—a clever portion of the scammers’ sales pitch that made enough of an impression in these homeowners’ minds for them to recall the detail in their police reports many months later. The construction team drew up a contract for Williams that included repairing foundation supports with treated sills, concrete-block pillars, and solid concrete pads, plus additional support in the back of the house to “take the shake out.” Williams paid the group $3,000 for these repairs.82

Mason and Williams—like Carrington—had been the victims of deceptive practices. The “free pest inspection” had only been a way to get in the door, so to speak,

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and none of the “repairs” had been warranted. The Centennial construction crews did not even perform some of the work contracted for, and any work actually done turned out to be shoddy at best. The City of Andalusia Building Inspector later reviewed Carrington’s “foundation repairs” and found mobile-home jacks, some resting at odd angles, set directly on loose soil under her house. Her “roof repairs” consisted of thin wooden “braces, nailed to roof rafters at top and ceiling joist at bottom”—all unnecessary. The Building Inspector concluded that there was “no evidence” of need for any of the foundation or roof supports, that the quoted prices were “completely out of line for the work installed on this residence,” and “that the work by the company did not improve the condition of the home.”

In Mason’s case, the workmen actually damaged the foundation rather than fixing it, raising one side of his home unevenly so that his floors slanted. Most towns, including Andalusia, required contractors to secure contractor licenses and permits for each building project. But homeowners unaware of this requirement did not know to ask to see these licenses or permits. Unsurprisingly, Centennial Construction had neither a license nor permits to make the repairs on the three Andalusia homes.

The Centennial Construction crew perpetuated a tradition of home-repair scams that had spanned centuries. Petty swindlers had long roamed through American towns and cities, staying just long enough to make a few dollars before moving on to the next place.

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83 David Lucas, City of Andalusia Building Inspector, Inspection reports of homes of Dot Carrington and Nellie King, June 14, 1984, ADAH, AGCP, box SG018698.


85 See David Lucas, City of Andalusia Building Inspector, Inspection reports of homes of Dot Carrington and Nellie King, June 14, 1984, ADAH, AGCP, box SG018698.
One clan known as “The Terrible Williamsons” moved all over the country over the course of several decades in the mid-twentieth century “pitching . . . the cheapest textiles passed off as fine imports, shoddy driveway resurfacing, or ineffective roof sealing.” Centennial Construction was just the latest operation to join in on the deceit, though the Centennial operatives had less complete mobility than the nomadic Williamsons. Furthermore, in comparison to more sophisticated historical home-repair schemes, the Centennial Construction scammers were relative amateurs. From the 1930s through the early 1960s, the Holland Furnace Company had operated a savvier version of the scam in which door-to-door sales agent often impersonated a governmental safety official in order to gain access to a residential furnace for an inspection, disassembled it, then reported grave safety hazards to the homeowner. The salesman then dug in with a hard sales pitch for a new furnace from the Holland Furnace Company, warning the homeowner that if they did not replace their lethal appliance they would likely become “accessories to murder.” Unlike the Centennial Construction crew, the Holland Furnace Company mobilized a salesforce with “extensive training in these tactics” and operated across several states. Also, the Holland Furnace Company left behind an operating furnace rather than hastily completed faux foundation work, which made the scam harder to identify and detect.86

The three Alabama homeowners likely became targets because of their advanced age. Home-repair schemes across America targeted the elderly because these homeowners were made vulnerable by isolation and poor mobility. Door-to-door salespeople could

86 Balleisen, Fraud, 266–69.
exert greater pressure on a single person living alone than on a group, and these seniors were unlikely to crawl under their homes or into their attics and discover problems (or the repairmen’s shoddy workmanship) themselves. These victims were also more likely to “take what one company tells them because it is difficult for them to shop around” and compare prices. Additionally, retired people tended to have accumulated savings, into which swindlers could tap. In fact, home-repair scams of this type had become so common that at least one other group worked the same scam in Andalusia that year. These other swindlers, operating under the name J&M Exterminator, defrauded two other homeowners, Mae O’Neal and Nellie King, out of $1,200 and $800, respectively, in a similar pest-control-then-foundation-work scam at approximately the same time. O’Neal, age eighty, and King, age seventy-eight, both lived only about a block away from Carrington, the first victim of the Centennial scam.

Over the next year, the staff of the Consumer Protection Division appraised the mounting evidence against Centennial—the victims’ police reports, the city building inspector’s investigation, a collection of fraudulent contracts—and discussed whether to pursue legal action. In March 1985, key decision-makers in the Attorney General’s Office, including chiefs of the Civil Division and Civil Litigation Division and the Attorney General himself, gave the green light to file a civil action against the firm and the individual

workmen for violating the ADPTA. The legislation contained a provision that fit the crime perfectly, prohibiting “[k]nowingly making false or misleading statements of fact concerning the need for . . . repair service.”89 This well-tailored provision would facilitate a quick and almost certain victory for the Attorney General in a civil suit. In addition, the Attorney General had the authority to prosecute the individual workmen for criminal fraud. A criminal action would be more difficult and time-consuming to prove in court, but the authority to prosecute alone served as a bargaining chip. One of the reviewers of the civil-action proposal noted that fraudsters “did [the] same thing in Escambia Co.”—less than 50 miles away—where the “victims [were also] old ladies.” He noted that in that case the Division “did not pursue criminal charges” at the request of the Brewton City Police Chief because “he wanted $ for the victims.” The reviewer recommended the same course for the Centennial case, but concluded, “If it looks like we cannot recover $, let’s prosecute!”90

The Division filed its civil suit in April 1985, and by November the Centennial operators had agreed to a settlement. The Attorney General agreed not to pursue criminal fraud charges (which could result in a prison sentence), and, in exchange, the defendants would repay the victims and agree to a court order not to perform any more structural repair work in Alabama. If the defendants violated this court order and attempted to reestablish the foundation-repair scam in the state, they would face charges for civil contempt, as provided in the ADTPA, which also could result in jail time. By the time the parties reached settlement in 1985, the fraudulently obtained money had long been spent, and the

90 Corky Harrison, Proposal to File Civil Action, March 20, 1985, ADAH, AGCP, box SG01898.
fraudsters were once again broke. Thus, each settlement outlined a payment plan, whereby the perpetrators would deposit a smaller sum (between $75 and $115) monthly with the Attorney General for distribution to the Centennial victims. One of the business’s principals, Clifford Allison, faced an additional barrier to repayment; by the time of the judgment, he was serving time for another crime in an Illinois state prison. Allison wrote to the Alabama Assistant Attorney General Michael Bownes from prison, assuring him that “the $4,000 [ordered in the consent judgment] will be paid,” but “[t]he only thing that might be a problem, is the starting date for my payments!” “IF something happens that I donot [sic] go on work release when expected,” he pleaded, “would you PLEASE take into consideration that the judicial system does not always work on schedule. (As you know.)”91 It would take several years, but the perpetrators would be made to pay for their deception. Thus, the Centennial case concluded, and the three elderly victims from Andalusia would be—gradually—compensated for their losses, presuming that the perpetrators stayed out of jail and lived up to their new obligations and the victims lived long enough to receive restitution.

The ADTPA had created several powerful tools to encourage quick and efficient settlements in cases like this. The statute clearly addressed deceit in the home-repair industry, and work scams of this sort left a permanent mark on the home, which an investigator could quickly assess and declare necessary or unnecessary, making the case

relatively straightforward to prove. Furthermore, the elderly homeowners who often appeared as victims in these cases were deeply sympathetic. Thus, defendants had little chance of mounting a plausible defense to charges under the Act. The Act also encouraged settlement by sharply increasing the penalties a defendant would face after the case proceeded to trial, including mandatory attorney’s fees and the possibility of $2,000-per-occurrence fines. The threat of additional criminal fraud charges (and thus of the possibility of incarceration) further pushed defendants toward settlement. This system conserved significant Division resources by keeping its staff attorney out of court and created efficiencies by creating a pattern of settlements across several different cases that could be referenced and replicated in future actions.

Indeed, the Consumer Protection Division replicated this same settlement pattern when it brokered a similar agreement with the dodgy individuals operating the parallel J&M Exterminating scam in Andalusia. Like in the Centennial settlement, the elderly female victims received gradual compensation for their losses through the establishment of a payment plan by the firm’s principals.92 Through these two settlements, the Division had obtained a measure of justice for at least five Alabama fraud victims and demonstrated both the ability of the Division to coordinate enforcement efforts with police officers and city officials and the powers conferred by the ADTPA to ensure favorable outcomes for the state whether at trial or, even more efficiently for the state, via settlement.

92 Reimbursement record for Mae S. O’Neal and Mae Nellie King, August 11, 1986–April 4, 1988, ADAH, AGCP, box SG018699.
Nonetheless, there is no sign that the settlements were publicized by the Division or in the press, so the settlements themselves would have had little deterrent function. This was a trade-off the Division would have weighed: prosecute publically and possibly deter others’ conduct, or procure a settlement and recover at least some money for the victims. Here, the home-repair fraud victims recovered at least some of their losses, and the threat of sanctions for reestablishing the repair-fraud scheme that applied to the individuals involved might at least deter them from future fraudulent conduct. Though imperfect, the Consumer Protection Division had chalked up a significant victory.

Creating a remedy for these consumers, however, hardly solved the home-repair fraud problem. The compensation plans established through these settlement agreements took time to make the victims financially whole—time that some elderly victims did not have. Of the J&M Exterminating victims in Andalusia, King recovered all $800 of her money over a seventeen-month repayment process, but O’Neal passed away at the age of eighty-one before receiving the benefit of the settlement.\footnote{Reimbursement record for Mae S. O’Neal and Mae Nellie King, August 11, 1986–April 4, 1988, ADAH, AGCP, box SG018699; “Mae S. O’Neal,” Find a Grave Index, available at https://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=120650147&amp;ref=acom.} Whether the other Andalusia fraud victims were repaid is unknown. The Consumer Protection Division could mitigate the financial harm to victims, but it could not turn back time.

More importantly, the home-repair scam proliferated wherever would-be fraudsters encountered vulnerable, credulous homeowners. The barriers to entry for these scams remained low despite local licensing ordinances—virtually anyone with minimal
construction experience, a truck, and a plausible contract form with an official-sounding business name could implement the scam. Across the state, as quickly as the Consumer Protection Division shut down one scheme, another emerged. Despite court orders prohibiting continuing conduct, many fraudulent operators continued to do business; these orders prohibiting future deceptive conduct proved only as effective as the state’s ability to enforce them. For these reasons, home-repair frauds—with schemes targeting everything from furnaces to foundations—remained an enduring and familiar part of the business landscape.

In some cases, offenders simply continued their scams under the radar, hoping that their small-scale, fly-by-night activities would stay invisible to state regulators. Soon after concluding the Centennial and J&M Exterminating cases, the Division pursued a case against Thomas Whitaker, who operated a similar home-repair scam in Mobile County. The Division secured a settlement in 1985 with Whitaker that included a repayment plan for the victim and a prohibition on all structural repair work in Alabama—a virtually identical settlement as in earlier home-repair-fraud cases. But in 1986, Whitaker violated the court order by performing work on two other women’s homes under the name “Expert Foundation,” this time many miles away in Coffee County, Alabama. The Coffee County District Attorney put out a warrant on Whitaker but failed to track him down. Then, in 1988, the Consumer Protection Division received a tip from the state Agriculture Department that Thomas Whitaker had appeared yet again, this time in Baldwin County,

where he had done foundation work for a seventy-two-year-old widow named Clarmilta Brownell, again in violation of the 1985 settlement agreement. Brownell reported that Whitaker, who was “a fast talker, but polite, not pushy or intimidating,” approached her about foundation work in February 1988.95

Like other home-repair scam operations, Whitaker produced a form contract, which might have garnered a shade of legitimacy for his foundation-repair business (figure 4). The form had the official-sounding title “Home Improvement Contract,” which imparted some sense of legality to the transaction. Technical-looking drawings of jacks supporting an “auxiliary sill” and marked with official-sounding indications of load testing conveyed a sense of professional expertise, though other aspects of the purported contract looked amateurish. Whitaker included a sketch of the premises on which he marked the locations of the three new piers he would install and included a “3 year guarantee on labor and mat[erials],” which could have further communicated an illusion of professionalism and trustworthiness. Even the name of his purported company, “Expert Foundation,” sought to garner an aura of competence and permanence. The details Whitaker recorded on the contract form, including notation of the homeowner’s check number for payment on the contract, might have further soothed concerns over Whitaker’s reputability. Whether Brownell regarded the contract as legitimacy conferring—or whether she just hoped to get a good deal on some repairs—this document would have served as an important prop as Whitaker enacted his home-repair scam again and again.

Figure 4: Mrs. Brownell’s Contract for Fly-By-Night Foundation Repair

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96 Home improvement contract, Expert Foundation (Thomas Whitaker) and C.K. Brownell, February 19, 1988, ADAH, AGCP, box SG018699.
Brownell paid Whitaker a total of $762 to install three piers and an eight-foot beam under her home “because her floor squeaked.” The widow later invited an inspector from the Department of Agriculture to inspect under her home, where he found improperly installed “four-by-fours held by screw jacks,” and he alerted the Consumer Protection Division to the scam. Yet a few weeks later, Brownell had second thoughts about the inquiry. She decided that she “was satisfied and had no complaint” against Whitaker and declined a request for a follow-up inspection by an agent from the Consumer Protection Division. Perhaps, like so many other fraud victims over time, Brownell became embarrassed about being drawn in by the fraud or for overpaying for such shoddy foundation work and preferred to absorb the financial loss rather than face public shame for being duped. Alternatively, Whittaker might have assuaged her anger with some sort of undisclosed payment. Brownell’s story demonstrates both the difficult task of investing victims in state enforcement efforts and of enforcing judgments against fly-by-night operators like Whitaker. Once more, this elusive mountebank had slipped quietly out of the state agents’ grasp, likely to continue “repairing” foundations door-to-door.97

Even when Alabama officials successfully shut down an operation within the state, operators could continue an operation beyond the reach of state regulators just by crossing state lines. The perpetrators of the Centennial Pest Control and Construction scam

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illustrate this point. Less than a year after the Attorney General finalized the settlement agreements with this group, the state of Mississippi began to investigate members of the same group for fraud. In 1987, that state suspended Centennial Termite and Pest Control’s license, and the Mississippi Department of Agriculture reached out to the Alabama Attorney General for information about the group’s fraudulent structural repair work in Alabama that might help it permanently shut down the group in Mississippi. American federalism thus offered life lines to fraudulent firms. The ADTPA furnished the state Attorney General’s Consumer Protection Division with significant new tools against consumer fraud within Alabama, but the Attorney General’s authority to act halted abruptly at the state line. For activity that spanned beyond a single state’s borders, one Attorney General would have to rely on information sharing and enforcement-coordinating activities among the Attorneys General of several states or even appeal to the courts beyond their own boundaries.

Better Living Magazine: Selling Fraud Through the Mail

Thousands of Alabama residents in 1983 received letters mail notifying them they had been selected from a list of millions of people for an exclusive offer from Better Living magazine, “America’s leading home and garden magazine . . . devoted to home, garden, health, fitness, cars, recreation, investments, sports, sideline income, fishing, camping, the outdoors, travel, crafts, product ratings, and personal finance.” A lifetime subscription

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98 Jim Haskins, letter to Attorney General Charles Graddick, November 2, 1987, ADAH, AGCP, box SG018699.
typically cost “up to $500,” but these lucky winners had the “once-in-a-lifetime opportunity” to purchase one for only $4.95. By one estimate, approximately 1200 customers across Alabama in the early 1980s sent in payments and subscription cards each month to take advantage of this offer from Better Living.99

The publication that subscribers ultimately received failed to meet consumer expectations. The so-called “magazine” was a thin tabloid printed on rough newsprint that consisted primarily of advertisements interspersed with a few articles. The magazine scam built upon a base of consumer confusion, as the name Better Living evoked the names of the popular, legitimate periodicals Southern Living and Better Homes and Gardens, both of which would have been offered only at a higher price. Optimistic consumers had hoped to get a familiar publication at a rock-bottom price, but they soon discovered that Better Living had absolutely nothing to do with homes or gardens.100

Instead, most of Better Living’s content involved sexually explicit themes. One Spring 1985 article described how a software program called “Mind Prober” could “enable the user to determine a stranger’s sexual habits and attitudes with reasonable precision—within minutes of meeting him or her.” Another program could be used to “send covert sexual suggestions to female employees.”101 An “article” titled “This Sex Manual Is Not for Beginners” was really a two-page advertisement for a book called Everything You

Always Wanted to Know About Sex, But Were Afraid to Ask, published by a press that appears to have owned Better Living. Thus, the press could profit doubly; subscribers to the “magazine” generated one stream of income, while purchasers of the books promoted in the publication generated further profits. A photograph of a nude woman covered two-thirds of the first page of this “article,” offering a preview of what might be in store for the subscriber who paid the “everybody-can-afford-a-happy-sex-life price of ONLY $6.95!” for the book.\(^{102}\) Classified-style advertisements that filled the bulk of the pages of Better Living were similarly tawdry, boasting of miracle “Hernia briefs,” various get-rich-quick schemes, diet pills, mail-order brides, pornographic magazines, and a multitude of sex aids.\(^{103}\) An Alabama court order would later summarize Better Living magazine as a “profusely illustrated text dealing with sex and topics which appear to be designed to offend the average consumer.”\(^{104}\)

The scheme was quite simple. As Michael Bownes, a lead attorney on the Better Living task force, explained, after sending “about three months’ worth of this trash,” subscribers received notice that the publisher was “updating their mailing list” along with a postcard for the subscriber to return if they wanted to continue receiving issues. “Of course,” he continued, “nobody wanted to continue getting it.” Embarrassed subscribers dropped off the list, while the company kept payments for their “lifetime subscription” for


\(^{103}\) See various advertisements, Better Living (Spring 1985): 17–18 [ADAH, AGCP, box SG018699].

a profit. This made the scheme cheap and effective—the company needed mail out only a few cheap tabloids before customers dropped from the list. If a reader happened to order any of the publisher’s other advertised books or products, so much the better.\(^{105}\)

![Figure 5: Assistant AG Michael Bownes Holds a Summer 1983 Issue of \textit{Better Living}]^{106}

The \textit{Better Living} ploy, like other common scams that operated in Alabama in the 1980s, followed patterns familiar to U. S. postal inspectors for more than a century. Mail-based scams, including those touting fake lotteries, peddling shoddy wares, or spreading pornography or other morally offensive materials, emerged right alongside the first legitimate mail-based marketing schemes in the 1850s and continued through the twentieth century. The \textit{Better Living} scheme combined several of these elements into a single


swindle—capturing the hope of consumers through a “lottery” subscription model and playing on information asymmetries in distant states to market a sub-par “home-and-gardens” periodical as an instrument to sell smut. Nineteenth- and early-twentieth-century regulators had long struggled with these schemes, first because of the lack of a mail-fraud statute, then because of barriers to enforcement. These postal regulators had struggled to secure judgments against companies perpetuating mail-order scams, and some operations such as the Louisiana Lottery had simply absorbed penalties for mail fraud (which had a statutory limit of $500) as a periodic annoyance but as part of the cost of doing business. Nineteenth-century anti-vice reformer Anthony Comstock declared these “swindlers . . . the hardest people in the world to run down” because of the way mail-fraud operations slipped easily between aliases and jurisdictions to avoid legal consequences.107

Despite decades of mail-fraud enforcement, these schemes persisted, and were no less common in the 1980s in Alabama then they had been a century before. Ella Boyd Martin noted that the Consumer Protection Division regularly received five complaints per week for suspected mail fraud. Most schemes followed a pattern of promising something “too good to be true”—an opportunity to purchase a product for far below market value or an advertisement guaranteeing money in exchange for stuffing envelopes. In the former example, would-be purchasers would be strung along for a few weeks or months with “letters thanking customers for an order, followed by letters apologizing for any delay in delivery because of a tremendous response to the advertisement,” and then followed by

107 Balleisen, Fraud, 128–39.
silence as the fraudster disappeared with the purchaser’s money, only to set up “a new P.O. box, a new name, and do it again.” In the latter scheme, the person inquiring about the envelope-stuffing position would send in $20 or $30, only to receive “a booklet instructing him how to begin the scheme again” by placing a similar advertisement and continuing the chain of fraud. “It’s a pyramid scheme,” explained one investigator.\textsuperscript{108}

Ordinarily, Alabama’s Consumer Protection Division would perform only a preliminary investigation of a mail-fraud scheme. At most, the inquiry might culminate in a strongly worded letter from the Division to the schemer demanding that he or she cease and desist. But if the mail fraud scheme persisted, the Division would refer the case to the U.S. Postal Service’s Inspection Division. Few such cases actually reached the courts, as most schemes ceased after either the Division or the Postal Inspector sent a letter. But when a case warranted litigation, the postal inspectors took control.

The postal service had institutional expertise in bringing such lawsuits, particularly since many of the schemes were “run by out-of-state operators” and would be pursued in federal court under the federal mail-fraud statute. The U.S. Postal Inspection Service also had institutional capacity, including a staff of specialized attorneys. In 1983, one such government lawyer, who was responsible for mail-fraud cases in 11 states, reported filing six envelope-stuffing cases within the year, “four of which involve[d] operators who make more than $1 million.” Though the postal inspectors received approximately a dozen reports of envelope-stuffing schemes per month, the attorney noted that he had “never

\textsuperscript{108} Karen Hartley, “More Alabamians Fall Victim to Failure-to-Render Scheme,” \textit{Montgomery Advertiser}, October 10, 1983.
found a legitimate work-at-home envelope stuffing offer.” “They’ve got machines to stuff envelopes – it’d be crazy to farm out anything like that,” he explained. Still, swindlers managed to prey on hopeful victims, many of whom could be counted on never to complain. “They lose only a small amount of money and are embarrassed they were taken,” the postal inspector attorney continued. The incidents actually reported were presumed to represent merely the tip of the iceberg of possible complaints.\textsuperscript{109}

Despite longstanding barriers to fraud enforcement against companies operating through the mail, as well as the option of referring the case to federal postal inspectors, Assistant Attorney General Mike Bownes, the lead attorney for Alabama’s Consumer Protection Division, decided to prosecute the \textit{Better Living} case under the ADTPA in 1984. It is not clear why Bownes decided to pursue the case himself instead of following the usual procedure of referring the case to the postal inspectors. In part, Bownes may have simply faced pressure from consumer constituents to take some action against the publisher of \textit{Better Living} and have seen the case as an opportunity for a political “win” for the office by satisfying a large number of aggrieved consumers. By the summer of 1984, the Alabama Consumer Protection Division had received complaints from at least 174 “deceived and irate” \textit{Better Living} subscribers.\textsuperscript{110} One annoyed subscriber who had previously submitted a complaint wrote back a month later pleading for the Division to act. “[I] sent you the front & back page which had my adress label, on it, a lone with my money

\textsuperscript{109} \textit{Ibid.}
order copy,” she wrote. “I am still receiving these issues and would like for them to be stopped.”¹¹¹ The case may have also been perceived as a way to bring in funding through a successful lawsuit. Though the individual losses were small—less than five dollars per subscriber—the ability to file a group action under the Act made a suit more attractive, especially in light of the prospect of levying significant fines for every instance of demonstrated deception. The publisher was an out-of-state business that appeared to have the assets required to satisfy such a judgment, and a successful lawsuit might provide financial resources sufficient to sustain the Division for months. Finally, the case may have also been appealing because it positioned the Attorney General’s Office as an upstanding moral guardian fighting the good fight against vice. Posing for newspaper photographs as an inveterate opponent of pornography, as Bownes did for the Montgomery Advertiser and Alabama Journal (figure 5), the Division was likely to find favor in a deeply conservative state that embraced a moral and political agenda of evangelical Protestantism.

In August 1984, Bownes filed a lawsuit on behalf of the State of Alabama against Better Living’s publisher, Avant-Garde Media, in state court in Montgomery, Alabama. Despite several efforts at notification, Avant-Garde Media never showed up to defend the case. Because the publisher was based in New York state, Alabama law permitted Bownes to serve the defendant by certified mail, but Avant-Garde returned the letter, unopened and marked “refused.” Bownes sent a second copy of the complaint and summons through first-class mail, but still heard nothing from Avant-Garde. Thus, the lawsuit began in

¹¹¹ Letter from Mary Bentley to Assistant Attorney General Mike Bownes, June 5, 1985, ADAH, AGCP, box SG18699 (typographical errors from the original).
Alabama without Avant-Garde, and Bownes easily secured a default judgment against the company. Bownes demonstrated that Avant-Garde had violated the ADTPA by misrepresenting Better Living’s “characteristics, uses, benefits, and qualities,” as well as by violating the general catch-all provision by engaging in “unconscionable, false, misleading and deceptive acts.” In response, the court ordered Avant-Garde to refund the subscription price to the 174 complaining subscribers, for a total of $861. Furthermore, Bownes argued that these Avant-Garde’s violations were “continuous and willful,” which justified the use of the Act’s special civil penalty for this more egregious conduct of $2,000 per occurrence—calculated for each of the 174 complaints that the Consumer Protection Division had received, for a total of $348,000. Bownes then successfully argued for a permanent injunction against Avant-Garde that prohibited the company from selling Better Living or any similar publication within the state of Alabama. And finally, since Bownes won the lawsuit for the state under the Act, the court ordered Avant-Garde to pay the Attorney General’s Office $600 in attorney’s fees.\textsuperscript{112} After the case concluded, Bownes sent another certified letter to Avant-Garde with the court order and a letter alerting the company of the court order and noting that doing business in the state would trigger a contempt order and a $25,000 fine under ADTPA enforcement provisions. “Guide yourself

accordingly,” Bownes warned. But this letter, too, was returned unopened, marked “refused.”

A year later, Avant-Garde continued to market lifetime subscriptions for Better Living in Alabama, in defiance of the court order. The Attorney General filed a contempt motion asking for $25,000 per continuing violation, as authorized by the ADTPA, but still the publisher defied these court orders. Since Avant-Garde refused to acknowledge the legal proceedings in Alabama, the Alabama Attorney General and two Assistant Attorney Generals (including Bownes), traveled to New York to enforce the judgment against the company in a New York state court in 1987. The New York judge enforced the $861 award to compensate consumers and the $600 award of attorney’s fees from the original judgment, but refused to enforce the $348,000 civil penalty because the court determined the portion of the Act authorizing this penalty was a “penal law” of Alabama, which could not be enforced by the courts of other states. After three years of legal work, the Alabama representatives returned home with less than $1,500—likely an amount insufficient to cover the group’s travel expenses to New York. Upon returning home to Alabama, the state agents could do little more than some of their forebears who had struggled with policing mail fraud in the nineteenth century, who had then warned “rural readers against mail-related swindles from New York City.”

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113 Assistant Attorney General Mike Bownes, letter to Avant-Garde Media, Inc. (and accompanying envelope), 31 May 1985, ADAH, AGCP, box SG18699.  
115 Order, Alabama v. Avant-Garde Media, Inc., No. 41990/86 (April 28, 1987, N.Y. Sup. Ct. N.Y. Co.), ADAH, AGCP, box SG18699; see also Huntington v. Attrill, 146 U.S. 657 (1892) (holding that a penal law designed to punish an offense against the public justice of the state cannot be enforced in the courts of another state).  
116 Balleisen, Fraud, 130.
warned starry-eyed purchasers: If it sounds too good to be true, it probably is. Buyers beware.

In the 1980s, magazines were far from the most sinister fraudulent goods peddled through the mail. Rampant inflation and a volatile gold market, for example, made some credulous consumers particularly receptive to mail-order gold-investment schemes and jewelry scams, both of which could lead to far more than five-dollar losses for these individuals. Through the 1980s, the Consumer Protection Division published numerous educational articles designed to steer consumers away from deceptive gold investment schemes advertised through the mail, or alternatively about other investments, such as real estate timeshares, that offered gold jewelry or ingots as sign-up incentives. The operations of the postal service allowed business ventures of both reputable and disreputable varieties to operate fluidly across state lines in a seamless national marketplace, but state boundaries created a patchwork of legal enforcement that stretched only as far as the state line. The ADTPA more clearly prohibited certain conduct like that of Avant-Garde in marketing for Better Living, but the new law had not entirely cured these more enduring barriers to anti-fraud enforcement.  

117 “The Gold Rush,” Consumers’ Counsel 2, no. 5 (April 1980): 4 (advising consumers about the actual meaning of terms used to describe gold); “The New Gold Rush: Buying and Selling,” Consumers’ Counsel 4, no. 2 (February 1982): 3 (advising consumers about ways sellers mislead consumers); “Ten Timeshare Tips,” Consumers’ Counsel 4, no. 5 (April 1982): 3, 4 (advising consumers that promotional giveaways of ‘solid gold’ ingots were possible because the ingots were worth very little); “Bargain Jewelry,” Consumers’ Counsel 4, no. 6 (June 1982): 3 (noting that if a jewelry offer seems too good to be true, it is); “Gold Investment Exchange Under Multi-State Investigation,” Consumers’ Counsel 5, no. 2 (June 1983): 4 (describing the investigation of a gold-investment scam called International Gold Bullion Exchange, Inc.); see also Balleisen, Fraud, 133–36 (describing mail frauds marketing fraudulent investment schemes).
The *Better Living* case, therefore, highlighted both the Attorney General’s new powers under the ADTPA as well as the statute’s flaws. On one hand, the Act authorized stiff penalties for Avant-Garde’s intentional, continuous misconduct. When the firm defied the court’s original order, the Act permitted the Attorney General to seek even harsher fines. Avant-Garde appears to have been a small company, not a multi-million-dollar enterprise. The $348,000 penalty, if enforced, could have simultaneously forced *Better Living* out of business and doubled the annual budget of the Consumer Protection Division. But the result of the case shows a fundamental incongruity between the geographic reach of the Attorney General’s Office and the defendant businesses it attempted to control.

*International Figure: Protecting Consumers When Legitimate Businesses Go Bust*

One morning in the summer of 1987, a fitness instructor received an unwelcome shock as she drove past the local health club at which she worked. “I worked on Friday and then I drove by on Saturday and the place was closed,” she explained.118 In cities across Alabama, nine International Figure health studios closed their doors suddenly, leaving “up to several thousand customers with paid-up, long-term memberships but no spa facilities to use.”119 The closure came completely without warning; one member even received a call a week before the health spa closed requesting payment of her annual

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118 Lekan Oguntoyinbo, “International Figure Salon Closes Suddenly with No Notice to Members,” *Anniston Star*, June 18, 1987.
dues. The fee structure for the health spa involved a “lifetime membership” of a few hundred dollars paid up front and supplemented annually by a smaller “annual fee.”

Other members bought package deals for a number of specific services, such as tanning visits, all paid in advance. Unlike perpetrators of home-repair frauds or other shady businesses, International Figure was not a fly-by-night operation; the business had operated women’s-only health clubs in Alabama for a decade. The fitness spa had long touted premium amenities, from Swedish saunas to free children’s playrooms, and claimed to be the state’s “most experienced health spa for women only.” But by the late 1980s, the health spa had fallen on hard times. By all accounts, International Figure had been a legitimate—though failed—business.

Other fitness studios bought a few of the defunct International Figure locations and “honored the paid-up memberships” of International Figure members, either automatically or after the payment of a “transfer fee.” But members at some locations found themselves without access to a health spa or a refund. When two of the closed health spas sold at auction in the fall of 1987, the Consumer Protection Division intervened to attempt to bring Alabama consumers the refunds they were due.

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120 Lekan Oguntoyinbo, “International Figure Salon Closes Suddenly with No Notice to Members,” Anniston Star, June 18, 1987.
121 Sharon W. Bonner, letter to Assistant AG Dennis Wright, October 19, 1987, ADAH, AGCP, box SG019339.
122 Consumer Complaint Form of Pat Greene, August 27, 1987, ADAH, AGCP, box SG019339.
123 “AG Suing International Figure Salons,” Montgomery Advertiser, October 15, 1987; International Figure advertisement, Montgomery Advertiser, August 28, 1983.
124 “Consumer Board Sues Spa Chain,” Anniston Star, October 15, 1987; Lekan Oguntoyinbo, “International Figure Salon Closes Suddenly with No Notice to Members,” Anniston Star, June 18, 1987.
Sudden closings of health spas across the state had been a major concern for the Consumer Protection Division since the Division’s inception, and the Division spent a large proportion of its time and resources policing health spas in its early years. The Division had sued seventeen health spas in 1981, all of which had abruptly closed, “depriving members of services already paid for.” In 1982, Attorney General Charles Graddick filed lawsuits against three more health spas, declaring the “health spa industry . . . the number one problem of my Consumer Protection Division.” In 1984, the Attorney General helped secure passage of a Health Studio Act, which created several protections for consumers, including a three-day, penalty-free cancellation period for health-studio contracts and a 30-day right to rescind a contract if a consumer signed a contract for a new studio with promised future services that never materialized. Even more importantly, the Health Studio Act had established a requirement for new health studios to post a $50,000 bond that could be used to compensate members with outstanding subscriptions when a health studio went out of business. However, since International Figure was established before the Health Studio Act took effect in 1984, it was exempt from that Act’s bonding

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requirement, and thus no bond reserves existed to pay unlucky former International Figure members.129

But even if International Figure had been subject to this insurance mechanism, money for refunds still would not have been available because the statutory bonding requirement had run into significant enforcement challenges. Having a law on the books did not automatically result in that law being enforced in practice. In 1988, one health-spa owner fought back when the Attorney General attempted to enforce the $50,000 bond requirement on his health spa by pointing out that the bond requirement had never been enforced against any other business in the four years since its passage through the legislature. Through his attorney, the health-spa owner complained that the Attorney General “discriminately singl[ed him] out . . . for selective enforcement of a law which has never been applied to any other individual or company since its inception.”130 In response, the Assistant Attorney General assured him that “this office is making every effort to ensure timely compliance by other appropriate health studios,” and pointedly reminded him that, “the enforcement of the Health Studio Act is not the sole purpose or duty of the Consumer Protection Division.” Laws did not enforce themselves, and the overworked, underfunded Consumer Protection Division struggled to meet its other obligations while health studios evaded the bonding requirement.131

130 Richard S. Jaffe, letter to Assistant Attorney General Dennis M. Wright re: Thomas Spencer, June 20, 1988, ADAH, AGCP, SG019339.
131 Dennis M. Wright, letter to Richard S. Jaffe, Esq., re: Thomas Spencer, June 29, 1988, ADAH, AGCP, SG019339 (emphasis added).
Although the Health Studio Act did not apply to International Figure, the ADTPA empowered the Attorney General to at least take remedial measures to restore some of the lost funds to consumers. Assistant Attorney General Dennis Wright used his powers under the Act to request that a state court freeze the proceeds from the auction of materials from two of the closed locations so that any money recovered could be “used for refunds.”\textsuperscript{132} The court approved the freeze and appointed the Attorney General’s Office as receiver of International Figure’s remaining assets. However, these actions turned out to be a “hollow victory,” because in addition to the refunds owed to its members, International Figure also owed the Internal Revenue Service (IRS) for back taxes. In fact, the IRS had a $190,000 tax lien against International Figure, which gave the IRS “first dibs” to the defunct health spa’s assets—assets which totaled only $35,000 (and only $8,000 of which were in cash). Despite the best efforts of the Consumer Protection Division, no money remained from which to refund disappointed former members of International Figure.\textsuperscript{133}

Health spas topped the Attorney General’s list of businesses of concern, not because health spa operators were particularly shady but because they tended to follow a subscription business model combined with a need for large initial capital investments (including exercise machines and pricy spa facilities like saunas and hot tubs) that made them particularly vulnerable to a volatile economy. Across the state there were many different types of businesses following comparable business models that similarly

\textsuperscript{132} ADTPA §§8(a)–(b); Patrick Rupinski, “State Files Suit Against Owner of Health Spas,” \textit{Birmingham Post-Herald}, October 14, 1987.
threatened to leave members stranded if the business shut down. Any business that charged a large, up-front fee for services to be provided in the future posed risks because the business could fold. The Division also pursued cases against “buying clubs,” businesses in which a consumer paid a membership fee for the opportunity to purchase goods at wholesale prices. When some of these establishments folded, the members were left both without a buying club and without a refund of the prepaid membership fee.134

Cemeteries served as another particularly grim example of this endemic problem, since they often offered prepaid “perpetual care” services or accepted advance payment for grave markers, headstones, and vaults. When owners mismanaged these payments, or when inflationary pressures exhausted funds sooner than expected, cemeteries fell into disrepair and owners shirked their duties. A 1991 Consumer Protection Division investigation into Greenlawn Memorial Gardens, a cemetery near the small town of Jacksonville, Alabama, revealed financial troubles and neglect. There, the owner had closed the cemetery’s perpetual-care trust fund, disconnected utilities, closed the main office, failed to provide prepaid grave markers, and stopped maintaining the grounds, all in violation of contracts with Alabama families. The Consumer Protection Division received at least 87 complaints and estimated that this number represented less than half of the people actually affected.135 Like in the International Figure case, the Attorney General petitioned the court for receivership of the cemetery’s assets in attempt to salvage value for

134 “Attorney General vs. Southern Buyers’ Club,” Consumers’ Counsel 2, no. 2 (Feb. 1980); “Uniway Buying Clubs Sign Consent Agreement,” Consumers’ Counsel 2, no. 7 (July 1980); “Buying Clubs May Be More Expensive Than Retail Stores,” Consumers’ Counsel 2, no. 7 (July 1980).
the affected consumers. But also like the International Figure case, these efforts constituted triage, not a solution; the business’s failure had drained its assets, and thus recovery for consumers was limited. “All of the money – about $10,000 – paid in advance for perpetual care and plots has been spent,” the Assistant Attorney General explained to a reporter covering the state’s lawsuit. The owner of the cemetery had fallen into “financial trouble,” and all the state could do was “try to find a buyer for the 13-acre cemetery.” A staff member at the Division predicted that there was only “about a 50 percent chance that the plot owners will be satisfied with what happens in the suit.”

Even with the tools available through the ADTPA, the state lacked the powers of resurrection necessary to bring a failed business back to life. Furthermore, in the cemetery context (and in sharp contrast with health spas or buying clubs), victims suffered emotional as well as financial injuries that no legislation could ever remedy. No legal remedy, for example, could compensate for the added grief of knowing that a loved one suffered the indignity of being buried in an unmarked grave, like the one documented by a Consumer Protection Division agent in the late 1980s, shown in figure 6.

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138 Jane Self Burnham, handwritten letter to S.F. Bryant of Greenlawn Memorial Gardens, August 8, 1990, ADAH, AGCP, box SG019325 (“[M]y father, Dr. Reuben Self, bought a bronze memorial marker from you to be placed on the lots which he purchased previously . . . It is now almost a year since my father passed away. The grave being left unmarked has caused me and my family added grief.”); Laura Howard, “Greenlawn Cemetery Woes Fill Up a City Hall,” Anniston Star, June 7, 1991 (statement of Venester Lewis, noting that her husband “was a veteran of three wars . . . but he’s up there in an unmarked grave”).
Figure 6: A Temporary, Handwritten Grave Marker at Greenlawn Memorial Gardens

Whether in the form of health spas, buying clubs, or cemeteries, even legitimate businesses harmed consumers when they fell apart. The ADTPA created important enforcement tools for the Attorney General’s office, such as authority to freeze sale proceeds and to serve as receiver for a business’s assets. These powers allowed the Consumer Protection Division to intervene quickly and mitigate some of the harm to consumers. However, the very factors that often led to a business’s failure—debts, lack of liquid assets, mismanagement, and so on—also hampered the Attorney General’s ability to compensate consumers after the fact.

139 J. Morris grave site image, ADAH, AGCP, box SG019325.
Conclusion

Though the tools and strategies that the Division employed were shaped by Alabama's political context, the problems themselves were not special to Alabama. In fact, fly-by-night companies, mail fraud, and business failures appeared throughout the United States. Regulators in all fifty states had long struggled to address these issues in the marketplace. Alabama fell behind in its regulatory efforts in the mid-twentieth century by failing to address these concerns in any systematic way. By the 1980s, Alabama had caught up modestly by creating a Consumer Protection Division and passing a consumer-protection law, though these new regulatory tools would come up against the same obstacles that all regulators faced. Fly-by-night operations would always be tough to nail down and even tougher to totally eradicate. The mail would continue to serve as a tempting method for circulating fraudulent offers to the public, joined by the telephone and then the internet. And businesses would continue to fail, leaving consumers in the lurch.

The task of policing consumer fraud, deception, and disappointment—whether accomplished through legal enforcement, consumer education, or other means—is difficult and often thankless, and the results of such efforts are often mixed. Throughout the 1980s, the Consumer Protection Division wrestled with consumer frauds and deceptions in many guises, aided by the new provisions of the ADTPA. The statute prohibited specific conduct, established different types of fines and remedies, and established forms of legal jeopardy that state officials could use to encourage settlement and compliance. As the Attorney General had predicted in 1981, the Act did constitute a hammer—but not a sword or a scalpel. Although the ADPTA did not entirely halt roaming conmen perpetuating
home-repair frauds, the legislation did facilitate settlements under the coercive shadow of the state’s ability to pursue criminal penalties in addition to civil penalties. By repeatedly targeting similar fraudulent conduct, regulators honed their enforcement skills and became more efficient and effective. Though policing home-repair fraud at times became a regulatory game of whack-a-mole, Alabama regulators improved their regulatory reflexes each time they used the ADTPA’s enforcement mechanisms to knock these ruthless operators out of the marketplace.

Furthermore, even when the Consumer Protection Division failed to recover fully for victims of a scam or a failed business, the Division often served as the only possible advocate for consumers that otherwise would have had no recourse at all. The economics of many of these low-level frauds meant that private attorneys had little incentive to bring lawsuits, whether brought under the ADTPA or some other means, against these groups. The defendants in these cases—fly-by-night operators or already-bankrupt businesses—had minimal or no financial resources from which the attorney could recover funds for either the client or the attorney him or herself. If the Division did not step in, these small frauds would pass without even protest. Consumer Protection Division enforcement actions, even when ultimately unsuccessful in returning lost money to consumers, still served an important symbolic role in labeling misconduct as wrongful and thereby setting community norms for what constituted improper conduct in the marketplace.

Yet the ADTPA hardly overcame all of the many barriers to consumer-fraud enforcement that had plagued regulators across America since at least the nineteenth century, including the challenges of policing fly-by-night operations, of prosecuting
schemes across jurisdictional lines, and of regulating the dangers posed by legitimate but failed businesses operating in a capitalist marketplace. The example of mail fraud in the Better Living case illustrates the limits of individual state action in a national marketplace. In this instance, the Alabama Attorney General may have approached the case with a touch of hubris—and without the benefit of the years of accumulated experience that other states’ Attorneys General would have had in the same situation. Individual state efforts to police mail fraud had long dissolved in favor of enforcement through the U.S. Postal Inspection Service, a regulatory body both better placed and with expansive authority to police interstate fraud operating through the mails. With the benefit of hindsight, it appears that the Consumer Protection Division would have been better off referring the Better Living case to these U.S. Postal Inspectors, who would not have run against the jurisdictional barriers that limited the Alabama Attorney General’s ability to recover damages. That official’s failure to take this course could have represented a nearsighted desire to showcase the prosecutorial powers of the new ADTPA, an ill-conceived attempt to extract thousands of dollars of department funding through litigation, overconfidence, or some combination. However, the Consumer Protection Division built its institutional knowledge base from the experience of being burned in the Better Living case; in future efforts to police fraud across state lines, the Division would better collaborate with other federal and state consumer-protection agencies rather than trying to prosecute alone.\textsuperscript{140}

\textsuperscript{140} See ADAH Consumer Protection Case Files collection, especially the Allied Marketing case file, ADAH, AGCP, box SG019325, for an example of collaboration between over a dozen attorneys general in a multi-state fraud scheme operated via mail and telephone.
Regardless of the impetus for taking on this failed enforcement effort, these cases provided learning opportunities for a still-young department. The Division began to make better use of nongovernmental allies, including investigators in the reinvigorated Alabama network of Better Business Bureaus (BBBs), which rose from being among the lowest ranked in the nation in the early 1980s to among the best by the end of the decade.\textsuperscript{141} By the mid-1980s, automobile arbitration boards became a prominent feature of both the Alabama’s Consumer Protection Division (representing Chrysler) and the Birmingham BBB (representing General Motors and Nissan/Datsun).\textsuperscript{142} The Division likely drew on lessons from other states, as all of these strategies had been tested elsewhere. For example, in the early 1970s, Rhode Island had developed both a binding arbitration program to resolve consumer disputes and a strong relationship with its state Better Business Bureau.\textsuperscript{143}

The Alabama Attorney General’s Consumer Protection Division, then, experienced both successes and setbacks. When Alabama finally adopted a consumer-protection statute and began to police consumer fraud along a model practiced in the rest of the United States, it closed one portion of the consumer-fraud frontier and dispensed with the negative stigma of falling behind in state enforcement trends. The ADTPA allowed the Division to take more vigorous action against consumer fraud in areas such as the home-repair-fraud arena,

\textsuperscript{141}Patrick Rupinski, “Alabama No Longer a Con Man’s Heaven,” \textit{Birmingham Post-Herald}, April 19, 1986; see ADAH Consumer Protection Case Files collection, especially the Advance Personnel case file, ADAH, AGCP, box SG018698, which demonstrates increasing coordination between state agents and local BBBs in the collection and sharing of consumer complaints and consumer information drives.
\textsuperscript{143}Kazanjian, “Consumer Protection by the States Attorney General,” 426–27.
and over time the Division gained experience that allowed it to ever more efficiently pursue similar patterns of fraudulent behavior.

But fraud was not always equally clear-cut. The Division had to police the consumer marketplace across a spectrum of business practices ranging from the blatantly fraudulent, as represented by home-repair scams in Andalusia, to the sketchy, as represented by the Better Living scheme, to the tougher case of legitimate-but-failed businesses, as represented by the health-spa cases. Furthermore, the Division’s activities occurred within a political ecosystem. Attorney General Graddick, who had been instrumental in pressuring the legislature for passage of the ADTPA, ran unsuccessfully for Governor in 1986 and left office in 1987. With the transition to a new administration came new enforcement priorities and prosecution strategies, though processes of institutional learning continued through the career consumer-protection specialists and staff attorneys who continued to take complaints and recommend actions. The Division over time would help resolve some instances of fraud, but only to the extent possible with a small budget and limited political will for regulatory action.

No regulatory regime could completely mitigate the integrally destructive elements built in to the American capitalist system. A too-good-to-be-true offer would always draw in some hopeful consumers; some entrepreneurial enterprises would always attempt push the boundaries of truthfulness to make a dollar; and, over time, some businesses would always fail. Sometimes failing businesses compounded the damage they would cause in their final months of operation by offering deep discounts on services, a tactic which attempted to draw in enough quick income to keep the business afloat, but which tended
instead to expand the number of consumers ultimately aggrieved without saving the business. When consumers invested their resources in these businesses or organized their lives in reliance on these businesses, they stood to suffer. In these cases, the ADTPA offered a menu of helpful tools to try to make the situation right, but the Division ultimately had few ex post remedies to offer Alabama consumers stuck in these difficult situations. Fly-by-night operators were difficult to track down. Even if the Division could find and prosecute the wrongdoers, there might be no assets from which to compensate the defrauded consumer. Scams operating across state lines presented jurisdictional challenges to enforcement and might even turn out to be essentially judgment-proof. The best advice for consumers in these areas was often the same after the passage of the ADTPA as before: *Caveat Emptor*, or Buyer Beware.

In fact, this message dominated Attorney General Graddick’s outreach to consumers over the course of his entire term, from the late 1970s through the 1980s. In part, this was a prudential message that recognized the challenges of consumer protection and the limited remedies after fraud had been accomplished—whether in Alabama or in virtually any other state. However, Graddick’s direction to “beware” may also be construed in a more culturally specific way as a description of the lingering suspicion of governmental regulation of the economy that prevailed in Alabama even after the passage of the state’s consumer-protection law. Despite several points of similarity between consumer-protection laws shared by the fifty states, conscious imitation of a widely shared regulatory tool did not result in homogenized regulatory cultures. The addition of a consumer-fraud statute to the Alabama’s regulatory regime hardly altered Alabamians’
conservative regulatory preferences or the libertarian, self-reliant mindset that still largely prevailed in Alabama’s marketplace. As Graddick himself defined the term “caveat emptor” at a 1984 consumer-protection rally, the term meant “what you and I must do to take responsibility for our own protection.”

Thus, even with a Consumer Protection Division in Alabama, fraud and deception would persist in the marketplace. Broad areas of the marketplace, such as those involving consumer finance, insurance, or banking, had been purposely excised from the ADTPA and therefore lay completely outside of the Attorney General’s purview. Banks, insurance companies, and finance companies presented a very different regulatory profile than the small-time fraudsters who fell solidly within the Consumer Protection Division’s jurisdiction. These companies comprised “six of the state’s ten biggest money-making companies” by the 1990s, and their products had far greater reach and impact than those of a traveling home-repair group, a tabloid magazine, or a health spa. Consumer financial services were already subject to overlapping state and federal regulatory regimes, yet as the Alabama Attorney General’s Office stepped gingerly toward the consumer-protection currents flowing through administrative agencies nationwide, the Alabama departments tasked with the protection of consumers in these excluded areas, including the state Banking Department and Insurance Department, remained passive and underfunded,

creating uneven consumer-protection enforcement across the state.\textsuperscript{146} Especially for fraudulent conduct in these areas, Alabama consumers would seek advocates and remedies for wrongdoing beyond the Consumer Protection Division. Most importantly, they would turn to a growing number of plaintiff’s attorneys, who fashioned other legal means of redress.

\textsuperscript{146} For example, while state insurance departments nationally collected about six percent of insurance premiums collected in the state in order to fund the regulatory activities of the state agency, Alabama charged only two percent of these premiums. Ibid., 965.
Chapter 2: “Alabama Is Open for Business”

In 1987, newspaper articles ticked off the number of counties in Alabama where a woman could not have her baby delivered by a doctor. In February of that year, the number had risen to twenty-four of Alabama’s sixty-seven counties. By July, Cherokee County lost its last obstetrician, and that number increased to twenty-five. The flight of physicians from rural communities had devastating consequences for babies and their mothers. One pregnant fifteen-year-old girl from Barbour County died in a car accident while rushing to a hospital in neighboring Pike County because she feared she was going into labor. The Barbour County hospital had stopped delivering babies more than a year earlier and would do no more than stabilize a woman in labor before transporting her to a different hospital. The cost of malpractice insurance had become too high for doctors and hospitals to provide these high-liability services.¹

In the 1970s and 1980s, an insurance crisis swept the nation, with doctors’ rising medical malpractice rates standing out as one of the most visible examples of upward-creeping liability insurance premiums. In California, hospitals turned away patients after thousands of doctors went on strike to protest triple-digit increases in their medical malpractice insurance premiums. As rates rose across the country, insurers left the malpractice market, and state lawmakers and medical associations scrambled for ways to

continue malpractice coverage. New York State lost its last private malpractice insurer in the mid-1970s, pushing the state’s medical association to create a mutual insurer to fill the gap and the state legislature to pass a law to create a mandatory insurance pool. Both the New York and California legislatures also instituted regulatory limits on price increases for liability insurance. In Delaware, the governor personally intervened after the state’s last malpractice insurer announced it would withdraw coverage, negotiating a month-by-month continuation of malpractice coverage for Delaware hospitals, a stop-gap solution to buy the state legislature time to craft “a legislative solution to the problem” of rising rates.²

In part, macroeconomic factors drove the crisis. The American economy suffered a recession in the early 1980s, leading the Federal Reserve to raise interest rates to slow out-of-control inflation. At a very basic level, insurance companies calculate current premiums based on predictions about the total risk within a pool of insureds and calculations of likely payouts in the future. The economic rollercoaster of inflation and recession in the 1970s and 1980s pushed malpractice rates higher because premiums in present-day dollars had to cover future liability, priced in less valuable dollars. When the economy then recovered, interest rates fell, curbing high returns that insurance companies had received on their investments, causing further turmoil in the industry.

Doctors also pointed to societal factors, including increasing pressure from patients “who know of wonder drugs and miraculous surgery” to take more risks in medical care, which seemed to exacerbate overall risks. But most of all, doctors and their insurers bemoaned an uptick in lawsuits, a byproduct of a “more litigious and consumer oriented society,” which they viewed as a major cause of rising insurance rates. “The new spirit of consumerism,” declared Alabama’s Anniston Star, “first turned toward industry is, increasingly, finding targets among the once seemingly unassailable—the professionals. And doctors are feeling the impact.”

In Alabama as across the country, debate raged over the proper assignment of blame for the insurance crisis. Trial lawyers blamed insurance companies, and insurance companies blamed lawyers. A spokesman for Alabama trial lawyers argued that private lawsuits had little to do with these rising insurance rates, citing instead insurance companies’ poor investment returns and declining interest income due to falling interest rates—along with greed—as the key inflationary drivers. But insurance companies pointed to lawsuits as the primary target for blame, calling for reform of the laws for filing tort lawsuits, in which plaintiffs generally sought money to compensate for another’s wrongdoing. Fewer lawsuits against doctors and businesses would mean fewer payouts by insurance companies, which in turn would bring down the premiums that doctors and

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businesses would pay. This effort for “tort reform,” framed as the solution to the “litigation snowball” and thus rising insurance rates, thus became the “dominant issue” of the 1986 elections in Alabama.⁵

This chapter traces the first successful tort-reform effort in Alabama, a movement that rewrote the rules of tort law and shifted the legal balance of power from plaintiffs (often consumers, employees, or patients) to defendants (often businesses, employers, or doctors). Proponents justified this rebalancing by citing the insurance crisis and the need to restore balance to insurance markets, as well as a sense in the business community that plaintiffs and their lawyers had abused the tort law system and grown rich at the expense of hard-working businesspeople and doctors.

Yet the political actors most opposed to tort reform in Alabama included some of the state’s best organized and most influential groups—trial lawyers, teachers, and labor unions—not to mention the state’s dominant Democratic Party. These groups perceived tort law as a critical piece of the broader regulatory ecology of consumer protection, particularly in Alabama, where other consumer-protection devices remained weak.⁶ Tort-reform opponents argued passionately that the system worked just fine and that a few outlier cases with high jury awards did not justify dismantling the entire system of legal

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protection for consumers, patients, and workers. Furthermore, these groups argued that the insurance crisis called for insurance reform, not a fundamental retooling of the rules for bringing lawsuits.

