

## How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws\*

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This study demonstrates how the structure of dispute resolution shapes the extent to which managerial and business values influence the meaning and implementation of consumer protection law, and consequently, the extent to which repeat players are advantaged. My analysis draws from, links, and contributes to two literatures that examine the relationship between organizational governance structures and law: neo-institutional studies of law and organizations and socio-legal studies of repeat players' advantages in disputing. Specifically, I compare an instance where powerful state consumer protection laws are resolved in private dispute resolution forums funded by automobile manufacturers but operated by independent third-party organizations (California) with one where consumer disputes are resolved in public alternative dispute resolution processes run and administered by the state (Vermont). Through in-depth interviews and participant observation in the training programs that dispute resolution arbitrators undergo in each state, I show how different dispute resolution structures operating in California and Vermont give different meanings to substantially similar lemon laws. Although my data do not allow me to establish a causal relationship, they strongly suggest that the *form* of the dispute resolution structure, and how business and state actors construct the meaning of lemon laws through these structures, have critical implications for the effectiveness of consumer protection laws for consumers.

Legal scholars, political scientists, and organizational sociologists are increasingly discussing the rise of governance structures within private organizations (Ayres and Braithwaite 1992; Braithwaite

\*Thanks to Catherine Albiston, Tom Baker, Lauren Edelman, Malcolm Feeley, Martha Feldman, Stephan Landsman, Carrie Menkel-Meadow, Calvin Morrill, Brent Nakamura, Evan Schofer, Carroll Seron, Martin Shapiro, Jonathan Simon, Doug Spencer, LSR General Editors Jon Goldberg-Hiller and David Johnson, and the anonymous LSR reviewers for helpful comments on earlier drafts. I also want to thank the National Science Foundation (SES-0919874) for providing funds for data collection and analysis. An earlier version of this article was presented at the 2012 Consumer Law Conference, the 2012 UC Irvine Center for Organizational Research Faculty Development Workshop, the 2011 annual meetings of the American Sociological Association and Law & Society Association and the 2011 Southern California Junior Law Faculty Forum. An earlier version of this article won Best Graduate Student Paper, Law & Society Association (2011), Best Graduate Student Paper, American Sociological Association, Sociology of Law (2011), and Best Graduate Student Paper, American Political Science Association, Law & Courts (2010). Please direct all correspondence to Shauhin Talesh, University of California, Irvine, School of Law, 401 E. Peltason Drive, Ste. 4800L, Irvine, CA 92697; e-mail: stalesh@law.uci.edu.

1982, 2002; Edelman and Suchman 1999; Freeman 1997, 2000; Freeman and Minow 2009; Lobel 2004; Macaulay 1986). By creating disclosure and ethics policies, reporting systems, and governance boards, organizations' "private governments" internalize a significant amount of legal rule-making, interpretation, application, and sanctioning within their own domains (Macaulay 1986). The rise of organizational governance structures is perhaps best illustrated by the growing use of internal grievance and alternative dispute resolution forums to resolve potential legal disputes outside the court system (Edelman 1990, 1992; Edelman and Suchman 1999; Galanter and Lande 1992; Menkel-Meadow 1999; Sutton et al. 1994). The increasing privatization of dispute resolution by organizations has been supported and approved by legislatures and courts across the United States (Talesh 2009).<sup>1</sup> Although it is well-established that consumers and other aggrieved parties such as employees and shareholders are adjudicating public legal rights through internal grievance and alternative dispute resolution forums operated by private actors, little empirical research addresses the process through which the meaning of law is constructed through different organizational dispute resolution structures. In particular, how does the structure of dispute resolution affect the meaning and implementation of law?

My study addresses this question in the context of state consumer protection laws. During the 1970s and 1980s, in response to consumer complaints that manufacturers (especially automobile manufacturers) were failing to stand behind warranties issued to consumers for products, all fifty states passed consumer warranty laws ("lemon laws") that afforded consumers powerful rights and remedies (Nowicki 1999). However, these rights are now largely contingent on first using alternative dispute resolution structures, some created and operated by private organizations and others by states (Talesh 2009). California and Vermont represent two extremes in the continuum of how disputes arising under lemon laws are resolved. California's lemon law mandates that disputes be resolved in dispute resolution forums funded by automobile manufacturers but operated by external third-party organizations. By contrast, in Vermont, consumer disputes are resolved in a public alternative dispute resolution structure operated by the state alone.

Through in-depth interviews and participant observation in the training programs dispute resolution arbitrators undergo in each state, I show how different dispute resolution structures

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<sup>1</sup> The United States Supreme Court in *AT&T v. Conception* recently reaffirmed its deference toward privatizing dispute resolution and specifically noted that the "efficient, streamlined procedures . . . reduc[e] the cost and increas[e] the speed of dispute resolution" (*AT&T v. Conception* 2011:1749).

operating in California and Vermont give different meanings to substantially similar lemon laws, one influenced by business values and the other balancing business and consumer values. Although my data do not allow me to establish a causal relationship, they strongly suggest that the *form* of the dispute resolution structure, in addition to how business and state actors construct the meaning of lemon laws through these structures, have critical implications for the effectiveness of consumer protection laws for consumers.