A surprising confluence of factors made tort reform possible in 1987. Critical economic and political conditions included the growing specter of tort lawsuits as a contributor to the insurance crisis and Alabama’s changing electoral map in the wake of Governor George Wallace’s final exit from the political stage. Those conditions facilitated the creation of the Business Council of Alabama (the “BCA”), a new business super-lobby with a new take on the politics of business, which emerged as a political powerhouse dedicated to the tort-reform movement. The BCA worked alongside a reinvigorated advocacy coalition of doctors, business executives, and defense attorneys, adapting tactics from the playbook of grassroots movements to build support for their policy prescriptions. As the BCA provided fuel for the tort-reform movement, the tort-reform movement in turn fueled the development and growth of the BCA by attracting resources and support. And at the same time that the BCA first began to flex its political muscle, a whirlwind 1986 election resulted in the seating of the state’s first Republican governor since the Reconstruction Era. These factors in combination—Alabama’s political and economic climate, a newly forged business alliance hungry for tort reform, and an electoral upset—made Alabama’s first tort-reform package possible. The BCA-led coalition rewrote the rules for bringing tort lawsuits, and the tort-reform movement helped remake the political landscape, reshuffling political clout among people and organizations, both within the state and without. This first successful tort-reform movement would have a long legacy in state
Liability under tort law expanded dramatically in the 1970s in courts across the country. Although contemporary legal scholars generally agreed that tort law had expanded, they disputed the implications of this change. At its core, the debate over tort reform in Alabama reflected these much broader disagreements over the law’s role in organizing the marketplace and the proper scope of liability for mistakes, failures, frauds, and accidents. These legal theories influenced legal policies, which in turn shaped the experiences of stakeholders in the marketplace.

On one side of the legal debate, William Landes and Richard Posner developed an economic theory of tort law predicated on cost-benefit principles, measuring the extent to which prevailing elements of tort jurisprudence allocated resources and responsibilities in an economically efficient manner. They viewed the increasing willingness of plaintiffs’ attorneys since World War II to push tort theories of liability as an inventive response to urbanization and the increasing complexity of consumer products in the marketplace. In the horse-and-buggy world of the nineteenth century, Landes and Posner argued, consumers were less structurally disadvantaged because they had more relevant knowledge


8 Tort law is a broad category of law in which one party sues another party, with whom he or she often has no contractual relationship, for money damages to compensate for accidents and other civil wrongdoing. Examples of tort lawsuits range from fender benders to botched surgical procedures to suits for fraud.
about products for sale. With the advent of more complex consumer goods, consumers were poorly equipped to evaluate product dangers, and producers had more control over design and production. “If a person is violently ill after eating canned salmon,” they explained, “it is pretty obvious where the fault lies—with the canner.” Thus, the canner, not the unwitting victim, should pay the economic costs for correcting the fault. Following this analysis, they concluded that tort liability generally created socially beneficial outcomes by creating market incentives for companies to offer products and services with a high ratio of utility to risk and by shifting the weight of responsibility for assuring safety to manufacturers, who exercised the most control over these complex products.9

By contrast, legal scholar George L. Priest portrayed the expansion of tort liability as a kind of legalized redistribution scheme that conscripted judges as “agent[s] of the modern state,” with powers to “internalize costs and distribute risks” and ultimately to “join the effort to aid the poor” through non-legislative channels. Rather than reducing the number of accidents and injuries or creating efficient risk allocations, Priest believed that this new legal regime threatened severe market distortions. Of most concern to Priest was the way that the modern tort system used law as a kind of third-party consumer insurance, shifting the burden for accidents and other mishaps onto producers and service providers—whether these accidents were preventable or not. This, he noted, “has progressively undermined the third-party commercial casualty insurance market . . . harming rather than

helping the poor.” In other words, Priest worried that extraordinary legal measures designed to address a single can of spoiled salmon might over time destroy insurance markets and price canned salmon out of the average person’s reach.10

As legal scholars sought to understand changes in the legal system, doctors became increasingly alarmed by the correlation they saw between more frequent malpractice judgments and the rise in insurance premiums. Like other tort lawsuits, medical malpractice suits had become increasingly common, and juries increasingly awarded a million dollars or more to successful plaintiffs—a rare occurrence before 1970. Physicians usually won these lawsuits; industry studies reported that verdicts favored physicians between 70 and 85% of the time. Still, pursuing a lawsuit was so costly (as well as embarrassing and inconvenient) that many physicians and their insurers preferred to settle cases as they arose. This money had to come from somewhere. Insurers raised premiums for doctors and hospitals, and health providers passed along these costs to patients. But the system could not bear an unlimited rise in insurance rates, and insurers gradually began to leave the malpractice market.11 Medical associations, state legislators, lawyers, and insurance companies had little control over national monetary policy or the rise of a consumer-oriented culture. Of all the factors cited for pushing insurance rates upward, only the lawsuit issue seemed ripe for intervention.

In relation to states like California and New York, Alabama had a relatively unremarkable “medical malpractice climate” in the early and mid-1970s, with moderate numbers of malpractice lawsuits and relatively low dollar awards for successful lawsuits.\textsuperscript{12} Yet Alabama, too, found itself in a “semi-crisis.” The insurer of most Alabama doctors announced that it would stop writing malpractice insurance and would leave the state entirely by 1977. The Medical Association of the State of Alabama, following trends in other states, formed a mutual malpractice insurance company. In addition, the Alabama Legislature followed other states in enacting new medical malpractice laws to limit liability. Most notably, the legislature amended statutes of limitations for medical malpractice suits, amending the statute of limitations so that adult patients had to file a malpractice claim within two years of the alleged harm, patients aged 4 to 18 within four years, and children under age 4 within eight. Doctors were hopeful that these legislative changes would bring down insurance rates and end the crisis, yet the crisis raged on.\textsuperscript{13}

Narrowed statutes of limitations, for one thing, had little effect on the number of suits brought on behalf of infants. Doctors complained that parents were increasingly suing their doctors whenever a baby was born with health problems. Thus, parents of babies born with low birth weights or with intellectual disabilities attributed these problems to the delivering doctor, even in cases where the doctor and mother met for the first time at the

\textsuperscript{12} In part, this relatively low number of malpractice lawsuits may have been caused by the fact that many established attorneys found it distasteful to sue doctors through at least the 1960s, as they viewed themselves as part of a single professional class. However, as will be described in more detail in the next chapter, as the legal profession in Alabama changed, so did its legal culture and the types of lawsuits in its courts.

delivery or in cases where the mother had obtained no prenatal care. Physicians protested
that, in most cases, birth defects remained out of the doctor’s control. Yet juries
sympathized with grieving parents and sometimes gave large money awards, perhaps more
out of a desire to soothe a family’s suffering than in recognition of the doctor’s fault. These
lawsuits attracted media attention and, at least in part, drove up the cost of medical
malpractice insurance for birth-related specialties. In response, doctors began to leave
these specialties in large numbers. Poor, rural counties—with high rates of poverty and
insurance plans that tended to pay fixed rates for deliveries—were hit especially hard, since
rising insurance rates quickly eliminated any profit for doctors and hospitals performing
births. Alabama already had the second-highest infant mortality rate in the country. The
future looked bleak.¹⁴

By the 1980s, rising liability insurance rates garnered attention in fields beyond
medicine, too. Cities and municipalities struggled to pay for liability coverage. When the
liability insurance premiums for city employees quadrupled in the tiny town of Cleveland,
Alabama, population 500, town officials laid off its two-man police force and took the
town’s sole police car out of service. Cleveland went without police for nine months while
the town scrambled to pay the insurance premiums. Across the state, fourteen sheriffs’
departments continued operations without liability insurance. Some businesses, like day-
care centers, similarly felt the pinch of rising rates for liability insurance, with a growing
number closing their doors. Other small business owners chose to go without liability

¹⁴ Ibid.; Tom Gordon and Kathy Roe, “Medical Malpractice Fears Spur Movement,” Birmingham News, April
insurance, even though they knew they were “gambling” and that “one damage suit could wipe them out.” This insurance crisis of the 1980s set the scene for the tort reform battles to come.

**Business Organizes**

In the late 1970s and early 1980s, a combination of voting-rights cases and economic shifts began to reconfigure Alabama’s political landscape, and slowly the lines that divided so-called Black Belt planters and Big Mule industrialists faded. New voters—arranged into new voting districts—.injected competition into political races and challenged the incumbent political elite. Yet neither group gave up the fight to control its political and economic destiny. Rather, the longstanding coalition of industrialists and agrarians scattered and some of its members regrouped, adapting new systems and cultivating new political narratives to translate economic muscle into political power.

Of all of the groups that arose from the ashes of the old Big Mule and Black Belt planter alliance, a new pan-business lobbying group—the BCA—proved particularly well suited to compete in the new political context because of its ability to rally a social movement to promote a reinvented “business interest.” The BCA crafted a message centered on the state’s “business climate” that capitalized on a populist vein of free-market ideology and that helped the BCA rally contributions and votes from both groups that would have identified with more traditional, class-based elites as well as a newly unleashed

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non-elite voting base. This sea change in state politics forms an essential backdrop for understanding the role of competing impulses toward consumer protection and tort reform from the 1980s to the present.

The BCA formed late in 1985 through the merger of two preexisting business groups, each powerful in its own right but even more powerful together. The first such group, the Alabama Chamber of Commerce, constituted the state’s branch of the national-level U.S. Chamber of Commerce. It served Alabama’s large agricultural interests, from timber to potatoes, as well as banks and other commercial entities. The style and location of the Alabama Chamber’s headquarters—a Greek Revival mansion in the center of Montgomery, just blocks from the State Capitol—reflected the group’s elite, landed membership. The second group, the Associated Industries of Alabama (the “AIA”), was a state-level affiliate of the National Association of Manufacturers (“NAM”) and included among its ranks the state’s major industrialists and manufacturers. The AIA headquarters similarly evoked the organization’s outlook and ethos, as it was located in the state’s economic center, Birmingham.

One especially powerful corporation, the state’s monopoly electric utility, the Alabama Power Company, belonged to both organizations. In part, this choice reflected

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16 Here I adopt the “thin ideology” theory of populism as a basic framework that poses “the pure people” against the “corrupt elite” but that itself is empty of any specific policy content. Rather, populism provides a narrative or organizing framework used to rally citizens around a cause, such as agrarianism or xenophobic nationalism, or no cause, such as a movement to “throw the rats out” even where no specific alternative vision is articulated. Cas Mudde and Cristóbal Rovira Kaltwasser, “Populism,” The Oxford Handbook of Political Ideologies (New York: Oxford University Press, 2013).

Alabama Power’s multi-faceted business identity. It owned large swaths of land across the state like its counterparts in the Alabama Chamber, but it also operated a technologically sophisticated business subject to environmental and labor regulations, which gave it common cause with AIA members. But membership in both organizations was even more important from a prudential standpoint: Alabama Power could not afford to be absent from any table where political elites hashed out priorities that might influence state policy.

Though the Alabama Chamber and the AIA often saw eye-to-eye, some issues—such as how to value land for property taxation—continued to divide them. For Alabama Power, membership in these two sometimes-competing groups was costly in terms of both resources and managerial focus. The company had to pay separate membership dues. And due the utility’s mammoth power and prestige, both sides of the business community expected the power company to provide key leadership and major funding for each organization’s initiatives. By the 1970s, moreover Alabama Power had become a favorite political target of Governor Wallace, who repeatedly directed the state’s Public Service Commission to deny Alabama’s Power’s requests for rate increases—to the delight of rate-paying voters and the disdain of the power company. A divided business lobby complicated the task of standing up to the Governor and weakened Alabama Power and the state’s other utilities in their periodic rate-increase battles. Thus, from the perspective of the power company, a united business lobby offered the prospect of better outcomes with outlay of fewer resources.\(^\text{18}\)

\(^{18}\) E. Clark Richardson, “President’s Report,” *Alabama Today* 50, no. 1 (Jan.–Feb. 1986): 5; Boots Gale interview.
Joseph Farley, who served both as President of Alabama Power and President and Chairman of the Board of the Alabama Chamber of Commerce in 1984, aimed to sell the Alabama Chamber’s other members on the benefits of a consolidated business group. At the group’s annual meeting, he bemoaned how the fragmented business lobby diluted resources and impact, explaining that, as a result, “[u]nfortunately, there is no single business organization now in Alabama which has adequate resources to properly and adequately represent the business community.” Farley explained that the lack of a “single, strong voice speaking for business” meant that “a variety of business associations and individual businesses . . . too often are driven too much by parochial or single issue interests rather than the broader total business interest.” For Alabama to compete with neighboring states for new factories, corporate headquarters, and investment, the business community would have to find a way to look past differences, combine resources, and speak cohesively with a single voice. “Again,” Farley explained, “enlightened self-interest of these groups and the future of Alabama demand our working together.”

Alabama was not the only place where manufacturing and commercial interests were looking at the possibility of merger. Buffeted by progressive policies on environmental and consumer protection, and heartened by conservative electoral successes at the national level, state-level business groups elsewhere looked for ways to extend their political clout. By 1985, thirty-eight other states, including Louisiana, Georgia, and Wisconsin, had undertaken a similar “consolidation venture” to bring together their states’

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Chambers of Commerce and manufacturing associations so as to benefit “the business climate” and reduce “duplication” of efforts. At the national level, however, a similar drive had fizzled; in the 1970s, the U.S. Chamber had attempted a merger with NAM to create a similar consolidated lobbying group but ran afoul of opposition from organizational leaders who feared losing influence. In addition, some individual businesses preferred to have greater control over a weaker lobby than less control of a stronger lobby. Manufacturers in particular worried that a merged organization “would inevitably shift focus away from manufacturing interests.” Thus, somewhat ironically, state-level groups like Alabama’s could accomplish a merger—and thereby exercise more consolidated power in state politics—precisely because their commercial and manufacturing groups acting alone were relatively weak as compared to their national counterparts and because the most powerful entities within the business community favored rather than feared such a merger. In short, the BCA was born in part because the Alabama Chamber and the AIA each had little to lose and much to gain.20

And so, late in 1985, through the encouragement of Farley and Alabama Power, the Alabama Chamber of Commerce and the AIA merged to form a business super-lobby, uniting the state’s commercial and industrial interests within the BCA. The BCA established its administrative offices in the former headquarters of the AIA in Birmingham,

the state’s economic center, but located its new Governmental Affairs Division in the Alabama Chamber’s former mansion in Montgomery.

The new organization’s leadership also reflected the BCA’s institutional legacy, though the AIA featured more heavily at the very top. Dick Dickson, former chairman of the AIA, transitioned to the role of BCA chairman, and J.B. Brand, Jr., the former president of the AIA, became Executive Vice President and chief architect of the consolidation. Meanwhile, E. Clark Richardson, a former Alabama Power lobbyist, took over as BCA President, serving both as a counterbalance to AIA influence and as a leader who understood and could defend the power company’s interests. Unlike the position of BCA chairman, which rotated from year to year, the BCA president was a paid professional staff member with a longer tenure. Further down the leadership chain, the new chairman appointed business leaders from a variety of industries—from mineral extraction, banking, and textiles, to timber and paper production—to chair over a dozen new standing committees. The AIA and Alabama Chamber each contributed resources and leadership and ceded some control in exchange for this consolidation of lobbying power.21

Though the organization’s membership was elite at the top, the BCA sought to do more than merely recreate the same institutional structures and strategies of the Alabama Chamber and AIA within a single entity. Rather, the BCA sought to build a kind of social movement organized around the rallying cry of “free enterprise.” As noted by the historian Benjamin Waterhouse, scholars have often hesitated to “employ the framework of ‘social

movements’ to describe the activism of economic elites.” Yet recent scholarship on the rise of American conservative movements reveals how business-focused groups have built social movements around common culture, ideology, and rituals—at times even consciously borrowing strategies and tactics from liberal-leaning political rivals.22


23 Cover of Alabama Today (Jan.–Feb. 1986), Auburn University at Montgomery Special Collections Library.
From the BCA’s inaugural issue of its member publication *Alabama Today* (figure 7), BCA leaders made clear that it intended to represent a new type of conservative lobbying force in the state, transforming the state’s “business climate” through the construction of a powerful new political machine. This objective meant disassembling old conceptions of a class-based elite and establishing a new, potentially more inclusive political ideology that encouraged voters to identify themselves as businesspeople, whether they ran small businesses, worked in middle-management at a national bank, or simply harbored dreams of proprietorship. The BCA challenged farmers to self-identify as businesspeople, too. Thus, the BCA not only reached out across traditionally segmented industry classifications (like manufacturing, resource extraction, agriculture, sales, and service), but also persuaded the owners and manager of smaller businesses and firms located in rural or peripheral areas to view their political interest as being aligned with those of the state’s industry giants.24

Strategically, the BCA self-consciously and purposefully mirrored the organization of some of its politically successful rivals. The “ultimate goal” of the newly formed BCA was to join forces and pool resources—to “[u]nify[] the voice of business in Alabama”—through the machinery of the political process. More specifically, the BCA hoped to counter the voting power of business’s “traditional opponents”—the “teachers, bureaucrats, and lawyers” who businesspeople perceived as “driving the law-making process” in the state legislature—all of whom had “excelled in the past while [business

interests] have been weak.” Thus, one of the BCA’s first stated goals was to “develop a highly organized and trained grassroots system designed specifically for member contact to legislators on vital issues.” In both rhetoric and strategy, the BCA began to chart a grassroots path to achieve its political interests.25

Early articles in BCA publications evidence the BCA’s aim of forging a new business consciousness that would transcend industry sector and invite a broad group to rally around the wider banner of free enterprise. For example, the BCA’s first executive vice president touted the BCA’s small-business members, noting that while the BCA may initially have been “viewed as the ‘big mules’,” already in its first year “the average BCA member ha[d] less than 50 employees, representing some 60 business classifications from a 2-employee partnership to a 10,000-employee textile operation.” Within ten years, the BCA would grow to include approximately 4,500 business members, of which 72% would be firms with 100 or fewer employees.26

The articulation of a new “business” identity was subtle but critical. In Alabama, the groups holding the most political power in the early 1980s had powerful, longstanding identities. Trial lawyers, teachers, and union members each possessed great clarity about


The BCA had some conservative models to follow as well, since both Alabama Power and ALFA (the Alabama Farmers Federation) had experience organizing and mobilizing local groups across the state. However, in the 1980s, liberal groups had developed a reputation for greater effectiveness.

26 Lee J. Green, “Tort Reform Tops Business Council’s Wish List,” Daily Mountain Eagle (Jasper, AL), March 17, 1995; J.B. Brand, Jr., “Report of Executive Vice President,” Alabama Today 50, no. 1 (Jan.–Feb. 1986): 6. Alabama Today was previously published by the Alabama Chamber, but it became a BCA publication when the Alabama Chamber merged with the AIA.
the occupational experiences and wider commitments that bound them together. Farmers enjoyed a similar esprit de corps. These groups were organized and reliably mobilized in part because they had a strong sense of “us”—a common set of interests that could be pursued through political means. An important precondition of the BCA’s success was teaching businesspeople that they were businesspeople—that “business” was an identity with which one could identify whether a farmer or a shoe salesman or a bank executive. Accordingly, BCA leaders honed their articulation of a shared sense of values, purposes, and communal belonging as a cultural rock upon which they could construct a political movement. In this way, the BCA built upon a “free-enterprise” foundation already well established by the 1980s, as seen in the campaign rhetoric of Ronald Reagan and discussions on conservative talk radio.27

In the first months of the BCA’s existence, staffers reached out to each business representative and requested that he or she either “volunteer or designate one employee to serve as a key grassroots contact.” Preferably, this designee would not be selected from “top management people,” but rather would be someone “readily available” who will “give a commitment to this program, not only for their company but for their community as well.” Richardson, the BCA president, pledged to “personally conduct training programs” for these designees before transferring management and coordination authority to the BCA Governmental Affairs Division. This approach supplied the on-the-ground manpower

needed for the BCA to advocate for its political interests, reinforced the BCA’s business-based identity, and extended the reach of BCA participation beyond the business elite of owners and managers down to middle managers.28

Next, building on its diverse membership base, the BCA began to construct systems and networks designed to exert maximum political influence on elected officials in this new political environment, where votes had become more precious than ever. As U.S. Chamber of Commerce President Van P. Smith noted in a speech he gave in Alabama to BCA members, a large percentage of citizens who had identified with “management” in the prior U.S. Census were either not registered to vote or chose not to vote. Smith warned, “Groups [that] oppose our free enterprise views and our commitment to limited government have been out registering new voters.” And while the U.S. Chamber could “help stimulate business interest in political action efforts, . . . we have to remember the votes, the voters, the polling places are here in our communities and states.” National-level lobbying groups garnered tremendous financial and technological resources, yet the representatives of these organizations could not be present on the ground in every state and for every race. Without state and local groups electing business-friendly legislators to serve in Montgomery and Washington, nationally coordinated lobbying groups would have no ears willing to listen when they came to call on lawmakers. Thus, the fate of the national

movement would rise or fall based on the ability of local organizations to convert dollars into votes for agreeable candidates. The BCA undertook efforts to cultivate a roster of business-friendly candidates with the express approval of its national-level affiliates, but it could accomplish this feat only through reliance on state-level networks and channels that would have been largely invisible to associations and federations based in New York or Washington, D.C.29

Another critical element of the BCA’s initiative to build political networks was construction of a cadre of full-time state lobbyists. These operatives had many roles beyond persuasion of legislators to take a particular policy position. They also gathered valuable intelligence on the voting records of legislators to determine which legislators were true “friends of business,” built enduring relationships with legislators, legislative staffers, and agents for other interest groups, and, where possible, helped to draft legislation. The constant monitoring of legislative affairs helped the BCA determine whom to support and whom to oppose in state elections—while reminding BCA-supported legislators of their campaign promises. The BCA began with one part-time lobbyist, then transitioned to four full-time lobbyists in the early 1990s. After about ten years, the BCA boasted eight full-time lobbyists in Montgomery, giving it one of the largest lobbying presences in Alabama’s Capitol.30 Even in the BCA’s early years, it appears that these


lobbying efforts effectively shaped some legislation at the committee stage and beyond, sometimes even leading to sponsors agreeing to “kill” legislation. For example, the BCA boasted in 1991 that a consultation between it and the Governor’s Chief of Staff had prompted a gubernatorial veto of a state-legislature resolution in support of an AFL-CIO-supported bill.31

BCA’s lobbyists also created a new membership incentive: the Legislative Bulletin, which featured a weekly roundup of the bills under discussion in the Alabama Legislature during each term, along with commentary on the BCA’s position on each one. In addition to tracking the progress of bills over time and reporting individual bill sponsors and supporters (of both pro- and anti-business varieties), the Legislative Bulletin gave readers instructions on how to call their respective legislators to express their protest or support.

In contrast to their counterparts in Congress, state-level legislators lacked robust resources to research bills and policies through organizations like the Congressional Research Office. As a result, the BCA’s lobbying efforts, including its Legislative Bulletin, could have had an even more potent impact on state legislators’ views on bills or policies, since most legislators would not have had resources to independently research each bill. Legislators

organizations with more than five registered lobbyists in the spring of 1995 were well-established political heavyweights: the Alabama Power Company (ten lobbyists), the Alabama State Employees Association (ten lobbyists), Waste Management Incorporated of Alabama (eight lobbyists), the Alabama Education Association (seven lobbyists), the Alabama Hospital Association (six lobbyists), and the Alabama Association of Retired Persons (six lobbyists). Id. at 373–383. However, even these groups used several part-time professional lobbyists, while each of the BCA lobbyists were full-time lobbyists working solely for the BCA. See id. at 348–383.

with little information on a complex bill’s impact could approximate a stance by aligning with the BCA position and adopting BCA talking points. In this way, the BCA also mirrored the strategy of conservative think-tanks in Washington, D.C., such as the American Enterprise Institute, which studied federal legislative proposals and evaluated them for their ability to promote “free enterprise.”

The BCA also sought to entice new members through a variety of conference offerings on business-regulation topics, often held at resorts on Alabama’s Gulf Coast. These conferences offered opportunities to mingle with the state’s political and business elite, and the organization’s ability to rally distinguished guests and speakers conferred an additional air of legitimacy to the organization. The highest profile meeting was its “Governmental Affairs Conference,” held annually from 1987. This gathering featured talks by BCA members as well as addresses by the governor and other political figures, such as Alabama’s U.S. Senators or other respected conservative advisors. In 1997, the conference featured election analysis from Washington, D.C., journalist and politico Charles Cook, Jr.; in 2001, conservative political strategist Karl Rove presented his “View from Washington.” The annual governmental affairs conference also featured activities like a golf tournament and yacht race, with prizes awarded during the final buffet breakfast. In the spirit of building networks between state officials and BCA members, the organization waived registration and golf-course fees for members of the Governor’s Policy Office and their spouses.32

32 BCA Governmental Affairs program, 2001, box SG025697, folder 14, Alabama Governor (1999–2003: Siegelman), Administrative Files, Alabama Department of Archives and History (ADAH); “James, Pryor, Clark among
While the BCA weighed in on a variety of issues that might affect state businesses, it also began to spin off more targeted business-activist groups to tackle political issues within specific policy clusters. Tort reform was one of the most important items on the agenda. In 1986, a coalition of lobbying groups created a separate (but affiliated and coordinated) “broad-based coalition of trade associations and businesses” dedicated specifically to “stop[ping] the spiraling costs of litigation.” This group, called the Alabama Civil Justice Reform Committee (the “ACJRC”), characterized itself as a “citizens grassroots program,” not merely an interest group. Yet it was composed of the state’s most powerful pro-tort-reform interest groups, including not only the BCA, but also the Alabama Farmers Federation (“ALFA”), the Alabama Hospital Association, and the Medical Association of the State of Alabama. The BCA and ACJRC had independent leadership and membership structures, but with significant overlap. Thus, former state legislator George Clark served as BCA’s executive vice president and chief lobbyist as well as chairman of the ACJRC.33

The BCA’s platform of tort reform represented more than just a policy priority—it further constituted a means of attracting dues-paying members and political contributions.

After making tort reform a key element of the BCA agenda, the group’s political action committee, ProgressPAC, raised $1.8 million for the 1986 elections. Before that year, “[b]usiness and industry was never in the ball game” on the issue of legal reform, especially in comparison to the “more organized political action groups, such as labor, trial lawyers, and the Alabama Education Association.”

Thus, within a period of months, the BCA transformed two business organizations into the beginnings of a new lobbying machine. The BCA drew in resources not only through combining the existing reserves of the Alabama Chamber and the AIA, but also by adapting strategies from grassroots organizations to build its membership base with smaller businesses and down the leadership chains of larger firms. It then mobilized these resources through publications like Alabama Today and the Legislative Bulletin, on-the-ground full-time lobbyists in Montgomery, and regular conferences with big-name speakers and a focus on networking and movement building. These efforts added to the organization’s prestige and legitimacy, which in turn encouraged more donations to support the organization’s mission, continuing the BCA’s cycle of growth. Governor Wallace’s exit from politics opened possibilities for bringing in new candidates, while changes in voting districts and rules further shook up the political status quo. The BCA capitalized on these opportunities in part by amplifying a preexisting free-enterprise sensibility that many Alabama voters had already adopted. The BCA rapidly accrued

influence in part because of the prevailing political context and in part because of calculated strategy. The stage was set for a dramatic reset of state politics.

**Alabama’s Unlikely Governor**

Together, legal changes to the electoral context, the entrance of a newly reorganized business lobby, and signs that Governor Wallace’s star was fading in the mid-1980s created the possibility of significant electoral reconfigurations in Alabama. In 1986, Alabama voters elected the state’s first Republican governor in over a century: Guy Hunt—a chicken farmer, Amway distributor, part-time Primitive Baptist preacher, and as one commentator put it, “one of the most unlikely persons . . . ever selected governor of any state.” The Solid Democratic South, long under pressure by the political dynamics unleashed by the Civil Rights movement, appeared to be crumbling, and the resulting disturbance in state politics opened a tremendous opportunity for the BCA.  

Some Alabama voters also simply craved change—any change. George Wallace, who had so firmly “dominated the political area of the state for almost three decades” and held “an almost mystical grip on a substantial portion of the state’s electorate” finally retired from politics at the end of his term in 1986.  

As long as George Wallace

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Amway is a multi-level marketing company that uses independent distributors to sell home and beauty products. Tennessee had already witnessed successful Republican gubernatorial candidates in the 1970s, and Louisiana elected a Republican governor in 1980. However, Mississippi would go on to elect its first Republican governor since Reconstruction in 1991; Georgia followed in 2003.  

commanded state politics,” political scientist Bill Stewart observed, “Alabama was unable to mature politically” into a system with political competition between political parties.37 “While the comet of George Wallace raced across Alabama’s political skies, Republicans could do little more than gaze in sullen amazement,” added historian Wayne Flynt. “When they challenged him directly, he crushed them.”38

With Wallace’s exit in 1986, the political field opened to Republican challengers. “Factors propelling the GOP to victory in other states began to apply to Alabama as well: suburbanization; Sunbelt prosperity and the growth of the middle class; demise of older, traditional, mainly rural Democratic voters; politicization of white evangelicals, reaction to liberal excesses, the youth counterculture, and anti-Vietnam activism; leftward drift of the national Democratic Party; white flight segregationists who left the Democratic Party as its base became more heavily African-American,” and so on.39 The 1986 elections gave the first clear-cut evidence of these new opportunities for Republicans. At the national level, the 1986 midterm elections had resulted in a net gain for Democrats, who took control over both the U.S. House of Representatives and Senate from Republicans. But in Alabama, the 1986 elections resulted in a different type of reversal of the political status quo. Although Democrats made gains in national-level politics, Alabama elected not only

37 Stewart, Alabama Politics, 106.
38 Flynt, Alabama in the Twentieth Century, 102.
its first Republican governor in over a century but also a surge of Republicans and conservative Democrats into the state legislature.\textsuperscript{40}

Governor Hunt’s run for office had started as a “shoestring, haphazard campaign.” Hunt proposed a vague but conservative platform that attracted some support from the business community as well as the farm lobby. But mainstream political donors hesitated to give money to a candidate with little chance of winning, and Hunt came with some baggage. This “marginal candidate of such bush league performance” had faced earlier investigations for “fiddling with his expense vouchers” when he was a “minor league political appointee in an obscure federal office of the state” and for “misusing his office for political gain.”\textsuperscript{41}

With the benefit of hindsight, most commentators ultimately agree that Alabama Democrats were the architects of their own demise in the 1986 race. Hunt’s principal Democratic challenger in the gubernatorial race, Bill Baxley, was an experienced politician and trial lawyer with tremendous clout. Having most recently served as lieutenant governor in Wallace’s final term, Baxley enjoyed excellent political connections and could draw on decades of experience in public life. He had won his first elected office as a county district attorney in 1969 at the age of 28, had gone on to serve as state attorney general from 1971 to 1978, and had narrowly lost a run-off vote for the Democratic gubernatorial

\textsuperscript{40} In contrast, in 1980, the state Senate had had no Republican members, and the House of Representatives was less than 5% Republican. By the time of the 1986 elections, Republicans were still a fringe party in state politics but had secured around ten percent of seats in the legislature. \textit{See Cotter and Stovall, After Wallace.}

primary in 1978. In the 1986 election, Baxley garnered support from numerous powerful political interests: teachers, trial lawyers, African-American Democrats, and labor leaders. He also had access to a political war chest, spending an estimated $4 million on the campaign, from primary to runoff to general election. In contrast, Hunt expended less than $1 million. Despite the financial advantage, Baxley’s candidacy was gravely wounded by a bloody war in the Democratic primary, which ultimately repelled many voters.42

Baxley had faced off in that primary against four other challengers, including Attorney General Charlie Graddick, a conservative Democrat.43 The Lieutenant Governor won the majority of the first vote, but not the plurality, which led to a runoff. Graddick then defeated Baxley by a slim margin in the runoff. Rather than conceding defeat, Baxley sued Graddick in federal court on the grounds that his opponent had violated federal election laws by illegally pulling Republican voters to vote in the Democratic primary. A three-judge panel ordered the Alabama Democratic Party to hold a new runoff race unless it could determine that Baxley had received the majority of valid primary votes. The Democratic Party met and declared Baxley its lawful candidate. Graddick agreed not to appeal the decision, but he still threatened a write-in campaign. By the time of the general election, Democrats were deeply divided and disillusioned with the gubernatorial race, and both Baxley and Graddick had become politically toxic. One commentator explained that the primary had soured the race because the dispute “made it falsely appear that someone was trying to close the curtain on” Alabama voters, which clashed with Alabamians’

43 For discussion of Charlie Graddick in his role as Attorney General, see previous chapter.
“stubborn and misapplied pride . . . that can’t reason well with authority.” Yet even with all of the political infighting and drama, Baxley’s loss—and Hunt’s win—came as a tremendous surprise. Before the smoke cleared, the tort-reform coalition rallied to make the most of this unexpected political opening.44

The Making of Tort Reform 1987

Tort-reform proponents hoped to ride the momentum of the 1986 gubernatorial elections to the passage of a tort-reform package that would shift the procedural rules for filing tort lawsuits so that businesses, doctors, hospitals, and cities faced fewer lawsuits and smaller dollar awards. Procedural rules about how a lawsuit must proceed in court greatly influence the capacity of the powerful and the weak to make effective use of the civil court system. Even small, seemingly insignificant tweaks to these rules can completely transform the legal landscape for plaintiffs or defendants—by leveling the playing field or by tilting the terrain and forcing one side to fight uphill. The answers to simple questions like where, when, and how plaintiffs must file complaints can significantly shift the balance of legal power. Unfairness in these procedural rules, however, often proves much easier to identify than to correct, particularly since procedural mechanisms must apply in all contexts and situations. Certain areas of tort law magnify these effects. When consumers wish to bring causes of action against businesses, for

example, small changes to the procedural rules can transform the practical level of legal protections for consumers or the businesses that serve them.

The procedural rules that shape a particular legal system depend on the objectives prioritized by rule-makers. Do the rules governing tort claims seek to provide the highest level of legal protection for plaintiffs, such as workers, patients, or consumers? Alternatively, do procedural rules seek to provide maximum economic efficiency? In the 1980s in Alabama, reformers reframed the issue, asking which procedural rules best reflected the ethos and requirements of free enterprise.

Though Governor Hunt’s election to state office occurred more because of political context than Hunt’s stated policy goals, he still had campaign promises to keep. On the campaign trail, Hunt had vowed to address the liability insurance crisis in the state that was pushing doctors out of rural counties and raising insurance costs for businesses and municipalities. Once he was in office, the BCA coalition did not hesitate to remind him of this promise.

Tort-reform bills had come up in the Alabama legislature before, but they had never passed. This type of legislation was a nonstarter during the administrations of the populist Governor Wallace; even if the legislature had been able to pass such a bill, Wallace likely would have vetoed it. During Wallace’s last term, a few proposals had even passed the House, but these bills were opposed by Governor Wallace and effectively killed by then-Lieutenant Governor Bill Baxley, who controlled committee assignments in the Senate and thus had the power to bury an unwanted bill in a hostile committee. During his last months in office, Wallace had gone so far as to organize an advisory committee on civil liability
laws, but its final report recommended relatively soft reforms to tort law—“requiring an injured person’s lawyer to file an affidavit showing he had investigated the case; charging court costs to people who file frivolous lawsuits; allowing lawyers to add defendants after a suit is filed”—alongside much stiffer regulation of insurance companies—“giving the Insurance Department more power to regulate property and casualty companies and include underwriting profits and investment income in the company’s profit and loss statements; and forcing insurance companies to have substantive reasons for canceling insurance policies.” These proposed reforms reflected Wallace’s populist inclinations, not the tort-reform wish list of the business community.45

After the shocking outcome in the 1986 elections, tort reform became a major BCA political imperative. Responding to the BCA’s entreaties, House and Senate leaders completely reshuffled committee assignments with the “overriding factor” in assigning committee appointments being “the legislator’s views on tort reform.” Pro-tort-reform and pro-business legislators filled nearly all critical positions. Long-time legislators stripped of their committee positions howled. The House and Senate Judiciary Committees, for example, were traditionally composed of almost all attorney-legislators, in part because these committees considered technical bills that called for legal expertise—both for writing and understanding bills and for explaining the bills to the full Senate. However, “for the first time in modern history,” non-lawyers—a businessman and a car dealer—chaired the

House and Senate Judiciary Committees, respectively. Only two lawyers could be found on the Senate committee roster, and only five of fifteen House committee members. By sidelining attorneys—and specifically trial lawyers—this shift also disempowered some of the chief opponents of tort-reform measures. Removing those legislators from key committee positions where they might block tort-reform measures greased legislative wheels in favor of speedy adoption.\textsuperscript{46}

With drafting help from lawyers appointed by business and medical-association groups, a group of pro-tort-reform legislators in the House of Representative pre-filed a wide-ranging set of tort-reform bills weeks before the 1987 legislative session began. Presumably this gesture was equal parts courtesy (to give everyone a chance to read the bills in full) and power play (to demonstrate the sponsors’ confidence in the bills).\textsuperscript{47}

Although drafted by Alabama reformers, the similarities between this tort-reform package and others appeared around the United States at the same time suggests that it was almost certainly influenced by similar bills appearing in state legislatures across the country in the late 1980s, whether information about these bills circulated directly via groups like ATRA that offered model bills or indirectly through news media and national business networks.\textsuperscript{48}


The American Legislative Exchange Council (“ALEC”) established its Civil Justice Task Force in 1987 and would become a larger player in circulation of model tort-reform legislation in the years that followed Alabama’s passage
Beyond drafting specific proposals, the tort reform coalition faced the task of convincing legislators outside of the core group of tort-reform advocates that support for the package made good political sense. In the weeks leading up to the opening of this legislative session, few days passed without an editorial or article on tort reform or the insurance crisis weighing in for one side or the other as political actors of all stripes read and digested these bills. Tort-reform proponents also needed to whip up support among regular citizens, many of whom had never heard of “tort reform.”

To this end, the BCA-affiliated ACJRC staged “tort reform rallies” over several weeks in early 1987 to garner support for this legislation in towns across Alabama. At these gatherings, speakers encouraged voters to call their elected state representatives and to demand that they support tort-reform legislation. ACJRC leaders characterized the meetings as a “grassroots movement,” and featured “testimonies” from doctors and businessmen to “instill[] public confidence in the cause” and “to hear that each individual’s problems aren’t unique.” In particular, the ACJRC highlighted the insurance crisis in Alabama, claiming that it reflected an unhealthy uptick in the litigiousness of Alabama society. And according to ACJRC leaders, Alabama voters were receptive to this message. “We’ve had standing-room-only crowds,” bragged an ACJRC leader. In these same weeks, newspapers also published anecdotes of civil lawsuits destroying small business owners. One bankrupt businessman, financially destroyed by a civil lawsuit, said he was privately encouraged by legislators and an appellate court judge to “publicize his misfortune to rally of this tort reform package. See ALEC, “History” (captured December 13, 2012), http://web.archive.org/web/20121213100400/http://www.alec.org/about-alec/history/.
efforts aimed at capping punitive jury awards in civil lawsuits.” He thought tort reform was unlikely to actually lower insurance rates, “but it could keep a man from losing everything he’s got.”

Opponents of tort reform evinced great skepticism about these anecdotal attacks on the tort system, shrugging off the purported grassroots uprising in support of tort reform as a “carefully orchestrated” political maneuver with little basis in reality. Tort-reform opponents also contested the idea that the proposed changes would have any meaningful effect on insurance rates, especially since neighboring Florida had enacted tort reform without any decrease in premiums. A Senator opposed to tort reform called the whole endeavor a “fraudulent scheme on the people of Alabama.” Tort-reform opponents also reminded the public that the tort system “benefits even those who do not receive the liability award” because the possibility of a costly lawsuit served to deter bad behavior. After a careful study, the editors of the *Anniston Star* concluded that “existing data is sketchy” about the impact of large jury verdicts and that “the ongoing debate has appeared to be little more than finger-pointing contest between attorneys, doctors, and insurance companies, with each group questioning the professional standards and profit motives of the other.”

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Despite these public critiques, the business lobby approached tort reform still “cocky from victories at the polls” in 1986. A coalition of lawyers and lobbyists from the BCA, as well as from the Medical Association of the State of Alabama and smaller business and industry groups, pushed legislators to pass the bills. Medical-association lobbyists reached out to journalists and legislators to explain the merits of the tort-reform package’s liability-limiting provisions and its predicted effect on the insurance crisis in the state. In addition, 250 BCA representatives traveled to Washington, D.C., to push Alabama’s congressional delegation to support tort reform at both state and federal levels. By the time the legislative session opened in April 1987, the so-called “business coalition” had picked up such momentum that it was clear that some sort of tort reform would pass; the only question was what the final package would include. Confronting the growing momentum for legislative action, one long-time opponent of tort reform in the state Senate reflected that “It’s hard to put your heart into something you know you are going to lose. Only crusaders put up a fight that can’t be won.”\(^5\)

The original 1987 tort reform package contained eleven bills, which ranged from the non-controversial to the deeply contentious. Even though the heart of tort reform sharply divided interest groups across the state, several of the bills occasioned little or no controversy. One such bill, which had the support of even trial lawyers, would require plaintiffs to show “substantial evidence” to continue a lawsuit. Alabama at the time was

unique in the nation for continuing to use the antiquated “scintilla rule,” which allowed a case to proceed to a jury if the plaintiff could show a mere gleam, glimmer, or speck of evidence in support of his or her case—even if every other piece of evidence favored the other side. One journalist, skeptical of the tort reform package overall, still supported elimination of the scintilla rule, which he called “ridiculous.” The state’s trial lawyer association similarly agreed that eliminating the scintilla rule would help reduce “the problem of frivolous lawsuits” and reduce wasteful use of judicial resources.52

Another of the less controversial sections of the reform package involved three bills changing the rules for “venue” (where a lawsuit can be tried).53 Alabama’s previous rules for venue were viewed as “clutter[ing] up the courts” because they allowed lawsuits to proceed in a tribunal that had no geographic connection to where the plaintiff resided or where an accident or injury took place. For example, a plaintiff who has a dispute in his home county of Coosa County, Alabama, with a business there might end up in court in the state’s most populous county, Jefferson, if the Coosa County business could be shown to also be “doing business” in the other county.54 Jefferson County in particular attracted a lot of lawsuits because some of the best lawyers clustered there and because of a perception that “juries in Jefferson County usually make larger awards in their verdicts” than jurors in other counties. The bill sought to prevent such forum shopping. A second

54 See Ingram v. Omelet Shoppe, Inc., 388 So.2d 190 (Ala. 1980).
less controversial bill eliminated a requirement in Alabama that a defendant pay an additional ten percent of a jury verdict as a penalty if that defendant appealed a case and lost. Finally, a third bill allowed judges to sanction parties who filed frivolous cases and required them to pay the other party’s court costs. This bill addressing frivolous lawsuits in particular was part of a national legal trend; thirteen states enacted similar bills in 1986 in part through the coordination of the Washington D.C.-based American Tort Reform Association (“ATRA”); ten more states would enact a frivolous-lawsuit bill in 1987.55

Among the more controversial bills, one gave judges the option of ordering a losing defendant to pay damages to the plaintiff in installments over fifteen years instead of all at once. This provision made large verdicts potentially less ruinous for businesses, but it also raised concerns that companies might never pay the full amount of a jury verdict—and would reap interest income on the money in the meantime.56 This bill also reflected a legislative agenda promoted by ATRA; nine states had enacted some type of law allowing for periodic payments of large damage awards in 1986, and at least five other state legislatures considered and passed a periodic-payments bill in 1987. Another controversial bill allowed a jury to hear evidence about whether an injured plaintiff had already received payment from an insurance company or employer for the same injury. On one hand, this bill would make double recovery by plaintiffs less likely. But the bill was controversial


because this measure also punished the plaintiff for choosing to buy insurance, yet did not allow the plaintiff to similarly show that the defendant would be reimbursed by its own liability insurance policy. This type of bill, too, was promoted nationally by ATRA and was adopted in some form by more than a dozen state legislatures between 1986 and 1987.57

The more controversial bills of the package had the strongest support from businesses and doctors: “caps,” or dollar limits, on the amount a jury could award to a plaintiff. The 1987 tort-reform package included two bills with damages caps. The first bill limited damage awards in medical malpractice suits to $1 million for a wrongful death and to $250,000 for any other non-economic damages, such as for pain and suffering. The bill’s proponents described its primary aim as capping the amount of money doctors might pay in medical malpractice suits, on the grounds that gargantuan court-ordered payments had driven up insurance premiums and pushed doctors out of the highest-liability specialties. But the caps took away discretion from juries and limited the amount a jury could award even in particularly heinous cases. Some senators objected because the bill created “a separate set of civil rules to govern civil lawsuits against doctors.” And one state senator objected to any type of limit on wrongful death lawsuits “because you can’t put a price on human life.”58


In legal terms, the last proposal mentioned above purported to abolish the common law “collateral source rule,” which makes evidence of a plaintiff’s acceptance of benefits from outside sources inadmissible.

The most controversial bill of all limited the amount of punitive damages that juries could award in any type of case to $100,000. Punitive damages constitute special money awards, beyond those directly compensating for harms to winning plaintiffs, that a jury may order a losing defendant to pay solely to punish the defendant for its bad behavior and to deter such wrongful conduct in the future. Even House members who generally supported tort reform called the $100,000 proposed cap “pitifully low.” Plaintiff’s lawyers noted that with a cap so low, “a victim could come out losing money after paying his attorney and other legal expenses.” Since the possibility of high-dollar damages created the financial incentives for lawyers to take on representations based on contingency fees, this relatively low ceiling threatened to prevent low-income plaintiffs from suing at all, especially in more complex cases that required large numbers of attorney hours. Furthermore, a punitive damage award of $100,000 could still destroy a small business, though it served only a minor deterrent function for the wealthiest corporate defendants because it eliminated the “‘unknown’ amount of damages that one exposes himself to when perpetrating outrageous bad conduct to the damage of those with very limited means.”

“This bill would basically put a stamp of approval on the cheaters and the schemers,” one trial lawyer argued. “You’re inviting every defrauder, every schemer, every cheat into the state.” Several black legislators specifically opposed these caps on both punitive damages and medical malpractice lawsuits because they worried that these bills more than others

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would disproportionately impact the ability of poor black Alabamians to secure legal representation on a contingency-fee basis.\textsuperscript{59}

Punitive-damage caps served as a kind of tort-reform holy grail because they set a hard limit on the amount that any business or hospital (or its insurer) could possibly pay in a single lawsuit, which significantly reduced the amount of financial uncertainty that these organizations faced while also crippling the mechanism’s deterrent power. At least eight states had enacted some type of limit on punitive damages in 1986, and at least sixteen more states placed some limit on punitive damage awards in 1987. However, no state had passed a cap as low as $100,000 on these types of damages, and most other states had merely raised the evidentiary standard on awards of punitive damages to require “clear and convincing evidence.” Others had limited punitive damages to three times the compensatory award without mandating a hard dollar-amount ceiling on punitive damage awards.\textsuperscript{60}

As deeply divisive as the punitive-damage cap proved to be, a final bill added to the tort-reform package caused the most outrage of all, particularly among black legislators. This bill sought to shorten the statute of limitations for discrimination suits—in other words, reducing the time that a person had between a discriminatory event and


filing a lawsuit before he or she forfeited the right to do so. The head of the Democratic-leaning teachers’ lobby indicated that he could find no non-discriminatory purpose for this proposal, as it would “affect the business community’s interest hardly at all”: “There goes Alabama again, another way to keep blacks down, to keep from protecting females.” “This bill has nothing to do whatsoever with tort reform,” agreed one House member. “It is an insult to me that you think I’m so dumb I do not have the knowledge that this bill has nothing to do with tort reform.” “Y’all have a bill that the KKK wanted,” fumed another black legislator. “If you want to get in bed with the KKK, that’s your business.” However, one political correspondent called the whole thing a political bluff—a mere bargaining chip. “The bill apparently was included to allow certain legislators who have opposed tort reform in the past to win a victory in shaping the package and weaken the punch they might have given bills that proponents held more dear,” he explained. Whether red herring or not, legislative leaders eventually removed this last bill from the tort reform package, allowing the remaining bills to pass the House with ease.61

When the tort reform package moved from the business-friendly House to the trial-lawyer-filled Senate, lawmakers prepared for a fight. As the Senate prepared for around-the-clock debate, the co-chairman of the Senate Rules Committee admonished state senators, “Y’all bring your sleeping bags and your p.j.’s and your air mattresses.” The secretary of the Senate reported that it was “shaping up to be the toughest session” he had

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seen in twenty-five years. Another senator predicted that the tort reform debates would be “the bloodiest battle in the Senate since the Wallace succession votes of 1967,” a divisive proposal which would have removed Alabama’s constitutional prohibition on governors seeking consecutive terms so as to allow Wallace to succeed himself as governor that year. Another long-time state representative agreed, noting he was “bracing himself for the worst,” but “[a]t the same time, a twinkle flashe[d] in his eyes when he [said] almost gleefully that he can’t wait to see what will happen.” As soon as the bills arrived in the Senate, filibustering began.62

But then, within a few days, it was all over—not because of compromise on the Senate floor, but because of “four days of intense backroom bargaining” between competing interest groups, including business groups and trial lawyers, in which the lawyers negotiated a few changes to the bills. The bills eliminating the “scintilla rule” and providing for new venue rules passed without changes, since they had all but universal support. Of the more controversial bills, the medical malpractice bill retained the $1 million cap for wrongful death cases, but included a new provision to adjust the cap upwards with inflation. Legislators adjusted the $250,000 limit on non-economic damages in medical malpractice suits upward to $400,000. With regard to punitive damages, the managers of the reform package accepted an increase in the cap to $250,000 and added


several exceptions, including where the plaintiff could show a pattern of intentional wrongful conduct.\textsuperscript{63}

Despite these compromises, some trial lawyers were furious. Jere Beasley, a trial lawyer who had formerly served as both Alabama lieutenant governor and president of the trial lawyers’ association, commented, “All this is going to do is hurt people.” But other trial lawyers expressed more optimism. “We’re not happy with those bills, but there’s a reason to them. Everybody was able to sit down and do the best they could under the circumstances,” commented another trial lawyer. The bills passed “overwhelmingly,” with the most controversial measures receiving no more than a few votes in opposition and others passing without any dissent at all. That night, the pro-tort-reform ACJRC invited “the entire Senate—even opponents—to dinner at an expensive restaurant” to celebrate.\textsuperscript{64}

\textsuperscript{64} Ibid.
The revised bills returned through the House for a vote before sailing onto Governor Hunt’s desk for his signature. With so much interest in tort reform, “the governor signed ‘Guy’ with one pen and ‘Hunt’ with a second pen on each of the 10 bills in order to have enough pens to give away.” Governor Hunt called it “a banner day for Alabama” and

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hailed the legislation as “tear[ing] away some of the shackles that have bound Alabama’s economic vitality in the past.” He hoped to send a message “that will be heard loud and clear across the country: Alabama is open for business.” The state development office subsequently placed advertisements in *The Wall Street Journal* “promoting Alabama’s business climate” (see figure 8) as well as a billboard in New York City’s Times Square proclaiming this same slogan: “Alabama Is Open for Business.” One Alabama state senator was unenthusiastic: “I think the Alabama public got caught up in strong wind blowing across this state and that they were brainwashed by tort reform.” But tort-reform advocates were ecstatic. “If I had a business in Mississippi,” the president of ATRA crowed shortly after the legislative triumph, “I’d think about moving it to Alabama.” BCA leaders, too, were thrilled. The BCA president told attendees at a Lion’s Club meeting that he did not care whether the BCA wore “a black hat or a white hat in the legislators’ eyes,” so long as now “they have a hat.”

The speed of the state’s legislative reversal was remarkable. Less than a year had passed since the 1986 elections and the election of a Republican governor. Only about a year old, the BCA nonetheless seemed to have built significant power networks in the legislature. Though many factors played a role, tort reformers’ victory seems attributable

in part at least to successful coalition building that allowed doctors and businesspeople to combine a collective reputation for competency and expertise to generate grassroots support for their tort reform aims. One state legislator recalled later that he had voted for tort-reform measures simply “because experts said it would work” to stem the tide of the rising insurance crisis. “[T]he business council and the doctors—they all they felt it would do some good,” he explained.67

Passage of tort-reform legislation, however, turned out to represent just the beginning of the story of the tort-reform movement in Alabama. First, enthusiasm for the campaign soon flagged after many months passed without clear effects on insurance rates. The same state legislator who had noted that he had voted for tort reform based on the advice of experts complained within a few years that though tort reform “gave them a good feeling for the time being” and “built . . . hopes that [the insurance crisis] would get better,” it was not clear that insurance rates were improving. State insurance officials reported that medical malpractice insurance costs had decreased over two years, but “it would be difficult to say with certainty that tort reform caused it.” Second, even as the governor was signing the reform legislation into law, savvy observers of Alabama government knew that the enactments still had a significant hurdle to clear before they could truly reconfigure the legal climate. On the same day that newspapers reported the governor’s signing of the bills, they added that the “Alabama Trial Lawyers Association is expected to file suits”

challenging the constitutionality of the controversial caps on punitive damages and awards in medical malpractice awards.\(^68\)

**The Unraveling of Tort Reform 1987**

Within weeks of the 1987 tort reform bills’ passage into law, opponents and proponents of the bills—primarily the Alabama Trial Lawyer Association ("ATLA") and the BCA—shifted their efforts (and their campaign dollars) to engage with the upcoming 1988 elections for the state Supreme Court. This move represented a shift in focus from ex ante constraints on lawsuits, achieved legislatively through measures to prevent certain lawsuits from ever being filed, to ex post constraints on large jury awards, achieved through election of business-friendly Supreme Court justices that would simply refuse to enforce excessive jury awards. The business coalition hoped that the election of Supreme Court justices with conservative leanings would have a trickle-down effect through the system as well; if attorneys knew that they faced long odds of having a large jury award confirmed by the Supreme Court, then they would be less likely to pursue stand-out awards or might be more willing to settle after trial for a lesser amount than a jury had awarded in order to avoid losing the award altogether on appeal.\(^69\)

The BCA had succeeded in shoring up conservative power in the gubernatorial and legislative branches in the 1986 election, but the state Supreme Court remained under the control of more liberal judges. In 1986, the Alabama Supreme Court was composed


entirely of Democrats but was split ideologically 5-4 between liberal and conservative justices. This appeared to give tort-reform opponents, a liberal-leaning group, an advantage in the court battles ahead.\textsuperscript{70}

Five of the nine seats on the Alabama Supreme Court were on the ballot, with at least three seats actually considered contested, in the 1988 election, including the chief justice position. The election, therefore, had high stakes, potentially presenting an opportunity to influence the political and legal philosophies of at least a third of the state’s highest deliberative body. Alabama politicos recognized that tort reform would soon emerge on the court’s docket, and contemporary observers knew that the composition of the court would likely determine outcomes in these coming tort reform battles. Accordingly, the same groups who had lobbied for and against tort reform in the legislature poured millions of campaign dollars into 1988 judicial races, which created a public outcry that the “obscene” amount of money offered by “special interest groups” appeared to be “buying candidates” and “politicizing” the state’s highest court.\textsuperscript{71}

Perhaps unsurprisingly, then, the race for the Alabama Supreme Court quickly turned bitter. Candidates accused each other of “ballot-rigging,” including a charge that “big business interests . . . offered [one candidate] $100,000 to refrain from running


against” a BCA-backed candidate. Members of the Alabama Democratic Conference, Alabama’s oldest black political action group, endorsed the candidate for chief justice supported by the trial lawyers, with one state representative warning that “candidates backed by the Business Council ‘usually mean bad news for black folks and poor folks because the Business Council has a way of owning their candidates and they aren’t really free to carry out their responsibilities without some interference from that group.’

Meanwhile, Governor Hunt used his radio program to urge Alabamians to vote, but only after educating themselves on the candidates’ positions on tort reform. Tort reform, the governor explained, “has provided a big boost to Alabama’s economy,” and so needed to be protected. Alabama voters proved somewhat receptive to such messages, but ultimately sent mixed signals. Of the five seats that appeared on the ballot, all went to Democratic candidates, two of which were favored by the trial lawyers and two of which were favored by the BCA. In the end, the BCA failed to shift the ideological leaning of the court. The depth of support for tort reform seemed less clear than it had been only a few months before when Governor Hunt had declared Alabama to be “open for business.”

Not long thereafter, court challenges to the tort reform bills began to roll in. An early case challenged the tort reform package’s venue provisions, ruling that the application of the venue provision to that case was unconstitutional. Tort reform proponents argued

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that the case’s holding should be understood narrowly to apply only to cases filed before the law properly went into effect. But trial lawyer Jere Beasley commented that the tort reform package overall was obviously unconstitutional, and he predicted that “the ruling was ‘pretty much an indication of what the court is going to do’ with the new tort reform laws.”74

In the end, Beasley’s prediction proved accurate. Year by year, the tort-reform measures fell like dominos, as lawyers challenged them and the appeals rose to the Alabama Supreme Court. In 1991, for example, the Alabama Supreme Court struck down a provision allowing judges to second-guess jury awards of punitive damages in a low-dollar-value fraud case involving the sale of a boat, advertised as new, that turned out to have been pre-owned. Then in 1993, the court ruled that the $250,000 punitive damages cap was unconstitutional in a case involving a child who suffered electrical burns while climbing on a transmission tower. The court determined that the Alabama Constitution declared that “the right of a trial by jury shall remain inviolate,” and placing a cap on the amount of punitive damages a jury could lawfully award, the court reasoned, violated this constitutional right to trial by jury. This trend continued. By the summer of 1995, the Alabama Supreme Court had struck down most provisions of the 1987 package as violating the state Constitution. These rulings meant not only that tort reform proponents had lost all ground gained in the 1987 legislative session, but also that if they were to attempt to

enact those same measures again, they would have to amend the Alabama Constitution to do so.75

Thus, Alabama’s first comprehensive tort-reform package evaporated under judicial review. In part, the rapid wax and wane of tort reform in the late 1980s in Alabama represented local contingencies. Despite its near-hegemonic control of all levels of state politics, the Alabama Democratic Party had become brittle by the 1980s. Whiffs of corruption and back-room dealing, combined with the power vacuum left in Wallace’s wake, ultimately undermined its legitimacy in the eyes of voters and led to some surprising electoral upsets. Yet the old guard Democratic Party retained power in certain pockets of state government, most notably the elected judiciary, which ultimately served as an institutional barrier to this tort-reform movement.

At a broader level, this story also reflects the diffusion of law and policy through a patchwork federalist legal system. Most law in America remains state law, enacted by state legislatures and enforced by state courts. Yet intrastate legal developments have ripple effects across the nation. Within the tort-reform context, for example, state medical malpractice suits affected national insurance markets, out-of-state corporations exposed themselves to liability under state law in each jurisdiction in which they sold products or services, and the reputation of a state’s legal regime could attract or repel manufacturing and business services. National organizations advocating for particular business-oriented

policies—including ATRA for tort reform specifically and ALEC for conservative initiatives more generally—could write model bills, circulate policy papers, draft talking points, and generally attempt to persuade legislators and policymakers on their positions. But as the Alabama tort-reform case illustrates, the evolving legal environment in a specific jurisdiction was always more complicated than the patterns described by think tanks or interest groups in their efforts to track legislative developments across the fifty states.\footnote{See, e.g., Amy Kjose, The State Legislator’s Guide: Tort Reform Boot Camp (Washington, D.C.: American Legal Exchange Council, 2011), https://www.alec.org/app/uploads/2015/11/TortReformBootCampGuideFinal.pdf.}

The more controversial the change to state law, the more local buy-in was required to see a bill through the legislature. State-level organizations and networks mattered; the presence, composition, and strength of a state business lobby—and its ability to build advocacy coalitions with other groups around common interests—could make or break a campaign. As the chairman of the U.S. Chamber had highlighted in his speech to Alabama business leaders in the mid-1980s, national organizations could craft a free-enterprise policy agenda, but “the votes, the voters, the polling places are here in our communities and states.” Much of the larger picture of the rise of conservative politics at the national level is thus, upon closer inspection, more aptly described as a mosaic of state and local campaigns, carried out with varying degrees of coordination, all of which over time would radically transform the broader political landscape.\footnote{Van P. Smith, “Business and the ’84 Elections,” Alabama Today 47, no. 6 (Nov.–Dec. 1984): 13–15.}

Federalism has shaped social movements in the United States since the founding era, including but not limited to abolitionism, women’s suffrage, prohibition, civil rights for racial minorities, the Tea Party, and marriage equality movements. Federalism both opportunities for burgeoning social movements, such as the opportunity to test strategies and methods across more than 50 culturally and politically diverse jurisdictions and the potential to grab a toe hold in state and local governments where races may be less actively contested, and policy may be more easily shaped. However, federalism also serves as a disruptive, fragmenting force, as it creates a costly political environment in terms of both resources and momentum. This means that social change, for better or worse, is often bumpy, gradual, and uneven across
By the end of the 1980s, the BCA had gained additional political momentum and learned important lessons about what it would take to promote the “business interest” through the political process at the state level. Tort reform also continued to offer a powerful rallying point for drawing financial contributions from business members to its political action committee. The BCA had lost the first battle over tort reform, but really the war was just beginning. For one thing, the BCA stirred an interest in the business community for political activism in the “business interest” and provided both a forum for political participation and clear steps toward achieving business-friendly political gains. The BCA also had demonstrated its ability to influence state legislative races; the rising number of BCA-funded or allied state legislators were a testament to this fact. The organization’s relative lack of success in the races for the state Supreme Court set the organization’s goals back to some extent, but these failures also provided a clear target for future activism. And the passage of tort-reform bills followed by swift erasure by the Supreme Court likely inflamed some business leaders and spurred a recommitment to the BCA’s lobbying and campaign funding efforts. In the years to follow, the BCA would refine its lobbying and grassroots organizing efforts with the help of national partners and renew its efforts for tort reform, though rallying cries based on an “insurance crisis” passed as the crisis itself eased. In the years ahead, the BCA would reframe its goals in terms of a more emotionally charged and politically powerful mission: to rescue Alabamians from the depths of “tort hell.”

See, e.g., David Brian Robertson, Federalism and the Making of America (New York: Routledge, 2018).
Chapter 3: Sending a Message

One day in the late 1940s, a mother in Clayton, Alabama, left the family grocery store in the hands of her teenaged son for a few hours while she went home to prepare a midday meal. Almost as soon as the woman had left the store, a man sauntered in and inquired about buying some groceries. The teenager was proud to make such a large sale; it seemed like the customer had bought up half the store. The man asked to charge the purchase, so the teenager wrote up a charge slip, just as his mother had taught him, boxed up the goods, and called after the man, “Thank you, Sir! We sure do appreciate your business!” When the teenager’s mother returned to the shop, he excitedly recounted the big sale, but when she heard the man’s name she moaned. “Oh Lord, Jere,” she said. “He owes everybody in town.” The family never received payment for the goods and never saw the man again. But the teenager, who would grow up to become millionaire Alabama trial lawyer Jere Beasley, had learned a hard lesson about how some counterparties were willing to gain advantage through exploitation and deception in the marketplace.¹

Throughout the twentieth century, Alabama consumers had few practical avenues of recourse for fraud or abuse. As we have seen, state-level attempts to regulate the marketplace came late—in the 1980s—and had limited reach. Before passage of a consumer-protection law, defrauded consumers could bring common-law fraud actions, but they faced a demanding legal burden of proof and often prohibitively high costs and

¹ Interview with Jere Beasley, February 21, 2017.

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fees. Even after passage of a consumer-protection law, there were economic disincentives to filing most fraud suits. However, while executive-branch consumer-protection initiatives continued to evolve, consumer advocates also began to explore new legal means of adjudicating consumer disputes. Across America, the same wave of consumerism that spurred the creation of consumer-protection divisions in government also generated new consumer-protective legislation. Thus, in the troubled area of consumer lending, the 1968 Truth in Lending Act ("TILA") aimed to help consumers help themselves by instating disclosure requirements that lawmakers believed would allow consumers to make better purchasing and borrowing decisions. TILA set the format for disclosure of interest rates, but it left the states the responsibility for determining what the maximum interest rates would be. Alabama lawmakers chose not to choose, setting no maximum interest rate for loans over $2,000. Faced with the resulting regulatory vacuum, Alabama consumers and their attorneys sought alternative avenues to regulate fairness in the marketplace.

This combination of weak state-level consumer-credit regulations and a disclosure-based federal credit-regulation regime created a legal environment that incentivized trial attorneys to privately regulate consumer-credit markets in Alabama through tort lawsuits. Even where the state had failed to restrain the darker forces of capitalist excess and exploitation through regulation, a jury might still "send a message" about the limits of acceptable behavior through a costly jury award.²

² For a variety of positive and negative uses of the idea of juries "sending a message," see David Frum, "‘Send Them a Message,’” Forbes, December 6, 1993; Susan Estrich, "Courtrooms, Not Capitols, Offer Political Solutions," Birmingham News, February 14, 1999 (reprinted from Los Angeles Times); Gregory Jaynes, “Where the Torts Blossom,”
Parallel developments in the law and the legal profession created conditions for a litigation boom in Alabama that began to draw national attention in the 1970s and that built to a peak in the 1990s. A new generation of trial lawyers tested the legal terrain with innovative legal theories to assign liability to corporations and to recover money for consumers. For some lucky plaintiffs, this litigation boom meant a substantial pay-off. Some plaintiffs would not have been able to recover anything without the creative new avenues to recovery opened by clever, often misfit lawyers. Juries not only found in these plaintiffs’ favor; they submitted million-dollar verdicts to punish companies’ bad behavior—sometimes in cases where the business had every reason to believe that it had followed the letter of the law. As expensive jury verdicts mounted in Alabama, businesses operating in the state began to coalesce around the idea of reforming the system. Calls that Alabama’s litigation revolution had created a businessperson’s “tort hell” spurred a conservative countermovement.

This chapter explores Alabama’s litigation culture through the 1990s and its place within a larger national legal ecosystem, primarily through the representative story of a single influential lawsuit. Through a series of unfortunate events, Willie Ed Johnson, a young black man in Alabama’s Black Belt region, set off to own a car and instead ended up with a mountain of debt, no car, and a lawsuit against the company that financed his purchase. One dimension captured by this lawsuit is the complex role that the automobile has played in the American consumer experience. Practices of deception within the used-


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car market stand out as the “classic stereotype of consumer fraud in America,” but car ownership is also an archetypical marker of material success and a car purchase is “a significant event in the life of many households in America, especially for the poor.” More importantly, Johnson’s lawsuit offers an instructive snapshot of both the lending practices that spurred a boom in the subprime auto-lending market in the 1990s and of the rise of the trial bar as a significant, though informal, arm of the regulatory state. And finally, Johnson’s case serves not only as a useful example of the types of lawsuits that proliferated in the late 1980s and early 1990s, but also as an influential example because the lawsuit became a national news story. Johnson’s jury returned a $50 million verdict in a case involving a single auto loan contract, an outcome that became direct anecdotal ammunition in the “tort hell” debates to come.

Stories like Johnson’s pit the figure of the lender against that of the trial lawyer. Though the lender and the trial lawyer often appeared on different sides of a lawsuit, in caricature they often appeared as two sides of the same coin. Both the lender and the trial lawyer were cast by their respective opponents as swindlers who preyed on consumers’ hopes and fears in the pursuit of astronomical personal profit. Meanwhile, both the lender and the trial lawyer believed they were being attacked for doing nothing more than increasing poor consumers’ access to the privileges of the marketplace—whether that meant providing access to loans or lawsuits—heretofore reserved for the better off and the

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rich. This tale of Alabama’s tort-law revolution, resting at the intersection of business, the state, society, and consumer culture, highlights the dangers of predation. At the same time, it reveals widely shared anxieties about the parallel ascensions of the loan shark, the trial bar, and the nanny state in the late-twentieth century.

Willie Ed Johnson Buys a Car

One day in November 1991, twenty-five-year-old Willie Ed Johnson set off to buy his first car. A high-school graduate who worked as a full-time custodian at a nursing home, earning just over $5 an hour, Johnson lived with his mother and stepfather, both of whom were blind, in a home he and his mother owned in the small town of Eufaula, Alabama. His father lived about an hour’s drive away in Dothan, a small city tucked in the southeastern-most corner of Alabama, near the borders with Georgia and Florida. Johnson’s father recommended a used-car lot in Dothan called Cars Are Us because he had heard they had good prices. Johnson’s mother, stepfather, father, and cousin all convened at this establishment to help Johnson pick out his car. Johnson had his heart set on a Chrysler Fifth Avenue, and when Johnson spotted a 1985 Fifth Avenue on the Cars Are Us lot offered at $2900, his family “figured it was a pretty good price.” Johnson test drove the Fifth Avenue and liked it. The family had brought in another car to offer as a trade-in, and the dealer test drove it and offered them $1000 in trade-in value. At that point, Johnson
Johnson did not have enough in savings to buy the car outright, so he needed to finance the purchase with a loan. The dealership, Cars Are Us, partnered with Mercury Finance, a national consumer-finance company, to provide financing on its used-car sales. The salesman at Cars Are Us faxed information on the car and on Johnson to the agent at the local Mercury office in Dothan to secure financing. The Mercury agent ran a credit check on Johnson and looked into his employment references, then called the car dealer back to work out “the way that [they wanted] the deal put together.” As the Mercury agent explained, this meant working out with the dealership, “How many months? Terms? How much you will go on the deal.” Once the dealer and financing agent worked out the contract, the Mercury agent would “type the contract up” as an official “retail installment contract” and send it over to the dealership for Johnson to sign.

Johnson’s credit was only “ok.” He had steady income from his job, but he had held the job for only six months, and his credit-bureau report contained only two entries—one positive, the other negative. To bolster Johnson’s application, Johnson’s blind stepfather offered to co-sign the loan. The Mercury agent explained that “his handicap . . . was

\[\text{\textsuperscript{4}}\text{ Deposition of Willie Ed Johnson, Johnson v. Mercury Finance Co. of Ala., CV-93-052 (Barbour County Cir. Ct., Clayton Division) [hereinafter “Johnson Dep.”], 5, 52–57, 66, 69. All case materials from Johnson v. Mercury Finance Company of Alabama were obtained through the Clerk’s Office of the Barbour County Courthouse in Clayton, Alabama. Note that this story comes primarily from Johnson’s perspective. The car dealership denied that the salesman ever represented the car’s price as being $2900.}

\[\text{\textsuperscript{5}}\text{ Deposition of Patsy A. Hines, Johnson v. Mercury Finance Co. of Ala., CV-93-052 (Barbour County Cir. Ct., Clayton Division) [hereinafter “Hines Dep.”], 40–57, 82.}]}\]
known to us but [he] had the income to help the situation.” “He had pretty fair income,” she continued. But still “it was a very weak deal.” In order to make the deal happen at all, Mercury required a $1000 “reserve” or “discount” on the loan “deducted from the dealer’s proceeds check.” In essence, this meant that Mercury would pay the dealership $1000 less that the face value of Johnson’s loan for the right to collect all future payments from Johnson. From Mercury’s perspective, the $1000 discount helped the finance company hedge against losses on this risky loan from a borrower with marginal credit. And the dealer had little bargaining power. Mercury Finance was the only company writing these types of loans in the area in 1991, so if the dealership wanted to make the sale at all, it had to accept the $1000 discount on the purchase of the loan. Few dealerships had enough capital on hands to offer loans outright, and even those that did might not have offered a loan to someone with an ambiguous credit history. Neither the dealership nor the finance company told Johnson about the negotiated “reserve” agreement that occurred in the background of his car purchase; the car dealer and finance company considered it a transaction between them alone that was conceptually separate from the auto sale.⁶

On the day Johnson returned to sign the retail installment contract for the car (figure 9), he was “in a rush” because he “had to come back and work” at the nursing home. Accordingly, Johnson hurried through without reading the contract, signing in two places and initialing quickly next to the place where his blind step-father had co-signed by making his mark. Johnson later acknowledged that nothing had prevented him from reading the

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⁶ Hines Dep. 51, 61–65, 72, 84.
contract or asking questions about any of its terms, but he signed where he was asked to sign without much thought because he “trusted them” and was in a hurry. Because he did not read the contract, he missed major details. The sales price of the car was $4,668.50—not $2,900—and he had agreed to add costly credit-life and credit-disability insurance policies that would pay off his debts in the event that he died or became disabled, adding more than $300 to the amount financed. He later explained that he had not wanted either insurance policy “because it was on me . . . I wasn’t married or anything. And I wasn’t worried about it hurting nobody else if I lost the car or something.” The cost of the six-year-old car and two credit insurance policies totaled more than $6,000. After subtracting the value of his trade-in vehicle, he financed the remaining $4,054.31 at an annual percentage rate (“APR”) of more than 26%. When Johnson signed the contract, the dealership instantly sold this debt for around $3,000—representing Mercury Finance’s $1,000 “discount” on the loan. This last transaction occurred totally out of Johnson’s view, but it was by no means unusual. All Johnson knew was that the debt would be Mercury Finance’s to collect. Johnson left with a used car and thousands of dollars of debt, but with little practical understanding of the documents he had signed.7

7 Johnson Dep. 22–24, 56, 71, 87; Retail Installment Contract of Willie Ed Johnson, November 15, 1991, Defendant’s Exhibit 1, Johnson v. Mercury Finance Co. of Ala., CV-93-052 (Barbour County Cir. Ct., Clayton Division) [hereinafter “Johnson Case File”].

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Figure 9: Willie Ed Johnson’s Contract, November 1991
Johnson soon ran into trouble. Three months in, the car’s “transmission went out,” and Johnson took out a $1,200 loan from a different lender to have it repaired. When later asked about this second loan, Johnson said he knew he made payments of $116 per month, but he could not recall how long he had left on the loan. “I borrowed some more since then,” he explained. Still, he stayed current with his payments and tried to weather the storm. But more trouble loomed. Johnson failed to pay a speeding ticket, and his license was suspended, which in turn led his insurance company to drop his automobile policy. When he lost this insurance policy, Mercury Finance sent him a letter informing him he was required to pay for “single-interest insurance” on the vehicle, insurance which only covered the finance company’s interest in the event the car was damaged and repossessed. Johnson could not buy car insurance without a license, so he went on without it. And then things went from bad to far worse. One night Johnson was drinking at his cousin’s apartment when the cousin’s girlfriend said she was sick and wanted to go to the hospital. Johnson was drunk and could not drive, but he let someone else drive the sick woman to the hospital in his car. The driver never returned. As Johnson explained, “when he put her off at the emergency room, he said he was supposed to [bring] the car back to the house. But he kept going. And then, they found out that he was running from the police.” Johnson called Mercury Finance but “they said there wasn’t nothing they could do, to just wait and see what come up with the car. And that’s it. And I was just steady paying for it.”

8 Johnson Dep. 14, 17-19, 26, 32, 37; Hines Dep. 13.
A few weeks later, Johnson got word that police had recovered his car in South Carolina, but only after the fleeing criminals had wrecked it and the car had caught fire. Johnson called Patsy Hines, his Mercury Finance agent, and she told him “that the insurance didn’t cover nothing. And that my credit was good. And if I didn’t want to mess it up, they would try to help me out to get it fixed.” Despite the extensive damage to the car, Johnson elected to have it repaired. “I’d rather it be fixed, than to have my credit messed up,” he explained. As Hines explained, “He had three options in this. Make his payments and leave the car be. Let his account go into default and be repossessed. Or repair the vehicle [for] which we would make him a side note which we did.” Hines stressed that Johnson had been a good client, and “[b]ecause he paid good” she “assumed he was very serious on his part” that he “did not want the repossession” and wanted to save his credit. “In not all situations do we offer a customer a loan,” she explained, but “Mr. Johnson had paid us well. We offered him the option of repairing his car” with a new loan from Mercury Finance. Besides, she explained, this “was his first real attempt of paying something back and helping his credit situation. I [did not find it] very strange that he would do that to try to protect this credit. I didn’t.”

Johnson’s new loan with Mercury Finance covered the cost of towing the car back from South Carolina, at which point it became clear that the damage to the car was severe. As the Mercury Finance agent recalled, “It was a borderline situation of whether you would consider it a total or not a total probably. The estimates were high. We didn’t have any

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idea until we brought the car back how much it would be.” Mercury Finance selected a mechanic to make the repairs and added the cost—an additional $2,323—to Johnson’s account in August 1992. But the car was never really right again after it caught fire. Even after the first round of repairs, the engine and transmission mounts were burned out and had to be replaced, and “there was stuff up under the bottom burned totally out.”

In September 1992, Johnson finally gave up. “I had to spend money, you know, to get the motor mounts fixed. And then, it still wasn’t running right. So, I called them and told them to come get it.” By that time, he explained, “I was behind on some stuff. You know, like the light bill and stuff like that was getting behind.” Johnson’s step-father had also passed away during these intervening months, further adding to the young man’s misery. Until that point, Johnson had not missed a payment, even during the time the car was stolen and wrecked.

After all of the money and effort that Johnson had put into the car, Hines considered it “very unusual” to have someone with good credit elect to have the car repaired and then call to have the car repossessed. So, “in a last ditch effort not to pick up the car” she called Johnson and tried to work things out. A few days before Christmas, the Mercury Finance agent offered to settle for a lower amount if Johnson’s father paid off the account, and it seemed like a solution might be reached. But after a few weeks, she recalled, “I never heard anything else,” and Mercury Finance repossessed the car in January 1993. The car

10 Hines Dep. 89–90; Johnson Dep. 35–36, 44, 49; Complaint at 3, Johnson Case File (May 24, 1993).
11 Johnson Dep. 44, 49; Hines Dep. 86.
sold at auction, but the proceeds of the sale barely made a dent in Johnson’s accumulated debt.\textsuperscript{12}

In hindsight, Hines acknowledged that the wiser course may have been to have repossessed the car after the accident. Since Johnson repaired the car, Mercury Finance could not make a claim under the single-interest insurance policy, and since the outcome was repossession in either event, Johnson would have avoided accumulating thousands of dollars in additional debt. In the end, Johnson’s “credit got messed up anyhow,” and Johnson still owed Mercury Finance a substantial sum of money for a car he no longer owned. He also still owed on the loan he took out from the second lender for transmission repairs in January 1992. In February 1993, Hines sent Johnson a demand letter on behalf of Mercury Finance, informing him that he owed the company a total of $6445.43 and threatening a lawsuit if he failed to pay. When Johnson realized how deep he was in debt, he went to speak to a local plaintiff’s lawyer, who helped him get copies of his contract paperwork from the finance company. (The originals had been “lost when the jail escapees stole his car and wrecked it in South Carolina,” the lawyer tersely explained.) In consultation with this lawyer, Johnson for the first time understood the terms of the contract he had signed, including the true price he had paid for the car. From here, Johnson connected with a more prominent trial lawyer with an office in Montgomery, Jere Beasley (the son who had learned a tough lesson about the consumer economy in his mother’s store), who agreed to take Johnson’s case. By May 1993, Johnson and Mercury Finance

were embroiled in a lawsuit of unexpectedly epic proportions and that would, in part, help reshape Alabama law for years to come.  

**Regulating Consumer Credit and the Lending Landscape**

Willie Ed Johnson was just one of the millions of Americans in the 1990s whose desire to own an automobile—even at a steep price—fueled an auto-finance frenzy. Easy access to consumer credit fueled booming sales of cars and consumer goods, which in turn generated stunning levels of revenue for lenders. For those willing to lend to consumers like Johnson with poor or no credit, the risks were high, but so were the possible financial rewards. These finance companies deftly negotiated state lending laws, assuring that their high-interest-rate loans stayed *just* on the legal side of the lines drawn by state usury laws and other consumer-credit rules. As reported in the finance journal *Barron’s*, the national subprime auto-loan market had become “suddenly sexy” in the early 1990s, attracting investors who hoped to “make big money on marginal borrowers.” These firms bragged of achieving fantastical returns, such as “a stunning 9% return on . . . $900 million in assets” in a market where “a 1% return on assets is considered healthy, and a 2% return is beyond most bankers’ dreams.” Britain’s *Economist* magazine noted that subprime lenders were “some of America’s fastest growing finance firms” and that their loans possibly accounted “for more than 10% of all of the money borrowed in the United States.” These firms

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borrowed money in wholesale markets at single-digit rates, then offered loans at 20–30% interest (or more, depending on local maximum rates) to subprime borrowers. Next, “Wall Street’s modern sophistication enable[d] lenders to package even low-grade loans and sell them as securities,” thereby “shift[ing] assets off their balance sheets and record[ing] profits on the sales.” This model “helped them to woo investors” and raise ever more capital. So long as interest rates remained low through the 1990s and the firms were able to continue borrowing cheaply and lending at high rates, they remained the darlings of Wall Street.14

Consumer finance companies existed and even thrived because they met an unserved need for credit in communities with poor or no credit. These credit-poor consumers were more likely to be low-income and to be non-white, and many were virtually invisible to more conventional creditors like banks, which considered these would-be borrowers too risky for traditional loan products. In the 1980s and 1990s, between twelve and thirteen percent of Americans remained “unbanked,” meaning that they did not have a bank account.15 Unbanked consumers had little chance of obtaining a traditional bank-financed loan. Willie Ed Johnson was one of these millions of “unbanked” Americans, though he navigated his payment responsibilities on his car loans by giving his

15 Fleming, City of Debtors, 236.
mother, who had a checking account, cash, enabling her to write the checks to Mercury Finance.16

Furthermore, America’s postwar patterns of suburbanization intensified the need for automobiles, which in turn underwrote an increasing number of lawyers’ practices. Civil suits (and settlements) provided the bread and butter for small personal-injury law practices, and traffic violations became “the plankton, the krill, of criminal justice,” feeding the smallest one- or two-attorney firms. For those millions of Americans living outside of a few major metropolitan areas with reliable transportation networks, access to an automobile served often as a necessary condition for employment. One consumer advocate noted that his clients’ “No. 1 concern is how to get to and from work.” Thus, consumers demanded consumer products like cars, even when these products were offered at a high cost. An auto loan, even one with a sky-high interest rate from a finance company, offered a ticket to employment, which in turn meant economic survival, and perhaps, one hoped, a road to future prosperity.17

But this same ticket could lead to darker places, too. The rising tide of consumer plenty and material prosperity in postwar America did not lift all boats equally. Low-income consumers remained unequal participants in the marketplace, confronting issues that ranged “from higher grocery prices and higher installment sales financing charges to

16 Johnson Dep. 50–51.
shoddier goods and fraudulent services.”

David Caplovitz’s groundbreaking 1963 sociological study, *The Poor Pay More*, highlighted the unequal position of the poor consumer, who was more likely to be subject to predatory credit arrangements, pay higher costs for consumer durables like washing machines and televisions, suffer high-pressure door-to-door sales practices, and receive goods of inferior quality even at higher prices. High-interest credit sometimes trapped poor consumers within grinding debt cycles. Consumers perpetually borrowed more to service existing debts, leading some to compare finance companies of the late-twentieth century to the “company store in mill towns and coal camps [that] ensnared workers in never-ending debt” or to refer to the urban poor as “urban sharecroppers,” alluding to the debt-peonage system that kept black tenant farmers “chained to their land” after the Civil War. So-called “fringe lenders,” including finance companies (but also rent-to-own stores, pawn shops, and check-cashing outlets) filled important gaps in the financial marketplace and provided credit access to low-income, unbanked, and less creditworthy consumers—but all “at a stiff price.” All of these problems continued to bedevil American society through the latter decades of the twentieth century.

Americans have long had an uneasy relationship with consumer credit. Credit access can drive capitalist prosperity, but using credit always carries the threat of “living

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beyond one’s means.” Without access to credit, most people would not be able to buy homes or start businesses. But without some constraints on lenders, these same borrowers could spiral into insolvency and poverty, forcing them to rely on the state’s safety net and threatening the broader community’s stability and social harmony. Regulating consumer credit has only been a deeply fraught endeavor, requiring policymakers to balance the desire to protect consumers from predatory lenders with respect for consumers’ autonomy and ability to make choices—sometimes even bad ones—in the credit marketplace. At either extreme on the policy spectrum—completely abolishing credit markets or unfettering them from all constraints—the capitalist system could run into significant problems, even collapse.22

For hundreds of years, states and nations regulated lending through usury laws, which set maximum interest rates for loans and thus rendered “loan shark” practices illegal. In the reign of Queen Elizabeth I, for example, Parliament imposed a ten percent maximum interest rate on loans, a law that remained in place from 1570 to 1854. Similarly, the Islamic legal tradition “overwhelmingly forbade usury” for its “perceived exploitative nature.” Yet, from London to Manama, each attempt to quash usury tended to encourage creative ways of dodging the law. For example, historian Fahad Bishara chronicles the ways in which property sales substituted for prohibited interest-bearing transactions around the Indian Ocean in the nineteenth century.23

In early America, usury laws formed part of the new country’s “legal inheritance.” But usury laws varied with the terrain. The most stringent laws after the American Revolution were found in established states along the eastern seaboard, while credit-starved regions along the frontier liberalized their laws to attract lenders. In the nineteenth century, Jeremy Bentham and other thinkers began to mount arguments against usury laws as “economically unwise,” and some American states—first Alabama, then Indiana, Wisconsin, and California—experimented with abandoning the laws altogether in the first half of the nineteenth century. But even in states with usury laws in force, clever lenders still structured transactions in ways to sidestep the rules (including by simply raising the sales price for goods bought on credit), just as their Old-World forebears had done. Still, usury laws remained the primary tool in the consumer-protective toolbox in use in states across the nation.24

During the early twentieth century, New York, the nation’s financial capital, began to experiment with different ways of regulating consumer credit, such as by regulating the additional fees that lenders could charge that could make the cost of credit exceed usury limits in practice. Further recalibration of lending laws took place not in the New York statehouse but in the courthouse, with “[j]udges’ decisions in small-sum debt collection cases reveal[ing] the state in action, puzzling over how to balance protectionism and paternalism, the limits of freedom of contract, and the legality of regulating private economic decision-making.” Across the nation, state legislatures also supplemented usury

laws and bans on fees with licensing requirements that aimed to push shadier vendors out of the market. But the largest-scale changes to consumer-credit regulation only emerged in the 1960s and 1970s, when consumer advocates pushed to restructure the rules for consumer lending at the state and federal levels.\textsuperscript{25}

A wave of consumer activism swept the United States in the 1960s, as reflected in President John F. Kennedy’s 1962 Consumer Bill of Rights speech to Congress, which laid out an expansive vision of consumers’ rights to safety, information, choice, and fair consideration by government officials.\textsuperscript{26} Though earlier consumer movements had pursued legal solutions to consumer-protection problems, the consumer movement of the 1960s placed a particular emphasis on legislation and litigation as tools for creating greater equality and fairness in the marketplace. At the federal level, passage of new laws, such as the 1966 Fair Packaging and Labeling Act, the 1967 Interstate Land Sales Act, and the 1968 Truth-in-Lending Act, reflected the decade’s consumer-protective ethos.\textsuperscript{27}

\textit{Consumer-Credit Regulation Through Legislation}

Of these federal acts, TILA made by far and away the greatest impact on consumer-credit markets. TILA created new federal rules about the form and content of consumer loan contracts. Consumer credit had traditionally been regulated by states, though the federal government had begun to regulate some aspects of consumer credit in the first half


\textsuperscript{27} Balleisen, \textit{Fraud}, 294–95.
of the twentieth century, including an effort to stabilize wartime inflation during World War II. TILA vested regulatory responsibility for consumer-credit regulation in the FTC. Instead of focusing on “controlling the price and quality of credit services” through tools like usury laws and licensing requirements, TILA focused on tackling information asymmetries by creating mandatory, uniform disclosures for the cost of credit. Information transparency, however, always runs the risk of information overload; to this end, TILA’s drafters sacrificed some nuance and complexity in favor of a single, clear measure of the cost of credit that could be compared across credit products. The legislation created a uniform, “nationwide mandate for disclosure of one mathematical conception of credit pricing that would be calculated similarly for all kinds of credit—the now ubiquitous annual percentage rate (APR).”

In contrast with usury laws that imposed static caps on interest rates from above, TILA’s standardization of credit rates in terms of APR increased transparency in the credit marketplace and thereby sought to harness business competition to drive down rates in response to market forces. TILA’s disclosure-based regulatory regime reflected the economic and political philosophy of its chief proponent, Senator Paul H. Douglas, a former economics professor at the University of Chicago. The economics department at Chicago cultivated a distinctive, though sometimes intellectually disjointed, “school” of economic thought in the mid-twentieth century that featured a strong belief in the power of

the market as a tool to regulate economic behavior. These economists sought to create free-market systems in which competition, not coercion, regulated the interactions among business, the state, and society. Disclosures, in particular, attracted the interest of legislators and regulators who sought alternatives to command-and-control policies. A disclosure regime appealed to many lawmakers because it “still assumed that consensual bargains in the marketplace can set the proper price for a transaction” and thus claimed “to protect the consumer without involving substantive governmental intervention in the market.”

But disclosure regimes did not only reflect trends in academic discourse. Disclosure mechanisms resonated strongly with the regulatory zeitgeist of the mid-twentieth century and was a regulatory strategy sought across regulatory fields and by both business and consumer advocates. A retail merchant advocate in the late 1940s praised New York State’s lending disclosure laws as “symbolic of Democracy in action” and “represent[ing] the highest type of self-regulation by businessmen devoted to the public interest in its broadest implication,” because a disclosure regime was “born of competition.” A few decades later, a consumer activist echoed a similar sentiment, explaining that:

The federal government is one way for us to return rational, informed choice to the marketplace—whether it’s interest rates or boxes of detergent or packages of potato chips. . . . To secure one of the consumer’s most basic rights—the right to choose—we need federal authority to compel lenders

31 From 1949 remarks of James Watson to the New York State Legislature, quoted in Fleming, City of Debtors, 149–50.
and food processors and soap makers to provide the kind of information and packaging that makes such choice possible.\textsuperscript{32}

TILA was not the only federal law of its time to rely on disclosures as a regulatory tool; like TILA, the Fair Packaging and Labeling Act and the Interstate Land Sales Full Disclosure Act, “sought to redress imbalances in information by requiring businesses to furnish purchasers with truthful, standardized statements as to the quantity, quality, and cost of goods, assets, or credit.” These federal statutes built on a foundation of state experimentation with disclosure provisions used to regulate lending; for example, New York State added new disclosure laws for small loans in the 1940s and on retail installment contracts in the 1950s, both of which in turn built on even earlier experiments with disclosures in state laws from the 1910s through the 1930s.\textsuperscript{33}

The logic underpinning TILA presumed that borrowers, as rational consumers, would scrutinize APRs across comparable products and select the most price-competitive option. TILA made such comparisons possible by standardizing both the APR calculation method and the way the APR would appear on a consumer contract, ostensibly lowering information barriers and facilitating comparison. Lenders, in turn, TILA drafters assumed, would lower their interest rates to compete for customers in the marketplace. Rather than relying on the data-gathering of bureaucrats to determine a fair rate, TILA’s sponsors anticipated that market actors would dynamically adjust interest rates according to market conditions without endless bureaucratic tweaking. A disclosure regime would not

\textsuperscript{32} From 1963 speech of David Angevine, quoted in Cohen, \textit{A Consumers’ Republic}, 359.


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necessarily constrain the actions that lenders could take in the marketplace or limit the types of credit products that they might develop or sell. In other words, disclosure requirements did not constrain what lenders could do; they merely outlined how lenders presented information to consumers. Disclosure regimes, proponents believed, would increase transparency in credit transaction and thereby help consumers help themselves.\(^{34}\)

But in practice, TILA’s disclosure regime had “grave limitations.” The standardized APR still confused consumers, and “mere disclosure often did not influence buying decisions.” Even with more information available, comparison shopping did not occur, in part because sellers, whether auto dealerships or retail stores, built relationships with specific lenders, and thus “credit-related decisions [were] often decided by default once the dealer or retailer is chosen.” Disclosures improved transparency, but “simply providing information did not deter people from taking on more debt than they could handle.” As the then-legal scholar Elizabeth Warren explained several decades later, “[m]andating disclosure to consumers represents a fairly unobjectionable regulatory goal” in itself, but “disclosure has limits in its capacity to balance badly unbalanced borrower-lender negotiations” when negotiations happen at all. Finally, consumers focused far more on the amount of incremental payments than the overall total and perhaps did not even “mind the higher overall price so long as the weekly or monthly payments were low.”

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TILA could mandate that consumers be *informed* about the costs of credit but not that they *understand* the full impact of these terms.\(^{35}\)

More than two decades later, the marks of TILA’s disclosure regime remained evident on the face of the retail installment contract that Willie Ed Johnson signed in 1991, as shown in figure 9. In the section prominently labeled “Truth in Lending Disclosures,” neat rows of boxes informed Johnson that he would pay a $1519.99 finance charge, representing a 26.29% APR, applied to the $4054.31 financed to cover the cost of the car and insurance policies purchased under the contract, all of which was payable over thirty monthly payments of $185.81 each. The APR calculation formula and presentation of each figure on this contract would have conformed precisely to the disclosure standards set out in TILA, down to the font size. At the same time, Johnson’s situation exemplified TILA’s shortcomings. By his own admission, he did not read or understand the disclosures about terms, and even if he had, it is not clear that he would (or could) have done anything differently. Mercury Finance operated without direct competition in the auto-financing market in this southeastern corner of Alabama, and for a borrower like Johnson with mediocre credit and no bank account, a traditional bank loan would have almost certainly been out of reach. Besides, Johnson cared far more about selecting the right car on that November day in 1991 than selecting the right creditor.

Consumer-credit regulations constituted a “crazy quilt” of regulatory federalism, and state laws co-evolved alongside the federal TILA. In this system, state and federal laws regulated different parts of the consumer-credit environment, often regulating different aspects of even a single consumer-credit transaction. TILA dictated how interest rates would be disclosed with respect to both the calculation method used and the way they would be displayed on contracts, but state laws governed the actual rates themselves. TILA cemented a new legal institutional reality for consumer lending while still preserving some room for state-level experimentation. TILA’s passage in Congress thus spurred a cascade of legislative activity in states as those states sought both to harmonize state laws with the new consumer-finance law of the land and to express differences in state characteristics and policy preferences. In Alabama, a new consumer-finance law emerged in 1971 in direct response to TILA, which accepted most of TILA’s defaults but also filled gaps in the federal law, in part by setting comparatively high maximum rates that could be charged by lenders, a choice that reflected the low-regulation, hands-off approach to regulation prevalent in Alabama.36

Consumer-credit transactions like Johnson’s fell under the purview of the Alabama Consumer Credit Act, commonly called the Mini-Code.37 The Alabama Legislature passed the Mini-Code in 1971 under pressure from Governor George Wallace, who had integrated consumer protection into his populist political agenda in the 1970 election cycle. The Mini-Code originated as a uniform law called the Uniform Consumer Credit Code—known as

the “UCCC” or “U3C”—which arose from the same social context as and in response to the enactment of TILA. The National Conference of Commissioners on Uniform State Laws, a non-profit legal association, drafted the U3C in 1968 as a state-level complement to TILA that would “conform the regulation of consumer credit transactions to the policies” of the federal statute while also harmonizing with other state uniform laws, such as the widely adopted Uniform Commercial Code (the “UCC”). Proponents of the U3C claimed that the uniform law would regulate consumer credit judiciously without regulating it “out of existence,” but consumer advocates from the National Consumer Law Center countered that the U3C went “nowhere near far enough” to protect consumers. These critics protested that the model law omitted significant areas such as debt-collection practices and credit bureaus entirely from its purview. They also noted that the panel that drafted the original U3C “was financed largely by lenders,” which made consumer groups suspicious of the fairness of its provisions. But in Alabama, legislators deemed even the U3C too comprehensive a consumer-lending code. The Alabama Mini-Code represented a “greatly abbreviated form of the U3C,” and this process of abridgement was what led to the law’s “derisive” nickname, “the Mini-Code.” As a kind of concession, Wallace “worked to lower the allowable interest rates [codified by the Mini-Code on certain loans] . . . and brokered an arrangement among state bankers not to charge the maximum rates.” But for loans over $2,000—like Johnson’s used car—the state still had “no usury limit” at all.38

The Mini-Code occasioned much complaint about its “deficiencies, ambiguities, and inconsistencies,” with “practitioners, courts and regulators alike” struggling to “understand its provisions.” Confusion over the Mini-Code also generated litigation. Clever lawyers exploited the ambiguities and inconsistencies in the law as a kind of escape hatch for overwhelmed debtors, erasing their debts by proving noncompliance. Even businesses that tried to stay in compliance could be surprised by a lawsuit proposing novel legal theories about how the business had failed to meet the Mini-Code’s labyrinthine and ever-evolving requirements. Every few years, the Alabama legislature amended the Mini-Code “to try to clarify and correct some of the perceived deficiencies in the original legislation,” which observers characterized as “a passage of laws adopted to fix last year’s lawsuits.”

Thus, the Mini-Code, with slight tweaks from year to year, continued to regulate consumer-credit transactions as a complement to TILA in Alabama—including Willie Ed Johnson’s used-car purchase. In the ways described above, Johnson’s contract with Mercury Finance represented decades of consumer advocacy, business lobbying, regulatory experimentation, and academic theorization, all crystalized and welded into the state and federal legal frameworks that gave shape to an ordinary auto-sales agreement in Barbour County, Alabama.

While consumer advocates actively fought for legislative reforms to consumer-credit markets at the state and federal levels, a parallel revolution in litigation was also underway. A plaintiff standing in Willie Ed Johnson’s shoes in 1900, 1950, or even 1970 simply could not have succeeded in a lawsuit against the finance company. In fact, he might not have been able to find an attorney willing to file the suit. Accumulated developments in legal doctrine and practice over the twentieth century gradually refashioned the American legal terrain in such a way that Willie Ed Johnson could, closer to the century’s end, bring a lawsuit against the company that financed his pricy auto loan in Barbour County, Alabama—and win.

Over the long twentieth century, the conceptual underpinnings of tort-law doctrine slowly drifted away from theories based on formal assignment of fault and towards theories based on allocation of risk. The academic currents underpinning this shift shared a common provenance with the intellectual forces that shaped TILA’s disclosure regime, including the growing influence of economics in legal academia. Economic modeling sought to identify efficient market relationships, and legal scholars applying economic thinking to legal concepts began to examine legal rules not just for their fairness or practicability, but also for the extent to which they lubricated the mechanisms of the market. Trends towards economic modeling also reflected a desire to theorize societal behaviors and to use policy to incentivize desirable behaviors. Some scholars articulated

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40 A “tort” is a civil wrong for which a plaintiff often seeks monetary recompense. For a fuller discussion of academic debate about tort law mechanisms, see previous chapter.
tort law as a kind of “accident insurance,” which allowed every accident victim to receive compensation for injuries by shifting the costs to the companies with the deepest pockets, whether they might be manufacturers or railroads or finance companies. These companies could obtain third-party insurance and pass on a proportionate cost to end users of the product. This system internalized costs and assured that accident victims did not end up destitute. Accordingly, tort-law doctrine shifted away from purely retrospective remedies—securing one-off justice for the plaintiff directly before the court—and towards assuring prospective justice—using lawsuits to incentivize socially beneficial activities and to deter bad behavior. In part, this evolution reflected a rebalancing of the American tort-law system, from “the idea that the primary purpose of tort law should be to compensate injured persons” to “the competing idea that its primary purpose should be to deter or punish risky conduct.” Over time, doctrinal drift towards this latter position conceptually transformed the tort lawsuit from a mere compensatory device into a powerful regulatory tool.41

Changes in tort-law doctrine were dynamic but gradual, with roots in legal developments from the late-nineteenth century and even earlier, as courts responded to transformations in the nature of manufacturing and distribution. But by the 1950s, an increasing number of products liability cases focused scholarly attention on defective consumer products and services. In the field of consumer products liability, shifting tort-

For more discussion of academic approaches to tort liability, see previous chapter.
law trends manifested in “more willingness on the courts’ part to hold manufacturers liable for any malfunction and compensate injured parties accordingly.”\textsuperscript{42} Evolving products-liability doctrine increasingly shifted responsibility for all accidents onto a product’s maker, even if an injured party could not pinpoint a particular action that caused the fault. This led to the application of a novel concept of “strict liability” to the manufacturers of consumer goods that required them to pay in cases of accidents related to their goods, not because of a clear showing that the manufacturer had failed to uphold a specific legal duty, but because judges deemed the manufacturer best positioned to prevent defects and reduce risks. Strict liability moved quickly from being a fringe theory to the common rule; most state legislatures had adopted strict liability laws by 1971 and nearly all states recognized strict products liability by 1976.\textsuperscript{43} In parallel to this shift in the law of defective consumer \textit{products}, a reorientation in the law of defective consumer \textit{contracts} also took place. A greater number of judges “refus[ed] to enforce harsh, one-sided bargains as written,” based on legal concepts such as unconscionability, which prohibited enforcement of terms so unfair as to shock the conscience or strike judges as “patently unreasonable.”\textsuperscript{44}

\begin{footnotesize}
\begin{enumerate}
\item Cohen, \textit{A Consumers’ Republic}, 361; see also White, \textit{Tort Law in America}, 3–113 (providing and in-depth discussion the intellectual history of tort law before 1950).
\item Priest, “The Modern Expansion of Tort Liability,” 35–37.
\item Professor Gilmore also notes that the concept of contract law as being separate and distinct from tort was in itself a legal construction or development, just of a prior era. Gilmore, \textit{Death of Contract}, 95–112. Thus, the change was not from a natural state to an unnatural one, but rather from one legal era to another with the assurance that the winds of change would again blow in the future, just as “in literature and arts, there are alternating rhythms of classicism and romanticism.” \textit{Id.} at 111.
\end{enumerate}
\end{footnotesize}
Federal intervention a few years later further opened legal possibilities for disgruntled and swindled consumers who had unwittingly entered oppressive contracts with sellers and lenders. In 1976, the FTC halted the longstanding practice of applying the holder-in-due-course doctrine to consumer contracts. This doctrine, which insulated third-party holders of debt instruments against fraud claims that debtors alleged against the initial creditor, originally developed as a way to facilitate markets for negotiable instruments used as currency in the eighteenth century. By the mid-nineteenth century, judges had acceded to the suggestion from creditors’ attorneys that they apply the legal principle to consumer contracts because of the common practice by merchants and manufacturers’ agents of having a purchaser in an installment sale sign both a sales contract and a promissory note (the negotiable instrument), which enabled the vendor to sell off the note. In the twentieth-century consumer-contract context, the doctrine had the effect of insulating finance companies, which bought consumer debt from sellers, from any lawsuit that could arise based on the original seller’s conduct. Before the 1970s, if a consumer signed a promissory note in connection with a credit sale and the sales company assigned the note to a finance company, the holder-in-due-course doctrine prevented the consumer from suing the finance company to relieve the debt, regardless of what deceit might have transpired at the moment of sale. Technically speaking, the consumer could still attempt to sue the original sales company claiming fraud or a defect in the product, but even if she won the lawsuit, she would still be required to pay the full debt owed to the finance company. The application of the holder-in-due-course doctrine to these loans meant that the sins of the original sales company would not transfer to the company that bought the tainted loans.
In the late 1960s, the holder-in-due-course doctrine became “one of the most contentious issues of commercial law,” in part because activist organizations like the Consumers Education and Protective Association in Philadelphia waged public campaigns against its more pernicious effects on poor urban consumers. After a series of cases in which courts refused to apply the doctrine to consumer contracts based on various theories in the late 1960s, the FTC stepped in and prohibited the application of the holder-in-due-course doctrine in consumer contracts through administrative rule-making in 1976. The elimination of the application of the holder-in-due-course doctrine to consumer contracts allowed consumers to seek relief from debts entered into under fraudulent or deceptive circumstances.45

Alongside substantive changes to the law, like the end of the holder-in-due-course doctrine, procedural changes in the law of lawsuits also transformed the legal terrain. The most significant procedural change was a major revision to Rule 23 of the Federal Rules of Civil Procedure in 1966, which created the modern class action. The class action had existed before 1966, but the “new” Rule 23 opened new avenues and cleared some (but not all) ambiguity from the former rules. Before 1966, consumers with small-dollar claims had virtually no legal recourse because the cost of litigation often exceeded the value of


More precisely, the FTC made it “a violation of federal law to use a negotiable instrument [such as a promissory note] in a consumer credit transaction,” which in effect eliminated the application of holder in due course principles in consumer contracts. Rogers, The End of Negotiable Instruments, 72; “Preservation of Buyers’ Claims and Defenses in Consumer Installment Sales,” 36 Fed. Reg. 1211 (Jan. 1971), codified at 16 C.F.R. § 433.
the claim. As one legal scholar noted, a consumer who had entered into fraudulent credit agreement “is a ‘consumer in limbo’ insofar as he has no legally-protected forum to which he may go for a speedy, uncomplicated, and impartial determination of his claim according to procedures that are commensurate with its worth in expenditure of time, energy, and money.” First, “usually so little money is involved in consumer litigation that it is uneconomical to resort to the expensive processes in appeal.” Furthermore, consumer creditors would typically appeal unfavorable trial court rulings in order to forestall consumer-friendly precedents, further increasing legal costs to plaintiffs. Creditors could also choose “to settle a consumer’s claim in order to avoid an adverse decision[,] or the risk of it[,] or of a hazardous appeal.” In contrast, through a class action, a group of plaintiffs with a common claim—for example, a group of people all bound by the terms of a boilerplate contract with a lender—could bring a single lawsuit for the full amount of their combined claims. This change amounted to nothing short of a “revolution,” generating new types of claims that could be brought economically and thus transforming the structure of the legal profession and the court docket. And though the federal Rule 23 applied only in federal court proceedings, this legal innovation trickled down to states, as nearly every state legislature adopted a class action provision similar to federal Rule 23 to bring the class action mechanism to state courts.46

Together, the demise of the holder-in-due-course rule and the expansion of avenues for class action lawsuits opened the courts to consumer-focused litigation beyond the realm of defective products and invited cases considering the fairness of consumer transactions structured by contract. At the same time that a wave of interest in consumer-protection legislation and enforcement swept state and federal government in the legislative and executive branches, consumer advocates found powerful tools in the judicial branches as well. As historian Lisabeth Cohen explained, through the 1960s and 1970s “the courts became another regulator of the marketplace, . . . another existing arm of government retooled to curb the influence of exploitative corporations and empower consumers.” Increasingly, moreover, consumer activists looked to juries, not voters, as a vehicle for “sending a message” about proper behavior in the marketplace, particularly since leaders of the consumer movement tended to perceive juries to be less corrupt and more attentive to the plight of consumers than legislatures. As lawyer and feminist legal scholar Susan Estrich opined, juries served as one of the last outposts for uncorrupted democratic process. She explained:

Tobacco companies, the No. 1 donors to the Republican Party, don’t fund campaigns for jurors. Women make decisions on juries in numbers equal to men; in local television, virtually all the decision-makers are men. Increasingly, the important debates and the important victories are taking place in real courtrooms, not the Capitol’s equivalent.
Thus, consumer advocates hoped that litigation could achieve fairness and safety in the marketplace even where legislative campaigns had fallen short.47

Alabama served as particularly fertile ground for this pattern of regulation-through-litigation, in part because the state adopted several unusually permissive rules for filing and sustaining lawsuits. As noted in the previous chapter, in the 1970s and 1980s, the state’s venue rules permitted plaintiffs wide latitude to select the county in which their cases would be heard, even if it was not the county in which the plaintiff resided. Furthermore, the antiquated “scintilla rule” meant that a case would not be dismissed, no matter how seemingly frivolous, as long as the plaintiff could show a scrap or shred of favorable evidence. Through the 1990s lawyers also viewed Alabama as a favorable place to file class actions because state court judges allowed ex parte certification of class actions—a process derogatively called “drive-by” certification. In practice, this mechanism allowed a plaintiff to request that a trial judge conditionally certify a case as a class action on the spot without allowing the defendant a chance to argue why a class action was improper. Class certification—and a concomitant ramping up of the stakes of that lawsuit—might occur before the defendant had even received notice that the plaintiff was attempting such a move. A defendant could not immediately appeal such a decision, either, which meant that the defendant could either proceed with defense of the class action or

attempt to settle the suit. In all, this reflected a trend across the country of entrepreneurial lawyers increasingly “test[ing] the class action waters in state courts.”