My analysis draws from, links, and contributes to two literatures that examine the relationship between organizational governance structures and law: socio-legal studies of repeat players' advantages in disputing and neo-institutional organizational sociology studies of how managerial and business values influence the way organizations construct law and compliance. Although socio-legal and neo-institutional scholars have examined the relationship between organizations, dispute resolution structures, and law, they have not sufficiently explored the micro-processes and mechanisms through which the meaning and operation of law is constructed in dispute resolution structures or the way managerial values flow into these structures. My study bridges these two literatures by showing how the *structure* of dispute resolution shapes the extent to which managerial and business values influence the meaning of law, and consequently, the extent to which repeat players are advantaged.<sup>2</sup>

My study, therefore, expands upon prior analyses of the relationship between organizational governance structures and law in several ways. First, although my study fits within the long tradition of exploring the gap between the law on the books and law in action (Macaulay 1963), it builds on this tradition by examining the meaning-making activities of organizations as they adjudicate public legal rights in third-party forums they create. Whereas previous work emphasizes the gap between the law in action and the law on the books, my study shows how the law in action in essence becomes the law on the books. Second, while prior neo-institutional studies show how business values influence written policies and internal legal structures (Edelman et al. 1993; Marshall 2005), I show how business logics also flow into dispute resolution structures run by *external third-party* organizations. My comparative research design also uncovers the micro-processes and mechanisms by which business values can shape the meaning of law and explores the conditions under which that occurs. Finally, whereas more recent scholarship advocates deregulation, public-private partnerships, and organizational self-governance in the context of the delivery of services and benefits in society, my analysis sounds a

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<sup>2</sup> For purposes of this study, "structure" refers to the different dispute resolution processes and systems operating in California and Vermont.

note of caution. At least in the context of the adjudication of public legal rights, I show the privatization of dispute resolution by organizations has the potential to undermine the rights of social have-nots.

### **Consumer Warranty Laws—Public Legal Rights Adjudicated in Private and Public Dispute Resolution Forums**

In an effort to encourage manufacturers, in particular, automobile manufacturers, to make safe products and to stand behind warranties issued to consumers, all fifty states passed consumer warranty laws in the 1970s and 1980s, California being the first.<sup>3</sup> If manufacturers were unable to make repairs as promised under their warranties, consumers could seek relief in court and obtain full restitution or replacement of their product, attorneys' fees, and in some states, a civil penalty up to two times the actual damages. In most states, consumers could invoke a "legal presumption" against automobile manufacturers that they had provided manufacturers a "reasonable number of attempts" as a matter of law if their automobiles were out of service for thirty calendar days or if they gave manufacturers four repair attempts within the first 12 months or 12,000 miles.<sup>4</sup>

Over time, consumers' ability to claim a legal presumption and obtain powerful legal rights and remedies afforded in court became largely contingent upon first using internal dispute resolution processes created and funded by automobile manufacturers. As these structures gained traction among similar organizations and became institutionalized, automobile manufacturers moved these processes outside their organizations and contracted with third-party organizations to administer manufacturers' dispute resolution programs (Talesh 2009). All fifty states have codified these third-party dispute resolution processes into law. Unlike courts, these private dispute resolution forums do not provide attorneys' fees or civil penalties and permit arbitrators in certain situations to award extra legal remedies such as another repair attempt.<sup>5</sup>

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<sup>3</sup> In 1970, California passed the first consumer warranty protection law, the Song-Beverly Consumer Warranty Act (Song-Beverly Act) Civil Code § 1790 et seq. (1970).

<sup>4</sup> The permissible range for invoking the legal presumption in most states is now the first 18 months or 18,000 miles from purchase.

<sup>5</sup> In particular, if a consumer has a defect with her vehicle but has not met a statutory requirement such as establishing a reasonable number of attempts, the arbitrator may still award extra legal remedies such as an additional repair attempt, reimbursement for an expense, or "other" nominal remedies.

By contrast, Vermont was the first of thirteen states to also create and administer a state-run dispute resolution structure where the only remedies available are full refund or replacement. Consumers making lemon law claims are allowed to choose between using the dispute resolution structures manufacturers fund *or* Vermont's Motor Vehicle Arbitration Board ("Lemon Law Board"). Unlike the single-arbitrator system in the private dispute resolution programs, the Lemon Law Board consists of a five-person panel of arbitrators (three citizens, an automotive dealer representative, and a technical expert) appointed by the governor that hears lemon law cases twice a month in a government building. There are no attorneys' fees and no civil penalties in this forum. Other than appealing for abuse of discretion, there is no right to sue in court.