Regulation-through-litigation also thrived in Alabama because of the lack of other regulatory avenues. In the 1990s, law professor Gene Marsh criticized the inaction of the state’s Attorney General’s office, asking “When is the last time the Attorney General, without regard to who held the office, made a major ‘bust’ of a consumer fraud operation in Alabama?” In other states, the professor observed, attorneys general made headlines for their “bold actions” against the most predatory businesses, but the Alabama Attorney General was “almost never listed among those states where action has been taken.” Alabama had virtually no consumer lobby to speak of; the organization that had the most significant engagement with consumer protection, Alabama Citizen Action, had two lobbyists in Montgomery and occasionally commented on consumer issues for newspaper articles but appears to have left little tangible impact on policy-making. This organizational weakness meant there was little political pressure for the Attorney General to act coming from the consumer-advocate side. Instead, trial lawyers took up the consumer’s cause. “It is our duty to speak for those whose voices have been silenced and for those who lack the ability to represent themselves in the public forum,” explained a

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In 1997, the Alabama Supreme Court held in several cases that ex parte class certification violated state law. The Alabama Legislature also passed a law in 1999 that allowed for direct interlocutory appeal to the Alabama Supreme Court of all class certification decisions, effectively ending Alabama’s time as a haven for class actions.

prominent Birmingham trial lawyer in the 1980s. In consumer fraud cases in particular, another trial lawyer noted that it was “professionally satisfying” to be on “the ‘right side.’”  

Trial lawyers claimed to be the ordinary Alabamian’s “only defender.” This stance had credibility because Alabama had, in Marsh’s estimation, “weak consumer protection laws, little public enforcement of what we have, and few outlets (other than the local lawyer) for people who have a complaint against merchants and lenders.” The combination of low educational attainment and a failure to formally regulate so-called “merchants of misery” created conditions ripe for fraud. Yet permissive filing rules aside, Alabama plaintiffs still had to walk an exceedingly narrow path to recovery. Alabama had among the shortest statutes of limitations for negligence claims, which meant that plaintiffs had a very limited window in which they could file a lawsuit before forfeiting any right to sue. Alabama was also one of the last states recognizing the “contributory negligence” doctrine, which meant that a plaintiff could not recover any money from a defendant if the defendant showed that the plaintiff shared even 1% of the fault.  

At the same time, plaintiffs who successfully navigated this legal minefield often found sympathetic juries waiting on the other side. Writing in the 1990s, Marsh explained that Alabama “juries [would] continue to hear effective closing arguments, describing [the jury] as the only hope in filling the void in consumer protection . . . an argument heard in courtrooms time and time again.

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across Alabama.” Given the vacuum of administrative consumer protection, it was no surprise that the state’s plaintiff’s bar sought to help fill the void, too.\(^\text{52}\)

Like the law itself, the legal profession changed dramatically over the course of the twentieth century. In turn, shifts in the practice of law had altered patterns of litigation across the United States. During the early twentieth century, “opportunities for women and minorities” in the legal profession, “if visible at all, were hardly golden.” Each new generation of lawyers, however, expanded its ranks by admittance of increasing numbers of non-elite lawyers, whether these lawyers arose from working-class families, claimed immigrant backgrounds, or hailed from racial- or ethnic-minority communities. But lawyers hailing from non-elite groups “were simply not part of the Rockwellian portrait of young lawyers being mentored at the feet of the Legal Giants.” Rather, the legal establishment resisted change. As historian Jerold Auerbach explained, “A veritable flood of lawyers with foreign names, concentrated in cities, who often entered the professional portals through night law schools or even correspondence courses, threatened the image of the legal profession as an aristocratic enclave.” In response, the American Bar Association fought to raise standards for legal education and “beat back night schools” to preserve the legal profession’s elite character. For those admitted to the state bar, institutionalized discrimination barred Jewish, black, and Catholic lawyers from top law firms through the

first half of the twentieth century. Shunned from elite, establishment law firms that defended railroad and other corporate clients, these outsiders had to be more flexible and entrepreneurial in their practices. Such lawyers made their living representing non-elite, working-class clientele, and while they expanded access to the courts to many ordinary people, their law practices generated controversy. This growing cadre of “plaintiff’s lawyers” garnered fewer resources and less reverence than their elite defense-bar counterparts, but through clever legal theories pushed the envelope on what constituted justice and fairness in the marketplace.

In Alabama, the plaintiff’s bar experienced a radical transformation in the postwar era, from a tiny cohort of attorneys in the 1950s into an organized political powerhouse by the 1980s. In the years after World War II, few attorneys specialized in plaintiff’s work. “Country lawyers” with general practices would have also taken on occasional plaintiff’s cases alongside drafting contracts and wills and trying an occasional criminal case. The big, establishment firms nearly exclusively worked for corporate clients—railroads, manufacturers, mills, mines, industrial outfits, utility companies, and financial institutions—with a clear focus on facilitating transactions and defending companies against civil complaints. One exception was the Hare Wynn firm in Birmingham, established in the late-nineteenth century and directed by trial-lawyer pioneer Francis Hare,

54 Coffee, Entrepreneurial Litigation, 20–21; Fleming, City of Debtors, 89–96; Friedman, A History of American Law, 538–42.
Sr. The Copeland Franco firm opened in Montgomery in 1947 as a plaintiff-focused practice, and the Cunningham Bounds firm followed in Mobile in 1958. Though these firms represented plaintiffs, they were still bound by the unwritten code of the social elite; professionals did not sue professionals, so even lawyers at the Hare Wynn firm quietly declined to accept suits against doctors.55

The locations of these three top plaintiff’s firms in metropolitan centers was no coincidence. For most of the twentieth century, Alabama’s urban counties had also served as the state’s litigation centers, concentrating both business and legal talent in a single place. In turn, the judiciary in these counties developed expertise in complex litigation—cases with scientific, technical, or economic intricacies that required broader applied knowledge than the average divorce or drunken driving case. As a result of Alabama’s permissive venue rules before 1987, plaintiffs’ attorneys had little difficulty filing civil actions in these urban counties, even if accidents or contract agreements that caused the lawsuit happened somewhere else. Since plaintiffs make the first move by filing the initial complaint, a plaintiff’s choice of a favorable venue, derisively called “venue-shopping,” usually gave that party a slight leg-up in the litigation to come. By the 1980s, groups that

frequently found themselves defending lawsuits began to complain that counties like Jefferson (home to the state’s economic hub, Birmingham) had become lawsuit mills inimical to fair treatment. “Why come to Jefferson County?” asked one proponent of systemic change. “Because,” he explained, that’s where the most effective [plaintiff’s] lawyers live. Because juries in Jefferson County usually make larger awards in their verdicts. Because the lawyer takes the country [defendant] outside the county where he is known and into an urban area where jurors are unlikely to know or care about his reputation.56

In the first batch of tort reform provisions adopted by the legislature in 1987, the state had changed the rules for determining venue in an attempt to push these cases out of urban courthouses and back into rural places, where advocates presumed that juries held more moderate and commonsensical views and where a defendant’s reputation might hold more value.57 In theory, this law aimed to be pro-defendant. But in practice the new venue rules leaned pro-plaintiff because pushing lawsuits out of urban centers and into each of Alabama’s 67 counties spurred a grand experiment in venue-shopping of even greater magnitude. Attorneys tested the hypothesis about rural juries being more moderate and found that juries in some counties seemed more open to certain types of arguments than others. Plaintiffs and defendants alike recognized a potential for home-court advantage, so they sought out counsel known to the community in which a case took place, expanding the legal markets in these areas. Soon large national companies—automakers, insurance

57 This venue provision passed as part of the 1987 tort-reform package, which is discussed extensively in the next chapter.
companies, and finance companies—found themselves scrambling for local counsel in rural counties like Autauga (pop. 34,222), Escambia (pop. 35,518), or Crenshaw (pop. 13,635). This development did not always mean that parties simply traded out the services of a large, urban law firm for a local practitioner. Rather, local counsel for both plaintiffs and defendants often teamed up with a larger firm, maximizing both the local reputation of the individual lawyer and the more extensive resources that a larger firm would bring. The proponents of the venue bill had sought a simpler, more defendant-friendly system but instead installed a more complex one.

58 1990 Population Figures, from U.S. Census Bureau.
Figure 10: Alabama Civil Filings by County per 1,000 Residents, 1979 to 2001

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Raw civil filings data from *Alabama Judicial System Annual Reports*, 1979 to 2001, located in the Alabama Supreme Court and State Law Library, Montgomery, Alabama. Cases include only non-domestic civil filings from Alabama Circuit Courts, the state’s trial court of general jurisdiction. County population data from U.S. Census Bureau. Josh Bruce, PhD candidate in the Duke University Sociology Department, generously created this visualization.
In the years after passage of the venue bill, attention shifted away from tales of the
moral failings of Jefferson-County juries and toward the juries of certain rural counties,
which the urban legal elite saw as unsophisticated and perhaps a little insular and corrupt.
Willie Ed Johnson’s home county of Barbour attracted particular scorn. In March 1995—
two years after Johnson filed his lawsuit in the Barbour County Courthouse, Clayton
Division—a scathing article in *Time* would call Barbour County, Alabama “nationally
recognized as tort hell” for its plaintiff-friendly juries, citing Johnson’s case by name.60
Notably, as shown in figure 10 above, Barbour County’s civil filings closely tracked the
statewide average and median until 1995 when *Time* published its article, after which the
number of civil filings surged. Thus, the *Time* article may have in fact created the
conditions in Barbour County on which it purported to report, by planting expectations
about Barbour County juries in the minds of entrepreneurial lawyers across the state.
However, figure 10 also tells a different story about Bullock County, a county adjacent to
Barbour County with a similarly rural character but a different trajectory in its civil filings
per 1,000 residents. While Barbour County’s filings hovered near statewide averages
before 1995, neighboring Bullock County’s filings doubled between 1987 and 1989 and
continued a meandering rise over the next decade. Though the statewide filings as a
proportion of population remained relatively steady through the 1987 changes to the venue
rules, the patterns of civil filings in Bullock Country reveal a shift in cases from urban
litigation centers to varied fora across the state.

the term “tort hell” and the ways that media shaped public opinion around tort-reform issues, see later chapter.
Figure 10 further shows that, as business groups had lamented, civil filings were indeed on the rise through the 1980s—though most of these cases would never proceed to trial. It is not clear, however, that this trend represents the litigation “explosion” that tort reform advocates feared. In fact, Alabama may have been merely catching up to other states. Legal scholar Marc Galanter estimated that in 1975, state courts of general jurisdiction across the United States generally had about 21.6 cases filed per thousand citizens. By this account, even by the end of the twentieth century, civil filings in Alabama occurred half as frequently. Whether characterized as a litigation explosion or a gradual catch-up, over roughly two decades, the number of these civil filings across Alabama did nearly double. This change at least correlates with changes in the number and type of lawyers practicing across the state.61

As Alabama’s legal landscape changed, so did the state’s legal profession. Increased recognition of tort-based remedies across America meant more potential lawsuits, which in turn sustained a full-time plaintiff’s practice for more trial lawyers. And changes to venue rules brought new dynamics to the practice of law, as described above. But in addition to forces derived from the changing legal context, there were also just more lawyers. Figure 11 shows the total enrollment in the four law schools in Alabama between

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While lawsuit filings may have increased, it is worth noting that the number of cases proceeding to trial across the United States had long been in a pattern of decline. See Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,” Journal of Empirical Legal Studies 1, no. 3 (Nov. 2004): 459–570; Stephen C. Yeazell, “Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial,” Journal of Empirical Legal Studies 1, no. 3 (Nov. 2004): 943–71.
1930 and 1971, and figure 12 shows the number of degrees awarded by the state’s two accredited law schools between 1961 and 1971. Aside from volatility during and immediately after World War II, enrollment figures remained remarkably steady from the 1930s through the mid-1960s but then started an upward drift in the late 1960s.

Some of this shift is likely attributable to changes in the applicant pool. The postwar baby-boom increased the pool of possible applicants from the late 1960s on, and the University of Alabama School of Law (“UA Law”) was in the midst of an iceberg-like crawl towards expanding educational access for black and minority students, graduating its first cohort of black law students in 1972. But the larger boost in overall numbers came from the arrival of new legal education institutions. UA Law had served as the state’s flagship law school since its founding in the 1870s and served as the state’s sole law school accredited by the American Bar Association until 1961, when the Cumberland School of Law, an established law school in Tennessee, moved to Birmingham. As shown in figure 11, the addition of Cumberland soon doubled the number of enrolled law students at accredited institutions in the state, and, by 1971, Cumberland accounted for two-thirds of students enrolled at an accredited law school. From the perspective of degrees awarded, shown in figure 12, Cumberland doubled the number of accredited degrees in the state within a few years.62

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62 As also shown in figure 12, this multiplier effect can be observed in terms of raw degrees awarded or in terms of degrees awarded per 100,000 population. Thus, the increase is not attributable merely to statewide population growth.
Cumberland’s entry into Alabama also left a mark on bar membership requirements in Alabama. Before 1961, graduates of UA Law had “diploma privileges” of “automatic admission” to the state bar without examination. With Cumberland’s entry, the Legislature amended the law to require all graduates to enter the bar by examination to “put the two accredited schools on an equal footing.” Though these competing institutions awarded equivalent degrees, the University of Alabama still maintained its prestige; it boasted the more distinguished alumni network, as many judges, law-firm partners, and law-degree-holding politicians hailed from UA Law, and accordingly many elite, establishment firms preferred applicants with a UA Law degree, either out of loyalty to their alma mater or because these graduates might better access elite networks. Before the new school built a solid alumni base, some Cumberland graduates competed for limited spaces in establishment firms, but others turned to smaller plaintiff-focused practices or even hung out their own shingle. Of course, not all law-school graduates go on to practice law, not all Alabama graduates practice in-state, and not all practicing Alabama lawyers graduate from in-state law schools. But many graduates did stay, adding to the growing ranks of lawyers in the state. Since the rules of the old order did not accommodate all of these newly minted lawyers, many of them opted to change the game.63

Figure 11: Total Enrollment in Alabama Law Schools, 1930–1970

All data from American Bar Association’s *Review of Legal Education*, 1930 to 1971. Consistent data are not available for the unaccredited Birmingham School of Law or the Jones School of Law. All issues of the *Review* used above are available online at https://www.americanbar.org/groups/legal_education/resources/standards/standards_archives.html.
Figure 12: Degrees Awarded from ABA-Accredited Law Schools in Alabama, 1961–1971

All data from American Bar Association annual Review of Legal Education reports, from 1961 to 1971.
Law schools unaccredited by the ABA also left a mark on the legal profession in Alabama. The Birmingham School of Law first opened its doors in 1915 and then moved around the city—for a while as a law department at Birmingham-Southern College, then as a part of the Birmingham YMCA’s educational arm, and later as an independent institution in a leased space inside the Jefferson County Courthouse. Along with other ABA-unaccredited law schools in Alabama, the Birmingham School of Law served a different type of law student. Students worked full-time and took night classes, finishing in four years instead of the traditional three. In addition to accommodating working students, the Birmingham School of Law admitted women, who were still rare figures in law school classrooms until the late 1970s. And the more affordable price-tag opened legal education to professionals in other fields like law enforcement who did not want to practice law but benefited from legal study. In 1974, Miles College, a historically black college, opened its own (unaccredited) school of law, further expanding opportunities for a legal education. These ABA-unaccredited schools always drew controversy; opponents complained about high attrition, low bar passage rates, poor job prospects, and general worries that these institutions did not provide a quality education. Yet these schools lumbered on because they served an otherwise unmet need in the community for a different type of legal education. The students who overcame the challenges of coursework and

Most law schools awarded an “LLB” degree before the American Bar Association Section of Legal Education recommended that the first professional degree should be called a “JD” in 1965. The change was in name only; the degrees were considered equivalent and schools made the JD retroactively available to LLBs. American Bar Association, Review of Legal Education (1965); “Questions and Answers,” Law Library Journal 72 (1979): 153–54. Both schools transitioned from awarding LLB degrees to JD degrees in this period, and all degree types are combined for this graph.

65 The other law schools unaccredited by the ABA were the Thomas Goode Jones Law School in Montgomery (now Faulkner Law) and, after 1974, the Miles Law School near Birmingham.
passing the bar moved on to additional challenges: finding work and carving out a name for themselves in legal practice.66

One night-school graduate, Lanny Vines, would go on to spark a one-man revolution in the state’s legal doctrine and practice. Vines graduated from the Birmingham School of Law in 1966 and founded a law firm with an already established lawyer, Clifford Emonds, Jr., that same year. Unencumbered by the rules of professional deference that were dominant in more elite firms, the Emonds & Vines firm took on medical malpractice suits as well as car accidents and workplace injury suits. Vines quickly distinguished himself for having an outside-the-box legal mind. In the 1970s, he crafted a new theory for workplace liability in the case of Grantham v. Denke, which radically changed employer liability in Alabama and opened up opportunities for thousands of subsequent lawsuits by employees previously thought to be barred by the Alabama Workmen’s Compensation Act. Vines also poured much of his time and energy into state and national trial-lawyers associations. Thus he wrote a detailed “recent cases” column in each issue of the trial lawyers’ quarterly journal from 1974 to 2000, which aimed to inform other lawyers about developments in the law and to spread information about successful claims. These columns were research intensive, sometimes running for dozens of pages, and often included information on verdicts or settlement amounts. And as time went on, Vines’s name often appeared alongside cases reporting the biggest verdicts. In the February 1982

issue of the journal alone, for example, Emonds & Vines served as counsel in 8 of the 127 featured cases, which together represented over $5 million in verdicts or settlements. Vines also served as president of ATLA from 1981 to 1982 and sat on its board of governors from 1980 to 1984. He also served as a trustee for TRIAL, ATLA’s political action committee. Over his many decades of service to the state association, Vines served on too many smaller committees to list. And his service did not stop at the state level; Vines also wrote articles for the national Association of Trial Lawyers of America’s journal and served on many national-level committees. Vines had risen in rank from a lowly student at an unaccredited night school to a major force within the Alabama legal profession.67

During the latter half of the twentieth century, associations of trial lawyers across the country became increasingly important bodies for information-sharing and professional development. The national Association of Trial Lawyers had formed out of a small coalition of union-affiliated workmen’s compensation lawyers in 1946 but grew rapidly to include all types of personal-injury lawyers nationwide by 1956. Meanwhile, ATLA formed in 1952 around a core group of elite trial lawyers led by Francis Hare, Sr., of the Hare Wynn law firm. Like the national association, Alabama’s ATLA expanded, claiming

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150 members in 1966, 500 members in 1971, and over 1,700 members by 1998. Through semi-annual meetings and periodicals, trial-lawyers’ associations diffused knowledge about legal strategy and helped attorneys hone skills such as cross-examining witnesses and crafting compelling opening arguments. These associations drew in members with continuing-education events that outlined the implications of developments in state and federal law and seminars on technical subjects like crashworthiness of automobiles and how to effectively deploy expert witnesses. Part of ATLA’s delegation to the national association extolled the virtues of the latter organization’s annual meeting, describing it as a place where speakers “[d]iscussed openly and shared freely . . . information about trial tactics, discovery techniques, and new causes of action.” More Alabama lawyers, they argued, should “treat” themselves to a national convention, if for no other reason than the group of trial lawyers in attendance represented “almost all of Alabama’s million dollar verdicts.”

Trial lawyers’ associations also increasingly turned to political engagement as a key priority. As the political composition of the state began to shift in the 1980s, ATLA ramped up its political drives in support of the state Democratic Party. In the words of one ATLA president in 1985, trial lawyers now made “front-page news” and constituted “a force to be reckoned with in the State.” To the leaders of an ever more cohesive and

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68 Cauthen, When Destiny Comes to a Fork in the Road, 465 (self-published autobiography of Alabama trial lawyer and former ATLA president); “Biography: Greg Breedlove,” ATLA Journal 18, no. 3 (Summer 1998): 6.
70 For further discussion of political change in Alabama in the 1980s, see other chapters.
well-resourced trial bar, plaintiffs’ lawyers needed to stand together in opposition to encroaching conservative political interests. “We are still on the side of the angels,” he promised, and the “best is yet to come.”

High levels of political activity required high levels of funding, so ATLA and the national association needed large donations from members to pursue their political goals. The advent of larger jury verdicts made such donations feasible. One trial lawyer, writing in the *ATLA Journal* in the mid-1980s, noted that “[w]here a $1 million verdict was a rarity less than 15 years ago, it is fairly common today,” a change he attributed in part to inflation and a doubling of cost of living, but also to “increased trial advocacy skills by the plaintiff’s bar.” He explained: “No longer are we the second class citizens of the profession that plaintiff’s lawyers were once considered. Because our members now lead the profession in income levels, we are attracting the best lawyer skills as well.”

Yet plaintiff’s lawyers would not have been able to represent ordinary people—and thus would not have been able to accumulate wealth—without a critical innovation in legal practice: the contingency-fee model. In a contingency-fee agreement, a lawyer tries a case in exchange for a promise of a percentage of winnings instead of an up-front fee. This model for organizing the business of law emerged first during the latter third of the nineteenth century in a few large East Coast law firms and then gradually diffused across the country. Many state legislatures initially pushed back on this development, complaining that it gave lawyers an impermissible financial stake in the outcome of the

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71 Caine, “President’s Column,” 4.
Opponents of contingent-fee structures also suggested that this system would generate frivolous lawsuits. But proponents of the model successfully argued that it also could better assure “fidelity, energy and proper zeal by one’s attorney” than a flat-fee or hourly-rate model. It further allowed access to the courts to the millions of Americans who had “no funds with which to hire a lawyer.” For these individuals, “the contingent fee was [a] ticket to admission to the judicial system,” and for the lawyers who represented them, the contingent fee allowed plaintiff’s-side attorneys, including personal-injury attorneys, to “flourish” despite drawing the ire of the elite bar.73

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As modeled in figure 13 above, these lawyers made mental calculations about the likelihood of a case being successful (which could mean either the likelihood of a favorable verdict at trial or the likelihood of reaching a lucrative settlement with the other party) in relation to how much the case might be worth. For the solid block of cases deemed reasonably likely to be successful and with a sufficiently high dollar value, this system would provide access to justice for many plaintiffs. As noted by legal scholar John Coffee, Jr., market forces can incentivize economically efficient behavior in this regard, but not necessarily socially optimal resource allocations. For example, this model incentivizes lawyers to accept some cases that are unlikely to prevail (and might even be considered “nuisance” cases) because of a slim chance of an astronomical reward, while ignoring many potentially meritorious but low-value cases.74

Unlike their defense-lawyer counterparts who could expect relatively steady work from the repeat business of steady corporate clients, plaintiff’s lawyers’ clients tended not to be repeat players in litigation, so these lawyers had to continually generate new business to stay afloat. Pooling all of one’s resources into a dud case that generated no compensation could prove ruinous. This economic environment pushed the best plaintiff’s lawyers to fashion novel legal theories that supported recovery by their clients, as well as to sharpen their estimates of a claim’s likely trial value (or settlement value), so that they placed potential cases more accurately within a mental rubric similar to the stylized model depicted above. A case’s potential value depended on an individual attorney’s subjective

74 Coffee, Entrepreneurial Litigation, 29–30, 229.
assessment of what a hypothetical jury would likely award, and estimates of a case’s value might vary wildly depending on the attorney. Part of this subjective assessment involved judging how sympathetic a plaintiff would be to a jury; a cocky ex-con was less likely to win compensation for an automobile accident than a selfless single mother making a left turn into a church parking lot. But some basic benchmarks existed for each case—the sales price of an allegedly defective product, a wrecked car’s repair cost, or an injured plaintiff’s medical bills—and an attorney could triangulate a likely jury award based on outcomes of similar cases, information that had come to circulate among the community of trial lawyers in part through ATLA resources like the ATLA Journal. This system rewarded attorneys for picking winners and punished them harshly for picking losers. Thus, unlike the plucky lawyers at non-profit organizations and legal aid offices, private plaintiff’s attorneys “did not have the luxury of selecting cases based on the moral worth of the client’s claims” because “law was a business as well as a profession.”75

Figure 13 models the likelihood of a case being accepted by an attorney but does not account for the volume of particular types of cases; high-dollar-value cases with a high probability of success are rare, and most ordinary peoples’ controversies generally involve small dollar amounts—a contract dispute with a contractor over home repairs, a fender-bender, or, like Willie Ed Johnson, a dispute over an auto-loan agreement for a used car. Consumer-loan cases might involve sums of a few hundred or a few thousand dollars, and vehicle accidents might be worth only several hundred dollars even after totaling property

75 Fleming, City of Debtors, 92.
damage, medical bills, and lost wages. Accounted for in the upper left quadrant of Figure 13, these cases did not necessarily fall into the category of economically viable complaints represented by the shaded area.76 For lawyers willing to take on many lower-value claims under a contingency-fee agreement, high volume was key to financial security. But even a high volume of the lowest-value cases simply could not justify the lawyer’s time spent preparing for them. That is, they fell outside of the shaded triangle of economically viable suits as modeled in figure 13 above, and even plaintiffs with worthy claims were unlikely to find a private attorney willing to take them on. Accordingly, most contingent-fee attorneys sought to develop a balanced portfolio of cases to manage their financial risk. Much like a stock portfolio, these attorneys might balance a high-value but riskier investment with several smaller cases that reflected surer bets. Alternatively, the attorney might seek out cases that made use of one or more legal mechanisms to alter the underlying economic perception of a riskier case, thereby turning a case with lower potential for payoff into an economically viable one. I describe and model three examples of such mechanisms below—each of which would play some role in Willie Ed Johnson’s case.

Figure 14: Model of Economic Viability of a Contingent-Fee Case with Punitive Damages

First, as modeled in figure 14, the availability of punitive damages could push an economically unviable case over the line into the zone of cases likely to be accepted by a lawyer on a contingency-fee basis. Punitive damages are awards of money to a successful plaintiff above and beyond the amount needed to compensate the individual plaintiff and aim solely to punish the defendant’s bad conduct. The more egregious the conduct demonstrated by an attorney at trial, the more punitive damages a lawyer could request that a jury award. Punitive damages could run into the millions of dollars, and thus could transform a case valued at $1,000 into a case valued at $1,001,000. This legal mechanism did not impact the likelihood of success at trial, but it significantly raised the financial stakes for defendants and could make a case more likely to settle before trial or even awaiting appeal. Lawyers thus kept a lookout for cases in which a jury might be persuaded to award punitive damages, and defendants meanwhile performed analogous calculations.
to inform their posture in settlement negotiations. In these ways, the availability of punitive damages altered the economic incentives for accepting certain cases. As one Alabama lawyer advised in the *ATLA Journal*: “[D]on’t rush into a fraud case without careful investigation and thought. Because the compensatory damages in these cases are often small or marginal, make sure that the fraudulent conduct is indeed significantly bad enough to justify a jury returning a verdict for significant punitive damages.”

Statutory disclosure regimes, in which a law required disclosure of information in a particular format, could shift the economic viability of a lawsuit through a different mechanism. Some disclosure requirements stemmed from general theories of fraud and misrepresentation from the common law; failure to provide critical information in a transaction where one had a duty to provide such information constituted fraud or at least negligent suppression of material facts. Other disclosure requirements came from statutes. For example, as discussed above, disclosures served as a prominent regulatory tool of consumer-protection through the 1960s and 1970s and was the primary regulatory mechanism of TILA.

Disclosure in itself failed in many instances to radically change borrowers’ decision-making; thus, Willie Ed Johnson reported that he had neither read nor understood the TILA-mandated disclosures in his own contract. But disclosure regimes also offered a backdoor through which borrowers might succeed in relieving debts through litigation because TILA and similar statutes created “low barriers to legal challenges by consumers

if sellers had not supplied mandatory disclosures.” TILA disclosures involved technical complexities, and it was easy for a lender to make a small technical error that could void the entire contract. Attorneys had a much easier time arguing that a borrower’s contract had defective disclosures than finding a viable legal theory to transform general unfairness in a contract into justification for that contract’s rescission. Unfair contracts were not necessarily illegal, but hidden terms or defective TILA disclosures certainly were.⁷⁸

![Diagram](image)

**Figure 15: Model of Economic Viability of a Contingent-Fee Case with Disclosure Claims**

As modeled in figure 15, the availability of legal claims based on a lack of required disclosures had the power to transform an unviable suit with both low likelihood of success on the merits and a low dollar value into a viable suit. Some statutes requiring disclosures might also include provisions for an additional financial reward for plaintiffs who brought improper disclosure claims under the act, which in turn would increase not only the suit’s

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likelihood of success but also its monetary value, shifting the suit’s economic viability further right in the conceptual model used above. For example, plaintiffs suing under TILA could also seek payment of their attorney’s fees from the defendant if their claim was successful, further improving the economic viability of such a legal complaint.\textsuperscript{79}

Although TILA ushered in an avalanche of disclosure-based suits, such legal actions had a longer history. Legal historian Anne Fleming documents attorneys using such disclosure-based claims in a “second wave” of New York State lending litigation in the 1940s based on state disclosure laws; and Philip Schrag recounts the strategic use of technical disclosure flaws in installment contracts to police consumer fraud at the New York City Department of Consumer Affairs between 1969 and 1971.\textsuperscript{80} Attorneys and advocates had long appreciated the incentive-creating potential of disclosure-based claims.


\textsuperscript{80} Fleming, \textit{City of Debtors}, 89–92; see Schrag, \textit{Counsel for the Deceived}, 46, 91.
Figure 16: Model of Economic Viability of a Contingent-Fee Case as a Class Action

Finally, as modeled in figure 16, the class-action mechanism allowed a lawyer to group many individual claims into a single suit. Structuring a suit as a class action did little to alter the likelihood of success, but it did make a case potentially more lucrative for the lawyer. A single big case (represented in figure 16 by the large asterisk) was more efficient to prepare than many smaller cases (represented by the cluster of small asterisks), and even individual claims as small as a dollar could offer a substantial financial incentive if a class action could aggregate tens of thousands—or even millions—of these similar claims. As a result, lower-value cases that individually would fall outside of the zone of cases likely to be accepted on a contingency-fee basis could, when combined, cross the line into the zone of viable cases. And even the threat of a class action might change the economics of a case when viewed from a settlement-focused perspective. If a plaintiff’s lawyer
approached a corporate defendant before trial with a hint that an individual’s complaint was really a test case for a class-action lawsuit down the line—a strong example of corporate wrongdoing even if the amount in question for the individual suit’s value was low—the defendant might settle the lawsuit in order to avoid the negative precedent and to stave off that eventual class action.\textsuperscript{81}

**Willie Ed Johnson Makes His Case**

A complex set of legal developments, then, paved Willie Ed Johnson’s path to the courthouse in 1993. Though Johnson did not have the financial resources to pay off his loans—much less hire an attorney—he knew that it was possible that a lawyer might be willing to take his case for a contingency fee. Jere Beasley, an experienced trial lawyer with a record of taking on big finance companies, evaluated Johnson’s case as a potential winner and accepted the chance to make his case at the Barbour County Circuit Court in Clayton.

Beasley had been raised in Barbour County, and he knew both the Barbour County Courthouse and the Circuit Judge well. Unlike Lanny Vines, Beasley had graduated from the prestigious University of Alabama School of Law. Yet Beasley still exhibited some classic characteristics of the outsider trial-lawyer, having twice escaped into legal practice. First, as the son of farmer-shopkeepers, law school offered an alternative to a life growing peanuts and cotton and running a grocery store.\textsuperscript{82} After a few years of practice in other

\textsuperscript{81} For more on class actions, see generally Coffee, *Entrepreneurial Litigation*.  
\textsuperscript{82} Note that Beasley is the boy from the anecdote that begins this chapter.
peoples’ firms, Beasley caught the “political bug” and left practice to serve as lieutenant governor for two four-year terms. But after a failed gubernatorial run in 1978, Beasley retreated back to legal practice only to find that he was not welcome at any of Alabama’s established firms. Beasley recalled sending out his resume with optimism only to receive not even “a single job offer.” So Beasley opened a solo practice in one half of a tiny duplex office building in Montgomery with the help of a single secretary and began to take a steady stream of plaintiffs’ cases.\(^83\)

Within a few years, Beasley began to regularly make national headlines for securing jaw-dropping jury verdicts. In 1991, he secured a $45-million jury verdict for five homeowners in a suit against Union Mortgage for fraudulent marketing of home-improvement loans secured by mortgages on the borrowers’ homes. Though reduced by the judge to $4.5 million, the *Wall Street Journal* reported that the original Union Mortgage jury verdict was “believed to be one of Alabama’s largest jury verdicts ever.”\(^84\) *Forbes* reported that fifty-one of Beasley’s cases between 1989 and 1993 had “resulted in jury verdicts or settlements of $1 million or more.” “By all accounts,” the *Forbes* article explained, “Beasley is a great advocate, simultaneously smart and folksy.” He was also “set to become one of the nation’s wealthier lawyers.”\(^85\) By the 1990s, the former


\(^{85}\) David Frum, “‘Send Them a Message,’” *Forbes*, December 6, 1993.
lieutenant governor was bringing dozens of lawsuits a year, many of which he filed in Barbour County, Montgomery County, or other counties across Alabama’s Black Belt.\textsuperscript{86} Thus, at the time Beasley accepted Willie Ed Johnson as a client, he had both developed a keen eye for lawsuits likely to be “winners” at trial and accumulated a sizable treasure chest from which to fund future contingency-fee suits. Each of the three economic-incentive-creating mechanisms described above—punitive damages, disclosures, and aggregation of claims—would play a role in the eventual shape of Johnson’s lawsuit.

First, Beasley perceived Johnson’s case as one likely to generate punitive damages and thus a worthy case to take on despite the relatively low amount in controversy under the contract. This perception shines through in the text of Johnson’s initial complaint, which articulated several fraud-related claims. Beasley had successfully argued for

\textsuperscript{86} See Gregory Jaynes, “Where the Torts Blossom,” \textit{Time}, March 20, 1995 (estimating that Beasley had filed 88 cases in Barbour County alone from 1993 to the time of publication).

punitive damages in other fraud-based suits brought by borrowers, including the *Union Mortgage* case. Fraud claims were particularly desirable because juries could award punitive damages *in addition to* compensatory damages (ranging from economic loss to pain and mental anguish) for these claims but not, for example, for basic breach-of-contract claims. Thus, Johnson’s complaint contained several requests in nearly each count for economic relief in “such amount as a jury may award for compensatory and punitive damages, plus costs.”

However, the precise nature of these claims for fraud evolved over the life of the lawsuit. A theory based on a lack of disclosures would have been attractive because a solid disclosure theory could improve Johnson’s chances of success, as modeled in figure 15. Thus, faulty disclosures formed the substance of Johnson’s fraud claims from the beginning, though Beasley experimented with a few different theories linking failure-to-disclose to fraud before settling on one such theory at trial. The initial complaint in May 1993 included claims that Mercury Finance and the car dealership had “fraudulently failed to disclose to [Johnson] that he was purchasing credit life and disability insurance” and had “fraudulently failed to disclose to [Johnson] that the [single-interest] insurance only covered if the car was repossessed.” However, these initial claims could wither without a strong evidentiary foundation. The assertion that the dealership had failed to disclose to Johnson that he was purchasing credit-life and disability insurance would have been extremely difficult to prove since, as shown in figure 9, the jury would have been able to

see where Johnson signed on a line marked “Signature of Customer Requesting Life and Disability Insurance” next to the premiums for each product on his contract. That’s not to say that Johnson truly understood what he was signing, but the presence of such clear language on the contract next to Johnson’s signature likely would have dissuaded a jury from returning a verdict for Johnson on this claim. And so, Beasley’s team continued to hone its theory to connect a claim for fraud (with its potential for generating punitive damages) with a claim for improper disclosures.88

Despite the emphasis from the beginning on a lack of disclosures in the credit contract, no version of Johnson’s complaint ever directly invoked remedies available under TILA or the Alabama Mini Code. The Mini-Code required a somewhat vague “full disclosure of finance charges, whether direct or indirect,” but generally deferred to TILA for the definition of those charges and for what remedies would be available for violation of the statute.89 TILA placed limits on a lender’s liability for improper disclosures at twice the “finance charge” up to a maximum of $1,000 per contract.90 In practice, this provision assured that borrowers could avoid the cost of improperly disclosed credit terms, but by statutory design they could not avoid paying the base price of the item being purchased on credit, whether it be a home, automobile, or television set. This limitation of remedies rendered these cases economically unviable under a contingent-fee arrangement if a plaintiff pursued the claim directly. On their own, the fees required to file the case at the

88 Complaint at 4–5, Johnson Case File (May 24, 1993).
89 Smith v. First Family Fin. Servs., 626 So.2d 1266, 1271 (Ala. 1993); Mini-Code § 5-19-1.
Barbour County Courthouse and serve process on the defendants totaled $196. If Johnson could only recover $1,000, then one fifth of his potential recovery would have already disappeared in court costs—all before paying a penny to his lawyers.  

A breakthrough came in mid-1993 when clever plaintiff’s attorneys in Alabama constructed a new way to exploit some of these statutory disclosure requirements while avoiding the liability limits imposed by TILA. This innovation would go on to totally transform the Johnson case. The critical legal opening emerged in Smith v. First Family Financial Services, a case brought by homeowners claiming undisclosed fees in a mortgage. Rather than tying claims directly to TILA, the plaintiff’s attorneys in First Family crafted their legal arguments around a claim of “fraudulent suppression,” a variety of a claim for fraud that requires proof that a defendant with a duty to disclose concealed or withheld a material fact. The First Family attorneys argued that since the Mini-Code required disclosure of all finance charges, a business firm that concealed or withheld a finance charge was liable for fraudulent suppression. The mortgage lender in First Family believed that accurate disclosure of the loan’s APR satisfied all statutory requirements, but the First Family plaintiffs argued that the “yield-spread premium” employed by the lenders increased the borrower’s cost of credit, and thus it too was a hidden “finance charge” that had to be disclosed. The yield-spread premium essentially represented a cut of the deal shared between the mortgage broker and the mortgage-finance company (as a kind of loan-origination fee), and the practice was widespread in the industry. The outcome of the case

91 Civil Fee Sheet for Willie Ed Johnson v. Mercury Finance Company of Alabama, et al. (Form C-8), Johnson Case File (n.d.).
left creditors across the country, “flattened by the notion that they could have met all the disclosure requirements heretofore known to exist in the Mini-Code and TILA, yet be liable for fraudulent suppression.” Trial lawyers had previously attempted to use other theories to connect consumer credit to fraud claims, but earlier cases failed to satisfy the requirement that the lender not only failed in its disclosures but that there was a corresponding duty compelling such disclosure. First Family’s legal reasoning became the “linchpin in subsequent lawsuits” by porting a broad and nebulous duty to disclose from the Mini-Code into a fraudulent suppression claim, thus “provid[ing] instant access to a fraud theory, but by way of a failure to disclose under the Mini-Code.” When the Alabama Supreme Court valorized the plaintiff’s analysis in July 1993, a flood of new lawsuits quoting the First Family opinion and its new legal theory flooded Alabama courts.

Six months into the case, Beasley amended Johnson’s claims to take advantage of the new legal precedent that First Family offered. Under what would become the dispositive issue in the proceeding, Beasley argued that the $1,000 “discount” that Mercury Finance assessed when it purchased Johnson’s loan from the car dealer was a hidden finance charge, just like the yield-spread premium determined to be a hidden finance charge in First Family. Under this theory, Johnson could make a fraudulent-suppression claim against the finance company for failure to make the disclosures and thereby port in the Mini-Code’s disclosure requirement into a fraud suit. Beasley filed this amended complaint with its new theory of liability in November 1993.93

93 Plaintiff’s Second Amendment to Complaint, Johnson Case File (November 18, 1993).
As Mercury Finance’s counsel pointed out, “[p]urchasing an installment contract at a discount is perfectly legal and is a common, widespread practice.” The finance company argued that the court should view its purchase of the Johnson car loan in exactly these terms. As shown in the first row of figure 17, Mercury Finance argued that two separate financial transactions had occurred—one between the dealership and Johnson, and a second between the dealership and Mercury Finance. Mercury Finance’s legal relationship with Johnson began after the sale of the car, and Mercury Finance had “no duty to disclose the amount of the discount at which it purchased the plaintiff’s note to Cars Are Us.” The discount was solely material to the transaction between it and the dealership, not the dealership and Johnson, just as a merchant is not compelled to share the wholesale price of its goods with its customers. Thus, it should not have mattered “whether [Mercury Finance] used the amount as a reserve, spent it, or buried it in the ground in a pickle jar.”

Besides, Mercury Finance argued, without the discount, subprime lending made little financial sense. As Patsy Hines, Mercury Finance’s branch manager in Dothan, Alabama, explained:

We are a secondary lender. We already know that people have credit problems. Our risk factor is much higher than I’m sure Ford Motor Credit and a bank. [At Ford,] all of these people go in with a very good credit file. They’re pretty sure there there’s not going to be a loss. [But] we’re pretty sure there may be a loss. Not one hundred percent of the time because we operate on the assumption that most people pay for their car. And they do.95

Still, out of a portfolio of several hundred accounts, the Alabama branch offices of Mercury Finance repossessed five or six cars each month. The discount or reserve served as a cushion against financial loss for Mercury Finance and allowed the company to serve its

95 Hines Dep. 81.
core clientele: low-ranking military personnel and poorer consumers who the traditional lending establishment tended to shun.96

The problem in Mercury Finance’s argument lay in the way that modern technologies like fax machines and computer processors had decreased the distance between the original lender (the car dealership) and the purchaser of the loan (Mercury Finance) until this distance appeared virtually nonexistent. As Johnson sat in the loan office at the auto dealer, the auto-finance transaction certainly would have appeared to have been between himself and Car Are Us. Yet Mercury Finance’s agents had already become involved in the transaction long before Johnson signed the contract. As we have seen, before drawing up Johnson’s loan agreement, the dealer sent a “buyer’s order” by fax with information on the car and the price, and Mercury Finance representatives compared the price to a national wholesale blue book to determine whether to make the deal. The Mercury Finance agent also checked the borrower’s credit report from credit agencies and confirmed his or her employment. Only then did the Mercury Finance agent call the dealer back and discuss how they wanted “the deal put together,” including the contract’s credit terms and the discount that Mercury Finance would require to take on the loan. Mercury Finance’s agents “filled out all of the loan papers and furnished them” to the dealers for final signatures. All of these steps, Beasley argued, meant that the assignment of the loan to Mercury Finance did not represent an arms-length deal. Instead, as modeled in the

second row of figure 17, Beasley argued that, though “[t]he loan papers are designed to look like there was an assignment of a loan from Cars Are Us to Mercury Finance,” in reality “this was a direct loan from Mercury Finance to Mr. Johnson.” Mercury Finance insisted that dealers were never permitted to “raise a bottom line figure to cover the discount” and that the discount came conceptually only from the dealer’s profit, not as a finance charge to the customer. “On the contrary,” Mercury Finance’s lawyers explained, “all of the information provided to Mercury Alabama, including two contracts signed by Johnson, demonstrated that the cash price of the automobile was $4,500, and that Johnson was not charged the discount on top of the cash price of the automobile.” But Beasley argued that this proposition was absurd—of course the dealership would raise the price in anticipation of the finance company’s discount and then charge this amount to the borrower, rather than subtracting it from the dealer’s proceeds. Using the favorable Alabama Supreme Court precedent from First Family, Beasley dug in on this theory as a way to turn the finance company’s $1,000 discount on the purchase of the loan into a hidden finance charge, which in turn would allow him to craft a disclosure-based claim as a claim for fraud against Johnson.97

Finally, though Beasley did not technically structure Johnson’s case as a class-action lawsuit, the attorney conducted it under a shadow or threat of group litigation and thus invoked some of the same mechanisms that made the class action so powerful. From Johnson’s first complaint, Beasley set out to show that Mercury Finance had engaged in “a

97 Hines Dep. 43–55, 66; JNOV Memo. at 21, Johnson Case File (January 5, 1995); Brief in Opposition to Defendant Mercury Finance’s Motion for Summary Judgment at 3, Johnson Case File (July 25, 1994).
pattern or practice of fraud or other intentional wrongful conduct” for which he sought punitive damages. To this end, Beasley portrayed Mercury Finance as a ravenous predator in the marketplace. The “discount” system ratcheted up car prices for unsuspecting buyers and served secretly to increase the cost of credit above even the disclosed 26% APR (or more) on the loans. And Mercury Finance’s Operating Procedure reinforced this view. The finance company directed that “automobile customers . . . be solicited for loans at every opportunity”; even vulnerable borrowers were not spared from solicitation. As the Operating Procedure explained, “A customer who calls to request an extension may be experiencing money problems and might be able to use a loan.” Beasley sought to show that once Mercury Finance had captured borrowers, the goal was to keep them forever in debt. As the Operating Procedure explained, “Special emphasis should be placed on soliciting auto customers in the latter stages of their contracts. We have earned all or most of our income on these accounts and it benefits the Company to rewrite the balance on a loan contract.” Policies such as these allowed a company based in Illinois to prey on Alabama consumers, Beasley contended. The outsider company entered Alabama to suck Alabamians dry and “left Johnson to bleed on the streets” with little thought other than a ruthless drive for profit. Even without the full formal trappings of a class-action suit, Beasley’s strategy highlighted Mercury Finance’s actions—and potential liabilities—in the aggregate.

98 Complaint at 3, Johnson Case File (May 24, 1993).
Beasley also assembled multiple witnesses to reiterate the theme that Johnson’s case was not a one-off occurrence. At trial, he called “Felicia Grubbs, Lois Hill, Joanne Banks and Willie Blackman to testify as pattern and practice witnesses,” each of whom testified that they had purchased cars from local dealerships through Mercury Finance loans and that they believed the cash price the dealers initially had quoted did not match higher prices later recorded in their installment contracts. The true roster of potential witnesses went even deeper; finance documents of several other unhappy Mercury Finance customers appeared alongside notations for Grubbs, Hill, Banks, and Blackman on Johnson’s exhibit list, and Beasley later recalled that he represented several—even dozens of—additional Mercury Finance customers waiting in the wings for the opportunity to sue. The testimony of each witness put Mercury Finance on notice of the potential for a follow-up lawsuit on the same grounds as Johnson’s complaint, thus raising the stakes on the Johnson case because the outcome of his case would likely predict the outcome of the future lawsuits over the horizon. By arguing that Mercury Finance not only victimized Johnson individually but also engaged in regular practices and procedures tainted with deception and fraud, Beasley could use the possibility for future lawsuits against Mercury Finance or even of a formal class action down the line to increase his client’s bargaining power.

100 Motion of Defendant Mercury Finance Company of Alabama for Judgment Notwithstanding the Verdict, or in the Alternative a New Trial [hereinafter “JNOV Mtn.”] at 22, Johnson Case File (September 1, 1994); JNOV Memo. at 35–36, Johnson Case File (January 5, 1995); Plaintiff’s Exhibit List at 7–8, Johnson Case File (July 22, 1994); Interview with Jere Beasley, Beasley Allen Law Firm, Montgomery, Alabama, February 21, 2017.
Most notably, however, describing Mercury Finance’s actions in the aggregate allowed Beasley to dramatically expand the financial damages claimed in an individual suit and harness the incentives created by the class-action mechanism modeled in figure 16 through a single trial. The trial lasted only a single day. But in that one day—and over Mercury Finance’s loud protest that the strategy was “grossly improper”—Beasley “developed a $1.5 billion figure” as an estimate of how much Mercury Finance Alabama and all of its sister companies might have collected over a ten-year period across the United States, presumably reached by multiplying $1,000 (the discount in Johnson’s case) by an estimated number of executed contracts (1.5 million). This strategy also emphasized to the jury that Mercury Finance was an out-of-state corporation with a national reach—an outsider company that came to Alabama seeking profits. Though Johnson was the sole plaintiff in the case, Beasley argued that “what the case [was] really about” was about practices in “50 states.” He continued:

We’re talking about damages to stop a practice, you know. . . . If I’m making $1,500,000,000.00 over a period of time and I’m going to make more in the future, I expect ten million will probably [be] just sort of a pat on the hand. I don’t know. I’m not going to suggest ten million because I’m going to suggest more.

This $1.5 billion figure became “the centerpiece of [Beasley’s] closing argument.” Beasley asked the jurors to “pick a figure anywhere from a dollar to $1,500,000,000.00 . . . to punish this company for doing folks like they’ve done.” The choice was the jury’s alone, but, Beasley submitted, “I’m going to suggest that you return a verdict for a hundred
However, this would not have been the first time that Beasley would have proposed a multi-million dollar award. As Beasley explained in a 1991 article he authored on “jury conditioning”:

> It is extremely difficult for a juror to vote for a multi-million dollar verdict in a case, regardless of the merits of the case, . . . if he or she has not been totally convinced that the Plaintiff is entitled to a verdict that will amount to more money than the juror has ever seen or will ever see over a lifetime. The juror must also believe that doing so is the right thing to do. I am totally convinced that jurors must be conditioned to think in terms of returning large money awards long before a case gets to the closing argument stage.

In the end, Beasley’s strategy was successful. He did not get the “hundred million” that he had requested in his closing argument, but Beasley must have persuaded the jury that a large award was necessary, as the jury met him more than halfway towards his suggested figure. Fifteen months after Johnson first filed his complaint in the Barbour County Courthouse, the jury returned a verdict for $90,000 in compensatory damages—to directly compensate Johnson for his money, time, and mental anguish—and another $50,000,000 in punitive damages solely to punish the firm and to make the verdict sting (see figure 18). These punitive damages served as a symbol of the jury’s intense scorn for what its members perceived to have been shameful and socially harmful practices.

Mercury Finance maintained until the very end that everything about Johnson’s transaction scrupulously followed the letter of the law, and the company accused the Barbour County jury of having “basically rewr[itten] the law in reaching its decision.” But the jury’s


judgment, not the company’s, was what mattered that day. “Beasley told the jury it was
time to send a message,” reported *Time* magazine, and the jury obliged, using the language
of punitive damages.¹⁰³

![Jury Verdict Form Finding for Willie Ed Johnson in August 1994](image)

Figure 18: Jury Verdict Form Finding for Willie Ed Johnson in August 1994¹⁰⁴


Though the jury awarded over $50 million, Mercury Finance did not actually pay that sum. The judge found $50 million “excessive” in light of “the evidence of financial condition introduced by the parties,” including “the financial position of the Defendant and the impact of the verdict upon this Defendant.” The judge also would have been aware of a then-recent U.S. Supreme Court case striking down punitive damages in an Oregon case because lack of judicial review of those damages violated the defendant’s constitutional rights. In addition, the judge may have simply sought to prevent the case from taking the record for the largest punitive damage award in Alabama history. The Barbour County judge thus ordered a new trial unless the parties accepted reduction of the punitive damages to $2 million from $50 million. A few days after the judge’s order, Johnson and Mercury Finance settled for a reported $1.5 million. As George L. Priest, a Yale law professor and tort-law expert, commented at the time, “It used to be that a million-dollar verdict distinguished a plaintiff’s lawyer,” but “[n]ow in Alabama that’s considered a defense victory.”

Mercury Finance survived the Alabama trial, but the company experienced more devastating legal troubles in the years following the Johnson case. The enterprise had remained a Wall Street darling even after the 1994 Johnson verdict, with Mercury Finance’s CEO John Brincat bragging that his firm’s’ management controls were so solid

106 Order, Johnson Case File (January 27, 1995) (granting motion for remittitur); Joint Notice of Settlement and Motion to Vacate Verdict and Judgment and Dismiss Case, Johnson Case File (February 1, 1995); Max Boot, “In the Land of Lawsuits,” Wall Street Journal, October 30, 1996.

However, another source reported that the settlement was less than $1 million. Gregory Jaynes, “Where the Torts Blossom,” Time, March 20, 1995.
“that he could not buy pencils without two other employees signing a voucher.” But in 1997 a “fictitious accounting” scandal at Mercury Finance revealed the company had been cooking its books since 1993 to inflate profits, and Mercury Finance faced a resulting “meltdown of its stock, sudden resignation of Brincat, and convergence of agents from the Federal Bureau of Investigation.” Financial analysts expressed utter shock at Mercury Finance’s implosion, but Jimmy Fryer, the high-school math teacher who had served as jury foreperson in the Johnson case (see figure 18), did not. “Investors shouldn’t be surprised at shabby practices in Mercury’s business,” Fryer told a journalist. “Some people and businesses in this society prey on people who are less fortunate. That’s what happened with Mercury.” Brincat received a “tough sentence” for his crimes of ten years in federal prison. At sentencing, the federal judge in northern Illinois echoed the same refrain that had rung through the Barbour County Courthouse in Alabama just a few years before: “A message has been sent to corporate America.”

Conclusion

Though most of the 40,000 or so civil cases filed in Alabama each year would not proceed to trial—much less result in a million-dollar verdict—Johnson’s lawsuit represented an example of a growing number of punitive damages cases that emerged during a brief but notable period that would serve as a kind of heyday for punitive damage

awards in Alabama. This peak punitive-damages period lasted from roughly 1993 to 1996 and was bookended by the Alabama Supreme Court’s 1993 decision in *Henderson v. Alabama Power Co.*, which invalidated the 1987 tort-reform law’s cap on punitive damages, and the U.S. Supreme Court’s 1996 rejection of an Alabama punitive-damage award in *BMW v. Gore* as unconstitutional.108

No official tally of the amount of punitive damages awarded over this period exists because trial-level verdicts were not published in legal reporters, and the state had no official recordkeeping of punitive damage awards. Still, a survey of the cases discussing punitive damages that were appealed to the Alabama Supreme Court over this period suggests patterns evocative of Johnson’s case. The cases that reached the Alabama Supreme Court generally involved some variety of fraud, almost always in a consumer sales context. Defendants in these cases tended to be out-of-state corporations, especially insurance companies. Relatedly, these out-of-state corporations often faced off against humble plaintiffs—whether an elderly woman in *Life Insurance of Georgia v. Johnson*, a widow in *Union Security Life Insurance Co. v. Crocker*, or African-American small business owners in *Sperau v. Ford Motor Co.* Though often reduced by either the trial judge or on appeal (or both), the initial jury awards of punitive damages generally totaled a million dollars or more. Johnson’s suit against Mercury Finance fits well amidst this


After *Gore*, punitive damages continued to be awarded, but the Alabama Supreme Court affirmed them less frequently; one commentator noted that only two of the ten cases following *Gore* in which the court reviewed punitive damages was affirmed. E. Burton Spence, “Punitive Damages in Alabama after *BMW v. Gore*: Are Outcomes Any More Predictable?” *Alabama Lawyer* 59, no. 6 (1998): 314–16. For more on the *Gore* decision, see later chapters.
group of lawsuits, as it too involved fraud, a suit brought by a sympathetic plaintiff against an out-of-state company, and a multi-million dollar punitive-damage award.\textsuperscript{109}

In the end, Mercury Finance fell under the weight of its other illegal actions, but other subprime lenders would step up to provide high-cost, high-risk loans to the same population of consumers with poor credit. These lenders learned lessons from each new lawsuit and adapted to close each path to litigation as it opened. In this way, little had changed in the pattern of give-and-take in consumer lending innovation and regulation since the early twentieth century.\textsuperscript{110} In Alabama, the cycle of amending the Mini-Code “to


Cases that do not neatly fit the pattern described above include wrongful death cases, for which only punitive damages are available, employment cases, and assorted other cases. See, e.g., Sears, Roebuck & Co. v. Harris, 630 So.2d 1018 (Ala. 1993) (reviewing $2.5 million punitive-damage award for wrongful death caused by water heater); Gold Kist, Inc. v. Griffin, 657 So.2d 826 (Ala. 1994) (reviewing $40,000 punitive-damage award in denial of worker’s compensation case); Lozier Corp. v. Gray, 624 So.2d 1034 (Ala. 1993) (reviewing $100,000 punitive-damage award in denial of worker’s compensation case); Big B, Inc. v. Cottingham, 634 So.2d 999 (Ala. 1993) (reviewing $1 million punitive-damage award in false imprisonment case); Lemond Constr. Co. v. Wheeler, 669 So.2d 855 (Ala. 1995) (reviewing $3.5 million punitive damages in wrongful death case); Affiliated FM Ins. Co. v. Stephens Enterpr., 641 So.2d 780 (Ala. 1994) (reviewing $250,000 punitive damage award for bad faith of mortgagor); Ex parte Weyerhaeuser Co., 702 So.2d 1227 (Ala. 1996) (reviewing $10,000 punitive-damage award in logging damage case); Heil Co. v. Crowley, 659 So.2d 105 (Ala. 1995) (reviewing $500,000 punitive-damage award in employment case); Campbell v. Williams, 638 So.2d 804 (Ala. 1994) (reviewing $4 million punitive-damage award in wrongful death medical malpractice suit); Smith v. Schulte, 671 So.2d 1334 (Ala. 1995) (reviewing $4.5 million punitive-damage award in wrongful death medical malpractice suit);

\textsuperscript{110}See Fleming, City of Debtors.
fix last year’s lawsuits” continued with a 1994 amendment to the Mini-Code that declared there was “no obligation or duty to disclose any agreement to assign or otherwise transfer a consumer credit transaction contract at a discount,” effectively closing any future suits following the reasoning in *Johnson.* But when a legal “loophole” such as the one in *Johnson* closes almost as soon as it is opened, does this represent a legal system running smoothly or a legal system in crisis? Are gap-filling developments in the law in response to litigation socially beneficial or a drain on community resources? This pattern repeated over and over again in Alabama through the 1980s and 1990s: lawyers jabbed, business parried, and the law changed. But was justice achieved?

A theme of tragedy runs through Johnson’s tale. In hindsight, his story plays out like a car accident in slow motion. But for the unpaid speeding ticket, there would have been no license suspension; without the license suspension, Johnson would not have lost his insurance; if he had insurance at the time the car was stolen and burned, perhaps he could have covered the repairs without adding to his mountain of debt. To many, Willie Ed Johnson would have been an extremely sympathetic plaintiff. He was a young man who fell victim to truly terrible luck and had his financial life ruined by a high-rate loan and a series of unfortunate events. Mercury Finance came off to most observers as far less sympathetic, especially after the fraudulent accounting at the home office came to light. But the lender had attempted to navigate every known legal requirement in the provision of its loans, and yet still ended up facing a stiff financial penalty. Mercury Finance had no

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control over whether Johnson paid the speeding ticket and lost his license nor over whether
Johnson lent the car to criminals fleeing the law. Was Mercury Finance punished simply
because it was the firm in closest proximity to absorb Johnson’s loss when tragedy struck?
Did Mercury Finance proximately cause Johnson’s misery, or was it the most convenient
villain? And even if Mercury Finance wronged its customers, why did Willie Ed Johnson
deserve to collect the windfall?

The 1994 amendment to the Mini-Code, if relevant at all, reaffirmed the legitimacy
of the practice of sellers assigning loans at a discount to finance companies—the precise
practice for which the jury sought to punish Mercury Finance to the tune of $50 million.
The disconnect between the jury’s scorn for and lawmakers’ approval of the same business
practice highlights the difficulty in reconciling the general and the specific in the law. A
legislature is tasked with writing all-purpose laws to guide conduct broadly, but juries are
asked to decide the merits in particular cases. Particularly in the ethically fraught area of
consumer lending, a business practice deemed fair in the abstract and perhaps even
essential to the functioning of the system overall can fall short of a community standard of
justice when applied to an individual’s case. Cases like Johnson’s highlight the differing
roles of legislative and judicial branches—the first focused on majoritarian community
needs, the other on individualized adjudication of cases or controversies.

Even if one accepts that the jury got Johnson right—that the finance company was
the predator and Johnson the victim—additional questions emerge. Some of the most
shocking and troublesome aspects of Johnson’s transaction with Mercury Finance—the
high cost of credit in relation to the mediocre product Johnson received and the aggressive
practices Mercury Finance promoted to push borrowers into never-ending cycles of debt—remained perfectly legal. In cases such as these, should one blame Mercury Finance for failing to conform the unwritten mores of fairness or the state for failing to codify those norms? The disclosure regime created by TILA and the Alabama Mini-Code created a system of punishment-by-proxy in which failure to meet disclosure standards stood in for failure to operate fairly in the marketplace. This system regulated commercial conduct through a veil of legal fiction; even if one agrees that Johnson’s contract terms were outrageous, it is hardly obvious that any package of disclosures, however extensive, would have changed his decision to buy the same car from the same lot for the same price on that November day in 1991. How comfortable should society be with a system that reaches a normatively proper outcome—relief for a struggling young man saddled with debt—through disclosure-based legal reasoning that we know to be at some level disingenuous? Are legal fictions compatible with or contrary to essential fairness? The constant tension between fidelity to process and fairness of outcome haunts the system of justice, in America as in Alabama.

And finally, to return to a question implicitly animating the entire discussion of this case: between the lender and the lawyer, who is the villain and who is the hero of this tale? Putting aside for a moment later revelations of Mercury Finance’s fraudulent accounting practices, this subprime lender did increase access to credit in places and to people unreachable by traditional lenders. In 1991, no other secondary lenders like Mercury Finance operated in the southeastern corner of Alabama. Without Mercury Finance bringing its business model to the state, Johnson’s only option would have been to apply
for credit directly from the dealership under a “buy here, pay here” arrangement. Yet with his credit history, there is no reason to believe either that he would have been able to purchase the car at all, much less purchase it on more favorable credit terms.\textsuperscript{112} Mercury Finance served as an agent for expanded access to the marketplace, and Johnson benefited, at least initially, from the increased access that Mercury Finance provided. However, Mercury Finance certainly viewed Johnson as a profit-stream and not a person; the company strived to extract the maximum amount of money from Johnson’s pocket within the bounds of what the law would condone and Johnson would pay.

Johnson’s lawyer responded to not-altogether-dissimilar market incentives. The law practice of trial lawyers like Beasley filled a gap left by a lack of government intervention into or oversight of consumer lending. Alabama law declined to limit rates lenders could charge for loans like Johnson’s, but, at some unwritten upper limit, the public—and therefore juries—found high-rate lending practices unjust and thus demonstrated a willingness to punish lenders, perhaps sometimes regardless of a practice’s conformity to legal requirements.\textsuperscript{113} Through use of contingency-fee arrangements, trial lawyers like Beasley opened access to the courts to people who could not afford up-front legal fees but who still wished to test a jury’s approbation of a contract or business practice. Trial lawyers emphasized their role as private servants acting in the public interest, but they also made their fortunes by finding innovative new ways to make “corporate America bleed[] for the public good” and recovering a third or more of the money a jury awarded to

\textsuperscript{112} Hines Dep. 40–41.
plaintiffs through contingency fees. Were these riches a just reward for hard work, risk-taking, creativity, and a little luck; or a profit-seeking blight that stole from the pockets of the wronged plaintiffs that lawyers purported to serve, as well as future consumers who would pay higher prices or have less access to credit? The contingency-fee system certainly increased access to the courts for some, but it also incentivized a search for maximum profitability, not maximum social benefit.

In the immediate aftermath of cases like Willie Johnson’s, social commentators across the political spectrum found villainy on both sides of this legal divide. In comparison to the simpler narrative of the man who swindled a naïve, teenaged Jere Beasley out of the cost of groceries at his family store, the cases that structured the tort revolution sweeping Alabama in the 1980s and 1990s presented much greater analytical and ethical complexities. The stakes, too, were much higher. As cases like Johnson began to accumulate, they formed an increasingly massive sedimentary formation atop a foundation of anxieties among corporate executives. Leaders of the Alabama business community, joined by many national observers, concluded that both the “frequency and magnitude” of punitive-damage awards—and the Alabama Supreme Court’s willingness to affirm those awards on appeal—had increased over this period. Professor George Priest stated that Alabama’s punitive-damages problem had grown to “epidemic proportions.”

Alabama Supreme Court Justice Gorman Houston, a conservative Democratic member of the court, similarly complained that punitive damages in Alabama had gotten “out of hand,”

particularly since the amount awarded could vary wildly even among factually similar cases. Businesses interpreted the litigation boom as an existential threat to their profitability and even survival. This fear overcame barriers of collective action and even inter-industry rivalry. A coalition of businesspeople, defense lawyers, doctors, and politicians found common ground in policies designed to quash Alabama’s rising litigation tide. As will be explored in the chapters that follow, the legal pendulum that had swung so decisively in favor of trial lawyers reached a crest in the mid-1990s and began a swift retreat. The outcome of the battles ahead would rewrite not only the rules of the legal system, but of the political system as well.115

Chapter 4: Turning the Tide

One hot, summer day in 1986, a woman walked onto the lot of a car dealership in Montgomery, Alabama, to purchase a car. She selected a red Isuzu Trooper. The “sticker” price was displayed on the vehicle, but when the salesperson drew up the contract, the actual cost was higher than she expected. Additional fees, including a charge described as “AMV,” brought up the price. The buyer asked the seller about the “AMV” charges, and according to the buyer, the seller described it as “a fee similar to taxes, tag, and title.” However, the seller recalled saying simply that the acronym stood for “adjusted market value.” After further negotiations, the buyer and seller settled on a final contract price, which included a variety of fees (including the AMV), and the buyer signed the contract. The buyer later discovered that AMV denoted “additional dealer profit or markup,” and she asserted that if she had known “what the AMV was, she would not have paid it.” The purchaser further assumed that the total for the car included an extended warranty, but the written contract indicated no such warranty. The buyer felt misled by the seller’s statements, but the seller argued that the buyer signed a contract with all terms precisely laid out. Should the purchaser be held to the terms of the contract as written? Or was this an instance of fraud?\(^1\)

Indignant about this perceived injustice, the purchaser took the car dealer to court. This little case, relatively insignificant in its facts, would cast a long shadow on the way

firms conducted business in the state of Alabama. The controversy went all the way to the Alabama Supreme Court in the spring of 1989, and the contours of the ideological disagreements among the court’s justices reflected much deeper, older debates about the role of the law as an intermediary between businesses and society in the consumer marketplace. To what extent should the written terms of a contract be enforceable if a buyer later brings his or her contemporaneous understanding of the contract terms into doubt? Should the same contract rules that applied in the horse-and-buggy world of the nineteenth century—namely that the law deems one who signs a contract to have read, comprehended, and consented to each term—still apply in a more technologically sophisticated era? How much savviness should consumers be expected to exhibit in the marketplace? How much should a business explain? And if courts did place weight on oral statements made at the time of a sale, how could either side prove what was said? Who should ultimately exhibit more caution in the marketplace, the buyer or the seller—in other words, was the most sensible standard caveat emptor (buyer beware), or caveat venditor (seller beware)?

2 See Mark P. Gergen, “Negligent Misrepresentation as Contract,” California Law Review 101, no. 4 (2013): 966–1011 (describing the long history of legal questions surrounding misrepresentation in contracts and the different legal doctrines used to adjudicate these claims); Arthur L. Corbin, “The Parol Evidence Rule,” Yale Law Journal 53, no. 4 (1944): 603–06, 609–18 (describing the parol evidence rule and the Statute of Frauds and describing some of the mechanics of how the rules work to privilege paper-and-ink contractual terms over oral representations or understandings); Debra Pogrund Stark and Jessica M. Choplin, “A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities,” NYU Journal of Law & Business 5, no. 2 (2009): 617–28 (describing the enforcement of “no reliance” and “exculpation” clauses in contracts despite the widespread knowledge that consumers in fact rely on salespeople’s statement and do not or cannot understand the terms of contracts into which they enter); Balleisen, Fraud (analyzing in depth the longstanding contestation over the doctrines of caveat emptor and caveat venditor in the American marketplace).
This problem was not new in the 1980s, nor was this debate unique to Alabama. In fact, the reality that individuals did not or could not read and understand contract terms had been discussed by courts for at least a hundred years, and a rich legal scholarship already described the implications of caveat-emptor and caveat-venditor legal regimes on economic efficiency in the marketplace as well as on social justice. In most other parts of the country, consumer-protection initiatives had already peaked in the late-1960s and early-1970s and consumerism in some places had begun to retreat by 1980. In contrast, in Alabama, as noted in previous chapters, an ethos of consumerism developed later in the 1980s.3

When consumer-protection did come to Alabama, its arrival was sudden. In the early 1980s, Alabama gained both a consumer-protection statute (being the last state in the nation to do so) and a consumer-protection agency. But as noted in preceding chapters, fraud-fighting success in these areas was limited and uneven. Then, in just a few years spanning the late 1980s and the early 1990s, the Alabama Supreme Court altered two sets of laws related to consumer fraud. First, the court changed the standard for evaluating

misrepresentation or fraud in contracts. Second, the court dismantled the tort-reform package that the state legislature had passed in 1987, which affected how and how much a jury could award plaintiffs in damages. As compared to the creation of a consumer-protection agency or to the creation of Alabama’s first consumer-protection law, these judicial changes to Alabama law were far less visible to consumers but would have a far greater impact on the legal underpinnings of the marketplace in Alabama.

This chapter traces these processes of legal transformation through the state’s highest court, then shows how these changes spurred a countermovement to reverse these legal developments through a political alliance between the state’s business lobby and the then-weak Alabama Republican Party. This countermovement took the form of a massive campaign to change the composition of justices on the Alabama Supreme Court. In the process, the business lobby won a second chance at tort reform, and the Republican Party gained the upper hand in state politics. But in the long term, this movement to achieve tort reform would remake the state’s laws and its courts, with profound long-term impacts on the balance of power among businesses, the state, and society.

**1989: Shifting Ground**

For 140 years, Alabama law had required a person claiming fraud to show not only that he or she relied on the misstatements of the alleged fraudster, but also that his or her

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4 This chapter uses the term “business lobby” as a shorthand for a constellation of loosely affiliated business-interest groups and their political-action committees. The primary actor was the Business Council of Alabama (the “BCA”), the development of which is described in a previous chapter. However, the “business lobby” in this context also includes industry groups such as the Alabama Retailers Association, and groups with interests overlapping “business interests” during this time even though the organizations themselves were not purpose-built for business advocacy per se, such as the Alabama Farmers’ Federation (“ALFA”).
reliance on those statements was “reasonable under the circumstances.” In practice, this meant that consumers were presumed to have read and understood the terms of the contracts that bound them. The purpose of this rule was to deter fraud while still discouraging “negligence and inattention” and requiring people in the marketplace to “exercise some measure of precaution to safeguard their interests.” Alabama’s Chief Justice Sonny Hornsby thought this standard created too high a bar, and the case described above, involving the dissatisfied purchaser of the Isuzu Trooper, kickstarted a radical shift in the law of the state. The idea that consumers and businesses had equal bargaining power in transactions was a farce when contract terms had become hopelessly complex—at times completely illegible—for even a sophisticated consumer. In a special concurrence in that case, the Chief Justice asked:

If “no rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool,” and if the “design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and security enable them to protect themselves,” then why does the law not permit the punishment of intentionally fraudulent scoundrels in every case and encourage the flight of their kind from the State?

Through his choice of quotations, Hornsby invoked two cases from the 1880s as examples of the ongoing, century-long debates on how the law should balance information asymmetries between contracting parties and address the vastly different levels of

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5 Bedwell Lumber v. T & T Corp., 386 So.2d 413, 415 (Ala. 1980).
7 Id.
8 So. States Ford, 541 So.2d at 1088 (Hornsby, C.J. special conc.) (quoting Chamberlin v. Fuller, 59 Vt. 247, 256 (1887) and Ingalls v. Miller, 121 Ind. 188, 191 (1889); internal citations omitted); Jeremy N. Trousdale, “Reasonable or Justifiable Reliance: Who Can We Believe?” note, American Journal of Trial Advocacy 21 (1997): 387.
comprehension and sophistication with which parties approach a contract.\textsuperscript{9} Should the law punish those who believe what they are told, or are laws “made to protect the trusting, as well as the suspicious” from deception?\textsuperscript{10}

In place of the existing rules, the Chief Justice proposed a new rule based on “justifiable reliance” (instead of “reasonable reliance”), which he described as using “subjective standards by asking whether the reliance was \textit{justifiable}, not according to objective standards measuring the \textit{reasonableness} of the plaintiff’s reliance.”\textsuperscript{11} Under this standard, businesses and their agents would be held scrupulously to the requirement to tell the truth to their customers, and contrary terms in a signed contract would serve as no sure defense if a jury believed that false statements had been made. The Chief Justice proposed that under this rule success on a fraud claim would be denied only where the representations made were such that “any normal person would recognize [them] at once as preposterous or . . . so patently and obviously false that [the defrauded person] must have closed his eyes to avoid the discovery of the truth.”\textsuperscript{12} This reasoning had both rational and emotional appeal, especially in Alabama where pockets of low literacy rendered residents more vulnerable to deception or where poverty and unemployment compounded the negative impact of even low-level fraudulent schemes.\textsuperscript{13} But Justice Houston disagreed. He argued

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\begin{itemize}
  \item \textsuperscript{9} Chamberlin v. Fuller, 59 Vt. 247, 256 (1887) (“no rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool”); Ingalls v. Miller, 121 Ind. 188, 191 (1889) (“design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and security enable them to protect themselves”).
  \item \textsuperscript{10} FTC v. Standard Education Society, 302 U.S. 112, 116 (1937).
  \item \textsuperscript{11} \textit{So. States Ford}, 541 So.2d at 1091.
  \item \textsuperscript{12} \textit{Id.} at 1090.
  \item \textsuperscript{13} In 1980, only about half of adults over age 18 in Alabama had achieved a high-school diploma, as compared to two-thirds of America’s overall. In 1985, the state’s unemployment rate was 8.9% (compared to a national rate of 7.2%). Alabama ranked 47th and 45th in levels of per capita income in 1980 and 1985 respectively. And in 1986,
for a more conservative course and saw “no compelling reason” to change the rule, especially since a change would only “encourage ostrichism in a free, democratic, upwardly mobile society.”¹⁴ “Should the policy of the courts not be to continue to discourage misrepresentation and deceit and to continue to discourage negligence and inattention to one’s own interest?” he asked.¹⁵

Four months after Hornsby laid out his thinking in his concurrence, the Alabama Supreme Court abruptly adopted this rule for justifiable reliance as the law of the state.¹⁶ This shifted Alabama’s fraud law virtually overnight from one based on the “objective” reasonableness of the allegedly defrauded person to one based on a subjective assessment of whether that person’s actions were “justified.” Alabama was not alone in making this change; by the 1990s a majority of states used some form of a “justifiable reliance” standard, largely based on a recognition that even sophisticated parties—lawyers and judges among them—struggled to read and understand contracts, and even if they did,

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¹⁴ So. States Ford, 541 So.2d at 1093 (Houston, J., writing specially to address Chief Justice Hornsby’s special conc.).
¹⁵ Id. (emphasis added).
¹⁶ This case involved a dispute between two businesses—not exactly the unsophisticated parties that had become the focus of the debate around reliance standards and that generally justified the creation of a looser standard for reliance.

In this case, an insurance salesperson told an oil-field operations company that it could offer the same coverage as the company’s existing insurer, and the company transferred their insurance to the new insurer. When the company made a claim after a lightning fire destroyed oil-field equipment, the company discovered that the new policy lacked a co-insurance clause found in the old policy, which meant only 30% of the damage was covered. The insurer had sent a letter a year before the fire, alerting the company to a related provision in the contract and asking the company to confirm the value of their equipment. The insurance company argued that this should have also alerted the company that they would not have full coverage in the event of a scenario like the lightning fire, but the company representative “claim[ed] that he did not understand the meaning of the letter, and that, therefore, he did not follow up on [the insurance agent’s] suggestion in the letter.” Thus, the case proceeded to trial for the jury to determine whether the company had relied on a misrepresentation of coverage the policy. Hickox v. Stover, 551 So.2d 259, 260–62 (Ala. 1989).
ordinary consumer contracts were offered on a take-it-or-leave-it basis without room for negotiation. Objective rules generally offer more stability at the cost of excluding some cases from judgment, while a subjective standard offers more flexibility and inclusiveness. In this case, an objective reliance standard might ask whether a reasonable person would have taken a salesman at his word, while a subjective reliance standard asks whether this person took the salesperson at his word.\footnote{Trousdale, “Reasonable or Justifiable Reliance,” 388–90, 388 n.31; Edwin W. Patterson, “The Delivery of a Life-Insurance Policy,” \textit{Harvard Law Review} 33, no. 2 (1919): 198–99, 222.} As the Alabama Justices explained in the pivotal case that adopted the new standard, a subjective standard was necessary “[i]n light of modern society’s recognition of a standard of business ethics that demands that factual statements be made carefully and honestly.” In other words: caveat venditor (seller beware).\footnote{Hickox, 551 So.2d at 263.}

To ordinary citizens, the change went largely unnoticed. But the business community expressed grave concerns. At a basic level, the change favored consumer-plaintiffs (and their lawyers) over businesses because it raised the standard against which sellers would be judged, which businesses found patently unfair. But the shift also had broader consequences for accusations of fraud in the consumer marketplace. First, the new standard essentially “eliminated the general duty on the part of a person to read the documents received in connection with a particular transaction (consumer or commercial)” because there was no longer an assumption that any person had read or understood the contents of a contract, only that he or she had relied on the oral description of the contract
offered by a salesperson.\textsuperscript{19} Second, the new standard changed the time limits to bring fraud cases. Alabama law required plaintiffs to bring a lawsuit for fraud within a short window of time after “discovering” the fraud, or else they would forfeit their chance to sue. Before 1989, if a person had a contract in hand that, if read, would reveal a salesperson’s fraudulent representations, the clock started running immediately on how long that person had to file a lawsuit, regardless of whether the person consciously realized what the document said or meant. After 1989, there was no assumption that a person had read the contract, so both parties could argue at trial over when the fraud was “discovered” and a jury would determine whether the plaintiff had filed the lawsuit within the permitted legal window of time—\textit{after the trial had occurred}. Furthermore, since a person’s reliance on statements would be judged subjectively, “any representation falling just short of being ‘patently and obviously false’ required submission of the case to a jury” as well.\textsuperscript{20} Businesses could no longer expect judges to dismiss weak cases before trial; a subjective standard meant a jury needed to look at the facts of each case to determine whether the basic standards for filing a lawsuit had been met, so nearly every plaintiff would be expected to have his or her day in court. This increased companies’ litigation costs and lowered the overall predictability in the legal system because legal costs remained high for strong and weak cases alike. Plaintiffs, in turn, strengthened their bargaining power in settlement negotiations because a case could be prolonged for months or years pending a trial, during which time the

\textsuperscript{19} Foremost Ins. Co. v. Parham, 693 So.2d 409, 421 (Ala. 1997) (overruling \textit{Hickox}).

\textsuperscript{20} Potter v. First Real Estate Co., Inc., 844 So.2d 540, 549 (Ala. 2002) (explaining problems with \textit{Hickox} standard).

Businesses despise environments of legal uncertainty. From a business perspective, this development brought into question whether contracts continued to have any real legal weight. Contracts were supposed to order human behavior and establish predictable, reciprocal legal relationships. If the validity of every pen-and-ink contract remained uncertain until a jury listened to all circumstances surrounding the contract’s signing, was it really a contract?

At the same time that the Alabama Supreme Court revised the state’s fraud laws, the court also began to unravel the business and medical lobbies’ 1987 tort-reform package, which had tightened the rules for bringing tort lawsuits and had limited the amount of money a single plaintiff could claim in a lawsuit.\footnote{For a discussion of the conditions of the tort-reform package’s adoption, see previous chapter.} In effect, tort reform had constructed a legal shield to protect health-care providers and businesses from excessive liability. When the Alabama legislature passed this comprehensive tort-reform package in 1987, the business community believed “the fight was over” and that the tort-reform coalition composed of doctors and business interests had won. However, within a few years it became clear that a tort-reform package alone would not transform Alabama into a business paradise. Almost immediately after tort reform passed the legislature, legal scholars and practitioners began to debate whether the legislation would survive the Alabama Supreme
Court’s scrutiny. Then, between 1991 and 1995, the court ruled most of the tort-reform package unconstitutional. “We are back to ground zero,” lamented the head of Alabama’s main business lobby. “We are back where we started.”

These two legal developments—the weakening of the enforceability of written contracts and the dismantling of tort-reform protections for businesses—were especially powerful in combination. Contract-based fraud claims would now almost certainly go all the way to a jury, without any limit on what juries could award. In a near-total reversal of the then-Governor’s post-tort-reform proclamation in 1987 that “Alabama Is Open for Business,” businesses perceived the shift in the legal climate in Alabama in the late 1980s and early 1990s as signaling open hostility to firms. Some businesses closed their Alabama operations and pulled out of the state, especially insurance and finance companies, which were the target of many of the largest judgments. For example, one life insurance company that had done business in Alabama for over 100 years pulled out of the state after a $15 million jury verdict against it in an insurance fraud suit.

Cases holding the 1987 tort-reform package unconstitutional include: Armstrong v. Roger’s Outdoor Sports, 581 So.2d 414, 421 (Ala. 1991) (striking as unconstitutional the legislature’s rule that judges should review all punitive damage awards without full deference to the jury’s judgment); Clark v. Container Corp. of Am., 589 So.2d 184, 198 (Ala. 1991) (striking as unconstitutional a law that structured how jury awards of over $150,000 would be paid); Moore v. Mobile Infirmary Association, 592 So.2d 156, 171 (Ala. 1991) (striking as unconstitutional a statutory limit on how much money a person could claim in a medical malpractice suit); Henderson v. Ala. Power Co., 627 So.2d 878, 893–894 (Ala. 1993) (striking as unconstitutional a provision limiting punitive damages in non-wrongful-death cases to a maximum of $250,000); Smith v. Schulte, 671 So.2d 1334, 1343 (Ala. 1995) (striking as unconstitutional a $1 million limit on certain wrongful death actions).

Other businesses remained in
the state, but began to disclose the uncertainty in the litigation climate as a source of possible shareholder risk in their 10-K filings with the Securities and Exchange Commission. Members of the business lobby echoed their members’ fears, spurring lawmakers to act “to end the plaintiff lawyers’ gouging of Alabama business so more jobs could be created in the state and so prospective businesses will not refuse to court Alabama because of the hostile legal climate.”

Faced with threats of an exodus of companies from the state, consumer advocates and plaintiffs’ firms largely shrugged it off. If companies were so afraid of juries, maybe it was because they had something to hide, and in that case, “folks in Alabama ought to be saying good riddance.”

News of large punitive-damage awards from trial courts—and news that some of these had awards survived the appellate process—resounded through state and national media outlets. An anti-lawsuit television advertisement described “a case where a man sued a snack-food company after he ate a sugary snack and fell out of a tree” and warned “that if you give a friend a haircut, that friend can sue if unhappy about the results.” (A spokesman for Alabama Trial Lawyers complained that the advertisement was “ridiculous” and that “no lawsuit like that has ever been filed in Alabama.”)

In the background, news

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25 Under the section heading “Known Trends and Uncertainties,” for example, one Alabama company explained: “A number of civil jury verdicts . . . have resulted in the award of substantial judgments against the insurer, including material amounts of punitive damages. In some states, juries have substantial discretion in awarding punitive damages in these circumstances. . . . Although the outcome of any litigation cannot be predicted with certainty, to date, no such lawsuit has resulted in the award of any significant amount of damages against the Company.” Protective Life Corporation, Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, Fiscal Year Ended December 31, 1994 (available online at https://www.sec.gov/Archives/edgar/data/355429/0000912057-95-001658.txt). This risk statement first appeared in the 1994 annual report and remained for years thereafter.


of the “hot coffee” lawsuit against McDonald’s in New Mexico further fanned the flames of concern about America’s “litigious society.”

And perhaps most significantly, conservative journalist and commentator David Frum authored a series of deeply unflattering articles in Forbes magazine over several months in 1993 that brought Alabama’s litigation climate into the spotlight. The first article called Alabama “a mighty frightening place to do business” because juries had awarded large, “multi-million” punitive-damage awards and because the state Supreme Court “steadily whittled away” at tort-reform laws. A second article contrasted the trend towards “sanity” in enacting tort reform measures in other states with the comparative backwardness of Alabama. The third article focused specifically on Jere Beasley, the same prominent Alabama plaintiff’s attorney who had tried the Johnson v. Mercury Finance case, and how he “plie[d] his trade in Alabama.” The article concluded sarcastically that Beasley’s ability to convince juries to award large punitive-damage verdicts in his rural home county made him the “Sam Walton of litigation” for proving that there was still “money in small towns”—if you knew where to look. These articles made serious waves. Forbes’s appraisal of the Alabama


30 See previous chapter for discussion of Johnson v. Mercury Finance.

legal climate was not only discussed in state and local media outlets, but it also became a talking point at press conferences and public hearings, including in Congress.\textsuperscript{32}

In retrospect, the business lobby’s decision in 1987 to focus attention and financial resources on tort-reform legislation was a strategic error because the Alabama Supreme Court quickly and easily overturned these laws virtually overnight. In Alabama, the direction of the law’s development would not be determined in the state Capitol but rather within the halls of the state’s highest court. Though the ultimate outcome of the 1987 tort-reform package disappointed the business community, the fact that this tort-reform package had passed the legislature at all showed that business groups, working together, had tremendous resources to influence politics. With the sting of the Forbes articles still fresh in the minds of members of the Alabama business community and their affiliates, the business lobby changed tack. Instead of changing the state’s laws through the legislature, changes which had proven easily reversible by the state Supreme Court, the business lobby decided to instead work to change the fabric of the state’s legal system by shifting the ideological composition of the Alabama Supreme Court in a business-friendly direction.

\textsuperscript{32} See David Frum, “The Business of Tort Reform: Seeking a Change in the System,” \textit{Anniston Star} February 5, 1993 (reprint of “Unreformed” Forbes article in Alabama newspaper); BCA, Legislative Bulletin 93-1, at 1 (tort-reform group cities Forbes article at 1993 press conference); Elizabeth Hayes, “Camp Rips Forbes for ‘Untrue’ Story,” \textit{Montgomery Advertiser}, March 31, 1993 (Alabama Secretary of State demands that Forbes retract “Unreformed” because of false information contained therein, but acknowledges that the “article leaves an unfavorable impression of Alabama in the minds of many business leaders” and threatens Alabama’s “industrial prospects”); Bob Ingram, “Court Wars: Business Council Aims at Judicial Incumbents,” \textit{Montgomery Advertiser}, July 8, 1993 (the BCA president was “quick to whip out a copy of a recent issue of Forbes Magazine which had a highly critical article about Alabama’s business climate” and he said that the Forbes article “hit the nail on the head”); Thomas Spencer, “James Targets Tort Reform,” \textit{Anniston Star}, October 25, 1995 (Alabama senators quote from “Unreformed” at tort-reform press conference in 1995); “Common Sense Legal Reform Act of 1995,” 141 Cong. Rec. H2873 (March 8, 1995).
1994: Proving Ground

Nine justices on the Alabama Supreme Court serve six-year terms and are elected in staggered, partisan elections, with seats appearing on the ballot every two years. By 1993, business groups had explicitly begun “mapping plans to remove from the Supreme Court those members who have done such violence to the tort reform package,” an initiative primarily led by the BCA, the state’s most prominent pan-business lobbying group, and the ACJRC, a single-issue tort-reform advocacy group representing over 100 individual, business, and trade-association members. If the business lobby could shift the ideological composition of the Alabama Supreme Court, then legislative changes might stick.33

The business lobby thus had a clear goal of changing the composition of the Alabama Supreme Court, but the right strategy to achieve that goal was not obvious. For one thing, judicial selection was then still closely controlled by the Alabama Democratic Party (the only political party with clout in a then one-party state) and heavily directed by lawyers. As political scientist William Stewart explained:

A common pattern at the state level was for a justice or judge to retire before the expiration of his term. The governor would then appoint a replacement who would have the advantage of running for a full term at the next election as an incumbent. . . . When there were occasional contested Democratic primaries, the state and local bar associations frequently would rate candidates and, more often than not, those with the highest evaluations won the primary and took office as judges.34

33 Bob Ingram, “Court Wars: Business Council Aims at Judicial Incumbents,” Montgomery Advertiser, July 8, 1993. For more on the BCA and ACJRC, see previous chapters, especially chapter 2.
34 Stewart, Alabama Politics, 190–91.
For a century, Democratic justices—and only Democratic justices—won election to seats on the Alabama Supreme Court, and the few Republicans appointed to the court to fill vacant seats had consistently failed to win election to full terms.\footnote{For more detailed discussion of Governor Hunt and the 1987 tort reform package, see the preceding chapter. Bill Poovey, “Hunt to Fight Conviction,” \textit{Akron Beacon Journal}, April 23, 1993; “Guy Hunt, an Acclaimed but Ousted Governor of Alabama, Is Dead at 75,” \textit{New York Times}, January 31, 2009.} Trial lawyers had long been major supporters of Democratic candidates and of the Democratic Party, and they generally opposed the tort-reform measures that the business lobby proposed. Thus, the idea of the business lobby running a pro-tort-reform candidate on the Democratic ticket was a non-starter. Yet no one was sure if a Republican candidate could win a statewide election in such a solidly Democratic state. The election of Republican Governor Hunt in 1986 had been characterized as something between a miracle and an accident, and the reputation of the Republican Party was potentially sullied by Hunt’s abrupt removal from office in 1993 for ethics violations.\footnote{William H. Stewart, “Guy Hunt, 1987–April 1993,” in \textit{Alabama Governors: A Political History of the State}, 2nd ed., eds. Samuel L. Webb and Margaret E. Armbrester (Tuscaloosa, Ala.: University of Alabama Press, 2014), 285.} Still, the conservative ideology of the Republican Party aligned with business interests, the Party itself offered a political platform without as much competition from other interest groups for influence, and the business community had the financial resources to fund major campaign drives. By 1994, the Republican Party

\footnote{“GOP Makes History in Court Elections,” \textit{Anniston Star}, November 9, 1994.}

had selected four business-friendly candidates willing to run for office. All that was missing was a cohesive plan of attack.

Enter the political consultants. Two of Alabama’s most successful business leaders—John Harbert III of the international construction firm, the Harbert Corporation, and Hall Thompson, who operated land companies, a major golf club, and a major tractor firm—invited Karl Rove to come to Alabama to develop a campaign to flip the political composition of Alabama’s Supreme Court. Karl Rove signed on to guide business-friendly Republican candidates to victory in the Alabama Supreme Court races over several cycles, from 1994 through the early 2000s. Rove came with past experience working with the Texas business community to achieve a similar goal with the then-trial-lawyer-dominated Texas Supreme Court. But in 1994, he had not yet attained the level of political status that he would achieve after propelling George W. Bush to presidential victory in 2000. Rove began his political consulting career as a direct-mail specialist, and he used data-driven methods like regression analyses to map a plan of action. Rove also brought an intuitive understanding of how particular messages might sound to conservative-leaning voters. Rove connected with leaders of the ACJRC and the BCA, as well as other groups with affected interests, such as ALFA, the state Realtors’ association, car dealers’ groups, and so on, to construct a resonant campaign.\(^\text{37}\)

Media consultant John Deardourff, meanwhile, worked with these Republican candidates on television advertising campaigns. He was best known for reviving Gerald Ford’s presidential campaign in the last weeks of the 1976 election and for helping to coin the optimistic campaign slogan that helped presidential hopeful Nelson Rockefeller win Oregon in the 1964 Republican primary: “He cared enough to come.” Deardourff focused on upbeat campaigns that allowed candidates to “be themselves, to run as who they were” and would come to be known as one of the “fathers of political consulting.” Both of the political consultants who came to Alabama were conservative, but Deardourff, at age 61, belonged to an old guard, while Rove, at age 43, represented a younger generation. Rove came to Alabama having already participated in dozens of political races across the country, but his work with Republican candidates for the Alabama Supreme Court would greatly burnish his political consulting reputation—for those who loved as well as loathed him—as a kind of political wunderkind.38

Thus, a powerful combination of factors came together on the eve of the 1994 elections. The business community in Alabama (as well as their out-of-state peers) felt persecuted by trial lawyers and under attack from the state Supreme Court, which motivated them both to pour significant amounts of money into political races and to flood this money into a political party without a marginal track record of success in state

elections. The desire for tort reform, which by the early 1990s seemed to include “Alabama-Supreme-Court reform” as a necessary precondition, spurred action and generated political will. Meanwhile, the nascent Alabama Republican Party, with no real record of success in Supreme Court races, had everything to gain from an alliance with the business community and very little to lose. The sharp increase in contributions was welcome, as was the opportunity to win voters to the Republican side. To the extent that reforming the state’s legal system served as a gateway for voters to define their politics as not just “conservative” but also “Republican,” the Alabama Republican Party and its national affiliate had much to gain from the fight. Finally, the addition of political consultants to the mix brought narrative skill to the campaign, stitching the business-driven tort-reform message to deep currents of conservativism in the community. The consultants crafted messages that taught Alabama voters about the tort system at the same time that they proposed a critique of that system articulated along the lines of conservative values. Political consultants also injected state-level races with a professional gloss previously reserved for national campaigns. Conditions had ripened for both a swing in the political and ideological composition of the state Supreme Court and the discovery of a new Republican base.

Before 1994, Supreme Court races in Alabama had been “normally sleepy affairs,” drawing moderate amounts of campaign financing since the Democratic Party elite often hand-picked candidates who ran unopposed in the general election and incumbents were rarely challenged. But 1994 marked the beginning of a new style of judicial politics. As one newspaper reported, by 1994 “Alabama’s traditionally dull Supreme Court elections
[had] hit the red zone on the ugly meter.” Five of the nine seats on the state’s Supreme Court were up for election in 1994, so the potential to shift the ideological balance of the court heightened the stakes of the election. Republican candidates Perry Hooper, Sr., Harold See, Mark Montiel, and B.J. Russell challenged Democrats for four of the open seats. Hugh Maddox, a conservative-minded Democrat and incumbent Supreme Court justice, ran unopposed in the general election for the remaining seat with heavy support from the business community.

The prize of the election was the position of Chief Justice of the court. The Chief Justice served not only as titular head of the court; he or she also acted as the chief administrative officer of the state’s judicial system. The incumbent Chief Justice, trial lawyer Ernest “Sonny” Hornsby, had served as president of his county bar association, president of the Alabama Trial Lawyers Association, and president of the Alabama Bar Association. Hornsby’s trial-lawyer credentials, Democratic support, and experience on the bench made him a strong candidate. But to the business community, he represented all that that community feared in the Alabama Supreme Court: a trial lawyer with deep

39 “GOP Makes History in Court Elections,” Anniston Star, November 9, 1994; Ala. Const. §§ 155–56. The Alabama Constitution intended that three seats would be up for election every two years, but the Constitution also requires that when vacancies on the court arise they may be temporarily filled by appointment of the Governor only until the next general election, at which time that seat goes on the ballot. Ala. Const. § 158. Over time, vacancies on the court shifted the cycles of election for those seats, and now in certain election years five seats are up for election at one time.

40 Bob Ingram, “Court Wars: Business Council Aims at Judicial Incumbents,” Montgomery Advertiser, July 8, 1993; “GOP Makes History in Court Elections,” Anniston Star, November 9, 1994; see Hugh Maddox, “6-7-1994 10-Day Form 2 Contributions,” Alabama Fair Campaign Act Disclosures, filed June 2, 1994 (showing contributions from many defense lawyers, conservative business PACs, and members of the business community).

Note that while the Hickox case, which changed the standard, was a per curium opinion, the standard adopted comes directly from Hornsby’s special concurrence in Southern States Ford. When Maddox prevailed in the Democratic primary and secured the Democratic nomination, his Republican challenger dropped out of the race, and Maddox ran unopposed for another term.

connections to the plaintiff’s-law community who seemed to put the interests of his professional fraternity before the interests of the business community in profitability or of the state in economic development. Of the seats on the Supreme Court up for election, the BCA focused most heavily on unseating Chief Justice Hornsby and Justice Kennedy, the son-in-law of former Governor George C. Wallace, citing their consistently “pro-trial lawyer and anti-business” approach. There was no reason to believe that the business lobby and the Republican Party necessarily would be successful, since their strategy remained untested in Alabama. But the political consultants aimed to give Republican candidates the best possible chance to pick up seats on the Supreme Court.42

One of Rove’s central tactics involved using data to focus election resources. Rove’s team began in 1994 by constructing “seven-layer spreadsheets” to understand historical voting patterns and to find pockets of swing voters and “ticket-splitters”—Democrats who chose not to vote a straight Democratic-Party ticket so they could cast a vote for Reagan.43 The methodology for this was relatively simple; Rove’s team simply subtracted number of votes cast for the Republican candidate winning the fewest votes in a county from that of the Republican winning the most votes, starting from the 1980 election and moving forward. The difference represented the number of voters who were

43 Alabama is one of the few states that still offers a “straight-ticket” option on its ballot, in which a voter may check a single box for a political party and thereby cast votes for all candidates running with that political party without having to indicate their choice for each contest. See “The Rise and Simultaneous Fall of Straight-Ticket Voting,” Governing, July 14, 2016, http://www.governing.com/topics/elections/gov-straight-ticket-voting-states.html.

Political scientists Bill Stewart, Earl Black, and Merle Black highlight the importance of Ronald Reagan as “a benchmark for party identification” that legitimated the Republican party in the eyes of many white southerners and helped establish a Republican realignment. Stewart, Alabama Politics, 106; Earl Black and Merle Black, The Rise of Southern Republicans, 205–07, 211–21.
likely to have split their tickets between Republican and Democratic candidates. Rove then targeted counties with significant numbers of ticket-splitters with messaging about why the Republican Party best represented their values and interests. Rove scoured county and precinct records to find evidence of undecided or independent voters that could be convinced of a candidate’s worth, of Democrats who might split their ticket for the right Republican, or even dissatisfied Democrats who might defect to the Republican Party. Rather than courting the party base, Rove focused resources—“volunteers, advertising, and the candidate” himself—on these elusive but valuable swingers and splitters.44

Once Rove determined which of Alabama’s counties had the highest percentage of these “ticket-splitters,” he focused resources on these locations. This meant that a significant portion of budgets for radio, television, mail, and telephone campaigning went towards these counties, especially in the last weeks leading up to the fall election. Rove also put the four Republican Supreme Court candidates in his charge on buses to visit these counties. Rove identified allies in each location by contacting local Republican groups and auxiliaries as well as Realtors, bankers, ALFA members, doctors, and car dealers in the area. Rove also drew on the local contacts of Harbert and Thompson, who had done extensive business around the state. Once Rove had identified sympathetic local leaders, he reached out asking for venues for the candidates to speak—preferably a recurring event such as a meeting of the Rotary Club, Chamber of Commerce, or another community


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business group, but alternatively at a special event hosted by a local businessperson. One such event occurred in a car dealers’ showroom. Rove asked local allies to alert local media and choreographed the events to be attractive to these media outlets so as to garner further attention. This seemingly simple strategy represented a complete shift from longstanding practice; candidates were accustomed to focusing on the population-dense (and thus voter-dense) urban centers and not spending much time in rural and less-populated areas of the state.45

Republican candidates also took an offensive posture in their political advertising, attacking the faults of their rivals instead of running bland endorsement-based advertisements. As the race heated up, the political rhetoric turned critical and even bitter. Republican challenger Perry Hooper, Sr., for example, invoked the negative publicity of the *Forbes* articles, discussed above, as artillery against his foe, accusing Hornsby of being “lawsuit-friendly” and driving businesses out of the state and calling upon voters to “end the greedy, power-hungry grip of Sonny Hornsby and his pals.” This advertisement appears in figure 19. In response, Chief Justice Hornsby ran a television advertisement that accused Hooper of “aiding and abetting” a murderer because, as a judge in the 1980s, Hooper had sentenced the culprit, then a law library employee, to probation and helped the man obtain a car loan. A few years later, the man who Hooper had helped went on to

kidnap and kill a female journalist, using “perhaps the same car” that the judicial candidate had helped him obtain, according to the advertisement. Hooper responded that he believed the ad showed that Hornsby had “panicked,” and then asserted his “confidence in the people of this state . . . to see through this fraud.”

The most dominant theme of Republican candidates’ campaign advertising invoked the tort-reform issue through the image of the rich, fat-cat trial lawyer. Hooper’s “Truth about Sonny Hornsby” advertisement, shown in figure 19 below, accuses the incumbent Chief Justice of “us[ing] his position to strong arm lawyers into financing his campaign.” Hooper took this idea even further in a television advertisement, in which a lawyer was solicited over the phone by a faceless Chief Justice Hornsby for “$500 from every member of the firm.” In the television ad, the lawyer protests, “but judge, you know we have a case before your court,” yet is silenced. Another advertisement for Republican candidate Mark Montiel, as shown in figure 20, similarly described his Democratic opponent as being “bankrolled by rich personal injury trial lawyers.” This advertising strategy hinted at a not-so-subtle quid-pro-quo relationship between solicitation of funds from trial lawyers and favorable rulings from the court. One journalist highlighted the severity of these advertisements’ accusations, which hinted at quasi-criminal actions that “border on bribery.” And another Republican advertisement shown in figure 21 ran under the title

“Tipping the Scales” and made the connection between trial-lawyer campaign dollars and favorable legal outcomes even more explicitly, using the image of two obese, cigar-smoking trial lawyers swimming in banknotes who weighed down the scales of justice while the heft of the lawyers and their cash raised up five smirking Democratic candidates. “Trial lawyers in Alabama,” the advertisement began, “have given democratic candidates . . . more than $3 million this year to tip the scales in favor of more and bigger lawsuits.” The advertisement hammered away at this charge, adding that the trial lawyers’ payments “guarantee the continuation of frivolous, runaway lawsuits that are choking the Alabama economy and costing Alabama jobs” while “the Trial Lawyers get rich from multi-million dollar awards.” The Democratic candidate for Lieutenant Governor would “stop any reform from passing the senate” while the Democratic judges continued to support “big awards” and “abuse . . . our judicial system.” All of this, the advertisement suggested, was possible through the support of their rich trial-lawyer backers. In other words, the fix was in, and only Alabama voters could “balance the scales.”47 Voters were thus encouraged to vote for independent judges—a descriptor with a double meaning that evoked both autonomy from trial-lawyer financial backing as well as a less politically charged moniker that could distinguish between Republican and Democratic candidates without repelling lifelong Democratic voters with overemphasis on their party affiliation.48

48 Interview with Karl Rove, January 5, 2018.
Figure 19: Advertisement for Republican Chief Justice Candidate Perry Hooper, November 1994
Figure 20: Advertisement for Republican Associate Justice Candidate Mark Montiel, November 1994
Figure 21: Advertisement for Republican Supreme Court Candidates, November 1994
This rhetoric connected with Alabama voters because it linked conservative values and support for Republican candidates. This strategy reflects what political scientist Frederick Mayer has identified as the core meta-narrative of contemporary American conservatives, in which “[i]n the beginning . . . America was strong, its people self-reliant, its government limited, its markets strong and productive” until liberals ushered in a welfare state that fostered dependency and corrupted moral values. As Karl Rove himself once explained, campaigns needed a persuasive theme “structured and delivered in a way that resonates with the information that voters carry around in their heads.” In other words, the job of an advertisement or other campaign piece is not to teach voters something new, but to form a new connection between existing ideas and to “evoke a reaction from voters that will cut through the clutter and focus attention on a central question.” The question, then, was “What values and attitudes do voters already have in their minds about a candidate and what message will draw on that information?”

The Republican political advertisements described above spun a compelling tale about how hard work was being undercut by a greedy few who sought financial advantage by gaming the system. These advertisements suggested that the government apparatus had been corrupted into a redistribution machine that acted through the courts and that funneled money to an in-crowd at the expense of the self-sufficient worker or businessman. On this

49 Frederick W. Mayer, Narrative Politics: Stories and Collective Action (New York: Oxford University Press, 2014), 104. It also reflects the values that Karl Rove identified as those that personally attracted him to the Republican party. Rove wrote: “Everyone’s early life shapes their perspective. Mine grew out of Western values that emphasized limitless opportunities, even when people’s circumstances constrain their lives. The experiences I had early in my life helped make me a conservative and led me both to the Republican Party and to the belief that I could make a contribution to the political battles that are the lifeblood of a democracy.” Rove, Courage and Consequence, x–xi.

50 Rove, Courage and Consequence, 67–69 (“What Is a Rovian Campaign?”).
political stage, the trial lawyer character served as the professional grafter and as one with the alchemic ability to extract great wealth from others’ misfortunes. Democratic opponents had the power of political inertia on their side, but their advertisements failed to sell an equally compelling political theme. For one thing, in the relatively prosperous 1990s, counter-narratives invoking the trope of the greedy businessman or of tensions between Wall Street and Main Street were not as readily available as they would be after the 2008 financial crisis. And for another, as the ruling party of the state, Democrats’ massive interest base probably made them less nimble in the advertising realm. Meanwhile, Rove sold the core idea of tort reform as a morality tale that pitted the American worker and striver against the lazy, corrupt trial lawyer and plaintiffs who “go out and sue in hopes of striking it rich”—all without ever using the clunky, legal-technocratic term “tort reform” to convey the message.\textsuperscript{51}

Other aspects of some Supreme Court advertising invoked racialized politics. For example, Hooper’s newspaper advertisement, as shown in figure 19, calls out Hornsby for his role in a scheme for a “Court Packing Plan” to “let a favorite few (their political cronies!) hand pick your judges.” This so-called court-packing plan refers to a controversial settlement in a racial-discrimination lawsuit that challenged a lack of black judges elected by statewide vote on Alabama courts. Hornsby and other members of the Democratic Party elite designed a plan to put black judges into certain positions in a process that achieved the goal of the settlement but that lacked democratic processes or

transparency. Accordingly, some news sources had characterized the plan as an opportunity to “pack Alabama’s highest courts with liberal, hand-picked black judges,” to take “voters out of the process,” and to create “racial quotas” on the state’s appellate courts. The implication was that the whole lawsuit (filed by a Democrat and settled among Democrats to appoint more Democrats to courts) was a power-grab—a scheme to bypass the formality of elections and give the Democratic establishment even more control over judicial appointments. But these allegations also had a strong racial component. In contrast to Hooper’s facially race-neutral description of Hornsby’s role in “court-packing,” Republican Supreme Court candidate Mark Montiel took more aggressive stance, explicitly equating the term “liberal” with “black” in one of his advertisements, as shown in figure 20. The advertisement referred to incumbent Democrat Ralph Cook, the only African-American judge then serving on the Alabama Supreme Court, as “the most liberal judge” on the court, used “liberal quotas” and “racial quotas” interchangeably, and referred to African-American Democratic leader Joe Reed as “Liberal Joe Reed.” The allegations of the “court-packing scheme” thus wafted whiffs of both racial and political favoritism to voters primed to react to such a message—though some voters certainly recoiled at the appearance of blatant political race-baiting.52

As Election Day approached, campaign donations mounted. Judicial elections in Alabama had never cost so much. Television advertising alone for the four Alabama Supreme Court candidates in the 1994 race cost the Republican Party more than $800,000—more than half of the Republican Party’s overall television advertising budget of $1.4 million. Large expenses necessitated large contributions; for example, the Alabama Farmers Federation and its political action committee, FARM PAC, gave the Alabama Republican Party more than $200,000, and the National Republican Party chipped in another $450,500 in the two months leading up to the election. With stakes high for the business lobby’s tort-reform agenda, businesses and business executives contributed generously in the 1994 races. The BCA, for example, had never raised more than a million dollars in a single election cycle before 1994, but in 1994 BCA’s ProgressPAC spent an estimated $2.4 million on “pro-business” candidates and participated in seventy percent of statewide races. The BCA’s ProgressPAC focused significant financial resources on three of the Republican candidates for the Alabama Supreme Court, contributing at least $45,000 to Chief Justice candidate Hooper, $70,000 to See, and $40,000 to Russell. Individual businesspeople and companies added tens of thousands more to these candidates’ war

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53 A political action committee (“PAC”) is an organization that exists to collect and distribute campaign contributions and are generally organized around political issues, coalitions, or industries.

chests. However, in the Cook/Montiel race, the BCA’s ProgressPAC chose to support incumbent Justice Ralph Cook over the Republican candidate, Mark Montiel, who had labeled Cook the “most liberal justice” on the court and who insisted that the business community had made the wrong choice.55

Overall, the 1994 elections resulted in a political coup for the Alabama Republican Party. Seven Republicans won election to statewide office, including in races for Governor and Attorney General. Many other Republicans prevailed in their local races. Reflecting on early results, a reporter proclaimed, “Not since the cannons fell silent at the end of the Civil War have Republicans staked such a claim on the state’s political offices.” Furthermore, it appeared that Rove’s strategy of targeting leaners and ticket-splitters may have made all the difference; a county GOP chairman reported “hundreds of people” reporting via telephone survey “that for the first time they split their tickets and voted Republican.”56

The national political context facilitated these victories as across the country the 1994 elections led to a Republican “revolution.” Republicans picked up eight seats in the U.S. Senate and fifty-two seats in the U.S. House in the midterm elections, thereby flipping


both houses of Congress to Republican majorities for the first time since 1954. The year 1994 also witnessed an exodus of Southern conservatives out of the Democratic Party. The newly elected Alabama Governor Fob James had flipped from the Democrats to the Republican Party for the 1994 election. Alabama’s U.S. Senator Richard Shelby was not up for reelection in 1994 but nevertheless switched parties shortly after that election, explaining that “Southern conservatives were no longer welcome” on the Democratic side of the aisle. However, conservative state-level legislators were sometimes less willing to switch parties than their federal-level peers, and in 1994 the business community had supported many conservative-leaning Democratic candidates as well as Republicans. As noted above, the BCA’s ProgressPAC supported Democrats Ralph Cook and Hugh Maddox in the 1994 Supreme Court races. However, the shift towards the Republican Party occurred on a large enough scale to be visible to ordinary voters, and the fact that Republicans proved they could win brought that party legitimacy. In 1994, across the country and in Alabama, the Republican Party was ascendant.