Thus, despite affording consumers substantively similar formal rights and remedies across states, the lemon law field developed different private and state disputing structures and processes for resolving consumer disputes outside courts. Moreover, outcome data on who wins between consumers and manufacturers in these private and state-run disputing forums in California and Vermont also diverges. Figure 1 shows that from 1996–2007, consumers obtained refund or replacement far more often in Vermont than in California.<sup>6</sup>

Even when consumers win in California, they do not always win refund or replacement (the only remedies defined by California's statute), but rather, approximately half the time consumers win an opportunity to allow manufacturers to repair their automobiles, a reimbursement for a specific expense, or some other remedy. I

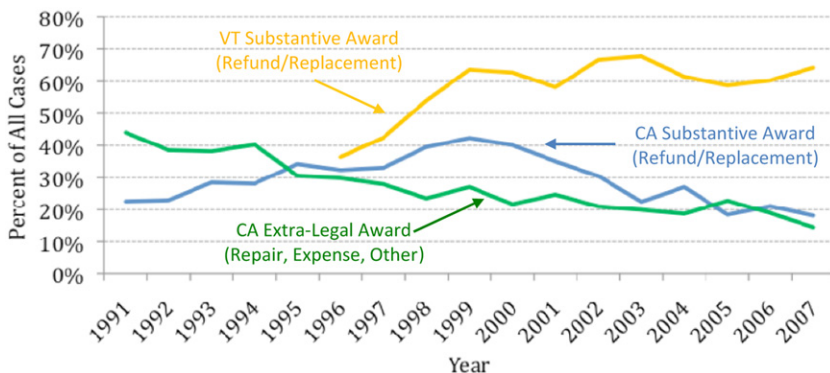


Figure 1. California and Vermont Consumer Outcomes.

<sup>6</sup> Upon request, Vermont provided me all consumer outcome data from 1996 to 2007 while California provided all data from 1991 to 2007.

labeled these “extra-legal” remedies in Figure 1 because they are not one of the statutory remedies provided in the lemon law.

Given there are similar formal laws but different dispute resolution structures and outcomes in California and Vermont, this study sought to explore the following research question: how does the structure of dispute resolution affect the meaning and implementation of law? My study does not attempt to make causal claims regarding different structures’ effects on outcomes. In particular, my small sample size of two states makes it difficult to determine whether differences in consumer win rates could be attributed to characteristics of the dispute resolution structures or were due to differences in the types of cases, manufacturers settling cases prior to lemon law hearings, or other factors. Rather, I was primarily interested in exploring the differences in how these private and state dispute resolution structures operate and implement law and seeing what differences might be relevant. In doing so, my study may help inform future quantitative research that can control for more variables and further test the possible causal link between dispute resolution structures and case outcomes.

## **Law, Organizations, and Dispute Resolution Structures**

My theoretical framework for answering my research question drew from socio-legal studies of repeat player advantages in disputing forums and new-institutional organizational sociology studies of how managerial values influence the way organizations respond to law. Each scholarly community emphasizes different mechanisms for explaining how organizations gain advantage in organizational governance structures. However, a central question relevant to both neo-institutional and socio-legal scholars that has not been sufficiently explored with systematic and persistent observations is how the meaning of law is constructed through different organizational dispute resolution structures.

In 1974, Marc Galanter argued “repeat player” litigants, namely, large bureaucratic organizations, shape the development of law and impede social reform through the legal system by playing for favorable rules, i.e., settling cases likely to produce adverse precedent and litigating cases likely to produce rules that promote their interests. Although Galanter also suggested that repeat players, through greater access to attorneys, alternative resources, and documentary evidence, would leverage their position to move dispute resolution in-house through alternative dispute resolution, this hypothesis has not received the same level of investigation as the wide-ranging studies on courts and tribunals (Albiston 1999; Dotan 1999; Kritzer and Silbey 2003; Lempert 1999; McGuire

1995; Sandefur 2005; Seron et al. 2001; Songer et al. 1999; Songer and Sheehan 1992; Szmer et al. 2007; Wheeler et al. 1987). Empirical studies of informal disputing structures using Galanter's framework focus on variation in complainants' success rates (Colvin 2011; Eisenberg and Hill 2003; Bingham and Sarraf 2000; Bingham 1998; Hanningan 1977; Hirsh 2008), the influence of occupational prestige and experience (Kinsey and Stalans 1999; Hirsh 2008), lawyer representation (Bingham 1997), legal resources (Bingham 1997; Burstein 1989; Hirsh 2008; Steele 1974) and complaint handlers' decision making (Gilad 2010). Noting the dearth of empirical studies on "private courts" (Galanter and Lande 1992: 394), law and society scholars repeatedly call for more studies of private dispute resolution structures, where many individuals increasingly adjudicate public legal rights (Edelman and Suchman 1999; Galanter and Lande 1992; Macaulay 1986).