As results came in on Election Night 1994, Alabama Republicans began to celebrate their victories for a variety of statewide offices—but most of the Supreme Court candidates remained on pins and needles for several days. Of the five open seats on the court, only two were securely filled by the day following the election, one of which went to candidate Hugh Maddox, who had run unopposed. An early newspaper report


tentatively awarded the three other seats to Republican challengers—Hooper for Chief Justice and See and Montiel for Associate Justice positions—with over ninety percent of precincts reporting. But two days after the election, the incumbent Chief Justice Hornsby declared his own victory, citing an unofficial total that showed him beating Hooper by a mere 304 votes out of over one-million votes cast. Despite their early leads, electoral officials declared Republican candidates See and Montiel as losers in their races. Hooper was furious. “We have endured lies in this campaign,” he fumed, “but I’ll be damned if I will accept outright thievery.” Investigations in counties across the state began to uncover human and computer errors, and the state elections office tallied and retallied the totals. A county judge ordered all ballots impounded statewide in anticipation of legal challenges. One week after the election, after a multitude of small corrections had been made to county totals across the state, Chief Justice Hornsby’s purported lead of 304 votes had narrowed to a margin of just nine votes. Hooper challenged the election results in court.59 One newspaper reporter joked that “Alabama chief justice’s race—like the ubiquitous battery-powered bunny—just keeps going, and going, and going.”60

59 The federal lawsuit was a constitutional challenge brought by Hooper and by a voter on behalf of other voters in the state. Lucy Baxley, a Democratic candidate for Treasurer who was similarly denied her position because of the contested absentee ballots, joined the suit. Roe v. Mobile Co. Appointing Bd., 904 F. Supp. 1315, 1334, 1336 (S.D. Ala. 1995). There were related state-court challenges as well, and the Alabama Supreme Court responded to certified questions from the U.S. Court of Appeals for the Eleventh Circuit in Roe v. Mobile County Appointment Board, 676 So.2d 1206 (Ala. 1995).

The election for Chief Justice ultimately came down to the question of whether to count certain contested absentee ballots. State law required that the signature on an absentee ballot be either notarized or witnessed by two adults, and these requirements appeared prominently in the absentee ballot package. Counting approximately 2,000 contested absentee ballots without notarization or witness signatures would swing the election in Hornsby’s favor, while excluding them would make Hooper the winner. The implication was that “Democrats had sought to alter absentee ballots to assure Hornsby’s election” through not-quite-above-board means. But members of the state Supreme Court argued that these ballots represented the political choice of the voters who cast them and excluding them essentially disenfranchised less sophisticated voters on highly technical grounds despite a ballot that in other ways clearly communicated their intended choices for office. The Alabama Supreme Court ruled that the absentee ballots should be counted because they “substantially comply with the signature requirements,” despite not meeting the technical requirements of state law. But the federal judge hearing the suit strongly disagreed, calling the late decision to count ballots that did not comply with state election laws a “post-election change of practice” that was “abominable under the Constitution of the United States” and equivalent to “ballot-box stuffing.” With the absentee ballots

61 However, in contrast to news reporters and federal judges, the Justices of the Alabama Supreme Court in a per curium opinion disagreed that this outcome was knowable, arguing “No one in Alabama or anywhere else knows who will win the election for Chief Justice when the uncounted ballots are counted.” Roe, 676 So.2d at 1219 [Alabama Supreme Court].
excluded, Hooper won the election by 262 votes, and in October 1995—almost a year after the election—he was sworn in as Chief Justice of the Alabama Supreme Court.62

It had been a long and costly battle—millions of dollars spent in the various campaigns plus likely thousands more in attorney fees poured into a series of lawsuits to adjudicate the results—all for what turned out to be a single Republican-held seat on the Alabama Supreme Court. The vote of a single Republican judge, even when added to the vote of conservative Democrats Hugh Maddox and Gorman Houston already on the bench, would not change the state’s stance on tort reform or the interpretation of contract laws. But the result invigorated, not intimidated, the business lobby and the state Republican Party. A Republican “revolution” seemed more plausible than it had before the 1994 election cycle.

The 1994 elections confirmed that the Republican Party was in Alabama to stay and that an alliance between the Republican Party and business groups could prove mutually beneficial. It remained less clear, however, whether this electoral outcome represented a conservative upsurge from the local to the national level—a kind of conservative, grassroots revolution—or a reaction to Democratic overreach in federal politics that trickled down to state and local elections. One Democratic state senator took the latter perspective, arguing that the victories of business-supported candidates should be read as more about “voters’ anti-Clinton, anti-incumbency mood than their support for tort

The BCA chairman seemed to agree that national-level politics had fueled victories at the state-level, noting that he believed Alabama was “caught up in the ground swell” and that “[w]hat happened in Washington filtered to every state house in the United States.” But the same BCA chairman also proposed that in the “successes came from our grass roots campaign.” The reality likely lay somewhere in the middle; a national conservative groundswell and discontent with Clinton’s policies likely drew voters out to the polls during these normally-sleepy midterm elections. But the state’s business lobby had also put in the ground-level work. In races for legislators and judges, the BCA vetted candidates to find “friends of business,” evaluated candidates’ proposals for likely business impacts, and tracked candidates’ voting records to hold them accountable for pro-business campaign claims. The business lobby was also plugged in to national-level conservative policy networks, through which intelligence and strategy could flow both up and down. And perhaps most importantly, business PACs, companies, and individuals in the business community provided a large part of the financial resources needed to fund campaigns. Whether one ascribed to a trickle-up or trickle-down hypothesis, the business-led, conservative victory in the 1994 elections cemented the alliance between business and the Republican Party in state politics. Their combined influence was still growing.

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Almost immediately after the election, the state business lobby and Republican Party doubled down on their now-proven strategy, selling the idea of tort reform as a conservative moral imperative and the idea of the trial lawyer as greedy opportunist. Furthermore, after 1994, more and more individual businesses and industry organizations began to join the cause. Before Hooper’s win, many businesses feared retaliation from local trial lawyers if they were to join the tort-reform fight. After each round of ballot-box success, this fear increasingly melted away, and new business groups began to offer assistance to these new Republican challengers to Supreme Court seats.65

1996 and Beyond: Battleground

The 1994 elections served as proof of concept. The 1996 elections provided the next opportunity to wage battle. In this election, Harold See, a University of Alabama law professor who had run unsuccessfully as a Republican for a seat on the Alabama Supreme Court in 1994, sought a rematch, running this time against Democratic incumbent Kenneth Ingram. Only one seat on the court was up for election that year.66 Like in the 1994 elections, money poured into the race from all sides, with trial lawyers providing heavy financial support for Ingram and businesses largely backing See. The combined spending on these two candidates for a single seat on the Alabama Supreme Court exceeded $6.5 million.67

65 Interview with Karl Rove, January 5, 2018.
66 See supra note 39 for discussion of the unbalanced election cycle.
67 Over the three campaign finance reports filed covering the 1996 election period, Ingram reported $695,083.31 in expenditures and $1,080,272.35 in in-kind contributions, and See reported $4,452,972.31 in expenditures and $298,198.66 in in-kind contributions. Kenneth Ingram, 11-5-1996 45-Day Form 1 Summary, Alabama Fair Campaign Act Disclosures, filed September 20, 1996; Kenneth Ingram, 11-5-1996 10-Day Form 1 Summary, Alabama
Furthermore, the 1996 elections, like the 1994 elections, heavily featured political advertising. The most infamous advertisement of the 1996 election became known as “the skunk ad.” The advertisement compared Republican candidate See to a skunk because before becoming a University of Alabama law professor he had been a “slick Chicago lawyer.” The advertisement proclaimed that “you can smell how bad this man’s ideas are no matter where you live in Alabama.” The advertisement used details of See’s divorce (from twenty years prior) to accuse See of having “abandoned his wife and two children in Chicago” after committing “adultery and emotional abuse.” The thirty-second skunk advertisement became notorious for its bad taste, and CBS News identified it as the worst campaign advertisement in the 1996 campaign cycle nationwide. The optics of the advertisement became even worse when newspapers began to report that the advertisement was financed by a group of eight “super rich” trial-law firms calling themselves the “Coalition for Family Values.” Newspapers began calling the group the “Gang of Eight.” Karl Rove got advanced notice of the advertisement from a friend at a television station, and he pounced on the advertising campaign as an opportunity to land a swift “counterpunch” to See’s opponents. Rove rallied both See’s wife and ex-wife, along with his daughter from his first marriage, to issue statements and appear in news conferences. See’s ex-wife praised the Republican candidate as “a good man whom I believe will make

a great Supreme Court justice for Alabama.” The “skunk ad” and the publicity that followed in its wake ended up making See’s opponent—not See—come across as a bit of a skunk. In hindsight, the television spot may have played directly to the business community and Republican Party’s strategy of framing the election as a moral battle in which trial lawyers were the enemy of the common man. The negative advertising campaigns had clearly backfired when the “skunk ad” became a talking point across the state, both during and after the election, and served as fodder for pro-tort-reform groups to besmirch the low character of trial lawyers and further damage the image of trial lawyers in the community. Reflecting on the 1996 campaign, Karl Rove told one reporter that he had “never seen uglier, nastier and meaner races than I have seen in Alabama.”

See beat Ingram in the 1996 election and became the second Republican member of the Supreme Court. Republicans added another justice the following year when sitting Justice Gorman Houston, a conservative Democrat who had served on the Supreme Court since 1985, switched mid-term to the Republican Party. Then in 1998, Champ Lyons became the fourth Republican Justice on the court when he was appointed by Republican Governor Fob James to serve out the end of a term vacated by a Democrat who left the

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In fact, the “sympathy aroused for See” after the skunk ads may have been “so widespread that several Democrats who besides Ingram also lost their races that year blamed the notorious ‘skunk ad’ for their defeat.” Stewart, Alabama Politics, 132.
court to run for another political office. The court became Republican-majority after the 1998 elections, in which Lyons won election to his appointed seat and was joined by newly elected Republican Justice Jean Brown, who had previously served on the court of criminal appeals. In the 2000 elections, Republicans picked up three more seats on the Alabama Supreme Court while holding fast to seats they already held, including replacing Chief Justice Hooper, who faced mandatory retirement based on his age, with another Republican Chief Justice. Harold See successfully defended his seat in 2002, winning a second term. Finally, in the 2004 elections, Republicans captured the last remaining Democrat-held seat on the Alabama Supreme Court. Within a decade, the Republican Party and their supporters had completely flipped the composition of Alabama’s highest court.  

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Momentum for Republican candidates grew as the Republican Party continued to expand its influence across the state. Political victories begat political victories as the Republican Party established itself as the dominant voice for conservative values in the state. In subsequent Supreme Court races, the common theme was heavy financial backing of Republican candidates by the business lobby, an escalation of tort-reform-themed political rhetoric, and a heavy emphasis on professional political advertising. Alabama Supreme Court races became the most expensive court races in the country, with an estimated $54 million poured into these races between 1994 and 2006. The second-ranked

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71 Blue boxes represent Democrat-held seats, while red boxes denote Republican-held seats. Note that elections are held in November of an election year and the winner takes office in January of the following year. Thus, Hooper’s successful 1994 election bid put him in office in 1995, See’s 1996 election put him in office in 1997, and so on.
state, Texas, trailed Alabama with $30 million spent over the same period, even though Texas’s population and land area are each than five times greater than Alabama’s.\(^{72}\)

The initial rise of the Republican Party in Alabama (as well as its waxing fortunes on the national stage) offered at least four strategic benefits to the business lobby. First, it could make political leanings of candidates more legible to voters. The candidate with the “R” next to his or her name was likely to be more conservative on a variety of issues than the candidate with the “D.” Business groups like the BCA could more easily encourage voters to vote a straight Republican ticket than to distinguish between business-friendly and -unfriendly Democrats. Second, movement of established politicians to the Republican Party buttressed its legitimacy, and with legitimacy came more opportunities for campaign funding. Businesses benefitted from a slate of Republican office-holders oriented towards business interests and could use campaign finance to support ever more favorable candidates—in races they could reasonably win. Third, business groups like the BCA did not have to battle for attention from the Republican Party in Alabama in the same way that they would have from the Democratic Party, at least through the 1990s and early 2000s. At that time the Democratic Party already featured deeply entrenched, funded, and organized political interests—including trial lawyers, teachers, and unions. BCA leaders insisted that “[i]nstead of teachers, bureaucrats, and lawyers driving the law-making process . . . business people needed to be heard.”\(^{73}\) Republicans offered the business lobby

\(^{72}\) U.S. Census Bureau, QuickFacts, https://www.census.gov/quickfacts/map/ (Alabama and Texas population and land area in square miles).

\(^{73}\) Martha Simmons, “Paving the Way,” Mobile Press Register, December 11, 1994.
just such a platform. However, the most significant result of this decade of political activity for the business community was undoubtedly the legal-doctrine dividends paid by the conservative shift in ideology of the Alabama Supreme Court. And the business-despised “justifiable reliance” standard created by Chief Justice Hornsby in 1989, discussed above, would be one of the first doctrines abandoned as the court pivoted to the post-Hornsby era.

The pivotal *Foremost* case would reshape the law for the second time in a decade. This case involved consumer fraud, just like the cases before that had justified the 1989 change in legal doctrine. In 1997, the Alabama Supreme Court, then with three Republican justices, reviewed a case in which a jury had awarded $15 million in punitive damages to three plaintiffs who purchased mobile-home insurance policies. The plaintiffs said that they had relied exclusively on verbal misrepresentations from the insurance sellers, who told them that there would be no premiums for the first year’s coverage and who failed to disclose that their policies included coverage for adjacent structures. The policy documents contradicted these representations, but the buyers reported that they had not read their contracts.

When the fraud standard had changed to allow consumers to rely on oral representations, a paternalistic vision of the type of vulnerable consumer who might rely on oral statements despite contradictory written contract terms seemed to prevail. However, the plaintiffs in this mobile-home insurance case seemed altogether ordinary and were not necessarily the unsophisticated or oppressed consumers that the shift in doctrine aimed to protect. Both sets of buyers had achieved a high-school degree or its equivalency, and both had stable employment, one as a state corrections officer and the other as a
materials handler at a lighting company. The corrections officer was also enrolled in a nursing program at a local university, and the other had listed reading as one of her hobbies. In fact, these plaintiffs looked to be at least on the cusp of achieving middle-class status.

As to the issue of whether the agent fraudulently represented that there would be no premium the first year, the court noted that each of the sales documents (including a purchase agreement, credit installment contract, invoice, and bill of sale) indicated the premium that would be charged for the first year. As to the issue of whether the insurance agent fraudulently failed to disclose that the insured parties were purchasing coverage for adjacent structures, the court noted that the line below “Adjacent Structures $3,000” on their declarations pages was marked “INCL.” The buyers may have been sincere that they had not read their policies, but there was no signal to the court that the buyers would not have been able to read and understand their contract documents if they had made the attempt. These were not the elderly, illiterate, unemployed, or desperate plaintiffs the justices had sought to protect in 1989, nor was this insidious fraud that only the court could eradicate. This case seemed to suggest that the justifiable-reliance standard had gone too far towards shifting the burden from caveat emptor to caveat venditor, and members of the court took the case as an opportunity to reverse doctrinal course.74

Justice Houston, who had just switched party affiliation to the Republican Party, wrote the majority opinion. The 1989 “deviation” from 140 years of practice, he explained, “was a mistake.” Houston wrote that though the Alabama Supreme Court “makes every

reasonable attempt to maintain the stability of the law, . . . on occasion . . . it is necessary and prudent to admit prior mistakes and to take the steps necessary to ensure that we foster a system of justice that is manageable and fair to all concerned.” The purported fraud outlined in the case before the court had occurred while the prior standard was the law of the land, so the court would not retroactively apply the new standard. But the court affirmed the jury’s verdict conditionally only so long as the plaintiffs accepted a dramatic decrease in the amount of punitive damages they had received.75

Though the decision represented a conservative shift in legal doctrine, the Justices did not split along partisan lines. One Democratic Justice did pen a fiery rebuke of the majority opinion, concluding that “those with greater knowledge and bargaining power” were now “free to lie” and “the consumers who are least able to understand the documents are free to catch them—if they can.” 76 But most Democrat Justices on the Supreme Court concurred in the opinion. Several of the supporters of the original doctrinal shift under Hornsby’s leadership even wrote opinions explaining a change in heart. Justice Janie Shores, who had voted in favor of the change to the standard in 1989, provided her own explanation of why she believed the change had been “a mistake.” The idea behind the justifiable-reliance standard, she wrote, originated in a desire to permit “a victim of fraud to assume that he was told the truth” and “to put his claim before a jury,” an idea that at the time “did not seem unreasonable.” But, in hindsight, the change “may . . . have been

75 Id. at 421, 435. Justice Gorman’s opinion affirmed the jury verdict conditionally upon two plaintiffs accepting remittitur of punitive damages to $175,000 and the other plaintiff to $173,000. If the plaintiffs did not accept the remittitur, then the court would reverse and order a new trial. Id. at 435.
76 Foremost, 693 So.2d at 442 (Butts, J., dissenting).
naïve.” The justifiable-reliance standard, she explained, “may have allowed careless victims of fraud to reach a jury with their claims,” or “encouraged victims of fraud to avoid discovering potential fraud when it could have been discovered by checking oral representations against the documents memorializing the transaction.” At worst, the justifiable-reliance standard “may even . . . have encouraged people to falsely accuse another of misrepresenting the facts in order to bring a lawsuit.” She continued, “[i]t is reprehensible to deliberately misrepresent material facts in order to cheat another.” However, “[i]t is equally reprehensible to lie in order to bring a lawsuit.” “The law,” she concluded, “can tolerate neither,” and the court never should have changed the rule. 77

Thus, the legal code changed once again in the state of Alabama, this time in a direction more favorable for the business lobby.

Although the Republican Party in Alabama maintained control of state politics in the decades following its ascent to power, the variety of conservatism in that party’s platform shifted and splintered gradually over time. The alliance between the Republican Party and the business lobby that propelled that party to power has since become unstable as the party’s base expanded. Republican Roy Moore, who served as Chief Justice of the Alabama Supreme Court from 2001 to 2003 and 2012 to 2016, presents a particularly clear illustration of the tensions within the state’s now-dominant Republican Party. As a judicial candidate, Moore represented an anti-establishment wing among Republicans that consciously rejected the influence of the “big-business wing” of that party, and his record

77 Foremost, 693 So.2d at 436–37 (Shores, J., concurring specially).
of electoral success demonstrates that his brand of conservative ideology has a solid base of support within the state. However, some of Moore’s most publicized political stunts—which have attracted many voters—have also attracted precisely the kind of national media focus on the state that the state’s business lobby preferred to avoid. First, Moore controversially placed a Ten Commandments statue in the lobby of the Alabama Supreme Court building upon his election to the position of Chief Justice, which led to his removal from office in 2003. After his reelection to the same position, he issued a “message to probate judges telling them to disregard the federal court ruling disallowing Alabama’s ban on same-sex marriages” in the wake of the Supreme Court’s *Obergefell* decision—and was suspended from the court again in 2016.\(^78\)

Though very different from the pro-business Republican candidates in the 1994 and 1996 campaigns, Moore’s core message related his evangelical Christian faith to his role on the court and pulled some of the same conservative-value levers that had been used by Rove in the campaigns in the 1990s, just to a very different end. The same concept of an earlier, stronger America corrupted by dependency and a lack of moral values that Rove hitched to a narrative about the necessity of tort reform transmogrified into a narrative about a need to bring Christian morality more literally into the courthouse. Both narratives invoke similar core values, but one narrative focused on business-friendly outcomes,

whereas the other proved more populist in its orientation. Moore’s lack of deference to federal court judges’ orders raised questions about the status of the rule of law within Alabama courts and thus created uncertainty in the marketplace—generating conditions similar to those in the chaotic, plaintiff-friendly legal environment that the business lobby in Alabama lamented in the 1980s and 1990s.

This internal fragmentation of political ideology within the Republican Party echoed earlier divisions in the Democratic Party, which manifested themselves on the all-Democrat Alabama Supreme Court in 1989, through the contrasting presence of “conservative Democrats” Gorman Houston and Hugh Maddox in relation to their more liberal peers. In the 2000s, Moore’s brand of conservatism contrasted sharply with several of his Republican Alabama Supreme Court peers. The saga of tort law in late twentieth-century Alabama reinforces the point that mature political parties in industrialized democracies rarely are one-dimensional, completely consistent with regard to policy priorities, or fully consistent in values or ethos.

This slice of American legal history further underscores that the law does not operate in a vacuum and that the societal ramifications of shifts in legal doctrine can defy expectations. The legal movement that swept through the Alabama Supreme Court in the 1980s to open the judicial system to defrauded consumers generated many unintended consequences, revealing the contingencies associated with doctrinal and institutional change. Chief Justice Hornsby’s 1989 change to the reliance prong of the fraud standard created commercial uncertainties, leading a powerful business-led coalition to work to make it relatively short-lived. We will always struggle to measure precisely how many
worthy plaintiffs found justice under the more permissive legal regime, or how many people manipulated the law to fabricate lawsuits for financial gain. The backlash against the doctrinal change, however, was unambiguous, adding fuel to a growing conflagration that razed the thicket of Democratic Party control in Alabama. Amid the resulting political ashes, the Republican Party found room to grow. And the spark that ignited this political reconfiguration emerged from a dispute over a single prong of the fraud standard in an otherwise unremarkable case.

This case study also has illustrated the intertwined nature of law, policy, and politics. Alabama’s civil fraud law reflected a policy choice about the legal thresholds consumers should face in bringing fraud suits. Before 1989, the law deflected consumers claiming misrepresentations in a transaction if those misrepresentations contradicted the written terms of the contract—even though this policy rested on the known legal fiction that presumed that consumers in fact read and understand contractual terms. This policy

79 In doing so, this chapter has drawn inspiration from many excellent works of legal and regulatory history that highlight the tensions and disconnects between policy aspirations, the laws born of those policy aspirations, and the impacts of those laws as implemented. See, for example, Stewart Macauley, “Lawyers and Consumer Protection,” Law & Society Review 14, no. 1 (1979) (conducting a study of consumer protection laws through a study of lawyers’ practice rather than legal doctrine, finding both a lack of concrete knowledge of the law on the books, so to speak, but a rich cache of “techniques” employed by lawyers to settle consumer-protection disputes in the shadow of the law); Fleming, “The Rise and Fall of Unconscionability as the ‘Law of the Poor’” (describing the interplay of legislatures and courts, and the intervening catalyst of litigation, in shaping the legal concept of “unconscionability” in contracts); Friedman, History of American Law, especially 323–25 (tracing the development of laws related to land titles as a response to economic developments, natural disasters, business innovations, and state action), 390–403 (describing the development of the law of corporations as a dialogue between state legislatures, business enterprises, political elites, state and federal courts, and a skeptical society), 516–23 (following parallel developments in liability through workers’ compensation and tort law and the policy tradeoffs between assuring predictable minimum compensation and deterring socially harmful conduct); Balleisen, Fraud, especially ch. 11, “The Promise and Limits of the Antifraud State,” 316–47 (tracing conflicts between existing regulatory tools or institutions and the problems they were to address, as well as the creative methods employed to overcome regulatory obstacles, through case studies of the fight to defeat the fraudulent firm Vigilant Protective Systems, the “populist deterrence” methods of Philadelphia’s Consumer Education Protective Association, the Securities and Exchange Commission’s evolving strategy of enforcement through litigation, and so on); Gilmore, Death of Contract (exploring how politics, policy, evolving mores, and scholarly disagreements shaped the law of contracts, highlighting contract law as practice rather than mere doctrine).
choice excluded some worthy plaintiffs from seeking legal recourse in order to enhance the binding impacts of contracts, and thereby facilitated the flow of credit. By contrast, from 1989 until 1997, once a consumer claimed that a seller had made a verbal misrepresentation, the burden shifted to sellers to assure that consumers knew exactly what terms their contracts contained. This change reflected a policy preference for expanded access to the courts, greater concern for consumer protection and less for expanded access to credit, and legal outcomes that prioritized communal weighing of the parties’ credibility and fairness rather than those that stressed the value of businesses’ capacity to rely on contractual legalese. After 1997, the policy winds changed again, and the law shifted back towards its pre-1989 presumptions, in line with a new set of political priorities.

Political narrative in turn served as the glue that connected the policy embedded in the law to partisan politics. Savvy political operatives such as Karl Rove helped translate and distill tort reform—from a policy debate among legal scholars and practitioners into a political platform not only compelling to doctors and businesspeople but also to ordinary voters with conservative values. Rove stitched the connection from policy to politics by placing tort reform within existing narrative structures that had abiding political valence—such as describing tort reform as essential to cultivating a welcoming “business climate” and framing permissive tort laws as inimical to values of self-reliance and free enterprise. All law, of course, does not reduce directly or simply to politics; rather, law inherently reflects policy choices, and effective politicos can knit these policy choices into political debates through artful storytelling. As socio-economic and cultural conditions evolve, so do the priority of individuals’ values and the political valence of those values, which create
openings for political movements to recraft narratives that reconnect law, policy, and politics afresh.

The power struggle over consumer fraud law in Alabama had political consequences in the longer term for the state, region, and nation. Through this decade of contentious political battling, strategic campaigns of moral suasion, and ever more expensive efforts to shape hearts and minds through advertising, consulting, and general politicking, the legal climate in Alabama began its conservative drift, a move that occurred simultaneously in neighboring states, including in Mississippi, Georgia, Tennessee, and the Florida panhandle region. By the end of this political decade, the modern Republican Party emerged stronger than ever in Alabama, and this development in turn fortified the voter base and general political clout of the national Republican Party. Within Alabama, this political shift would create conditions favorable for renewed state-level legislative tort-reform efforts that would cement the ideological counter-movement in the courts through emphatic statutory declaration. In turn, those legislative moves would alter the balance of power among businesses, consumers, and the state over the subsequent decade.
Chapter 5: Tort Retort

In the 1990s, notions of rampant “lawsuit abuse”—a term coined to describe the practice of filing a frivolous lawsuit to exact payment from the other side—became so engrained in American culture as to get the attention of leading comedians. A 1992 sketch on NBC’s *Saturday Night Live* featured a fictional attorney in a television advertisement who encouraged viewers to call his law offices at “1-500-HARASSS” (“the extra ‘S’ is for extra harassment,” he explained). A woman queried, “I’d love to sue somebody, but don’t I need a reason?” The attorney responded that it was a “myth” that “to be successful a lawsuit must have merit.” In fact, he continued, *nuisance suits* stood out as the most lucrative lawsuits of all. After showing a clip of another lawyer begging for a settlement and an end to the constant harassment, the attorney in the advertisement asked, “Why don’t you come in for a free consultation and let us help you collect the money you didn’t even realize you were entitled to?”¹ The studio audience erupted in laughter.

By the latter half the 1990s, the tort reform question saturated political debate in both Alabama and the nation more broadly. This chapter traces the evolution of arguments made on both sides of the tort-reform divide and investigates the efforts of stakeholders to mobilize popular support for their policy positions through the 1990s. Faced with political roadblocks in both state and federal legislatures, tort-reform proponents at the state and national level shifted their strategy, hoping to reconfigure legislative politics by shaping

public opinion on tort-reform. To further this effort, tort-reform proponents funneled tremendous resources into public relations initiatives. Business-lobby groups crafted a compelling narrative framework around the idea of “lawsuit abuse” to rally public support for tort reform, even creating made-to-order “grassroots” movements (funded in part by the tobacco lobby) to construct and spread these narratives. These endeavors emphasized particularly evocative cases, not necessarily representative of the majority of controversies, in the hopes of influencing perceptions about the tort-reform cause. In Alabama, an additional narrative thread generated a special sense of urgency around the “lawsuit abuse” issue—the widely disseminated assertion that Alabama had become uniquely a “tort hell.” Trial lawyers attempted to counter tort-reform proponents’ narrative strategies, but they were outmaneuvered at many turns. As the sense of a legal crisis evolved, so did the options available to political strategists and elected lawmakers. By the end of the 1990s, the shifting winds of political sentiment opened pathways for legislative tort reform that had been unavailable a decade before.

A Tale of Two Tort-Reform Packages

The broader tort-reform movement in the United States operated in tandem at both state and federal levels in the 1990s, with some tactics used across political terrains and others created specifically to target one political realm or another. At the federal level, the battle for tort reform that had for several years raged in the U.S. House of Representatives reached a crescendo in the mid-1990s. In the lead-up to congressional elections in 1994, Republican leader Newt Gingrich and his Republican colleagues staged a rally on the steps
of the U.S. Capitol in which Republican lawmakers promised to institute sweeping legislative reforms through a “Contract with America.” One such promise involved enacting sweeping tort-reform initiatives to “stem the endless tide of litigation” across America. Gingrich accused the justice system of no longer serving the interests of justice, alleging that there had been a shocking rise in the number of lawsuits—by 1989, he counted “one lawsuit for every 10 adults” nationwide. “Enough is enough,” he proclaimed.2

The text of the tort-reform provisions of the Contract with America did not materialize from thin air. These business-friendly provisions were crafted for business interests, by business interests. Two powerful Washington, D.C.-based business lobbying associations, the U.S. Chamber of Commerce (“the Chamber”) and the National Association of Manufacturers (NAM), led the charge, and many industry and trade associations followed. The Chamber “spearheaded the effort” by using its media resources to generate nationally broadcast town-hall-style meetings via satellite, op-ed articles, and print and broadcast pro-Contract political advertisements. The organization further


It is not clear how Gingrich derived this figure. As noted in chapter three, Alabama annual civil filings hovered around 10 civil filings per 1,000 state residents in 1989, and Marc Galanter estimated that there were on average around 21.6 civil filings per thousand U.S. citizens in state courts across the country in 1975. See supra, figure 10; Galanter, “Reading the Landscape of Disputes,” 54–55. To reach a figure of one lawsuit for every ten adults, Gingrich likely includes some combination of state and federal criminal cases, domestic cases including child custody and divorce, or bankruptcy filings in order to reach his figure. However, these types of cases hardly serve as evidence of a more “litigious” society—just a more law-bound one.

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mobilized its representatives for appearances on radio talk shows as well as before congressional committees.³

Victor Schwartz, an attorney and legal scholar, in part directed the specific text of the Contract’s tort-reform measures.⁴ A long-time proponent of tort reform and one of the movement’s leading voices, Schwartz had authored twenty publications advocating different aspects of tort reform by 1995, at least fifteen of which appeared in law reviews and journals. Schwartz co-authored the leading law school textbook on tort law, advised the American Law Institute’s tort-law projects, and served as counsel to the Product Liability Coordinating Committee, a coalition with over 800,000 members dedicated to reforming federal product-liability law. Finally, Schwartz served as general counsel to an organization called the American Tort Reform Association (ATRA), a non-profit advocacy group based in Washington, D.C that coordinated national action on the tort-reform issue. ATRA served as a key node in a web that connected business groups, lobbyists, legal scholars, and think-tanks. Schwartz worked alongside and coordinated efforts between his home organizations and other groups such as the Chamber, the National Federation of Independent Business, the National Association of Wholesalers, the American Legislative


⁴ “Tort Reform” memorandum, n.d. (c. 1995), Philip Morris, Truth Tobacco Industry Document [hereinafter TTID] Nos. 2047992857–58, https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/yphh009 (“PM was involved, through Victor Schwartz, in drafting of original ‘Contract.’ At this point, bill likely to be ‘tinkered with’ very little.” (emphasis in original)).
Exchange Council (“ALEC”), and the CATO Institute, all to rally support for the tort-reform measures in Gingrich’s Contract.5

A single-cause organization, ATRA represented a coalition of more than 300 businesses, associations, and firms, though a large proportion of its financial backing came from the tobacco industry, whose corporate leaders had long been interested in tort litigation and civil-justice reform. In 1986, the tobacco industry began working on what it called the “Tort Reform Project” through a tobacco-industry trade group called The Tobacco Institute, a tobacco lobbying body founded in 1958 to act on behalf of leading tobacco companies. Philip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson each contributed financially to the work of the Institute in proportion to its market share. Though the Institute emerged in the 1980s, tobacco companies had long been sensitive to the risks of liability through litigation; indeed, as early as 1964, “fear of litigation” had already become “the crucial factor shaping industry policy.” That said, early efforts on the Tort Reform Project remained modest and mostly involved legislative tracking and research-related activities. However, in the 1990s, the threat posed by litigation became increasingly serious. In response, the Tobacco Institute began to pour millions of dollars

into its tort-reform efforts at both the state and national levels, investing more than $9.6 million in 1990 and almost $7.5 million in 1991.\(^6\)

In 1992, tort lawsuits brought by consumers became a truly existential threat when a U.S. Supreme Court opinion expanded the possibility of lawsuits by smokers against tobacco companies for the harms caused by cigarettes. In that case, an appellate court had concluded that an existing Surgeon General’s warning about the dangers of cigarettes to health barred individual smokers from suing tobacco companies on the grounds that the companies had failed to warn them of the danger of smoking. The U.S. Supreme Court, however, disagreed, reversing that decision and ruling that the Surgeon General’s warning did not bar the suits.\(^7\) This ruling all but declared a legal open season on tobacco companies. If every smoker—living and deceased—had a potential claim against these tobacco companies, the legal liability faced by these companies would know no bounds. Other industries deeply affected by tort litigation, such as insurance and finance companies, could abandon a hostile jurisdiction and thereby avoid liability under that jurisdiction’s laws. But tobacco companies, like other manufacturers, relied on national markets. By July 1992, tobacco companies faced a total of 43 lawsuits in 14 states.\(^8\) As of December

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of that year, the number had risen to over 50 lawsuits. A memorandum circulated at Philip Morris in December 1992 described litigation as “among the most significant threats facing our company.” By 1995, the litigation threat had become even more worrisome. As one Philip Morris document explained, “one judge and one jury anywhere in the county can devastate the economy of Richmond [the home of Philip Morris], leaving a crater where our plant is.”

Only tort reform seemed to offer a solution. By changing the liability laws (or maintaining favorable liability laws where they already existed), the tobacco industry could assure its own survival, even in the wake of the many lawsuits now on the horizon. For example, capping punitive damage awards (or eliminating punitive damages altogether) might decrease the industry’s liability by billions of dollars over time. Tobacco’s funding of tort-reform efforts reflected these goals. By the end of 1995, the Tobacco Institute had budgeted well over $16 million for its 1995 Tort Reform Project and over $12 million for 1996. The Tobacco Institute directed almost a third of this budget towards tort-reform efforts in 19 states in 1995, and it projected expanding to 23 states in 1996. Within the national-level budget, the Tobacco Institute directed about a half-million dollars to various retained consultants and national think-tanks per year, including $70,000 and $50,000 to ALEC in 1995 and 1996 respectively. But the Tobacco Institute designated the lion’s

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share—over $5 million in 1995 and over $2 million in 1996—to support the work of ATRA. This funding represented more than half of ATRA’s overall budget.10

The existential threat posed by tort litigation to tobacco (and many other similarly situated industries) had a national scope, since lawsuits could arise from any jurisdiction in which a company conducted business. Tort reform at the federal level was attractive for such firms because a single bill could change the legal climate across all fifty states at once. However, passage of favorable legislation faced especially high barriers at the federal level because of the sophisticated lobbying apparatus in place in Washington, D.C., and the wide field of interests already competing in the federal political arena. Accordingly, the tobacco industry actually saw state legislatures as holding the greatest hope for tort reform.

“[D]espite well-financed efforts spanning more than 10 years, beneficial product liability reform measures will not be enacted by the Congress in the near future,” a Philip Morris executive explained in the early 1990s. “Prospects for reform,” he opined, “are much better in the states.”11 Still, for well-funded organizations like ATRA, tort-reform strategy did not represent an either/or proposal. Rather, ATRA leaders believed they should seek tort reform simultaneously at both state and federal levels, sometimes employing similar strategies at each level and sometimes cultivating tactics specifically for a particular political terrain.

10 “Tort Reform Project Budget (Revised),” October 11, 1995, Philip Morris, TTID Nos. 2047647109–17, https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/gsgn0085; Carl Deal and Joanne Doroshow, The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights (Center for Justice and Democracy and Public Citizen, 2010), 5.
At the federal level in the 1990s, tort-reform proponents of all stripes tied their hopes to Gingrich’s Contract for America. As votes poured in for federal-level Republican candidates in the 1994 midterm elections, Gingrich and his Contract colleagues celebrated a major political victory. Yet the work of actually enacting their promised reforms still lay ahead. Republican lawmakers argued that this strong electoral support constituted a popular referendum on conservative legislative proposals, including tort reform. Thus, they urged other lawmakers to act quickly to enact the conservative agenda. The political stakes for these conservative lawmakers were high. A Contract for America advertisement signed by 300 Republican candidates boldly proclaimed, “If we break this contract, throw us out. We mean it.” One political commentator noted that “[b]rash language like that, so easily tossed back in the signers’ faces if they don’t follow through, demands a degree of prospective willpower that’s rare in politics.”

Accordingly, Contract conservatives introduced a federal tort reform bill in the U.S. House of Representatives on the opening day of the 104th Congress—the “Common Sense Legal Reforms Act,” so named because the existing legal system was “an affront to common sense” that “[o]nly the organized trial lawyers and their lobbyists do not recognize.” Among other provisions, the bill featured a limit on punitive damages and a change to the way that the responsibility for payment of a jury award would be allocated among multiple defendants in a single case. This second provision would change the rules in cases where multiple defendants—often several companies—shared the blame for a

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single instance of wrongdoing in a lawsuit. Under the existing system, a successful plaintiff could recover the total amount of money won in a lawsuit from any of the guilty defendants—which often meant that the defendant with the “deepest pockets” paid the plaintiff, then wrestled the other defendants’ share of the damages from those defendants, sometimes through a second lawsuit. The existing system thus prioritized easy recovery of court awards for plaintiffs over distributive fairness for corporate defendants. Under the proposed new rule, each defendant would pay only in relation to its proportional share of blame for the accident or incident. If one defendant happened to be bankrupt, defunct, or otherwise unable to pay by the time the lawsuit concluded, the plaintiff could not recover that defendant’s share of money from other co-defendants. By design, then, the combination of punitive-damage limits or caps and changes to the liability rules would shift the greatest burden of financial liability away from the wealthiest and most powerful corporate defendants, which had the greatest resources but also often paid the bill at the end of a long and expensive lawsuit.

After a brief hearing in February 1995 at which eight witnesses testified, the House Judiciary Committee submitted its report on the bill, hailing it as a way to finally end the “punitive tax” created by tort lawsuits that “hits average Americans and small businesses worst of all.” In the hearings, a lawyer in a private firm testified that “unpredictable and outrageous claims for punitive damages” in particular were the “most urgent problem in

14 In legal terminology, the tort-reform proposal sought to change the rules in the federal system from joint-and-several liability to several (or proportionate) liability.
civil litigation.” The president of a Cincinnati-based machine-tool company and the vice president of a medical-device manufacturer each testified that out-of-control tort lawsuits were stifling innovation and sapping American companies of their competitiveness. Opponents, however, called the bill “radical.” “This is not reform,” wrote one Representative, “it is a wholesale revolution brought solely in the name of corporate defendants.” Critics further emphasized the lack of empirical evidence to substantiate the alleged litigation explosion, in part because “state courts don’t capture the data” for information such as amounts of punitive-damage awards or settlements, “so folks are picking numbers as it suits them.”16 Despite these criticisms, the bold promises by Contract for America signors spurred a vote in the House. Under House Speaker Newt Gingrich’s leadership, the House of Representatives passed this tort-reform bill early in 1995.17

The bill then moved to the U.S. Senate, where proponents and opponents rehashed the tort reform debate. One sponsoring Senator characterized the existing tort system as a legal dystopia that “turn[ed] neighbors into potential defendants and/or plaintiffs” and that made families fear participating in Little League baseball. “The fear of being sued,” he argued, “hangs over too many relationships in our society today.”18 Victor Schwartz of ATRA echoed such arguments in testimony before the U.S. Senate Judiciary Committee in April 1995 on the issue of punitive damages. Schwartz acknowledged the concern that

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the impact of punitive damages could not be quantified because “no comprehensive system of reporting exists,” but he conceived of the punitive-damages problem as not one about scale but about uncertainty. In other words, the problem rested not with the frequency of punitive-damage awards or even the amount awarded, but the “erratic” nature of punitive damage awards that did “not separate out behavior that is wrongful and should be punished from behavior that is not deserving of punishment.” And even when behavior merited punishment, multiple awards of punitive damages to punish the same conduct over several lawsuits could bankrupt companies, having the unintended effect of depriving other worthy plaintiffs from recovering basic compensation. Also, punitive damages punished shareholders, including pension funds and ordinary citizens, much more than the actual decision-makers in a firm.\textsuperscript{19} However, the appetite for tort reform differed greatly in the Senate from that in the House. By May 1995, a group of Republican and Democratic Senators had halted the bill’s progress. The bill, which had passed so rapidly through the House, disappeared from the Senate agenda and languished in committee.\textsuperscript{20}

As the federal bill lost momentum, tort-reform proponents’ attention shifted to state legislatures. Alabama’s Republican lawmakers in particular found themselves on the hot seat, as they had modeled their own state tort-reform package on provisions in the GOP’s

\textsuperscript{19} Victor Schwartz, testimony before the Senate Judiciary Committee, 4 Apr. 1995, Philip Morris, TTID Nos. 2048768854--82, https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/ngjg0093.

Contract with America, with political support from the state business community and with drafting guidance from tobacco-industry advisors.21

As in Washington, D. C., a state-level tort-reform bill passed the Alabama House easily, particularly since the business lobby had poured unprecedented amounts of money into the 1994 elections in support of business-friendly (and therefore generally tort-reform-friendly) state Representatives.22 But as the bill passed to the Alabama Senate, it stalled in committee—just as the federal bill had stalled in the U.S. Senate. Newt Gingrich told Alabama’s Governor James to expect movement on tort reform at the federal level in October 1995. In response, Governor James hesitated to exercise his influence to spur tort reform in the state—despite his campaign rhetoric that placed tort reform at the center of his agenda—and Alabama’s legislative year ended in fall 1995 without any meaningful action on tort reform. Only then did House Speaker Gingrich inform Governor James and leading Alabama Republicans that the federal legislative climate had shifted and “that other priorities had forced Republican leaders to drop the issue until next year at the earliest” in Congress. Only after all hope for a federal solution had dissolved did Governor James call legislators back to the state capitol in Montgomery for a special session exclusively on tort reform in the early weeks of 1996.23

21 Hartina Flournoy, internal memorandum, 3 Feb. 1995, Philip Morris, TTID Nos. 2048619500-02, https://www.industrydocumentslibrary.ucsf.edu/ tobacco/docs/ngww0096 (“ALABAMA — Henry Turner queried whether or not we wanted a bill dropped there. Advised that we support the bill – in fact we drafted it – pushed by the business community.”).
22 See previous chapter for an in-depth discussion of the business lobby’s role in the 1994 elections.
During the 1994 election that had elevated James to the statehouse, the Business Council of Alabama (the “BCA”) had chosen not to support any gubernatorial candidate, instead focusing its resources and attention on legislative and judicial races. In fact, the business lobby deemed the loss of James’s opponent, Democratic incumbent Governor Jim Folsom, as “a loss to some extent” because Folsom had supported several pro-business initiatives while in office, including “education reform and the tax incentive legislation that lured Mercedes Benz and dozens of other companies to expand in Alabama.” Despite Folsom’s “pro-business” reputation, James had run as a Republican, citing his identity as a businessman and his personal attainment of a small fortune selling barbells as proof that he was a business-friendly fiscal conservative. But by late 1995, tensions between James and the business community intensified. James’s “close friend” Ralph Eagerton in the Department of Revenue had already created a “running feud” with the BCA “over new interpretations of old tax laws” that business leaders claimed unfairly taxed business in the state.24

Tort-reform proponents argued that it was time for the Governor to live up to his Republican credentials by calling a special session to pass tort reform legislation. Political cartoons mocked James’s wavering attitude, comparing him to a boxing coach sending a bruised and beaten fighter, captioned as “Alabama’s image,” back to the ring, once again to be brutalized by “excessive punitive damage awards,” depicted as a man wielding a bat

while Alabama’s Image fought only with his fists (see figure 23). The political cartoon ran not only in the state capital’s *Montgomery Advertiser*, but also in other outlets across the state, including the smaller circulation *Cherokee County Herald*.  

![](image)

**Figure 23: A Political Cartoon Shows Governor Fob James Allowing Alabama’s Image to Brutalized by High Punitive Damage Awards**

While James stalled, tort-reform advocates insisted that the reputation of the state’s business climate suffered, and that the resulting wounds would take a long time to heal. As pressure mounted, the Governor finally conceded to the business community’s appeals and called a special session of the legislature to focus solely on tort reform in January 1996.  

Rhetorically at least, James supported tort reform. The Governor opened the

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special session on tort reform with an address to the legislature that stressed the policy as a way to balance “the scales of justice.” He assured the assembled legislators that his only desire [was] to see the civil justice system reformed fairly and to eliminate even a perception of lawsuit abuse while protecting the rights of our citizens to achieve remedy in courts for injuries done to them, and to assure that plaintiffs and defendants alike be guaranteed a fair trial.

Alabama, he continued, did “not need legal ‘speed traps’ for business.” In another press conference announcing the special session, James illustrated his support for tort reform more cryptically by wielding an unloaded pistol before an audience of baffled reporters. A business lobbyist later decoded the Governor’s message: “We’re being asked to accept an unloaded gun to defend ourselves against high-powered, semi-automatic lawsuits.”

Before the session began, Governor James claimed that he had only planned to call the special session if “the bills would have enough legislative support to become law,” so going into the session the Governor must have been confident that his bills would pass. But in the end tort reform proved too contentious and the legislature too divided. Although Governor James had worked out the details of his proposed bill in consultation with representatives from both the business community and trial lawyers, the resulting tort-reform package represented a compromise deal that met friction from both camps. Business representatives claimed that the Governor’s proposal contained support for “the trial lawyers’ phony punitive damages bill” that created only an illusion of protection for

27 Fob James, Jr., *Address to the Joint Session of the Legislature*, January 8, 1996, ADAH, box SG24622, folder 2.

businesses. On the other side, trial lawyers flexed their muscles in the Alabama Senate. If the business community really wanted tort reform, why not support the bill? When the tort-reform bill passed the House with amendments added by business-friendly interests, former-trial-lawyer Lieutenant Governor and Democrat Don Siegelman directed the bill to the Senate Judiciary Committee, which was chaired by trial-lawyer Senator Roger Bedford, Jr. Bedford chose to release only one of the bills, the “phony punitive damages bill” so derided by the business community, out of committee for a vote on the floor. On the last day of the special session, debate over this bill devolved into “yells and shouts that almost turned into fistfights.” When Senator Michael Figures, himself a lawyer, “took the gavel as the Senate’s presiding officer” from the Lieutenant Governor and made a last-gasp attempt to pass the punitive-damages bill supported by trial lawyers, Figures “yelled at a group of senators shouting even louder at him,” saying “If you want to reduce this to a fight, let’s get it on. Here I am, come get me.” The state legislature devolved into chaos, and, unsurprisingly considering the political environment, no bill attained a Senate majority during the special session.29

The special session ended like the regular session had only months before, with a tort-reform package stuck in the Senate Judiciary Committee and with a state legislature deeply divided—even “poisoned”—by the tort-reform battle. As illustrated by a January 1996 political cartoon (see figure 24), some commentators detected a whiff of betrayal about the tort reform fight in the special session. Siegelman, Bedford, and Figures had turned against Governor James and the BCA, sabotaging the bills to assure that no real legislation would pass the Senate, despite a host of public promises to the contrary. To invoke these themes of betrayal, cartoonist Jim Palmer employed a quotation from Marc Antony’s funeral speech in Shakespeare’s *Julius Caesar*, noting that like the assassins who
betrayed their Roman leader, the Lieutenant Governor and Senators were “all, all honorable men.”

The business lobby felt similarly betrayed by the Governor, who had put his support behind the trial-lawyer-friendly punitive-damages bill. The outcome of the special session affirmed the sense that there could be no meaningful compromise between the business community and the “trial lawyers and their water carriers.” One editorialist even complained that any bill “acceptable to Siegelman and Bedford is essentially worthless in changing the status quo,” because they had “received so much trial lawyer money in the past that their view of this issue will forever have a green tint to it.” But Governor James suffered the greatest political consequences in the special session’s political wake. James had expended a great deal of political capital—not to mention half-a-million taxpayer dollars—to call the session, and when it failed to produce any legislation, it made him look both weak and foolish, while raising doubts about whether he was a real Republican. The Wall Street Journal editorial board questioned James’s “pro-business” credentials, and a Montgomery newspaper reported that “Gov. Fob James might be the titular head of the Republican Party in Alabama, but you couldn’t tell it by the way the special legislative session he called has gone.” James had attempted to negotiate with trial lawyers for a middle-ground solution for tort reform, but when his package failed to pass, he lost much more than the chance to pass a tort-reform bill. By dealing with the business lobby’s

30 Jim Palmer, “All, All Honorable Men” (political cartoon), Montgomery Advertiser, February 1, 1996, at 12A.

Political cartoonist Jim Palmer once again captured this outcome, depicting the Governor as a bumbling, feckless husband belittled by a nagging, controlling wife (see figure 25). In a disturbing allusion to domestic abuse over marital jealousies and infidelities, the unattractive, abusive wife (the BCA) beat her husband (Governor James) with her handbag, complaining that he was “Hangin’ out with th’ trial lawyers, eh? Won’t consider my tort needs, eh?” Palmer characterized the debate over tort reform as familial infighting rather than a serious policy dispute—a battle more symbolic than substantive. The outcome highlighted that James wielded no power in this failed political marriage, leading the narrator to chime in, “The honeymoon’s over.”\footnote{Jim Palmer, “The Honeymoon’s Over” (political cartoon), Montgomery Advertiser, February 4, 1996, at 2F.} Tort reform had not only failed, but it had also dragged Alabama’s Governor James down with it as it crashed and burned in the state legislature.
As prospects for tort reform dimmed in Alabama, those in Washington, D.C., took a more promising turn. The Common Sense Legal Reforms Act had been set aside for many months since its initial introduction. But after amendments, this tort-reform package finally moved out of the Senate Judiciary Committee and passed both houses in 1996. The final version of the act began with a summary of findings that reflected Gingrich’s earlier meditations on the sad state of the American legal system, including findings that:

our Nation is overly litigious, the civil justice system is overcrowded, sluggish, and excessively costly and the costs of lawsuits, both direct and indirect, are inflicting serious and unnecessary injury on the national economy; . . . [and] there is a need to restore rationality, certainty, and fairness to the civil justice system in order to protect against excessive, arbitrary, and uncertain damage awards and to reduce the volume, costs, and delay of litigation.\(^{33}\)

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From the view of the law’s drafters, the American legal landscape looked exceedingly bleak, but the bill promised radical change to the tort-law system. However, even though the bill passed the House and Senate, it never became law. President Clinton vetoed the bill, saying that “the legitimate problems of ordinary people should not be sacrificed to get rid of frivolous lawsuits.” The House attempted but failed to pass the bill over the president’s veto, stalling the Republican drive to accomplish federal tort reform.

After the embarrassment of the failed special session on tort reform, Alabama lawmakers had hoped that a federal tort-reform bill would remove the political pressure to pass such a bill within the state. But President Clinton’s veto signaled not only that tort reform would not be forthcoming on the federal level that year, but also that it was unlikely to occur through the end of Clinton’s term. Still, year after year, tort reform topped the business lobby’s legislative agenda in Alabama. Between 1995 and 1998, five major attempts to pass tort-reform legislation in Alabama failed in succession, and each of these attempts followed the same script as the first failed effort. During the first three of the Alabama Legislature’s four annual Regular Sessions over this period, a tort-reform package passed easily through the business-dominated House of Representatives, only for the package to languish and die in the less amenable Senate Judiciary Committee. In 1998,

Governor James flipped the script and started a tort-reform package in the Senate in “an effort to focus attention on what the upper chamber did or failed to do with” the bills. Yet this tort-reform package, too, never left the Senate Judiciary Committee. Tort-reform proponents identified the problem as trial-lawyer influence, especially the placement of trial-lawyer-friendly Senators on the Senate Judiciary Committee and a former-trial-lawyer Lieutenant Governor Siegelman who, as chief officer of the Senate, effectively signed the bills’ death warrants by assigning them to this trial-lawyer dominated committee. Siegelman at least outwardly supported tort reform, but business-aligned Senators charged the Lieutenant Governor with performing “an elaborate charade, so the Lieutenant Governor could appear to support tort reform while knowing the bill would never make it to the Senate Calendar.”

The Tobacco Lobby and the Court of Public Opinion

Stakeholders attributed the failure to pass tort reform in the 1990s at state and federal levels in large part to a lack of support from elected lawmakers, but these stakeholders also realized that political will for legislative change often starts from below. The battle over tort reform reflected not just a battle for elected offices, but also one for public support. In 1996, Governor James’s policy advisor suggested as much when, in the

wake of the failed special session, he advised James: “Before we embark on litigation reforms, the public must understand how tort reform will benefit them. Win public judgment first – then win the vote.” But proponents of tort reform faced a public-relations problem that was not easily resolved. Tort reform revolved around specialized, technical, and dry matters of legal procedure. The laws governing lawsuits grant a significant amount of legal power to the parties that they favor, but the differences among current and imagined alternative legal defaults, procedural mechanisms, and policy levers are difficult to explain to voters who lack legal training. For tort-reform proponents to sell tort reform to average voters, they needed effective messages that commanded attention without requiring detailed lectures on the structure of the tort system.

Opinion surveys conducted at the behest of tort reformers consistently showed that businesspeople—but not necessarily ordinary voters—tuned in to tort-reform messaging. In Alabama, most small- and large-businesses queried by the BCA reported that tort reform topped their legislative priorities in 1995. A parallel survey of small-business members of the Alabama Chapter of the National Federation of Independent Businesses (a small-business lobbying group) ranked “excessive litigation” as members’ fourth-highest concern in 1995. By 1998, the same business group reported that “[t]hree of four small-business owners said the high cost of liability insurance and fear of being sued are the

38 “Tort Reform Strategy,” memorandum from Michael Ciamarra to Governor Fob James, Jr., 27 February 1996, container SG024622, folder 2, Alabama Governors Papers (James), Alabama Department of Archives and History (emphasis in original).
biggest problems facing business.”39 By contrast, surveys of ordinary voters showed that concerns about lawsuits resonated far less in the population at large. Education, crime, and drugs topped the list of voters’ legislative concerns in a 1997 state survey, which not only found that “tort reform’ [was] not a top priority for Alabama voters” but also that “15 percent of those polled had to ask for a definition of what the pollster meant by ‘tort reform.’” One journalist concluded, “A decade of debate and millions in advertising apparently haven’t excited Alabama voters about ‘tort reform.’” Trial lawyer Jere Beasley echoed this sentiment. “When you get outside Montgomery and the politicians,” he asserted, “the average citizen could not care less.”40

Through the 1990s, key leaders in the tort-reform movement sought to reframe popular sentiment. Rather than focusing on doctrinal distinctions between different procedural rules, tort-reform proponents began to present the core elements of tort reform in rhetorically simpler and emotionally more resonant packages, using the language of “lawsuit abuse,” “the lawsuit lottery,” “jackpot justice,” “junk lawsuits,” and “the lawsuit tax.” In doing so, tort-reform proponents rallied public opinion while giving tort reform a new vocabulary.

People make meaning through stories. This new vocabulary used by tort-reform proponents represented much more than simply a collection of words to simplify the concept of tort reform. Rather, these ways of talking about tort reform tapped into deeper


narrative tropes in American culture, quietly reconfiguring the ways that ordinary Alabamians viewed the American litigation system. Political scientist Frederick Mayer explains “how stories that engross can persuade by altering our attitudes, changing our beliefs, and constructing our interests.” They can even “so frame an issue that action becomes an expression of identity and, indeed, a moral imperative.” In other words, storytelling frames both a problem and a menu of possible solutions. Well-constructed narratives transform discrete facts into comprehensive understandings about the world that suggest what outcomes are just or unjust, cementing the determination of individuals and groups to prioritize specific issues as deserving of mobilization of scarce resources of time and money. And the framing of a problem and the concomitant delineation of potential policy responses can powerfully shape political behavior. Of course, not all narratives work, and all narratives are not equally compelling. For a narrative to resonate and have purchase, it must dovetail with at least some of the listener’s preexisting values and notions of how the world works. “As with jokes,” the economist Robert Shiller explains, “a narrative has to be delivered just right to be effective.”

Tobacco companies had long been adept narrators, selling cigarettes through stories. As illustrated by historian Allan Brandt, cigarette makers had “all but perfected . . . meaning-making processes” through the early-twentieth century. These companies had put their marketing skills to use during the 1960s and 1970s to overcome not only

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conclusive scientific evidence that smoking kills but also anti-smoking policies such as mandatory “warning labels on the packaging and a ban on broadcast advertising.” More specifically, cigarette makers had tapped into “[w]idely shared libertarian attitudes about both the role of the state and the behavior of individuals,” as well as “a deep and abiding skepticism, if not overt hostility, to paternalistic interventions on behalf of health.” By the end of the 1970s, the industry had learned to invoke “Big Brother or the Prohibition debacle to point out how paternalistic government interventions offended the basic American values of independence, autonomy, and the right to take risks.”

The strategy of tort-reform messaging followed a similar script. Like the cigarette ads of earlier decades, tort-reform messaging in the 1990s spoke to a preference for personal responsibility and market-driven competition, while disparaging regulatory intervention and invoking conservative American values.

Tobacco companies had tremendous financial resources and clear tort-reform political objectives, but by the 1990s “Big Tobacco” also served as a kind of political bogeyman. Thus, another central ingredient of tort-reform efforts from the 1990s on was subtlety. Tobacco companies could work behind-the-scenes through lobbying organizations like the Business Roundtable and especially the American Tort Reform Association (ATRA) to support policy goals at the national and state levels, without revealing that the emerging tort reform coalition included a “Big Tobacco” component.

42 Brandt, Cigarette Century, 280–81.
ATRA leaders understood the need to construct tort-reform messaging on multiple planes—both at the state and federal levels and to expert and lay audiences. ATRA directed its own ATRA-branded advocacy primarily to a legal and policy audience. This included a weekly legislative newsletter called *Legislative Watch* as well as a “fax on demand” service to distribute legislation and other tort reform information directly to its members.\(^4^4\) Also, its semi-annual publication, the *Tort Reform Record*, contained summaries of state legislative actions on tort reform grouped by state and issue. These publications targeted readers fluent in legal terminology and well versed in various legal mechanisms for tort reform, as the publication’s sections launched directly into lists of developments related to “collateral sources” and “non-economic damages” without any explanation of these terms.\(^4^5\) This approach would have helped state legislators understand legal developments in other states and aided large businesses and their attorneys as they navigated the laws of the fifty states, but it had no chance of changing the views held by the public at large.

Recognizing the need for a complementary form of outreach for a non-specialist audience, ATRA spawned a different, complementary type of advocacy group.

With the help of a national political consulting firm, ATRA began in the early 1990s to create model “grassroots” tort-reform citizen groups that it could seed and cultivate in states across the country. These “Citizens Against Lawsuit Abuse” (CALA) groups organized at the state level and billed themselves as “citizen activist” groups staffed with


locals, but they drew their advertising, research, and strategy—as well as a significant amount of funding—from ATRA. In a way, then, members of these groups fought as ground troops for large businesses, including ATRA’s largest supporter, the Tobacco Institute. Knowingly or unknowingly, these groups took part in battles-by-proxy within tort-reform campaigns in their states. ATRA first deployed CALA groups in Texas, where Philip Morris credited the groups with “making tort reform a more politically charged issue” amid the 1992 election year. Based on this early success, ATRA funded new groups “in Alabama, Mississippi, and West Virginia.” As explained in a Philip Morris memorandum, these CALA groups, wherever they operated, were to deploy ATRA’s “communications strategy and tools which help organize and generate financial support” in order to achieve three objectives, as directed by the Tobacco Institute: “to advocate tort reform legislation, to communicate an anti-lawsuit message, and to make the plaintiffs’ trial bar politically radioactive.”

In service of the first and second objectives laid out above, and in contrast to the technocratic debates occurring at the level of policy-oriented lobbying groups, the state-level citizens groups mobilized a simpler vocabulary of “lawsuit abuse” and “frivolous lawsuits” to describe the legal landscape. Rather than informing voters about the technical dimensions of tort-reform measures (or even to teach them the meaning of the term “tort

reform”), these citizen groups cultivated general critiques of the legal system to increase political support for legislative change. Furthermore, since ATRA established CALA organizations on a non-profit basis, they (unlike true lobbying organizations) could make “unlimited, unreported political contributions” under certain state election laws. Thus, state CALA groups could support political activities without reporting their spending like other political entities, including trial lawyers’ organizations.47 The emergence of CALA organizations prompted immediate public complaints, as critics characterized their strategic combination of simplified rhetoric and secrecy as “a sly deception designed to appeal broadly to patriotic, hard-working Americans, many of whom will ultimately serve on juries.”48

In Alabama, the local CALA group, called Alabama Voters Against Lawsuit Abuse (“AVALA”), formed in 1993 and claimed 14,000 supporters by the late 1990s.49 AVALA’s directors fervently denied formal affiliation with the national network of organizations started by ATRA and publicly insisted that AVALA had “not taken a dime of tobacco money.” Instead, the organization claimed to rely mostly “on small contributions” from its grassroots citizen members.50 When attorney Jere Beasley disputed AVALA’s “grassroots” character by accusing the group of receiving funding from tobacco

48 Deal and Doroshow, The CALA Files, 3.
companies and other big businesses, AVALA issued a scathing press release attacking “wealthy Montgomery personal injury lawyer Jere Beasley” and his “series of lies and inaccuracies.” The press release “questioned Beasley’s motivation for attacking a grassroots group made up of consumers, taxpayers and small business people.” The group further accused Beasley of unseemly “mudslinging” and expressed shock that Beasley “would stoop to smearing 13,000 AVALA supporters.” Criticizing Beasley for being “part of the problem with our broken civil justice system” AVALA acidly noted that “[u]nlike the rest of us, many trial lawyers know what it is to have millions of dollars,” and predicted that Beasley’s “dirty tricks” would “not fool the people of Alabama.”

Despite these indignant denials, internal Tobacco Institute records show that AVALA did in fact receive funding, both directly and indirectly, from the organization. One 1995 Tobacco Institute budget document includes funding directed to AVALA—$225,000 for 1995 and $100,000 planned for 1996. The millions of dollars that the tobacco industry directed to ATRA would also have provided additional direct and indirect support to AVALA through strategy and marketing materials. Finally, Tobacco Institute political consultants provided indirect support to AVALA through media campaigns. One political consultant boasted in a letter to a tobacco executive that his group, which specialized in “coalition


building” and “grassroots organization,” had “[d]esigned and implemented a grassroots strategy on tort issues in Alabama,” and sponsored an editorial that ran in the *Mobile Register* about AVALA, which praised the group for its proposed “simple reforms.”

Though accused of engaging in “smear tactics” in 1996, Beasley’s insinuations about AVALA hit their mark, though he lacked access to corroborating evidence at the time.

Despite the loud protests of AVALA’s leadership about its independence and “grassroots” character, there were other not-so-subtle signs of national coordination. For example, AVALA used the same logos, slogans, and marketing materials as organizations in other states, such as the “Stop Lawsuit Abuse” image illustrated in figure 26. Aware that the legitimacy of these groups hinged on their “local” identity, CALA groups worked hard to “maintain the face of local citizens groups,” but these similarities contradict the

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54 Other examples include a document titled “Alabama State Plan 1999” from the Philip Morris in which the tobacco strategy is described as follows: “Provide state and national tort reform coalitions with subtle support” and “provide funding for state tort reform coalitions.” “Alabama State Plan 1999,” Philip Morris, TTID Nos. 2072021650 et seq., https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/rivh0085. Another document from the same document collection traced AVALA’s efforts in 1994, reported that “[i]n addition to [AVALA’s] bi-monthly publication Courtwatch, there will be print and television advertisements, and possibly a petition drive” in 1995, and noted that “AVALA will continue to be very active on grassroots and public education campaigns” in 1995. L. Astilla, “State Tort Reform,” April 1995, Philip Morris, TTID Nos. 2048769010 et seq., https://www.industrydocumentslibrary.ucsf.edu/tobacco/docs/qzhg0093.

idea that they operated without at least some top-down coordination and sharing of resources.56

AVALA also operated with support from Alabama business-lobby groups like the BCA and the Alabama Civil Justice Reform Committee, both of which asked their members to join AVALA and provided materials to help spread its reform gospel across the state.57 But in sharp contrast with the business lobby, which worked through more established channels to influence the political process through direct lobbying and campaign funding of desirable candidates, AVALA focused almost exclusively on swinging public opinion through screeds against the evils of “lawsuit abuse” and especially

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through caricature of the villainous trial lawyer.\textsuperscript{58} AVALA’s plan rhetorically mimicked that of Shakespeare’s Dick the Butcher in \textit{Henry VI}: “First thing we do, let’s kill all the lawyers.”\textsuperscript{59}

In addition to differences in strategy, the tone of AVALA’s advocacy efforts in Alabama also diverged from the activities of other groups promoting tort reform in the state. AVALA’s messaging was simple, direct, vivid, and “common sense” in attitude—but also at times histrionic. AVALA’s executive director, Skip Tucker, placed emotionally charged articles and letters to the editor in newspapers across the state. Tucker understood both politics and the power of the pen. After serving for ten years as a reporter, editor, and assistant publisher of the \textit{Daily Mountain Eagle}, a newspaper in Jasper, Alabama, he then had worked in the press office of two gubernatorial campaigns and in one governor’s administration.\textsuperscript{60} In 1998, Tucker characterized the failure of the legislature to pass tort reform as “a slap in the face to every person now working for minimum wage who yearns for a good job with a good salary.”\textsuperscript{61} Rather than offering specific information about the content of tort-reform bills, Tucker’s articles attacked from a different angle, focusing on trial lawyers as arch villains in the moral battle for tort reform. One of Tucker’s opinion pieces, running in a large-circulation Alabama newspaper, began: “Here they go again.

\textsuperscript{58} See previous chapters for a discussion of the Alabama business lobby’s funding of legislative and judicial campaigns in support of tort reform.
\textsuperscript{59} Shakespeare, \textit{Henry VI Part II}, act 4, scene 2.
\textsuperscript{61} Skip Tucker, “Siegelman, Bedford Place Kiss of Death on Bills to Stop Lawsuit Abuse,” \textit{West Alabama Gazette} (Millport, AL.), April 2, 1998.
Wealthy personal injury trial lawyers continue to try to trick the public with a totally transparent and cynical mix of deceit, half-truths, disinformation, and outright lies.” In Tucker’s portrayals, AVALA represented a beacon of truth under siege from ruthless plaintiff’s attorneys. “Having killed tort reform for the third year in a row,” Tucker complained in 1997, trial lawyers

are hysterically pointing fingers of blame at the Alabama Voters Against Lawsuit Abuse, hoping to divert attention from their guilt.

Their lies are almost too ridiculous to deserve reply, but the plaintiff trial lawyers clearly feel that if they repeat these lies often enough, someone will believe them. False charges ring from them like wind chimes in a rainstorm. Words fly from their mouths. Here is the most ridiculous lie: Trial lawyers are now claiming that it is businesspeople who are killing tort reform. Please excuse me for laughing out loud, but that is so wildly untrue that it is just about the dumbest thing I ever heard.62

In response to a series of opinion pieces written by trial lawyers defending the tort system, Tucker wrote that trial lawyers “have viciously attacked the most honorable and honest people . . . without a second’s hesitation, reservation or remorse” and that “[t]heir distortions fly back at them until nothing of their credibility remains, but shreds.” He concluded, “You almost have to feel sorry for them.”63 AVALA’s executive director even used metaphorical language comparing trial lawyers to swine, noting that “[t]he only ones who don’t see the problem [with the tort system] are the ones feeding at the trough” and “[i]t is the hog at the trough that squeals the loudest.” Remaining in the metaphorical


barnyard, at another point he described the arguments from trial lawyers as “Deja Moo,” since they elicited "the eerie feeling that you’ve heard this kind of bull before."  

In addition to demonizing money-hungry trial lawyers, AVALA marketing materials also tried to rally public opinion for tort reform through appeals to pocketbook common sense. Tort reform, AVALA argued, would abolish what the organization called the hidden “lawsuit tax” (see figure 27). According to AVALA’s informational leaflet titled “A Huge Problem Growing Out of Control,” this insidious levy was “built into the price of health care services and goods,” purportedly adding $3,000 to an $18,000 pacemaker and $8 to a $11.50 dose of a child’s DPT vaccine. The group also estimated the magnitude of the “lawsuit tax” on ordinary consumer goods, asserting that “half of the price of a $200 football helmet is liability insurance” and that when a consumer bought “a step ladder, the liability insurance represents about $20 of the cost.” Despite the specificity of the claims, which lent them credibility, AVALA did not furnish citations to the data that ostensibly underpinned these economic calculations, so it is impossible to know the source or methodology that generated them.  

Since the organization claimed to portray tort reform as being about *lawsuit abuse*, AVALA also made a point of calling out specific illustrations of unjustified legal actions. An AVALA leaflet titled “10 Examples of Lawsuit Abuse that Happen Every Day” featured anecdotes about lawsuits designed to elicit indignation. Under the heading “Junk food, junk lawsuit,” the leaflet described how “[a] man who’d eaten a lot of sugary snack food fell out of a tree…and sued the snack food company for $100 million in damages!” Under the heading “Fear of not flying,” another lawsuit reportedly involved “[a] man [who] joined a group to learn, among other things, to fly through self-levitation.” But when “[u]nsatisfied with the results,” the man “claimed psychological and physical damages . . . and sued the group for $9 million.” These leaflets were not entirely generic; they included references to AVALA and Alabama at strategic points. However, they read like form materials prepared centrally that allowed local groups to fill in blanks. Invariably, the
anecdotal descriptions of outrageous lawsuits did not mention when or where plaintiffs filed these lawsuits, complicating any attempt to verify the claims. The leaflet’s authors did acknowledge that “many of these cases were eventually dismissed,” but the brief anecdotes appeared without any type of case citation, making further inquiry into the status of these cases impossible. Instead, the pamphlet emphasized that these “real cases . . . can happen today in Alabama unless we reform the system.”

The point of these materials was never to provide a meticulous accounting of episodes of lawsuit abuse—they rather sought to gin up popular anger about unscrupulous manipulation of the American legal system. A 1995 presentation to a tobacco industry audience reported that AVALA’s messaging had proved “highly effective.” Measured by Philip Morris’s original goals for the organization—“to advocate tort reform legislation, to communicate an anti-lawsuit message, and to make the plaintiffs’ trial bar politically radioactive”—AVALA had succeeded with flying colors.

Other groups attempted to fight back against AVALA, but AVALA’s strategic choices made it an especially challenging foe. Three anti-AVALA television commercials ran on ABC stations in Alabama markets in the fall of 1996 in the period leading up to the election of Republican Harold See to the Alabama Supreme Court. The advertisements,

66 Alabama Voters Against Lawsuit Abuse, “10 Examples of Lawsuit Abuse that Happen Every Day,” from Action Kit for Taxpayers, Consumers, Working Families, and Small Businesses, n.d. (c. 1999), ADAH, box SG025688, folder 39. The ellipses within quotations are original to the source. In fact, this may have been the same leaflet distributed (presumably with reference to California instead of Alabama) by the Los Angeles Citizens Against Lawsuit Abuse group in 1999 under the same title. See Deal and Doroshow, The CALA Files, 21.


68 For further discussion of Harold See’s election, see previous chapter.
produced by a group called Committee for a Fair Judiciary, portrayed AVALA as a puppet whose strings were controlled by Big Tobacco and other corporate interests. One advertisement opened on an image of a gated property and an admonition: “This week [after the elections], behind gates like these, in mansions all over Alabama, the super-rich will be having parties. You won’t be invited.” Each advertisement accused AVALA of attempting to trick the people of Alabama into voting against their interests and concluded with some variation of the phrase “Hardworking Alabamians won’t be fooled.”

However, as soon as mandatory state campaign-finance disclosures became available, AVALA’s Skip Tucker mounted a counterattack, calling the advertisements lies and revealing that funding for these advertisements—well over $100,000—derived from state trial lawyers. AVALA ran competing advertisements at the same time, but the trial lawyers could not use campaign-finance disclosures to similarly reveal the source of AVALA’s funding because, though deeply political, AVALA was organized as a non-profit, not a political committee, and thus did not have to reveal its funding sources. Tucker defended the group’s structure, explaining that secrecy protected AVALA members because “trial lawyers have a history of coming after the folks who stand up against them.” In the end, these advertisements probably canceled each other out in the domain of public opinion. If some group was secretly funding every media campaign, one might reason, then perhaps there was less sting in the accusation from either side.

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Another single-issue group called We the Jury also attempted to push back against AVALA, but its success also proved limited. Focusing on protecting citizens’ rights to trial by jury, We the Jury was founded by H.L. “Lindy” Martin, a serial joiner and passionate advocate of a variety of causes. Born to Powhatan-Cherokee parents in North Carolina, Martin settled in Alabama after ordination as a Baptist minister, where he served for over twenty years as Dean of Student Services for a local Baptist university. A lifelong Rotarian with perfect attendance over his more than 40 years of membership, he also became an activist in the American Indian rights movement. He had served terms as Principal Chief for both the Powhatan Indian Association in North Carolina and of the Cherokees of Jackson County, Alabama, and he established the Society for the Preservation of American Indian Culture.71

We the Jury opposed both tort reform and the move towards arbitration clauses, both of which, Martin believed, interfered with the sanctity and autonomy of the jury process. In the mid-1990s, Martin wrote a series of letters to the editor in newspapers criticizing AVALA’s position—not because of its funding sources (as trial lawyers had done) but because of how AVALA’s proposals for tort reform would decrease the power of juries to determine judicial outcomes. Martin opposed any legislation that would diminish “opportunities for judicial redress,” noting that “[b]oth the U.S. and Alabama

Constitutions provide for the separation of power among the three branches of government.” He believed that “[m]ost thoughtful Alabamians want this [system] to remain in place.” Portraying the jury as “the most democratic body in the American governmental system,” he argued that to “tamper with the right to trial by jury . . . is to undermine a cornerstone of our democracy.” At a basic level, Martin insisted, “[t]he citizens of Alabama are trustworthy[,] and they would rather have jury members deciding questions of punitive damages than . . . allow some other procedure to be utilized.”

AVALA’s response the Martin’s criticisms followed the same patterns as its attacks on the Committee for a Fair Judiciary. The tort reform organization accused We the Jury of being just another front organization for “wealthy personal injury lawyers who get rich playing the lawsuit lottery at our expense” and Martin of spewing lies with “great gall.” As one AVALA representative concluded in an anti-We the Jury piece, “I encourage Martin and the rest of the lawyer-backed group to examine the facts more closely the next time they attempt to sway the overwhelming majority of Alabama citizens who support reform in our state’s civil judicial system.”

Easily fending off these scattered attempts to discredit AVALA, the organization’s extensive outreach reached many voters in Alabama, and likely changed some minds. The group certainly added a strong voice to discussions of tort reform across Alabama and raised the stakes associated with these debates. But even working in combination with

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other CALA groups nationwide, AVALA and its ilk do not alone explain the growing sense that America was a “litigious society” or that Alabama was among the worst offenders in fostering lawsuit abuse. The AVALA materials’ descriptions of outrageous lawsuits—the junk-food eater who fell out of a tree or the man who wanted to fly—captured attention briefly, but these stories came across more as the sort of wacky accounts one might see in a supermarket tabloid; as such they were ultimately quite forgettable amid all the efforts to shape political agenda setting in state capitols and on the national scene. To make Americans care about tort reform, proponents needed anecdotal cases with facts simple enough to be explained in less than a minute but also with high jury verdicts that would shock the conscience of listeners.

The Power of Archetypal Lawsuits

Put in the language of social science, tort-reform proponents needed to identify exemplary lawsuits to serve as focusing events for tort-reform advocacy. Political scientists define a focusing event as “an event that is sudden; relatively uncommon; can be reasonably defined as harmful or revealing the possibility of potentially greater future harms; has harms that are concentrated in a particular geographical area or community of interest; and that is known to policy makers and the public simultaneously.” Focusing events can propel issues onto public debate, change the dominant issues on the policy agenda, and mobilize interest groups and coalitions to act for policy change. Some focusing events, such as natural disasters or sudden catastrophic incidents, attract policymakers’ attention without the need for policy advocates’ intervention. However,
other such occurrences are made, not born—selectively constructed by advocates of a particular policy position and designed to concentrate attention on a particular problem or issue. This is not to say that any garden-variety episode can be honed into a focusing event; rather, the facts of the case must match the terms of debate. An event with outrageous or uniquely compelling details fulfills a necessary but not sufficient condition for the creation of a focusing event. From there, policy advocates must make the necessary connections between the event and a policy debate, filling gaps, connecting dots, and drawing conclusions.74

In the case of tort reform, no single lawsuit had such an unmediated impact on the average voter as to spur political will for policy change without policymakers’ intervention. Instead, tort-reform advocates worked diligently to cultivate public awareness of the legal cases that most urgently suggested a need for tort reform. Two cases in particular, one from out-of-state and one from Alabama, would come to transform national and state conversations about tort lawsuits. The first, nicknamed the “hot-coffee case,” cemented fears nationally about a legal system out of control, while the second, the “BMW case” served as evidence that the situation had careened out of control in Alabama courts. Together these cases became powerful rhetorical ammunition that tort-reform proponents used to shape a national perception that lawsuit abuse had run rampant.

The so-called hot-coffee case rose to national attention in 1994 when a New Mexico jury awarded seventy-nine-year-old widow Stella Liebeck $2.9 million in a lawsuit arising

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from burns to her thighs from a hot cup of McDonald’s coffee. Punitive damages made up $2.7 million of this verdict. Liebeck had held the hot cup of coffee between her thighs while sitting in a parked car, and the coffee spilled between her legs and pooled in the car seat, causing serious burns that required a series of skin grafts. Liebeck’s lawyers argued that McDonald’s executives had callously failed to implement safety measures in the face of hundreds of complaints about the temperature of its coffee, and the jury agreed. The judge reduced the jury verdict to less than a million dollars, and the case settled for even less. In short, Liebeck did not become a millionaire. Still, most people viewed Liebeck’s lawsuit as a grasping get-rich scheme. Liebeck, not a McDonald’s employee, had placed the coffee cup in a precarious position and then had lost control of it. Why did the onus fall on McDonald’s to pay for the accident? Despite the severity of the victim’s injuries and systemic evidence about the risks associated with McDonald’s stipulated temperature for its java, many people felt that McDonald’s had been treated unfairly. In the wider media, “hot coffee” became a metaphor for abuse of the legal system.75

As newspapers transmitted news of the lawsuit around the world, the story lost detail and nuance as editors whittled the details of Ms. Liebeck’s case down to a mere forty-eight words. At that length, as one professor of communications explained, the


The pop-culture legacy of Ms. Liebeck’s case has been long lasting. For example, country music star Toby Keith’s 2009 hit single “American Ride,” which takes a non-politically-correct view of the darker sides of American life while affirming the singer’s pride in being an American, includes the lyrics: “Plasma gettin’ bigger, Jesus gettin’ smaller; spill a cup of coffee make a million dollars . . . That’s us; that’s right; gotta love this American ride.” Toby Keith, “American Ride,” by Dave Pahanish and Joe West, track 1 on *American Ride*, Show Dog Nashville, 2009.
message of “woman-coffee-millions sound[ed] like a rip-off, not like a logical consequence of a thoughtful trial.” As a result, public opinion came down “squarely on the side of McDonald’s.” The makers of the situation-comedy *Seinfeld* even invoked the hot-coffee case in two 1995 episodes in which a character sneaks a cup of gourmet coffee into a movie theater by hiding it in his pants, suffers burns as a result of this subterfuge, and then sues. When another character tells him he is sorry “about that movie thing,” the coffee-smuggling character replies, “Sorry? Are you kidding? You did me the biggest favor of my life! I spoke to a lawyer, we’re suing for millions!” Confused, his friend asks, “Suing? What for?” “The coffee was too hot,” the litigant explains. “It’s *supposed* to be hot,” the other replies with a look of wonder. “Not *that* hot,” the other explains with a wag of his finger. The audience laughs. Then, when later asked whether he believes his lawsuit has any merit, the coffee-drinking character replies that his lawyer assured him that “if there’s one coffee-drinker on that jury, I’m gonna be a rich man!” Another character groans. “That’s despicable,” she cries. “Who ever heard of this anyway—suing a coffee company because their coffee is too *hot*—it’s *supposed* to be hot!” The audience again erupts in laughter.76

The hot-coffee case had become one key focusing event for national discussions around tort reform—lawmakers’ metaphorical “exhibit A.” In the media and other public

fora, “hot coffee” became a politically charged shorthand to describe a certain type of social ill: the greedy, lazy line-cutter who profits from manipulating the system rather than through his or her own work ethic. Most importantly, even voters without understanding of the meaning of the technical term “tort reform” could fluently discuss “hot coffee.” The tale of the careless coffee-drinking female millionaire plaintiff evoked themes and spurred emotional responses that rallied far more Americans to the tort-reform camp than any discussion of legal technicalities ever could have done.

Even though the hot-coffee case had no geographic connection to Alabama—the incident and the lawsuit took place in New Mexico—the story resonated in Alabama and became a litmus test for talking about fairness and unfairness in tort lawsuits. While plaintiffs’ attorneys continued to argue that the deterrent effect of large verdicts made the consumer marketplace safer for all, tort-reform proponents joked that at least they were “doing more than crying over spilled coffee.” When a local Alabama man won more than $5 million in a jury verdict against an insurance company, the man’s lawyer justified the award by assuring a reporter that it was not just “another McDonald’s coffee cup

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77 The term “line-cutter” is borrowed from sociologist Arlie Russell Hochschild. Hochschild posits that one central “deep story of the right” is framed around the idea of the profound unfairness of cutting in the line on the way to the American Dream. In this narrative, liberals “have removed the shame from taking. The government has become an instrument for redistributing your money to the underserving. It’s not your government anymore; it’s theirs.” Arlie Russell Hochschild, “I Spent 5 Years with Some of Trump’s Biggest Fans. Here’s What They Won’t Tell You,” Mother Jones (Sept.–Oct. 2016), https://www.motherjones.com/politics/2016/08/trump-white-blue-collar-supporters/. See also Hochschild, Strangers in Their Own Land.


A business journalist cited the hot-coffee case, along with a psychic’s successful suit against a CAT scan manufacturer whose machine purportedly eliminated her ability to see the future, to assert a need for legislative tort reform in Alabama. “The fact is,” explained the journalist, “one way or the other, you, the consumer, are picking up the tab for these indefensible awards.” Alabama even had its own variation on the hot-coffee theme in the form of the “famous hot enchilada cheese sauce lawsuit” in which a girl’s family sued a Tuscaloosa restaurant after cheese sauce spilled and burned her leg.

The second key case that focused attention on perceptions of a burgeoning national litigation crisis struck closer to home. This controversy was the suit that the Birmingham oncologist Ira Gore had brought against BMW. To recall the circumstances that prompted the lawsuit – Gore purchased a BMW sedan in 1990, then took the car to a body shop for detailing nine months later to make it look “snazzier.” The detailer then informed Dr. Gore that at some point BMW had retouched the car’s paint before sale, and Dr. Gore sued BMW, claiming that BMW’s failure to disclose that the car had been repainted had constituted fraud. Gore’s lawyer argued he “had been sold used or second-hand goods at a ‘new’ price,” and an Alabama jury agreed, awarding the oncologist more than $4 million, mostly through punitive damages—a money award intended both to punish BMW for its nation-wide practices and to send a message to other firms. At approximately the same time, a second Alabama jury heard a virtually identical case of another man named Yates.

83 Gore’s suit against BMW is detailed in the introduction to this dissertation.
who had purchased a car from the same dealer under the same conditions. Yet the second jury had awarded Yates only $4,000 for the same claims. On appeal, the Alabama Supreme Court found Dr. Gore’s jury award excessive, but the court reduced the award only to $2 million. BMW appealed to the U.S. Supreme Court, and the Court reversed the case, holding that such a large punitive damage award violated BMW’s constitutional right to due process. The Court did not draw a clear line on where the constitutional limit for punitive damages lay, but its opinion contended that the Gore case had crossed the line, wherever it was. In the end, Dr. Gore’s case ended with a revised award of only $50,000—perhaps not even enough to cover payment of his own legal fees through the lengthy appellate process. BMW avoided the multi-million-dollar jury award, but the company did not recoup the costly legal fees that it incurred defending the case. After years of litigation, neither party to the case stood out as an unambiguous “winner.”

Across the country tort-reform proponents and opponents nationwide tried to make sense of the so-called “BMW case,” disagreeing about the lessons one should draw from it. Proponents invoked the BMW controversy not for its final whittling down to $50,000 but for its initial $4 million award. For these groups, the case proved that punitive damage awards had spun out of control. A journalist for the Washington Post conflated the BMW case with the hot coffee case, noting that, “Gore’s BMW has become a popular symbol of America’s litigiousness and high jury awards, like the scalding cup of coffee that led

initially to a $2.7 million judgment against McDonald’s.”85 And the disparity between the Gore and Yates cases legitimated the “lawsuit lottery” metaphor: the already well-off Dr. Gore had pulled the lever on a litigation slot machine and had won big, while the other plaintiff had walked away with a paltry consolation prize. Tort-reform advocates further interpreted the U.S. Supreme Court’s intervention in the case as a sign that the state needed legislative tort reform to limit unconstitutional damage awards. From a business perspective, too, it was entirely unsatisfactory that it took years of appeals for BMW to gain a ruling that reduced the jury award. The amount of the final judgment did not account for the thousands (perhaps even millions) of dollars that the company had spent on legal fees. Moreover, while the U.S. Supreme Court’s opinion pushed the law of punitive damages in a business-friendly direction, by holding that excessively high punitive damages could violate a defendant’s due process rights, it did not offer specific instructions on how to properly calculate these damages or create an upper limit on what amount would be considered excessive. In future cases, companies facing punitive damages would be able to cite the BMW case to bolster their claims for reduction of the award, but this precedent created a weak legal shield at best. Only legislative caps on punitive damages could fully constrain jury awards, proponents claimed. In the interim, business interests still found the BMW case useful as a rhetorical tool in the struggle to win support for their cause. In the U.S. Senate, for example, Republican Senator Orrin Hatch used the BMW case as a political bludgeon during debates about the tort-reform package in early 1996. “I

defy any member of this [Senate] to read the opinion in this case and tell the American
people that justice was done,” he said.86

Yet tort-reform opponents reached opposite conclusions about the BMW case. At
each stage of judicial review, appellate tribunals reduced the award until Dr. Gore walked
away with only $50,000. From this perspective, the case taught a positive lesson about the
moderating influence of the judiciary on jury awards. Rather than being a symbol of the
legal system’s failure, the BMW case represented instead how the multi-layered system
created checks on jury awards that exceeded an appropriate measure of justice, as well as
legal precedents that fine-tuned such assessments and articulated them in flexible legal
rules. Judges—not (the then nonexistent) legislative limits on damages—had brought the
award to Dr. Gore down to this more socially acceptable level. The president of the
consumer-advocacy group Public Citizen argued the BMW case should halt cries for tort
reform. The outcome “should end debate over any need for federal legislation,” she
explained, because “courts have the power and obligation to ensure fairness.”87

Furthermore, the “lottery” element in the case represented a key design element, not a flaw.
The real question was not what whether defendants thought the punishment was fair, but
whether the punishment created the right financial incentives in the marketplace. The
proper goal for legislatures and the judiciary was to incentivize upstanding behavior by

86 Ibid.
87 BMW v. Gore, 646 So.2d at 621–23; BMW v. Gore, 517 U.S. at 563; Andrew Frey, Evan Tager, and David
Cordero, “Reflecting on the 20th Anniversary of BMW v. Gore,” Law360, May 19, 2016,
https://www.law360.com/sports/articles/795007/reflecting-on-the-20th-anniversary-of-bmw-v-gore; McKee, “The

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corporations and punish misrepresentation and fraud. Additionally, as one of Gore’s attorneys explained, “You want to give the plaintiff adequate incentive to bring the lawsuit against the defendant. It is like winning the lottery, but society is better off because presumably harmful policies become changed.”

In many corners of Alabama, however, commentators deemphasized this more academically oriented debate about the implications of the BMW case. Instead, the case mattered because it crystalized state shame. Residents of Alabama were long accustomed to hearing news that their home state has been recognized for falling behind the rest of the country by one metric or another; Alabamians had, from time to time, found “some reason to fall back on the soul-satisfying exclamation, ‘Thank God for Mississippi,’” if only because of the neighboring state’s position on the very bottom rung of some comparative ranking. As news of the BMW case began to appear in state newspapers, the perception that Alabama had become exceptionally litigious spread. One of BMW’s lawyer’s “called Alabama ‘the punitive-damages capital of the world,’” and a journalist echoed this sentiment, registering a lack of surprise that the U.S. Supreme Court would accept the BMW case “as a test case for whether there should be federal limits on jury awards” because “[i]t is Alabama, after all, that has gotten a growing reputation for juries that award high amounts of money for what appears to be little harm to the person bringing the lawsuit.”

Reader’s Digest branded one of the Alabama Supreme Court Associate Justices

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89 Key, Southern Politics, 229.
that had heard the BMW case as one of “America’s Worst Judges,” insinuating that campaign contributions from Dr. Gore’s legal team to the Justice had influenced the case’s outcome. The BMW case “was one of the celebrated, supposedly crazy products of our judicial system,” and tort-reform proponents recognized that this negative reputation could serve a powerful political purpose. Even in 1994, before the U.S. Supreme Court agreed to hear the case and propelled it into the national spotlight, state business interests had used the case as an example to “portray[] Alabama’s court system as being out of control and in need of reform.”

**Political Narrative and the Construction of “Tort Hell”**

The depiction of Alabama as especially litigious and its juries as over-zealous and particularly punitive had already begun to take hold in popular imagination by the 1980s, but this problem lacked a widely shared name. The concept of “lawsuit abuse,” for example, was a term that had been applied to describe tort suits in courts nationwide. But then, in 1995, a journalist coined the term “tort hell” to describe the state of the legal system in Alabama, and the name stuck. The term was first used in a *Time* magazine article titled “Where the Torts Blossom” as a derogatory way to describe Jere Beasley’s law practice in Barbour County, Alabama, “an ordinary little county that has become nationally recognized as tort hell,” where “the lawsuits grow thick and wild.”

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In a 2008 article, an Alabama attorney stated that Alabama first “earned the ‘Tort Hell’ title in a 1993 *Forbes* magazine article by David Frum.” Forrest Latta, “To Hell and Back,” *Business Alabama* (Nov. 2008): 43. However, none of the three articles Frum published in 1993 discussing Alabama use the term “tort hell” (or “jackpot justice” or
a Washington, D.C. attorney echoed Time’s assertion and expanded it statewide in an article in the Wall Street Journal, noting that “as Time magazine recently declared, Alabama has become the nation’s ‘tort hell.’” 94 Within weeks, discussions of Alabama as a legal netherworld began to echo through state and national papers. This term materialized suddenly but resonated powerfully. As shown in the chart below, the term’s metaphoric appeal encouraged proliferation of its use throughout the print media. Local newspapers even began to report on its use in other newspapers. One Alabama paper reported that “a national business magazine described Barbour County in Alabama as ‘tort hell,’ while the Wall Street Journal described the state as ‘plaintiff’s heaven.’” Within weeks of the Time article, Alabama was no longer just another state with a “lawsuit abuse” problem; Alabama stood alone on a pedestal as representing the deepest circle of America’s legal inferno.95

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“lawsuit lottery”). These articles do, however, portrays Alabama’s tort system in the 1990s as an exemplar for punishing out-of-state corporations and generally reflects poorly on the state’s legal climate and culture. In this way, these earlier articles set up expectations about “tort hell” that the 1995 Time article gave a name.

The only use of the term “tort hell” that I have found predating Jaynes’s Time article appeared in 1993 in an Allentown, Pennsylvania, newspaper article, in which the writer complains that the world is falling into “tort hell” because fears about lability and lawsuits spurred a local group to build a fence to prevent sledding on an Allentown hillside in the winter. Paul Carpenter, “The Sledding Hill Now Has a Snow Fence,” Morning Call (Allentown, PA), March 24, 1993.

Furthermore, for more information on Jere Beasley and his rise to national prominence for cases tried in Barbour County, as reported in the Time article, see previous chapter.

As accusations about “tort hell” began to ricochet around state media outlets, the term began to do more than merely descriptive work. Its widespread adoption affirmed readers’ preexisting stereotypes of Alabama, reinforcing expectations that the state would be an outlier in national rankings. People make meaning chiefly through narratives. For Alabama residents, the “tort hell” narrative reverberated as yet another slap at the state, a development soon reinforced through anti-trial lawyer activism.

Tort-reform rallies held around the state in 1995 demonstrated the narrative resonance of “tort hell.” In late October 1995, a Montgomery Area Chamber of Commerce program “drew hundreds to the Embassy Suites conference center,” where a Mobile-area insurance-defense lawyer named Davis Carr staged “a grass-roots meeting to organize the fight against lawsuit abuse” before a standing-room-only crowd. Carr explained “how bad

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96 Article data collected from LexisNexis Academic PAPERS (all newspapers) database, ProQuest News & Newspapers database, and Newspapers.com (n=287). Duplicate articles were removed where they appeared in more than one database, but syndicated articles published in multiple papers are counted in each paper in which they appeared.

97 See Mayer, Narrative Politics.
Alabama’s national reputation as ‘plaintiff’s heaven and tort hell’ had become,” comparing ordinary Alabama business people to “sheep being led to the slaughter.” “Alabama’s reputation as a business-friendly state has been gutted by the publicity about punitive damage awards here,” he warned the audience. He claimed that “the situation is far worse in Alabama than in any other state,” and thus “national attention focused on the problem has ‘gone far beyond idle curiosity.’” “They’re making fun of us now,” Carr admonished. “We’re the subject of ridicule.”  

Figure 29: Alabama Small-Business Owner and Tort-Reform Proponent Hobson Cox Holds a Handmade Sign at a 1995 Tort-Reform Rally in Montgomery, Alabama

This tort-reform rally was not a one-off event; Carr made similar presentations to audiences across the state. He had given an earlier version of the presentation to members of the Business Council of Alabama at the Council’s annual conference at a seaside resort in Orange Beach, Alabama. In Orange Beach, he highlighted the link between Alabama’s “frivolous lawsuits” and trial-lawyer political activism. “There are a few lawyers in this state who are making more money than high paid athletes and Hollywood movie stars,” Carr explained. “How many of you could make four phone calls and raise more than $1 million?” Trial-lawyer contributions, he argued, poisoned Alabama’s system and led to “big punitive damage jury awards that add about $25.09 to the cost of doing business” in Alabama. As with most such arguments, the attorney did not explain how he derived this remarkably precise sum. The point, however, was not about the figures themselves but that the state had fallen into “tort hell” and that only businesses and citizens working together could halt the state’s frightful, litigious descent into a legal netherworld.

These rallies, some of which drew standing-room only crowds, aimed to garner public support while also sending a message to Alabama’s Governor James, who at the time was weighing the option of calling a legislative special session on tort reform. In October and November 1995, Carr held rallies in the smaller Alabama cities of Dothan and Anniston. Next, Carr appeared at a hotel conference center in Tuscaloosa, this time in front of an audience of around 250 people. During this presentation, he offered “an array of statistics and national news media stories showing Alabama as one of the worst—if not the worst—state in America.” The presentation also featured a clip from the “1-800-HARRASSS” comedy sketch from Saturday Night Live and a keynote address by a local
taco-shop owner who discussed his experience as a defendant in the “hot enchilada cheese sauce” lawsuit—Alabama’s version of the hot-coffee case. Later that same week, Carr traveled to Sheffield, a smaller city in the north-western corner of the state, to talk to Muscle Shoals-area businessmen about the tort-hell issue. “We are trying to explain what’s going on in Alabama,” he said, asserting that insurance and financial companies, including one called the Life Insurance Company of Georgia, had chosen to cease transacting business in the state because of the state’s exceptionally bad legal climate. “You don’t have to go far to see that this is an issue that’s touching everybody,” the lawyer told the crowd. “This is just the tip of the iceberg.”

Carr knew that the Life Insurance Company of Georgia planned to leave Alabama because he was one of the company’s defense lawyers. Just days after holding tort-reform rallies in Montgomery, Tuscaloosa, and Sheffield, Carr argued an appeal in the Alabama Supreme Court for that insurer, resulting from the lawsuit that Daisey Johnson had brought for insurance fraud, resulting in a multi-million dollar jury award. As defense attorney for the insurance company in that case, “Carr put forth—and the court adopted—a set of standards used by trial judges to review verdict amounts to determine their fairness.” Carr also persuaded the Alabama Supreme Court to cut the punitive damage award against the company by more than half. The jury had awarded $15 million, but the trial judge had reduced it to $12.5 million. Carr’s arguments helped pare it back further to $5 million.

101 Daisey Johnson’s case is described in more depth in the introduction to this dissertation.
Carr reported that his “client was glad to get any kind of relief,” but, he added, “a lot more needs to be done.” To this end, Carr took on the mission of changing the laws of the state, not only through his work in the courthouse and the legislature, but in the court of public opinion. Through the powerful imagery of Alabama as “tort hell,” tort-reform proponents such as Carr captured public attention and reframed the terms of the tort-reform debate in the state.

**Trial Lawyers Attempt to Quench the Flames**

Thus, proponents of tort-reform legislation, including the powerful tobacco lobby, had seeded “grassroots” organizations, used certain cases as culturally resonant examples of a litigation crisis, and developed a powerful vocabulary around the tort-reform issue that contextualized the situation in terms of “tort hell,” “jackpot justice,” and “lawsuit abuse.” By the end of the 1990s, tort reform had taken a greater political and emotional charge than it had ever attained before at either the state or federal level. By the end of the 1990s, proponents of tort reform could accurately report that their constituents expressed not just concern—but outrage. Tort-reform opponents had not conceded, but they often failed to match the skill and savvy exercised by tort-reform proponents in shaping public opinion. Some opponents of tort reform attended Carr’s tort reform rallies, “hoping . . . to speak up and ask . . . questions and challenge” the “false statistics and ‘scare tactics’” used by the

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Alabama trial lawyers in particular found themselves on the defensive. While AVALA’s Tucker and others characterized trial lawyers as greedy and corrupt, the trial-lawyer community, most of whom considered themselves primarily victims’ advocates, struggled to uphold the reputation of their vocation. The ATLA president articulated the stakes of the moral battles ahead in a 1996 address to its members. A “grab for power . . . cleverly called tort reform” was underway, he explained, in which “an insidious public relations campaign has portrayed the wronged as the wrongdoers.” In Alabama, trial lawyers and their allies argued that they served as the “only obstacle to the forces who are intent on taking away most of the remaining individual rights of American citizens.” Trial lawyers’ “past opposition to those intent on destroying individual rights and our present willingness to fight for these rights,” one spokesman contended, “are the reasons the legal profession is the most noble profession known to man,” he continued. It was time, this individual charged, to “‘grit our teeth’ and ‘gird our loins’ to fulfill our high calling of protecting our individual rights against the immoral onslaught of wealth and power.” Recognizing that trial lawyers faced long odds, he pleaded with his fellow attorneys to join the fight and “quit shirking your duty.” “Give of your time, and give of your money,” he beckoned. “Do this until it hurts, and then give more. Then and only then will you be a
veteran of the war, fulfilling your individual obligation to your clients, to your profession, and to the people of this county.”

Like tort-reform proponents, trial lawyers sought to use media channels to inform voters and citizens about their side of the tort-reform debate through print media, including newspaper articles and opinion pieces. But on several counts these media efforts proved less sophisticated than their opponents. First, while tort-reform proponents generally mobilized a cohesive set of arguments around “lawsuit abuse,” tort-reform opponents approached the issue from a variety of sometimes conflicting angles. Some authors attempted to prove a negative—that there was no tort crisis—while others framed arguments around the role of the jury in the democratic process, the greed of big business, or theories of economic deterrence in the marketplace. This plurality of arguments against tort reform often took on abstractions, rather than presenting compelling parables. As such, they often weakened rather than strengthened opponents’ rhetorical position, muddying the waters of debate and testing the attention span of their desired audiences.

Second, while tort-reform proponents selected from a curated selection of powerful words and phrases, including “lawsuit abuse,” “jackpot justice,” and “tort hell,” opponents often used legal terminology that went over the heads of their audience. Trial lawyers, for example, used the term “tort reform” more often than tort-reform proponents, and they were also more likely to discuss specific legislative tort-reform proposals in their writings. Tort-reform opponents also failed to craft a framework as simple as proponents’ “lawsuit

abuse” narrative. The most similar phraseology used by opponents was likely the word play “tort deform,” which conveyed their negative views of tort reform but required the audience to have a preexisting understanding of the term “tort reform” (or at least “tort”) to be effective.105 This type of written engagement with the tort-reform debate reflected these lawyers’ experiences and training, but it had limited popular appeal.

Three opinion pieces published in local papers highlight these limitations of trial-lawyer messaging. First, trial lawyer articles tended to take a defensive perspective, attempting to counter tort-reform proponents point-for-point rather than by generating new narrative frameworks. For example, Jim Pratt, incoming ATLA president in 1997, argued in one piece that “Big Business,” not trial lawyers, created the real barrier to sensible tort reform. Pratt pointed to punitive-damage caps—one of the most prominent items on the tort-reform agenda—and distinguished two proposals.106 A trial-lawyer-supported plan would have capped punitive damages at ten percent of the defendant’s net worth, while the business lobby argued for a cap of $200,000, regardless of the defendant’s size. Pratt did not explain in his piece why one measure was superior to the other but instead highlighted the business lobby’s unwillingness to negotiate about the terms of a legislative cap. “I have called upon the leadership of the BCA . . . to reach a compromise,” he wrote, but “I have not been successful in opening such a line of communications.” He also sought to refute

106 Punitive-damages caps are laws that “cap,” or place an upper limit on, the amount that a plaintiff can win in punitive damages. These laws do not affect the amount a plaintiff can win to compensate directly for a defendant’s harm.
the idea that lawyer greed generated huge jury awards. “[T]rial lawyers do not determine the damages awarded in a particular case; rather it is a jury of 12 citizens who hear all the evidence, determine if a wrong has been committed and, if so, what damages are due the plaintiff,” he explained. By focusing on the dispute between “Big Business” and the trial-law community, Pratt did little more than affirm the battle lines of tort reform as laid out by tort-reform proponents. By doing so, his opinion piece actually played into tort-reformers’ central framing of the issue as being about the dueling economic interests of these groups rather than about the interests of consumers or about essential fairness in the consumer marketplace. When Pratt assigned responsibility to juries rather than lawyers for large verdicts, he reminded the reader about the greedy lawyer trope without effectively refuting the idea. Furthermore, his accusation that businesspeople were recalcitrant or unwilling to bargain likely did little to support the implied idea that lawyers, in contrast, were reasonable. After all, why should Big Business negotiate a truce, especially if they seemed likely to win the battle outright? In essence, Pratt’s piece reified tort-reform proponents’ narrative without meaningful retort.107

Second, where trial-lawyer opinion pieces sought to craft a counter-narrative, they tended to over-explain and create complexity instead of invoking essential values. Thus, Montgomery trial lawyer Thomas Methvin tried to convince readers that the “tort reform push” represented nothing more than an elaborate “charade,” a scheme to rile up the business community and public “to raise money for the 1998 elections.” In a lengthy


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opinion piece, Methvin presented multiple statistics about Alabama’s job growth, business climate, corporate compensation, and damage-award amounts, all in comparison with neighboring states. The piece cited numerous studies, as reported in at least six different periodicals, and quoted three different university professors (former economists from Harvard and the Massachusetts Institute of Technology plus a former dean of the business school at the University of Alabama at Birmingham). Methvin overwhelmed his reader with precise figures, including down-to-the-dollar data comparing punitive awards in five states and similarly specific reporting of nine Alabama CEO’s salaries. In sum, the opinion piece amassed data to suggest that Alabama business was booming without tort reform. But then, Methvin rather confusingly concluded that “in order to stop the perception [of a need for tort reform, he would] support legislation to put a cap on punitive damages of 10 percent of a company’s net worth, or $1 million, whichever is lower.” In other words, after going to great lengths to dismiss tort reform as unnecessary, Methvin ended with a tort-reform proposal. If a reader had sustained sufficient engagement to read such a long piece, especially one with the term “tort reform” in its title, he or she would wonder why one proposal was preferable to another if the whole effort was truly a “charade.” The article essentially asked readers to care about an issue that the article simultaneously argued had minimal importance. In addition, Methvin’s piece privileged technocratic expertise over clear themes, in contrast to articles that spoke of “lawsuit abuse” and that cast tort reform
as supportive of self-reliance and destructive of graft. As such his effort was unlikely to resonate with readers who did not already subscribe to his position.  

At least occasionally, opponents of tort reform did offer simple and intuitive appeals. Trial lawyer Jere Beasley argued against tort reform in plainspoken, compelling language, appealing to readers’ sense of essential fairness in the consumer marketplace. Beasley refrained from explaining any particular tort-reform bill, instead summarizing “tort reform” (which Beasley enclosed several times in quotations as if to apologize for using the legal term at all) as meaning simply that people’s “rights as consumers will be sharply limited in the courts.” Tort reform was more than “just a line from a political ad,” he explained. In contrast to Pratt’s opinion piece, Beasley eschewed the idea that “[t]he fight over tort reform” was fundamentally “about trial lawyers and the Business Council of Alabama.” Rather, Beasley contextualized the debate as “a fight over what controls consumers will have over the marketplace”—in other words, about how the government would apportion power between businesses and consumers. Beasley organized his own piece around letters he had received from concerned consumers, explaining that “[s]lowly but surely, people are discovering that their rights as consumers are very much in danger from the ‘tort reform’ crowd.”

This narrative strategy rhetorically allowed Beasley to position himself as a messenger rather than as an interested party, even though in reality he was very interested


in the outcome of tort reform. Beasley hammered home the idea that average people could lose legal rights through the words of several of these salt-of-the-earth correspondents—not through the published studies of university professors. Beasley channeled the fury of a letter writer from Uriah, a tiny hamlet of less than 300 people, who “couldn’t even find out if there would be public hearings on these bills” and who expressed “deep feelings about wham-bam passage of this type of legislation.” Beasley further contended that a “man from Macon County [a majority-African-American rural county in Alabama’s Black Belt region] put it best: ‘Most people will not wake up until they get hurt or badly mistreated by some big company and find out in court they will come up on the short end of the stick.’” But consumers need not necessarily be victims, Beasley preached. Drawing on a Biblical parable in which the Israelites destroyed the walls of Jericho by marching around its perimeter with trumpets, Beasley proclaimed that like those trumpets, “[t]he voices of the people of Alabama are beginning to be heard,” and that “soon the Jericho of tort reform will be in rubble.” Yet he also conceded that “it is hard for those whose voice is alone in the wilderness to keep raising their voice,” and concluded, without great confidence, that “[t]he pendulum will swing back toward the people if all of us persist in bringing those rights to the fore of peoples’ thoughts.”