New institutional organizational sociology studies on the other hand, examine how managerial values shape the way organizations respond to law and compliance. These studies show that law becomes "managerialized" when business values such as rationality, efficiency, and management discretion operating within an organizational field<sup>7</sup> influence the way organizations understand law, legality, and compliance (Edelman et al. 2001).<sup>8</sup> Existing research shows how managerial and business conceptions of law: (1) broaden the term "diversity" in a way that disassociates the term from its original goal of protecting civil rights (Edelman et al. 2001), (2) transform sexual harassment claims into personality conflicts (Edelman et al. 1993), (3) deflect or discourage complaints rather than offer informal resolution (Marshall 2005), and (4) even shape the way public legal institutions such as legislatures (Talesh 2009) and courts (Edelman 2005, 2007; Edelman et al. 1999) understand law and compliance. Training programs administered by intra-organizational professionals such as in-house lawyers and human resource professionals help institutionalize managerialized conceptions of compliance by often claiming that grievance procedures and formal personnel offices insulate organizations from legal liability while simultaneously limiting law's impact on managerial power and unfettered discretion (Bisom-Rapp 1996, 1999; Edelman et al. 1992).

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<sup>7</sup> The construct of an organizational field refers to the community of organizations and affiliated entities, including suppliers, customers, competitors, that share common systems of meaning, values, and norms (DiMaggio and Powell 1983; Meyer and Rowan 1977; Scott 2002; Scott and Meyer 1991).

<sup>8</sup> The primary logic of organizational fields has traditionally been a business or managerial logic that emphasizes managerial discretion and authority as a means of achieving efficient and effective production or services (Selznick 1969; Orloff and Skocpol 1984; Jacoby 1985; Baron, Dobbin, and Jennings 1986).

Although early accounts of organizations, and in particular, organizational fields, emphasize the way uniformity, taken-for-grantedness, and institutional homogeneity lead to one dominant logic within a field (Tolbert and Zucker 1983), more recent work emphasizes that fields often include multiple and contradictory logics (Edelman et al. 2001; Friedland and Alford 1991; Heimer 1999; Lounsbury et al. 2003; Schneiberg 2002; Schneiberg and Soule 2004; Scott et al. 2000; Stryker 2000).<sup>9</sup> Most recently, interviews with lemon law actors involved in lemon law dispute resolution across the United States reveal that there are underlying competing business and consumer logics operating among public (state regulators, state lemon law administrators, state arbitrators) and private (manufacturers, automotive dealers, third-party administrators, private arbitrators) actors (Talesh 2011).<sup>10</sup>

In sum, socio-legal and neo-institutional empirical studies emphasize different mechanisms for explaining how organizational repeat players gain advantage in organizational governance structures. Socio-legal studies suggest that repeat players maintain structural advantages in public legal institutions and private organizational forums, but devote little research to *how* different alternative dispute resolution structures shape the meaning of law and facilitate or inhibit repeat player advantages. Similarly, existing neo-institutional research predicts that managers, and in particular, managerialized conceptions of law operating within organizational fields, influence the way in which organizations understand law and compliance. Less attention, however, is devoted to *how* managerial values flow into dispute resolution structures or the conditions under which this occurs. My study bridges these two literatures by demonstrating how the institutional design of the dispute resolution structure influences the degree to which managerial values shape the meaning and implementation of law and consequently, the degree to which repeat players gain advantage. As I discuss in the next section, I used two different qualitative methods, participant observation and interviewing, to answer my research question.

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<sup>9</sup> The term “logic” refers to the way individuals organize their thoughts and assumptions about meaning, values, schemas, and culture (Friedland and Alford 1991).

<sup>10</sup> Private actors view the purpose of lemon laws and the value of informal disputing forums as adhering to “business logics” of efficiency, cost-effectiveness, allowing for managerial discretion and control, productivity (solving problems informally) and customer retention. Conversely, public actors view the goals and purposes of lemon laws and dispute resolution in a “consumer logic” more closely tied to the liberal legal language of rights, protection, equal access, transparency, and precedent. In sum, lemon law disputes are adjudicated in different structures with public and private actors deploying differing value systems concerning lemon laws and dispute resolution.



## Methodology

### Site Selection

Before highlighting my methodology, a brief explanation of why I chose California and Vermont to study is warranted. My site selection was driven by two goals. First, I wanted to compare two states operating dispute resolution systems outside the court system. Second, I wanted to select two states with significant variation along the dimensions of public and private control of the dispute resolution structures. Figure 2 highlights the various lemon law dispute resolution structures in the United States.

While all fifty states allow third-party administrators to operate lemon law programs on behalf of manufacturers, I chose California because there are more lemon law cases in California than in any other state. Because there is an active docket of lemon law cases, third-party administrators conduct more arbitrator training processes in California than in any other state and consequently provided me more opportunity to collect data. Of the thirteen state-run dispute resolution programs, I eliminated the two states using administrative law judges because I wanted to avoid a court versus alternative dispute resolution comparison. I also eliminated the four states that contract directly with a private organization because these structures reflect a mixture of public and private control. Of the remaining seven states using arbitration panels, I chose Vermont because its dispute resolution program was the most clearly publicly run (while the others had elements of the private structure in the early stages) and Vermont's program coordinator expressed the most willingness to grant access and be studied.