Using relatively simple language and a Biblical metaphor that would have been intuitive to a large portion of the news-reading and Bible-fluent public, Beasley framed his tort-reform narrative around a power struggle between the weak and the strong in the

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110 Ibid.; Josh. 6:1–27.
marketplace. This is not to say that the choice of Biblical parable would have been universally resonant; some may have perceived this imagery as heavy handed or overly dramatic. But in these ways, Beasley’s narrative tactics competed more directly with those of tort-reform proponents in terms of simplicity of appeal and thematic framing. Beasley thus tailored his message to a lay audience more effectively than some of his trial-lawyer peers. However, his approach remained idiosyncratic and did not form part of a cohesive narrative strategy.

In many ways, the media shortcomings of tort reform opponents merely reflected the fact that trial lawyers were trained to be just that—lawyers. Neither media consultants nor journalists nor (with the exception of former Lieutenant Governor Jere Beasley) politicians, trial lawyers had forged their writing and reasoning skills in the crucible of law school. Their op-eds and other public commentary reflected this training. Lawyers faced a comparative disadvantage in shaping public opinion when compared to tort-reform proponents rooted in media-centered professions. But public opinion shaped citizens’ roles as jurors as well as their roles as voters, and though trial lawyers were less savvy in shaping tort-reform debates in the court of public opinion, they fared better in the actual courthouse.

A 1996 article in the Alabama Trial Lawyers Journal illustrates the tactics used to shape public opinion within jury pools. In this essay, two attorneys offered advice on how to “overcome the poisoned jury pool” of citizens who “have been convinced that ‘jackpot justice’ rules the day.” One piece of advice touched on “semantics”—“do not call it ‘tort reform’,” the authors advised. Though “most jurors do not have a clue as to the meaning of ‘tort reform,’” a juror in voir dire “may quickly rise to the bait and show his true colors
when prompted by buzz words and phrases such as ‘too many lawsuits’; ‘frivolous lawsuits’; ‘runaway juries’” and so on. The authors noted that by 1996 it had become “down right in vogue to sport an AVALA pin on one’s lapel” and to fret about “McDonald’s syndrome.” In such a hostile environment, the plaintiff’s attorney had to tackle the idea of “lawsuit abuse” head on—both to remove jurors so prejudiced by tort-reform messaging that they would not award damages to worthy plaintiffs and so that the discussion “can set the stage for closing argument when the frivolous lawsuit can be contrasted with the case being tried.” The authors suggested leading with a discussion of the hot-coffee case up front, using the following sample script:

Ladies and gentlemen, while it might seem odd, I want us to talk about the McDonald’s case. The purpose of this discussion is neither to attack or condone that result. We are here about another matter altogether. I simply want to discuss whether the McDonald’s verdict and the publicity from it will have any affect [sic] on your ability to treat my client fairly.

The authors also offered readers a script to “distinguish the case at hand from the ‘bad cases.’” The attorney would ask the jury pool casually about their knowledge of, “You know, those cases you might have heard about on Paul Harvey’s radio program or have seen written up in the paper like the McDonald’s coffee case.” From there, the trial lawyer could solicit a pledge from jurors that if the attorney proved “this case is not one of those cases,” the jurors would “do their best . . . to return a fair and just verdict.” The authors also advised explicitly asking whether jurors belonged to the BCA, a Chamber of Commerce, or AVALA. Through all of these efforts, trial lawyers could mitigate the

111 Voir dire is part of the jury selection process in which plaintiffs and defendants (and/or the judge) may pose questions to potential jurors to reveal conflicts or potential bias.
effects of the lawsuit-abuse narrative in specific jury pools and perhaps even help shape the views of those citizens called to serve as jurors. However, the scale of this opinion-shaping drive was miniscule in comparison to the numbers of potential voters reached though tort-reform proponents’ media drives and rallies. Lawyers could bring jurors to the side of a particular plaintiff, yet they still struggled in the wider battle for hearts and minds.\textsuperscript{112}

By the late 1990s, members of the Alabama trial-lawyer community recognized that they were losing the public relations side of the tort reform battle yet saw no effective counterattack. As ATLA President Jim Pratt acknowledged, by 1997 Alabama was experiencing a tort crisis—but, in his view, it was a crisis of perception. Trial lawyers could mount plenty of evidence to counter tort reformers’ specific assertions that the state faced a crisis—demonstrating, for example, that business investment remained strong, that Alabama businesses reported record profits, that unemployment hovered at twenty-year lows across the state, that other states’ courts faced comparatively higher verdicts, or that the Alabama Supreme Court regularly reduced punitive-damage awards on appeal. But “[p]erceptions are like rumors; once they spread, because they are not real, they are very difficult to destroy.” Tort reform proponents had a stronger, simpler narrative “designed to take the complex issue of tort law and reduce it to a question of lawsuit abuse.” And the process of “lawyer-bashing and sensationalizing issues” weakened the trial lawyers’

reputation and creditworthiness, compounding the problem of how to construct a retort to the tort reform proponents’ platform.113

No amount of data on the state’s generally positive business climate could completely assuage businesspeople’s concerns about the tort law system, including concerns that their companies might have some unknown and potentially ruinous liability lurking just around the corner. Businesses grumbled over state-driven regulations, but at least administrative and criminal laws had predictable outcomes. Tort lawsuits, in contrast, drew on both a written codex of laws and on the ancient and more nebulous “common law” tradition, which imported fuzzier notions of fairness and equity into its legal standards. At its core, tort reform built upon human fears—of financial ruin, of public shame, and most of all, of the unknown—and once fears take root, they are exceedingly difficult to eradicate.

A New Cast of Characters

After several years of battling for tort reform in state and federal fora between 1994 and 1998, tort-reform proponents knew that they simply did not have the support they needed in either the U.S. Senate or Alabama Senate to pass a strong tort-reform bill. As one business representative explained, “Nothing is going to change until the cast of characters changes.” Thus, in Alabama, tort-reform proponents set their sights on the 1998 elections, a year in which every state legislative seat was on the ballot. “The election in 1998 will determine the outcome of tort reform,” explained one Alabama Senator who

strongly supported tort-reform measures. “It is a defining issue. It is going to make some people leave the [Democratic] party or lose their elections.”

As with prior election cycles, the Alabama business lobby faced off against the state’s trial lawyers. At its annual 1998 Governmental Affairs Conference—timed to fall just weeks before the official opening of election season—the Business Council of Alabama highlighted its tort-reform priorities for its legislator attendees with sessions titled “Trial Lawyer Targets” and “Tort Reform in Alabama: What Happened? What’s Next?” as well as a talk by Tiger Joyce, ATRA president, on national tort-reform trends. Meanwhile, the head of ATLA complained that campaign rhetoric around tort reform was no more than “a fundraising tool” to funnel money into the BCA and its business-lobby affiliates.

Whether the emphasis on tort reform was contrived or sincere, it raised significant funds; in the 1998 elections, the BCA went on to funnel nearly $6 million into the 1998 elections through its political action committee, ProgressPAC, up from $2.6 million in the 1994 race and around $370,000 in the 1990 race. No one seemed surprised when these two groups topped the list of campaign contributors in the election overall. But while business lobby spending had increased dramatically over previous state legislative election cycles, the efforts of trial lawyers began to flag. The trial lawyers’ political action committee,

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TRIAL, had spent approximately $1.6 million in 1990 (approximately *four times* the spending of ProgressPAC in that year) and over $4 million in 1994 (about 50% more than ProgressPAC that year). In contrast, in 1998, TRIAL reported campaign spending of just over $3 million, approximately *half* of what the BCA had spent in that year’s race. The BCA had not only surpassed the trial lawyers’ association in spending—it had left them in the dust (see figure 30).\(^{116}\)

![Figure 30: Comparison of Campaign Finance Expenditures Between Alabama Business and Trial-Lawyer PACs over Three Election Cycles](https://sos.alabama.gov/alabama-votes/media/campaign-finance-reports)

The battle over tort reform revived in 1999, with a very different “cast of characters” in Alabama politics reshuffling the status quo. The 1998 elections had

\(^{116}\) Campaign contribution tallies taken from Alabama Secretary of State Elections Division, Campaign Finance Reports, ProgressPAC and TRIAL, expenditures column, including all reported expenditures in calendar year, except for prior year’s year-end report due in January of the following year, which is tallied with the previous year’s spending), all available online through the Campaign Finance Report Portal (via “Paper Filings”) at https://sos.alabama.gov/alabama-votes/media/campaign-finance-reports.
produced an Alabama Legislature that leaned far more conservative than it had in 1994. The BCA had directed funding to 119 candidates in 1998, of which 83 percent won their races. This tally included the election of two business-supported Republicans to the state Supreme Court, shifting that court for the first time to a Republican majority.117 As a result, the 1999 legislature seemed more amenable than ever to a tort-reform bill.

Yet even with a relatively smaller war chest, trial lawyers and their political allies had achieved at least one major electoral success in the 1998 election. The previous lieutenant governor, Democratic trial lawyer Don Siegelman—the same Siegelman that the business lobby blamed for tort-reform bills’ failure to move past the Senate Judiciary Committee in 1996—beat the incumbent Fob James to become governor. Siegelman had received significant campaign funding from trial lawyers, but he also received significant support from teachers, businesspeople, physicians, and unions. In addition, he secured the endorsement of Alabama’s Black Caucus, which enabled him to win an estimated 94% of the votes statewide from black voters. Tort reform, though a live issue in legislative and judicial races, did not factor much in the gubernatorial race. Siegelman had many qualities that would have attracted votes, including his extensive state political experience; before running for governor in 1998, he had served terms as Secretary of State, Attorney General, and Lieutenant Governor. He also ran a campaign based on the imperative of fixing Alabama’s education system. Siegelman promised to get kids out of prefabricated “portable classrooms” and proposed a controversial scheme to enact a state lottery to

117 See previous chapter for an in-depth description of judicial races in the 1990s.
increase funding for state institutions of higher education, tuition-free access to college for many in-state residents, and the funding of preschool programs. The lottery idea proved unpopular with many religiously and socially conservative voters, but in contrast, the incumbent Governor James had suggested that colleges should be “run like a production line,” a comment which one newspaper editor characterized as “unprofessional.”

The BCA had not endorsed Siegelman, but it had also not endorsed James. In part, this position reflected the BCA’s practice in the 1990s of not endorsing gubernatorial candidates, as that race tended sharply to divide the BCA’s base, so that any expression of support risked alienating BCA supporters. More critically, endorsing gubernatorial candidates simply did not make for good politics from the BCA’s perspective when the incumbent Governor James had failed to deliver on the BCA’s tort-reform bill.

But in this new political environment, many commentators wondered whether the elections had simply reproduced the same political conditions under which federal tort-reform had failed in 1996—a Republican-leaning legislature pitted against a Democrat executive that led to political torpor. Most critically for tort-reform proponents, would Alabama’s new former-trial-lawyer chief executive, like President Clinton, veto any tort-reform measures that passed over his desk? Eager to test Alabama’s new political climate,


tort-reform proponents immediately proposed a tort-reform bill in the 1999 session, just as
had been done in each of the prior years.\footnote{Ibid.; Brett Davis, “Alabama Is Open for Business,” \textit{Huntsville Times}, June 23, 1999. For more on electoral battles over the Alabama Supreme Court, see previous chapter.}

Since President Clinton had posed the most significant and intractable barrier to federal tort-reform legislation, reformers had to wait a little longer for a change in leadership at the national level. Clinton won reelection in 1996, assuring limited openings for congressional action before the next presidential elections in 2000. If Clinton had vetoed a tort-reform bill once, he seemed likely to do it again. In the lead-up to the 2000 election, tort-reform opponents, including trial lawyers, poured money into the campaign of Democratic presidential candidate Al Gore. Around the same time, an aide’s memo surfaced with notes suggesting that President Clinton’s veto of the 1996 tort-reform bill had been a “quid pro quo” arrangement with trial lawyers struck by a leader in the Democratic National Committee—which tort reform advocates quickly characterized as an under-the-table deal to trade campaign funding for Clinton’s veto of the tort-reform package. Compared to other scandals of the Clinton administration, this arrangement prompted little public comment (and was explained away by Democratic officials as a case of sloppy, incorrect notetaking by an aide), but for some in the business community this episode confirmed a sense that Democratic candidates remained beholden to trial lawyers.
As such, it buttressed tort-reform proponents’ commitment to fund Republican candidates in national as well as local elections.\textsuperscript{121}

The resulting political environment opened the political stage for Texas politician George W. Bush, who had a strong record of tort reform going back to his 1994 run for governor of Texas. In that state’s 1994 gubernatorial race, Bush’s team had developed a four-pillar platform featuring policy positions on education, juvenile justice, poverty, and tort reform. Bush’s political consultant Karl Rove credited himself with the addition of the tort-reform pillar, explaining that at the time “Texas was awash in junk lawsuits filed by personal injury trial lawyers” and that “the small business community was wired up about junk lawsuits.”\textsuperscript{122} Rove’s strategy seemed to have worked. During that gubernatorial race, Bush had explained that “the first and most important thing” he would do as governor would be “to insist Texas changes the tort laws and insist we end the frivolous and junk lawsuits that threaten our producers and crowd our courts.” After Bush’s victory, he kept his promise, signing tort-reform bills into law within weeks of entering office.\textsuperscript{123} Then, in the 2000 presidential election, Bush ran again in part on his tort-reform record, distinguishing himself from other candidates in the Republican presidential primary by emphasizing that Bush was a “reformer” with \textit{tangible results}, as evidenced by the jewel in his legal-reform crown—reshaping “tort laws in Texas.” Television ads for the Bush


\textsuperscript{122} Rove, \textit{Courage and Consequence}, 83.

campaign emphasized his tort-reform record, and one Bush “set-piece speech” focused wholly on an aggressive tort-reform agenda.\textsuperscript{124} When Bush won the Republican nomination and then the presidency, the presidential barrier to tort-reform posed by President Clinton disappeared. After 2000, the tort-reform ball was back in Congress’s court.

As political leadership changed following elections in 1998 for Alabama and 2000 for the country as a whole, tort reform gained new life. In this new political climate, all the efforts to shape public opinions about tort reform through political narratives around “lawsuit abuse” nationally and “tort hell” locally, as well as through the selection and promotion of focusing event cases such as the “hot-coffee case” and the “BMW case,” would pay dividends. In Alabama, legislative change came rapidly after the 1998 elections; Governor Siegelman’s lottery proposal failed to pass a referendum vote, so his promises for educational reform in the state never came to pass. But within weeks of taking office, Siegelman saw a tort-reform bill through the legislature and signed it into law.

The final straw seems to have been the conclusion of a tort case in which an Alabama family received a jury award of $581 million in a case involving overcharges for two satellite dishes. At approximately the same time as he signed the tort-reform bill into law, Siegelman also announced that Honda had signed on to build a new assembly plant in Alabama. Several commentators connected the breezy passage of tort reform, the jaw-dropping punitive damages award in the satellite case, and the arrival of Honda as events

\textsuperscript{124} Rove, \textit{Courage and Consequence}, 144–47.
tied together by more than just temporal coincidence. In other words, they subtly attributed Siegelman’s quick pivot on tort reform to some combination of embarrassment over the outcome of the satellite dish case and the threat that Honda might reconsider its deal. In a speech before the U.S. Chamber of Commerce, Siegelman echoed the words of his predecessor Governor Hunt, who in 1987 had signed a later-overturned tort-reform bill, by proclaiming “Alabama . . . open for business” once again. The 1999 tort-reform bill created a cap on the amount of punitive damages that could be awarded by a jury, limited the options for filing class-action lawsuits, and curbed “venue-shopping,” making it much harder for plaintiffs to file lawsuits in “Lowndes, Barbour and other counties simply because juries there have awarded big-money verdicts against companies.” “For 12 years,” Siegelman continued, “Alabama has been haunted by the specter of our tort laws.” But now, he proclaimed, “the era of ‘tort hell’ in Alabama is over.” This particular sound-bite proclaiming the end of “tort hell” in Alabama was so widely reported through newspapers that its impact is clearly visible in the use of the term in 1999, as charted in figure 28 above.125

Legislators at the federal level, too, brought tort-reform legislation back on the table. Perhaps the most significant tort-reform legislation, the Class Action Fairness Act (CAFA) came in George W. Bush’s second administration, passing Congress in 2005. This

statute adjusted procedural rules to facilitate the removal of large class-action lawsuits out of state courts and into federal courts, which corporate defendants considered more sophisticated and fairer to their interests. Proponents of CAFA argued that it would help state court systems by remedying an “explosion of state court class actions [that] have simply overwhelmed their dockets,” with one proponent arguing that the “flood of class actions in our state courts is too well documented to warrant significant discussion, much less debate.” The legislation was also designed to halt “judicial blackmail,” by which the class action mechanism could “give a class attorney unbounded leverage” even “in cases that border on frivolous” and to enhance due process rights. The Senate Report for the bill alluded to the legal climate in Alabama repeatedly to justify the bill’s passage on federalism grounds. “Why should a state court judge elected by the several thousand residents of a small county in Alabama tell New York or California the meaning of their laws?” the report’s authors asked. And, citing an Alabama products liability suit, “[w]hy should an Alabama state court tell 20 million people in all 50 states what kind of airbags they can have in their cars?” Once President Bush signed CAFA into law in February 2005, proponents hoped that it would “prevent plaintiff’s lawyers from searching around for local jurisdictions that may yield top-dollar awards.”

Through a combination of public-opinion-shaping initiatives and electoral politics, then, tort-reform proponents gradually created favorable conditions for tort reform.

Inspiring few citizens without legal training at the beginning of the 1990s, tort reform had become a cause with popular resonance by the end of the decade. This shift reflected the careful attention of tort-reform proponents to crafting compelling political narratives that intertwined tort-reform concepts with conservative values. The would-be destroyers of tort hell generated a compelling new language to describe a tort law crisis both nationwide and within Alabama, while cultivating especially vivid cases as focusing events to garner attention to their cause. Trial lawyers had long argued that they, more than any other group, represented the interests of consumers/citizens, but tort-reform proponents challenged that idea by highlighting injustices and imbalances baked into the tort system. As one observer noted, in the tort-reform battle, “both sides earnestly think they’re on the side of the angels.”

Through the powers of narrative—and through the clever adoption of storytelling around cigarettes, hot coffee, and a fresh coat of paint—a business coalition convinced a significant enough portion of the public that tort reform represented a better balance of equities among business, the state, and society, as compared to the legal status quo. As a result, tort-reform proponents achieved a level of comprehensive procedural adjustments to the tort system at state and federal levels theretofore unattainable.

This eventual success of tort reform in Alabama underscores the extent to which political narratives matter. They can inscribe moral and political content onto existing policy issues and propel focusing events to the center of a public debate. Anecdotal evidence can play an outsized role in shaping and cementing political narratives; for

example, tort-reform stakeholders often highlighted legal cases with extreme punitive damage awards or strikingly unusual fact patterns in their efforts to outline the contours of a proposed problem—whether that problem was permissive tort laws or consumer fraud. This strategy most likely plays on the power of the availability heuristic—the “pervasive mental shortcut whereby the perceived likelihood of any given event is tied to the ease with which its occurrence can be brought to mind”—one of the many ways documented by cognitive psychologists that ordinary citizens regularly miscalculate the risk of certain events. This mechanism of misperception is particularly powerful when triggered through “availability cascades,” in which events “trigger chains of individual responses that make these perceptions seem increasingly plausible, compounding the perception of the likelihood of an event or pervasiveness of a problem. Scholars of risk regulation have been particularly attentive to these concepts; as suggested here, these concepts may have as much analytical power and salience when applied to political contests over interactions between law and policy in other areas.128

Even though political stories exaggerate and amplify certain messages while obscuring others, their creators cannot construct them out of whole cloth. To be compelling, such narratives must be simple, direct, and seamlessly integrated into people’s existing comprehensive worldviews and value systems—what Antonio

Gramsci might call “common sense” and Pierre Bordieu might call “doxa.” The core narratives of the tort reform movement had currency because they were built upon a foundation of hard, observable fact—even though the inferences and conjectures derived from this foundation sometimes stretched this truth beyond recognition.

Figure 31: Lanny Vines Poses with Santa Claus and a White Tiger in Front of His Home

The image of the fat cat trial lawyer, for example, resonated because people could bring to mind real examples of such lawyers. In small towns where everyone knew everyone’s business, resentment brewed wherever the local trial lawyer’s lifestyle seemed too lavish, perhaps because of an ingrained notion that lawyers should behave as modest professionals rather than high-flying entrepreneurs—even if these lawyers more closely

resembled the latter. Even if most lawyers lived middle-class existences, the few who stood out did so brilliantly. On the national stage, Robert Kardashian, attorney for O.J. Simpson in the so-called “Trial of the Century,” served as progenitor to the notoriously flashy Kardashian clan. Meanwhile in Alabama, Lanny Vines, who had entered legal practice with a night-school degree and built his practice from the ground up, became known for his extravagant, cheeky Christmas cards. One displayed two expensive cars decked with bows in front of his stately mansion and the caption, “Even Santa knows some gifts won’t fit down the chimney.” Another, shown in figure 31, featured Vines posed with Santa Claus and a recumbent white tiger in front of an exotic sports car.130 A single, potent image or anecdote served as a hook upon which to craft a story about the “wealthy personal injury trial lawyer,” which in turn served as a platform from which to interrogate the source of that wealth and the fairness of the system that created it. Such images, and the confidence, even arrogance, that underpinned them, helped to set the stage for tort reform.

The attempt to identify a regulatory ecology highlights the complex, sometimes opaque networks that connect actors and institutions within a policy domain; the logic of political narrative construction instead emphasizes the narrow, the simple, the linear, and the intuitive. The resulting narrative may be myopic, lacking in nuance, and even hyperbolic—but the nugget of truth at its core may render it persuasive nonetheless.

130 Lanny Vines with Santa Claus and White Tiger (image), “The Lanny Vines Collection of Fine Continental Furniture and Decorative Arts,” Freeman’s Auction, April 15, 2015, https://freemansauction.com/news/lanny-vines-collection (also available at https://perma.cc/KZB8-HTEB); “A Lanny Vines Christmas Album,” Google+, January 17, 2008, https://plus.google.com/photos/117988049552220999599/albums/5156670759565936865. The image shown in figure 31 appears to be an original unretouched image from which the final Christmas card image derived; the final card image was edited to have festive wreaths on each window of Vines’s home, red bows tied around the sports car and the tiger’s neck, and snow falling from a night sky.
Conclusion: Tort Reform and Beyond

The success of tort reform at state and federal levels—in Alabama through a combination of both reconfiguring the composition of the Alabama Supreme Court and as a result of the 1999 tort-reform legislative package, and at the federal level through the passage of CAFA—reshaped the rules for filing tort lawsuits and thereby altered the legal landscape in Alabama and America. As the rules changed, so did financial incentives in the legal marketplace. Corresponding legal institutions either evolved to match the new environment or withered.

Coda: Alabama after Tort Reform

For a time, Alabama’s low-regulation environment, combined with permissive procedural rules and rumors of favorable jury pools, had not only fostered the growth of a local trial bar but also attracted outside lawyers and lawsuits. Within the state, as highlighted especially in chapter 3, an invigorated trial bar rose to prominence as a legal and political force. Attorneys like Jere Beasley and Lanny Vines developed novel theories of recovery and won millions upon millions of dollars for slighted plaintiffs—and themselves. Alabama’s favorable litigation climate eventually attracted lawyers from other states, like Chicago trial attorney Daniel Edelman, who selected Alabama state courts as
the venue for nationwide class actions filed against banks in the early 1990s because of the state’s permissive filing rules and often plaintiff-friendly juries.¹

However, decades-long, multi-stage efforts to rewrite the law of lawsuits in Alabama, as described in depth in chapters 2 and 5, and to transform the political composition of the Supreme Court, as detailed in chapter 4, ultimately reconstituted the state’s litigation environment. After the 1999 tort-reform law capped the amount of punitive damages available to plaintiffs and reconfigured Alabama’s venue rules to narrow where a plaintiff could file a lawsuit in its courts, the state became a much less attractive place to file a lawsuit. This reshaping of the law fundamentally restructured the regulatory ecology of consumer fraud in Alabama, forcing legal institutions and practices to change as well.²

Alabama lawyers responded to changes in the legal environment by adapting new models of legal practice in order to survive. For many lawyers, this meant maintaining a litigation-focused practice but opening offices or filing lawsuits in other states. Many of the notable Alabama plaintiff’s firms discussed in chapter 3 opened satellite offices in adjacent states where the litigation climate appeared more favorable. Hare Wynn opened offices in Arkansas and Kentucky, while Jere Beasley’s firm, Beasley Allen, opened an office in Georgia.³ Firms specializing in defense work adapted too, following the trail of

² For more on the ways that markets shape the allocation of legal resources and efforts, see Coffee, *Entrepreneurial Litigation*, 229.
available legal work to other jurisdictions. Several Alabama defense firms opened satellite offices in states with more trial work or, alternatively, in places that allowed a shift to legal services in corporate, contract, or intellectual-property areas.  

Experienced Alabama trial lawyers, who had honed their skills trying cases in Alabama courts during the so-called “tort hell” era, began to appear in other jurisdictions’ courtrooms—wherever a state’s laws for filing lawsuits might offer a procedural advantage for the plaintiffs they served. One conservative Mississippi Supreme Court Justice complained about the impact of this geographic diffusion of legal talent on Mississippi state courts. “There was a time,” he noted, “when judges in Alabama gave plaintiff attorneys tremendous leeway in civil cases. After a while, those judges were out, and the lawyers just moved on to filing cases in Mississippi.”

Since at least the 1990s, Jere Beasley’s law firm has taken on high-profile lawsuits in courts across the country, including a well-publicized case in California against Taco Bell for misrepresenting the actual meat content of its “seasoned ground beef,” and another in St. Louis, Missouri, against Johnson & Johnson for cancers related to use of its talcum powder products. Beasley’s firm withdrew the Taco Bell suit, explaining that Taco Bell had addressed its deceptive marketing practices. However, the talcum-powder suit led to a $110 million

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verdict in the plaintiff’s favor—the largest such verdict in any of the many talcum-powder suits then ongoing in Missouri courts. Tort-reform proponents estimated that two-thirds of the talcum-powder cases filed in St. Louis courts were filed on behalf of out-of-state plaintiffs. Missouri attracted this litigation because its procedural rules created a lower bar with respect to the standards for expert medical and scientific testimony that lawyers could present to a jury—an asset in a products-liability suit in which success depended on demonstration of scientific causation to the satisfaction of a jury.\(^6\)

While the tide of Alabama tort lawsuits in general began to recede after 1999, a few new litigation opportunities emerged for select private firms in Alabama in the form of lawsuits filed on behalf of the state. During the same year that brought caps on punitive damages and stricter venue rules, the Alabama Attorney General hired high-profile trial lawyers from the Cunningham Bounds firm to represent the Alabama Department of Conservation in a suit against Exxon Mobil. The state alleged in this case that Exxon had “cheat[ed] Alabama out of royalties from natural gas wells that the oil company drilled in state-owned waters along the state’s Atlantic coast.” A first trial resulted in a $3.5 billion verdict, but the Alabama Supreme Court overturned the verdict and ordered a new trial because the jury had viewed a forbidden internal memorandum before deciding the case. Alabama’s Republican Governor Bob Riley later added Jere Beasley to the state’s trial

team, and a second jury returned a verdict for $11.9 billion, which the trial judge reduced to $3.6 billion, representing approximately $100 million in compensatory damages under the parties’ contract and $3.5 billion in punitive damage for fraud. Even after this downward revision of the award, the case set a state record for largest award in a civil case. However, in 2007 the Alabama Supreme Court threw out the punitive damages portion of the award, explaining that the case was really a contract case, not a fraud case. As Justice Parker explained:

The prohibition against punitive damages for breach of contract, even where the breach seems particularly egregious, often results in framing complaints as asserting fraud so that punitive damages will be available. This case is such a case, and the fraud claim has overshadowed the actual cause of action, which sounds in contract.

The Supreme Court also reduced the compensatory portion of the award to around $50 million. The principles underlying tort reform in Alabama applied to the state as well as private plaintiffs.7

Still, for the elite law firms able to take part in such actions, work for the state still could prove lucrative. In the Exxon suit, Cunningham Bounds and Beasley shared a 14 percent contingency fee, which would have been a tremendous payment from a $3.6 billion award, but which still represented a healthy return on investment when taken from the reduced sum of $50 million. A few years later, the Attorney General turned to Balch &

Bingham—a corporate defense firm that represented Exxon in its suit—to represent the state in a lawsuit against oil giant BP following the 2010 Deepwater Horizon oil spill. Like the state’s contingency-fee arrangement with Cunningham Bounds and Beasley in the Exxon suit, Balch & Bingham expected 14 percent of any award against BP on a contingent fee basis. As described by legal scholars like John Coffee, such arrangements between state attorneys general are controversial but generally tolerated so long as the state maintains control over the litigation, thereby preventing any private motivations of the contingent-fee attorney from overwhelming the state’s obligation to manage and uphold the public interest. Such arrangements, after all, should not be equivalent to the “eighteenth century sovereign commissioning a privateer to roam the high seas to seek out and plunder the Crown’s enemies.”

This expansion of opportunities to represent the state, however, touched only the most elite firms. Not all Alabama attorneys could so easily adjust their practices to changing market conditions, whether by landing a huge case brought by the Attorney General’s office or opening an office in another state. Expanding to new jurisdictions might require passing a second bar exam or partnering with local counsel, and Alabama lawyers would have faced stiff competition from local trial lawyers already operating in those jurisdictions over a limited book of business. This tightening of the Alabama legal market trickled down to ATLA as well, as a less wealthy trial bar could offer fewer

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contributions to fund the organization’s political objectives. As financial support waned, so too did ATLA’s power and prestige in state politics.

Alabama plaintiffs, with or without an accompanying Alabama-based attorney, also began to appear in high-profile cases in other states with more favorable litigation conditions. One Alabama consumer chose to file a complaint against his bank alleging fraudulent credit-card practices in Illinois rather than Alabama, explaining that “Alabama’s consumer-protection statute not only bans class actions but exempts financial institutions from suits over deceptive trade practices, so the case wasn’t viable [in Alabama].” Illinois boasted more liberal—and thus favorable—consumer-protection laws.9 Another Alabama man filed a controversial suit in New Jersey state court in which he claimed that a New Jersey company’s acne medication had caused his inflammatory bowel disease. Statutes of limitations in both Alabama and New Jersey limited a plaintiff’s time to file a lawsuit to two years in such suits. However, Alabama measured from the time of the injury, while New Jersey started the clock at the time a person discovered (or should have discovered) that he or she had a basis for a legal claim. These slightly different rules meant that when the plaintiff’s time to bring a lawsuit in Alabama had long expired, the door to the courthouse remained open in New Jersey. A New Jersey jury would go on to award $25 million in compensatory damages for the man’s claim.10


As discussed in detail in chapter 5, tort-reform proponents eventually recognized the advantages of linking their cause to powerful political narratives, which led them to coin the moniker “tort hell” as a shorthand for Alabama’s legal climate in the 1990s. As the litigation landscape changed and both trial lawyers and plaintiffs began to seek out other venues in which to bring their legal claims, Alabama no longer generated much useful anecdotal ammunition in the ongoing battle for public opinion about tort reform. As Alabama’s reputation as “tort hell” faded, tort-reform advocates identified new locales to serve as exemplars of what they identified as the tort problem. As soon as 2001, West Virginia newspapers began to identify their own state as “tort hell,” rather than Alabama.¹¹

¹¹ Pattern identified by author from review of articles using the phrase “tort hell,” collected from LexisNexis Academic PAPERS (all newspapers) database, ProQuest News & Newspapers database, and Newspapers.com (n=287); see also figure 28 in chapter 5 demonstrating overall trends in the use of this term.
Table 1: States with One or More Jurisdictions Identified by ATRA as a “Judicial Hellhole” (Alphabetically by Year)

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</table>
Most notably, ATRA—the same group identified in previous chapters as a leading tort-reform group on the national stage that helped direct and coordinate much of the messaging around (and proposed legislation for) tort reform at state and local levels—similarly began to deploy the “tort hell” theme in discussions of other jurisdictions. Indeed, from 2002, ATRA began to publish a report on “judicial hellholes,” which it defined as:

cities, counties, or judicial districts that attract lawsuits from around the nation or the region because they are correctly perceived as very plaintiff-friendly jurisdictions. They are places where the law is not applied even-handedly to all litigants. The motto etched on the façade of the United States Supreme Court, “Equal Justice Under Law,” is forgotten in these areas.

The report collected anecdotal—not empirical—evidence and assessed jurisdictions primarily on conversations with unnamed “individuals familiar with litigation in the hellholes” in order to derive an annual list. The list sometimes called attention to entire states (such as California, Louisiana, or West Virginia) but more often selected particular counties (such as Cook, Madison, and St. Clair counties in Illinois, or Jefferson and Hidalgo counties in Texas) or regions (such as “South Florida” or “Mississippi’s 22nd Judicial District”)—or even targeted a particular court such as the Court of Common Pleas of Philadelphia. Table 1 summarizes in greatly abbreviated form the rough contours of the geographic variety of ATRA’s “judicial hellholes” from its first publication in 2002.

\[\text{12} \text{ American Tort Reform Association, } \textit{Bringing Justice to Judicial Hellholes 2002} \text{ (Washington, DC: ATRA, 2002), 1–3.}\]
Several states appear again and again, such as California, Florida, and Illinois. Though Alabama appeared several times over the years as a “dishonorable mention” in ATRA’s annual report, it only appeared once, in 2008–2009, on the actual list of “judicial hellholes”—a development that demonstrates the impact of electoral and legislative change in the state since the 1990s, when it had served as a model of so-called “lawsuit abuse.”

Despite the lack of methodological rigor in ATRA’s survey of its own members for anecdotal examples of lawsuit abuse, the effort consolidated popular use of the term “judicial hellholes,” which ATRA even registered as a trademark. This term had strong narrative appeal for many of the same reasons that “tort hell” gained such political currency in an earlier decade. National and local media outlets happily reported that one or another jurisdiction had been named a judicial hellhole—if nothing else, the edgy term made for an attention-grabbing headline. At least fourteen newspapers and magazines featured ATRA’s first list of judicial hellholes in 2002, an accomplishment that ATRA called “a great success” for “bringing to light the abuses in certain courts and branding these jurisdictions with a common name” so that “[p]ublic light and public pressure may inspire judges to become more evenhanded jurists” and “the counties in which they sit may shed the title of judicial hellhole.”  

In essence, ATRA had adapted the regulatory strategy of  

14 Table 1 draws data from the 2002 through 2017–2018 Judicial Hellhole reports, which are each listed with full citation details in the bibliography.


As the law of lawsuits in Alabama (and many other jurisdictions) narrowed the class of civil actions that could be effectively brought in state courts, a different legal model rose to prominence that featured heavy advertising and a high volume of smaller-dollar-value settlements instead of a smaller number of large jury awards. This legal model would have been impossible before the U.S. Supreme Court’s 1977 decision in Bates v. State Bar of Arizona, which held that state bars’ prohibitions on legal advertising violated the federal constitution. But even after the Supreme Court legalized promotional marketing by attorneys, an advertising-intensive model remained risky. Buying publicity is expensive, and the connection between advertisements and increased business often turns out to be tenuous. Some firms tried advertising with little tangible result, then returned to their tried-and-true models of chain referrals and mainstream business development.\footnote{Victor Li, “Ad It Up,” ABA Journal 103, no. 4 (Apr. 2017): 35–41; Bates v. State Bar of Ariz., 433 U.S. 350 (1977).}

For the few lawyers who found success from an advertising-heavy business model, their rise could be meteoric, as illustrated by the remarkable career of Alabama attorney Alexander Shunnarah. A son of immigrant parents, Shunnarah attended the unaccredited
Birmingham School of Law (like several of his entrepreneurial-attorney predecessors described in chapter 3) and opened his own law firm in 2001. Shunnarah’s practice is broad—from personal injury to bankruptcy to family law to traffic cases—and spans two firms: Shunnarah Injury Lawyers PC and Alexander Shunnarah Gulf Coast LLP. Together, the firms cover a wide geographic area, with a dozen offices across Alabama, Mississippi, Georgia and Florida. Though Shunnarah welcomes less lucrative suits, a high volume of small suits adds up to significant financial gain.\footnote{18}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{shunnarah_advertisement.png}
\caption{A Ubiquitous, Standard Shunnarah Advertisement\footnote{19}}
\end{figure}


\footnote{19} Photograph by Dixon Johns, Birmingham, Alabama, 2018. Used with permission.
Although Shunnarah’s profession is as a lawyer, in many ways his business model distills to effective marketing. As of 2015, Shunnarah’s advertisements filled approximately 2,000 billboards and thousands of television spots every month. Some of this advertising is fairly tame, such as his ubiquitous, standard billboards displaying his name and telephone number. But other advertisements stride forth in a spirit of shameless self-promotion, even poking fun at his own outsized marketing efforts. One such tongue-in-cheek advertisement begins with images of empty billboards and stark text: “Every hour a billboard is left unused, abandoned and neglected. They sit bare and without purpose.” The camera zooms in to Shunnarah’s face as a single tear rolls down his cheek. “Not on my watch,” says Shunnarah. Another such advertisement takes place in a “marketing meeting” at the Shunnarah firm, and every time the camera pans away and returns to the meeting, Shunnarah and his team are surrounded by more marketing swag—from

20 Ibid.
Shunnarah mugs, beanies, and pens, to even branded hot sauce, soccer balls, and teddy bears. Shunnarah explains, “Mama used to say that if people don’t know you, then people can’t hire you. I want the people of Alabama to know that I can help them.” Shunnarah also has a large social media presence and takes any opportunity to connect with potential clients, even appearing at “Alabama’s largest anime and gaming comic con,” Kami-Con, in 2018 to sign autographs, take photos, and distribute branded gear. Shunnarah’s website also provides a “sneak peek” of new billboard designs for online fans, joking that viewers should “[g]et excited for even more chances to play the ‘How many Shunnarah billboards can you spot game.’”

Figure 34: Announcement for Shunnarah Appearance at Kami-Con 2018

Shunnarah’s business model manifests an all-or-nothing approach. In order to generate the kind of business that justifies the high cost of advertising, the firm requires media coverage on a huge scale. And now that Shunnarah advertisements saturate the state’s highways and airwaves, a late adopter of the same strategy could not be competitive without huge expense; a single billboard would do nothing to compete with Shunnarah’s outsized presence across Alabama, which means that his is the name that comes to mind when its residents find themselves in legal trouble. In fact, Shunnarah’s marketing efforts have likely garnered him one of the most recognizable names and faces across the state.

This name recognition seems, in fact, to have generated significant legal business. In 2015, Shunnarah’s telephone hotlines received “an average of 1,500 calls on Mondays alone.” Yet this large number of solicitations does not directly equate with a large number of traditional jury trials. First, non-lawyers who serve as intake employees record the details of a potential client’s case on a form template that corresponds to the type of claim that the firm might pursue. Next, staff attorneys consider each case to determine the case’s likelihood of success and its potential payout. For cases involving a possible insurance payment, attorneys or non-attorney staff attempt to predict what the insurance company might accept. The goal is settlement, and Shunnarah estimates that 95 percent of his cases do settle. For the cases selected for representation, the next step, in the words of Jere Beasley, is to “get in quick, get out quick”—to negotiate a settlement as efficiently as possible. This step most clearly distinguishes law practices like Shunnarah’s from trial-focused practices like Beasley’s; whereas Beasley’s firm take a much smaller number of cases, invests heavily in them, and attempts to extract the largest possible award,
Shunnarah’s firm takes thousands of cases, invests little, and seeks a speedy outcome—usually over no more than nine months, compared to years for a traditional trial. Beasley’s model is artisanal; Shunnarah seeks the economies of scale provided by the assembly line. Though Shunnarah himself admits that he serves more as the “brand” and “business administrator” of the firm than an actual litigator, attorneys at his firm still try cases—just very few. In 2014, his attorneys tried nine cases in courtrooms across Alabama—a number that tied the firm in statewide rankings for having tried the most cases over the year. Alabama still cultivated powerhouse plaintiff’s attorneys—just through a business model that no longer relied on a stream of in-court lawsuits to sustain them.22

**Alabama in Context: The Broader Legal Landscape**

This case study of consumer tort law in Alabama has reflected the historical contingencies of a particular time and place, focused on state-specific developments, along with tales of a few quirky personalities and distinctive political campaigns. But this narrative offers several insights about the structure of American federalism and the ways that social, political, and economic developments have shaped the law within one laboratory of democracy. Channels of diffusion brought legal concepts and innovations to Alabama—in the form of concrete legal theories around building a state consumer-

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Alabama’s law before 2012 did not regulate the contingency-fee relationships of private attorneys hired to represent the state, only the process for hiring them. In 2012, the Alabama Legislature enacted the Transparency in Private Attorney Contracts Act, which amended § 41-16-72 of the Alabama Code of 1975 to regulate these contingency fee arrangements. *See Ala. H.B. 678 (2012).*
protection apparatus in the 1970s and 1980s, as well as through subtler political narratives imported by Karl Rove’s consulting efforts in judicial elections, and then through information flows between national and state lobbying organizations in the 1990s. These channels also operated in reverse, as groups like ATRA scaled up Alabama’s bespoke political messaging around the concept of “tort hell” to create its national “judicial hellholes” initiatives, and other state business lobbies began to advocate for changes in their home judiciaries after watching the results of the Alabama Supreme Court’s conservative shift. Alabama served as a testing ground for tort reform, to the benefit of the business lobby and the detriment of the state’s traditional trial bar, yet even this development spurred innovative new business models for lawyers, which in turn may influence developments elsewhere.

Is Alabama’s civil justice system fairer today than in the 1970s, or in the 1980s and 1990s? My response to that query, admittedly hedged, is that such appraisals depend on what criteria one chooses to highlight. For a consumer stuck in a bad contract, like Willie Ed Johnson and his contract with Mercury Finance, Alabama’s tort system today likely offers no remedy. The creative theories employed by Johnson’s legal team, which invoked both the technical requirements of statutory disclosures and the punitive-damage remedies of a fraud suit, would probably no longer survive a defendant’s motion to dismiss. As a result, someone in Johnson’s situation, confronting both bad luck and deep unfairness, may have no direct legal recourse. He would be left to work out what arrangement he could with the finance company or perhaps to file bankruptcy to discharge the debt; but no multimillion-dollar verdict would loom in the calculations of any lawyer he might seek out.
Similarly, Dr. Gore’s lawsuit, if filed today, may never reach a jury—and therefore would not likely spur such disgust from critics of the Alabama tort-law system. By the same token, Daisey Johnson would likely struggle to find an attorney willing to take her insurance fraud suit; with punitive damage caps that reduce the financial incentives for such actions, her case would be far less attractive. Fewer potentially lucrative cases also means that trial lawyers must be more selective in the cases they take on a contingency-fee basis, lest they find themselves with a book of business that generate no jury awards. In the language of microeconomic modelers, damage caps represented a negative supply shock to the market for legal services.

On the other hand, for a business drafting a consumer contract in Alabama, the system today feels much fairer and more predictable than it would have in prior decades. Car dealers and insurance companies still agonize over the wording of their contracts, fearing that some misplaced comma might alter the legal enforcement of a deal—but not the precise phrasing of their salespeople’s pitches. Alabama courts now expect consumers to read contracts and to be bound to their terms. Furthermore, more distinct lines separate the law of contracts from claims for civil fraud; it is much harder to turn a breach of contract into a fraud suit, which has dramatic consequences for potential civil liability. Fraud suits open the door to punitive damages, while garden-variety contract breaches generally only allow something akin to a refund. Accordingly, the BCA’s legislative focus has shifted away from tort reform; a survey of its advocacy platform in 2018 reveals much more of an
emphasis on issues of education, healthcare, and infrastructure development than legal reform.  

Thus tort reform in Alabama reshaped the law of lawsuits through a series of normative tradeoffs: more certainty in outcomes in exchange for less individualized justice; smaller dollar awards for some plaintiffs and thus a decreased deterrent effect from judgments in exchange for increased perceptions of legitimacy of process, especially among economic elites; and increased legal security for businesses, which at least sometimes translates into lower barriers to entry via liability insurance for new enterprises and heightened access for consumers to specific goods, services, and credit. However, this increased access for businesses and consumers comes at the expense of higher risks born by those consumers and a concomitant reduction in their latent legal power. In a pattern so often repeated (and then reversed) in history, the ethic of caveat venditor ceded to that of caveat emptor.  

Mere discussion of who resides comfortably, and perhaps with great satisfaction, “on the side of the angels,” however, misses the most important legal and policy considerations. The regulatory ecology that constitutes the environment for tort law is comprised of many individuals, including lawyers, businesspeople, politicians, lobbyists, journalists, voters, judges, and jurors. These individuals are often embedded within organizations and institutions, including pressure groups, legislatures, executive agencies, and courts. All of these protagonists, as demonstrated by the narrative of tort reform in

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Alabama, function as strategic actors. They advocate for their own narrow interests as well as broader societal interests, sometimes at the same time. These actors make choices within a system structured by interlocking sets of rules that govern not only the law of lawsuits but also campaign finance, electoral politics, and professional ethics—not to mention the ordinary social mores and customs that bind human relationships within a cultural context. Though Alabama’s particular political culture may differ from that in California or Maine, one can usefully compare patterns of action among different groups working towards similar ends.

Striking the proper balance between retrospective and prospective justice—sometimes manifested in lines distinguishing judicial roles on the one hand and legislative or regulatory roles on the other—requires careful evaluation of the institutional structures and incentives engrained in a system of laws. This sort of goal balancing rarely comports with populist politicking. A regulatory ecology framework, particularly as employed by historians, can be especially useful tool in future policy debates because of the way this analytical approach connects formal and informal structures, demonstrating a web of governance that often remains invisible to lawmakers, regulators, and everyone else involved. A clear grasp of that web of governance can foreground the trade-offs that confront policy-makers when they consider reforms of one kind or another and encourage more defensible assessment of their social benefits and costs.

This case study of Alabama reminds us how the unique structure of the U.S. federalist system creates possibilities for legal experimentation. In the words of Louis Brandeis, “[i]t is one of the happy incidents of the federal system that a single courageous
state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” This dissertation has documented how Alabama served as one such ‘laboratory’ in the 1980s and 1990s, and how a series of legal experiments in the law of lawsuits diffused from Alabama to reshape laws across the country. In the span of two decades, coalitions of lawyers, jurists, businesspeople and politicians constructed a state consumer-protection division with distinctive features, enacted two rounds of tort reform legislation, engineered the transformation of the state Supreme Court, and reinvented the state’s trial bar at least twice. These changes completely reconfigured the civil justice system in Alabama as it stands today, but the long-term ramifications of these changes on law, society, business, and the state, remains preliminary at best.

Lawsuits are an integral part of the institutional fabric of American capitalism. Framing some grand unified theory of civil actions, or solving the puzzle of how best to structure the law of lawsuits in any jurisdiction, are tasks that lie far out of reach of any single dissertation project. One broad lesson that emerges clearly from this thesis is that the structure of this legal institution matters deeply. Another is that state law matters, too. We need more historical examinations of state-level patterns of legal development and diffusion, as well as additional research on the intersections of law and politics within states. From the 1950s through the 1970s, consumer-protection statutes and regulatory divisions spread across the North American continent, and over time networks among state Attorney Generals strengthened and evolved. But how did these developments shape evolving practices in consumer protection, with what implications for policy-making? This
chapter has gestured toward patterns of legal practice in which attorneys from one jurisdiction crossed state lines into another jurisdiction, whether for a single case or to open a satellite branch of a firm. Yet we lack any comprehensive understanding of how law and legal practice shape legal markets across state lines.

Another crucial question concerns the economic impacts of tort reform. It is difficult to measure those consequences, whether for a given state’s business climate or fairness in its consumer marketplace. Just as tort-reform opponents and proponents lacked much empirical evidence to support their policy positions in the 1990s, we have precious little sophisticated statistical analysis to help us sort through what tort reform has wrought. Though Alabama no longer appears among the nation’s “judicial hellholes,” Alabama’s reputation as “tort hell” has been hard to shake. The U.S. Chamber Institute for Legal Reform ranked Alabama forty-third of fifty states for the quality of its liability system in 2017, despite the state’s adoption of extensive tort-reform measures. Only the “judicial hellholes” ranked lower: Mississippi, West Virginia, Florida, California, Illinois, Missouri, and Louisiana. Yet a review of the report’s methodology shows that, like the ATRA judicial hellhole reports, the report reports only perceptions; it is based on interviews of “a national sample of 1,321 in-house general counsel, senior litigators or attorneys, and other senior executives who are knowledgeable about litigation matters in public and private companies with annual revenue of at least $100 million.” Alabama’s ranking relies on 125 evaluations from this elite group. As with so many other reputational ratings, such a report
might only reproduce the effect that it purports to describe, since the survey participants appear to be both the sampled population and the audience for the study.24

Businesspeople and doctors linked tort lawsuits in Alabama to an insurance crisis in the 1980s and a business-development crisis in the 1990s, but while medical malpractice rates have now been stable for over a decade (see figure 35) and the business climate seems positive, these developments may have little to do with tort reform. Intervening economic events, including the 2008 financial crisis and the overhaul of American healthcare in the Affordable Care Act of 2010, seem much more plausible drivers of these market conditions than a punitive damages cap. Furthermore, such imprecise measures do not permit lawmakers to tweak existing laws to more closely approach a balance of interests. For example, should the punitive damages cap be higher or lower? Do statutes of limitations for bringing certain types of lawsuits optimize values of finality and certainty while still providing a reasonable opportunity to make a legal claim in light of societal realities?

As for consumers, reliable data on the frequency of frauds is hard to come by. However, the modest resources on the Alabama Attorney General’s website aimed at consumers suggest that fraudsters run many of the same common scams that would have been familiar to Attorney General Graddick’s Consumer Protection Division and for others long before—check fraud schemes, illegal telemarketing, identity theft rings, false charity promotions, and home repair fraud continue to dupe unsuspecting Alabama consumers. The Alabama Attorney General uses many of the same tools today that it did in the 1980s—providing consumer education materials, mediating with retailers, circulating contact information for federal regulators, and taking calls on a consumer-protection hotline—

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along with a few twenty-first-century options as well, such as online searchable registries of legitimate contractors and charities to help consumers recognize genuine operators in the marketplace. The advice sounds familiar, too: “Check all unsolicited offers with your Better Business Bureau”; “Don’t assume a friendly voice belongs to a friend”; and “Make sure you have guarantees and warranties in writing.” In short, now as it was then: _caveat emptor._

The difficulty in quantifying the impact of tort reform arises not just because of complexities in legal and business markets, but also because of the mixed motives that drove tort-reform debates in the first place. The tort-reform wars were always waged by proxy; every skirmish represented multiple layers of meaning. Consumer advocates fought for consumer-protection laws to curb predatory marketing practices—but also as a critique of capitalist excesses and an assertion that government regulators should serve as a countervailing force against the concentrated economic power of Big Business. Trial lawyers fought tort reform to safeguard access to justice for poor consumers—whose cases and controversies sustained their professional livelihoods—but also as a part of a broader coalition of groups that supported the Democratic Party of Alabama and were supported by that political party in turn. Businesses and doctors hoped that tort reform would limit

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their exposure to liability and reduce the overall cost of doing business, both because this outcome reflected their view of fairness and because they served to profit more under such a legal regime. Political lobbyists and organizations on both side of the debate entered the fray in order to nudge the debate in ways favorable to their long-term strategic visions, while also hoping that the tort reform issue would attract financial contributions from core stakeholders and improve their places in the political pecking order.

As for the ordinary citizens at the center of the tort-reform vortex, whether they served as litigants, voters, jurors, or consumers, tort law has always been about reaffirming community values in a public forum. In many cases, an ounce of regulation would have provided a surer (and less socially costly) cure to the problems raised in a tort lawsuit. A regulator could have insisted that the Life Insurance Company of Georgia refund all unlawfully procured premiums obtained from aggrieved policy-holders like Daisey Johnson. State insurance regulators could have declared the rate of Willie Ed Johnson’s car loan usurious if it was indeed so, or required financiers to disclose the discounts they required on their loans, fining them for initial violations, and turning to sterner remedies where necessary. A state agency could have (and later did) establish a clear rule informing companies like BMW when a repair must be disclosed to purchasers. The explosion of tort-law remedies in Alabama reflected in large measure the conditions of urbanization and uneven economic development that characterized its extremely low-regulation environment.

Tort law by design fills gaps in a formal legal code. Alabama displayed a regulatory environment so unstructured by rules and regulations that tort lawsuits took root and
multiplied. I remain unsure whether the lot of businesses and consumers has improved or deteriorated after tort reform; hopefully carefully constructed statistical analyses will help us sort through that difficult assessment. We do know that lawsuits provide a broad but diffuse deterrent effect, encouraging businesses to avoid known risky practices that could cross the line and incur financial penalties. These suits also provide an important pathway by which the weak can transmit messages about the bounds of acceptable conduct to the powerful—and by so doing, provide outlets for dissent, and sometimes redress, in our capitalist democracy. Tort reform closed one channel for airing these grievances and seeking justice. If this history is any guide, inventive political and legal actors will soon open others.
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Biography

A native of Birmingham, Alabama, Anna Johns Hrom attended Wellesley College, where she earned Bachelor of Arts degrees in history with honors and French cultural studies in 2009 and received the Ralph H. Bollard Prize for Distinction in American History. She served for two years in the Teach For America San Antonio Charter Corps. In 2015, she earned her Juris Doctor, *summa cum laude*, from the Duke University School of Law and was selected for the Order of the Coif. She earned a Master of Arts degree in history from the Duke University Graduate School, also in 2015.