### Participant Observation: Training Processes for California and Vermont's Dispute Resolution Arbitrators

Two of the three third-party administrator organizations operating dispute resolution programs on behalf of automobile

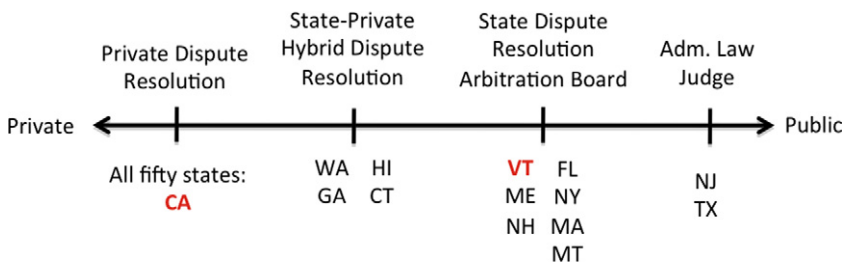


Figure 2. Case Site Selection.

manufacturers in California granted me access to observe and participate in their arbitrator training programs. Both third-party administrator organizations that I studied were national organizations that specialize in dispute resolution (mediation and arbitration) of a variety of disputes often involving consumers and businesses. One organization, which I refer to as National Dispute Resolution (NDR), only recruits lawyers to be lemon law arbitrators. The other organization, the Bureau of Dispute Resolution (BDR), recruits primarily non-lawyers (though lawyers are permitted to join).<sup>11</sup> Both California training programs use non-lawyers to train arbitrators. Each training program consists of two-to-three day training sessions run by the respective organization. Training processes in California typically occur two times a year. I attended and participated in two NDR training sessions and two BDR training sessions over the course of 18 months.

My primary goal was to understand how arbitrators are socialized into the field and taught what the lemon law means. In doing so, I evaluated how trainers were amplifying or suppressing business or consumer logics. Attending training programs allowed me to evaluate the extent to which training programs employ formal legal formulas for determining breach of warranty and what if any extra-legal criteria trainers use to teach what constitutes a breach of warranty. These venues gave me access to the processes through which law is constructed and implemented by third-party administrator organizations.<sup>12</sup>

During my research, I was surprised to learn that unlike California, Vermont does not conduct a formal training program but instead trains new arbitrators on an individual basis. Accordingly, my evaluation of their training program consisted of in-depth interviews with the state program administrator in charge of training, Vermont's legal counsel, and asking all arbitrators I interviewed to explain the training they received. Despite Vermont's lack of a formal training program, I am relatively confident that I captured how Vermont trains its arbitrators because the program administrator and legal counsel spoke in detail about their role in training, the goals and points of emphasis in the training program, and the rationale for having a panel of arbitrators adjudicate cases in a public forum.

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<sup>11</sup> As a condition of being granted access, both organizations requested I use pseudonym names in any scholarship produced from my research. Thus, I have replaced the actual names of each organization with the pseudonyms "NDR" and "BDR."

<sup>12</sup> Although I was not permitted to tape record any part of the training programs I attended, I took notes during the sessions and drafted my fieldnotes shortly thereafter (Emerson et al. 1995).

**Table 1.** In-Depth and Ethnographic Interviews

Interview Category	Type of Actors Interviewed	# of Interviews	
		In-Depth	Ethnographic
Automobile Manufacturers	Corporate Executives in charge of Lemon Law Issues	6	5
Third-Party Administrators (2 different organizations)	Head of Arbitration Training Dept. Trainers/Instructors Corporate Executives	8	1
CA Private Arbitrators	Corporate Liaison to Manufacturers Private Arbitrators hired by Third-Party Administrators	0	11
CA State Regulators	Director of Regulatory Dept. Lemon Law Certification & Monitoring Regulators	4	4
VT State Administrators	Program Administrator Lemon Law legal counsel Legislative Analyst	3	1
VT Panel Arbitrators	Automotive Dealers Technical Experts Citizen Arbitrators	13	3
	Total	34	25

### In-Depth and Ethnographic Interviews

I conducted fifty-nine in-depth and ethnographic interviews with five categories of participants: (1) automobile manufacturers; (2) two separate third-party administrator organizations; (3) California state regulators; (4) Vermont state administrators; and (5) Vermont arbitrators (see Table 1).<sup>13</sup> I identified interviewees through a combination of purposive, niche, and snowball sampling (Lofland 1995).<sup>14</sup>

I asked all interviewees to offer their perspective on the purpose of warranties and lemon laws. I asked actors to characterize the objectives of lemon law dispute resolution structures and their role in such structures, as well as the goals of training programs. By asking substantially similar questions to all actors in the field, public and private, I was able to chart the areas of consensus and contestation. All in-depth interviews were confidential, lasted sixty to ninety minutes, and were digitally recorded and transcribed with the consent of the research subjects. I used qualitative coding software, ATLAS.ti, to code my interview and ethnographic

<sup>13</sup> Ethnographic interviewing is a type of qualitative research that combines immersive observation and directed one-on-one interviews (Spradley 1979).

<sup>14</sup> With respect to Vermont's dispute resolution structure, the program administrator provided me with the contact information for seventeen current or retired arbitrators. Thirteen arbitrators agreed to be interviewed. Because arbitrators serve a three-year term on the Lemon Law Board with the opportunity for renewal two times, my data reflects arbitrator perspectives over a period of twenty years. No interviews of regulators were conducted in Vermont because they do not have any. In fact, other than California, few states have a regulatory department dedicated to monitoring manufacturers' dispute resolution programs.

data. This allowed an additional layer of transparency, systematization, and formality to my coding process.

## **How Different Organizational Dispute Resolution Structures Shape the Meaning of Law**

This section demonstrates how different dispute resolution structures operating in California and Vermont filter competing business and consumer logics in different ways. This results in different organizational structures giving different meanings to substantially similar lemon laws operating in both states, one influenced by business values and the other balancing business and consumer values.

In California, managerial and business values of efficiency, managerial discretion and control, productivity and customer retention flow into the rules, procedures, and meaning of law operating in dispute resolution structures mainly through a training and socialization process for California arbitrators. Third-party administrators hired by automobile manufacturers to run their dispute resolution programs teach a set of rationales and scripts that emphasize eliminating consumer emotion and individual voice from the process and narrowing the fact-finding role of arbitrators. Arbitrator training programs reshape the meaning of law by building discretion and flexibility into legal procedure and remedies and recontextualizing legal rules and arbitrator decision making around a set of business values. As a result, arbitrators are taught to deploy an altered version of the lemon law that mirrors formal law, but is filtered with business values and influence. Moreover, organizational repeat players gain subtle advantages through the operation of the dispute resolution structure.

In contrast to California's managerial justice adjudicatory model, Vermont uses a collaborative justice model that balances various interested stakeholders, reflecting both business *and* consumer values in a state funded and designed dispute resolution structure. As a result, Vermont's structure is far less likely to emphasize business values at the expense of consumer interests and prevents many repeat player advantages enjoyed by manufacturers in California. To the extent business values are introduced into the process by the presence of an automotive dealer and technical expert board members, they are balanced with competing consumer values by the presence of three citizen arbitrators on the Lemon Law Board and a program administrator who oversees the program. In particular, citizen arbitrators balance the fact-finding and deliberation process with a consumer perspective that often allows emotion and individual voice to enter the process.

Furthermore, the technical expert on the Lemon Law Board counterbalances manufacturers' repeat player advantages, e.g., greater knowledge, experience, and ability to offer expert testimony or expert reports.

The following analysis highlights how different structures influence the meaning and implementation of law in different ways. I focus on five important structural differences that emerge from having one organizational structure dominated by business values and the other balanced with consumer and business values: (1) the adjudicative orientation of dispute resolution arbitrators; (2) the fact-finding role of dispute resolution arbitrators; (3) the role of consumer emotion and individual voice in the process; (4) the level of enforcement of legal procedures; and (5) the meaning of legal terms and remedies.

### **Adjudicative Orientation of Dispute Resolution Arbitrators**

Consistent with prior neo-institutional studies (cf. Bisom-Rapp 1996, 1999; Edelman, Abraham, and Erlanger 1992), professional training is a key mechanism for the diffusion of organizational constructions of law in manufacturer-sponsored training programs. The dispute resolution programs in California and Vermont train and socialize their arbitrators in different ways. In California, arbitrators are taught to disregard any prior knowledge of legal processes and strictly follow what they are taught in the training processes. Trainers emphasize discretion and flexibility with respect to applying formal law in these processes. This philosophical orientation is a key mechanism for explaining how organizations shape the meaning of law.

Conversely, Vermont's panel of arbitrators receive minimal formal training and socialization. The little training they do receive largely focuses on assuring that they apply formal law. Vermont arbitrators believe the effectiveness of the Lemon Law Board is contingent on the right mixture of people offering different consumer and business perspectives while still operating within the strictures of formal law. The legitimacy of California's dispute resolution training programs administered by the NDR and BDR is based on the idea that professional training and socialization produce impartial and neutral decision makers. In Vermont, these same core legal principles rest on interest representation and balancing consumer and business logics in the structure.

Almost immediately after California's dispute resolution training programs begin, arbitrators, the majority of whom are lawyers, are socialized to approach legal decision making from the NDR and BDR's perspectives and follow the script provided to them. After warning arbitrators that their forum has a different philosophy

than the court system, trainers that I interviewed indicate that they instruct arbitrators to follow organizational prerogatives when adjudicating lemon law disputes and writing legal decisions:

THIRD-PARTY ADM.: I'm like you're going to write this, you're going to say this, you're going to do this because this is our program. It's got all kinds of rules and intricacies. . . . Just because you're a lawyer, just because you've had X education, just because you've had lots of experience arbitrating doesn't mean anything to me in terms of what I need you to do and how you need to operate in this program. (Third-party Adm., BC8020, lines 374–387)

By deploying a program philosophy that asks arbitrators to not think like lawyers and simply follow what they are taught, California training programs create discretionary space for considering non-legal values when evaluating consumer disputes. For example, although trainers repeatedly stress the importance of due process, business values of maintaining managerial discretion and flexibility influence the degree to which formal law is applied (cf. Edelman 1992). In order to allow increased adjudicatory discretion in these processes, formal law is expressly devalued in California training programs:

THIRD PARTY ADM.: Because so and so versus so and so [referring to a case], what does that really have to do with exactly what I'm looking at today, you know? Because an arbitrator, I think they feel like they're judge for the day. And if they feel it rises to the level of substantial impairment [of use, value, or safety], it's going to rise to the level of substantial impairment whether it's wind, noise or electrical issues. So I think arbitrators enjoy the program because they feel like they have flexibility too. (Third-party Adm. lines 1100–1128)

THIRD-PARTY ADM.: The fact that we include [cases] in California has actually always been a source of agitation for me. It's starting to shove legal things into a process that really was intended not to be a legal process completely.

[Legal] decisions can be made and they can be wrong. And this piece of case law can contradict that piece of case law. I don't see it as having a place in the arbitration. (Third-party Adm., BC8050, lines 665–734)

California training programs also provide a written training manual that limits the legal principles and reasoning arbitrators are permitted to use when evaluating lemon law cases. Other than what is taught during training sessions and conveyed in the written manual (which includes some statutes and cases while excluding

others), trainers forbid arbitrators from conducting additional legal research. This framework signals to arbitrators that all they need to know about lemon laws is confined to the training manual and two-day training course. However, filtering selected legal provisions into a manual creates discretionary space for California training programs to re-contextualize certain legal principles around a set of business values (cf. Mertz 2007). In particular, the training manuals include the NDR and BDR's written interpretations of the meaning of some cases and statutes. By controlling the oral and written educational process, the NDR and BDR are able to influence how arbitrators understand lemon laws.

The training curriculum in Vermont is strikingly different from California both in style and substance. First, there is very little formal training of arbitrators on the Vermont Lemon Law Board and no formal training program. Because arbitrators serve three-year terms that can be renewed twice, training occurs on a rolling basis as new members are appointed to the Lemon Law Board by the governor of Vermont. Second, the goals of Vermont's training curriculum reflect more of an orientation toward rights, protection, and following formal law than California's curriculum. Instead of relaxing the degree to which formal law is applied, Vermont's brief training curriculum emphasizes adherence to formal law, patience, and thoroughness when deciding cases:

INTERVIEWER: When you're training a new board member, what values are you hoping to instill in the board members? What are you trying to accomplish?

STATE ADM.: Consistency with application of the law. And they do this, [the panel arbitrators are] very thoughtful in reference to not rushing, like they take it seriously. They're not in a hurry to leave. (State Adm., DC4500, lines 700–720)

Third, instead of including only selected provisions of the lemon law, Vermont arbitrators are asked to review a complete copy of the lemon law statute. Unlike California training programs, Vermont's program administrator does not offer any specific interpretation or guidance regarding what specific statutory provisions mean. Receiving a copy of the actual statute as opposed to an edited version in a manual reduces the opportunities to filter business values into what lemon laws mean.

Perhaps most importantly, the legitimacy of Vermont's Lemon Law Board emerges from panel balance and adjudicating cases in a transparent forum. Vermont's arbitrators believe it is critical to have business *and* consumer perspectives present in the decision making process because statutory terms such as "substantial

impairment of use, value, or safety” and “reasonable number of attempts” are ambiguous with respect to their meaning (cf. Edelman 1990, 1992):

PANEL ARBITRATOR (TECHNICAL EXPERT): But that is where I think having different people on the board, because what may not be substantial [impairment] to me, may be very substantial to a consumer advocate. And I may lose. That is why it is good to have a representation. [T]hat is what I like about the board, it is diverse. . . .

We have an older gentlemen [citizen board member] sometimes when he asks a question, I’m like, “Where in the heck is he going with this thing,” *because we think differently. He was a legislator for years*. So he asks a question and all of a sudden he enlightens me. (Technical Expert Panel Arbitrator, LL4530, lines 590–617, 1035–1043) (emphasis added)

As opposed to forcing arbitrators to conform to one interpretation of lemon laws, Vermont reconciles the inherent ambiguity of law by assuring that business and consumer perspectives are part of the legal decision making process.

Thus, the different adjudicative orientations in California and Vermont facilitate and inhibit the conditions under which and the degree to which business values are more or less likely to flow into law. In California, arbitrators are immediately socialized to deemphasize formal law. This philosophical orientation creates space for non-legal values to pour into the meaning of law. In Vermont, arbitrators are part of a structure that relies on balancing the Lemon Law Board with multiple stakeholder perspectives and applying formal law unfiltered by an extensive training curriculum.

### **The Fact-Finding Role of Dispute Resolution Arbitrators**

While both Vermont and California dispute resolution programs emphasize impartiality and neutrality, they construe the *meaning* of these terms differently. The divergent fact-finding approaches arbitrators deploy in both states illustrate the way impartiality and neutrality mean different things. In California, impartiality and neutrality are considered compromised when arbitrators actively investigate facts. In Vermont, actively investigating facts is considered a necessary component for establishing impartiality and neutrality. This distinction is important because passive arbitrators in California provide structural advantages for repeat players whereas the inquisitorial role of arbitrators in Vermont offsets repeat player advantages.

For example, California training programs teach arbitrators to act as passive arbiters and rely solely on parties’ production of



relevant factual evidence. Trainers that I interviewed indicate that they warn arbitrators that actively investigating facts compromises their neutrality and impartiality: “It is up to the parties to prove their own cases and we do not want an arbitrator stepping over the line of proving a case for a party . . . I wouldn’t [say], how does that [car defect] effect your use [of the vehicle] because then you are feeding them, you are leading their evidence” (Third-party Adm., BC8000 lines 528–531, 555–566). In contrast, Vermont arbitrators view their role as inquisitorial. Vermont arbitrators indicate it is their responsibility to actively gather information and facts regardless of whether the parties offer information on their own. According to Vermont arbitrators, active investigation assures a procedurally fair and neutral process:

INTERVIEWER: Did you feel like [asking many questions] was compromising your neutrality?

PANEL ARBITRATOR (CITIZEN): No. I think we had an obligation to do that. . . . It wasn’t our job to try the case, but by the same token, it was our responsibility to get all the facts so we could make a decision. (Citizen Panel Arbitrators, LL4540, lines 628–636)

Thus, active fact-finding preserves arbitrator impartiality and neutrality in Vermont whereas active investigation compromises the process in California.

Active investigation also counterbalances any experiential and informational advantage manufacturers maintain such as manufacturers’ unilateral access to repair history records and ability to bring experts or expert reports into evidence:

PANEL ARBITRATOR (CITIZEN): Sometimes the consumer really didn’t know how to present his or her case very well. And by the same token, the manufacturer probably had been in there two or three times and had some experience.

So it behooved the board to lead the consumer to ask questions that the consumer was not aware of. Because the consumer wouldn’t know—sometimes the consumer’s not very well educated and wouldn’t know what substantial impairment of use, value or safety meant. So we would have to say, well, do you think this substantially impairs the car and all that. So we’d have to lead the consumer in that direction, to be fair. (Citizen Panel Arbitrators, LL4540, lines 600–628)

Actively investigating facts in Vermont also includes preventing intimidation from repeat players against one-shotters during questioning:

PANEL ARBITRATOR (TECHNICAL EXPERT): So I had to step in because [the manufacturer] basically was trying to sway the board, [] on a technicality or whatever his point was, I would play a devil's advocate and give the consumer the chance to do the same thing, and [the manufacturer] got mad at me and called me out on it. And I said to him, "I am not going to allow you to be a bully at this board. It is as simple as that. If you think that something plays well for your client, we are going to go quid pro quo." (Technical Expert Panel Arbitrators, LL4530, lines 1096–1143)

The inquisitorial role of Vermont arbitrators, therefore, appears to curb repeat player advantages manufacturers may gain with passive arbiters in California.

Business logics that permeate training processes in California also affect the amount of *independent* expert information offered into evidence concerning automobile defects. For example, California training programs teach arbitrators that they may appoint a technical expert to examine a vehicle and issue an expert report if necessary. However, by focusing on efficiency, time delay, and resource conservation, trainers dissuade arbitrators from using technical experts:

THIRD-PARTY ADM.: It is a long process [to hire a technical expert] and you should not waste the time and delay unless it is necessary. . . . Think about the relevance. Think about why you need it. They are not the end all be all. (IR7010, FN, lines 232–248)

By framing technical experts as potentially unnecessary or an inefficient use of time, California training programs exclude neutral technical experts who may have the requisite experience and mechanical equipment to identify vehicle problems and leave evaluation to the lay knowledge of arbitrators, who usually have only manufacturer testimony to rely on. In fact, manufacturers I interviewed indicate that they often bring mechanical experts to hearings.<sup>15</sup> Under these circumstances, arbitrators are especially captive to manufacturers' technical evaluations and testimony because they are trained to avoid appointing independent experts. In this way, the dispute resolution structure subtly gives repeat players control over the degree and scope of technical information admitted into the hearing. Indeed, California state regulators repeatedly lamented in interviews how efficiency concerns guide the way facts are offered into evidence and hinder the overall fairness of the third-party administrators' dispute resolution programs.

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<sup>15</sup> State regulators who audit California lemon law hearings also indicate consumers rarely if ever bring a technical expert to hearings.

In Vermont, arbitrators indicate having a technical expert on the Lemon Law Board prevents parties from misleading the Board regarding technical defects or problems with vehicles, combats information asymmetry between manufacturers and consumers, and leads to better evaluation of the technical issues involved in the case:

PANEL ARBITRATOR (CITIZEN): Well I know on our board, we have had cases [where] the manufacturer has said something and the technician would say no, I don't believe that's quite right. Then they would discuss it and come to find out, the technician would be right.

And the manufacturer, I don't think he was trying to mislead, but I think he was presenting it in a different light than the technician would view it. And I think the technician is there to keep the manufacturer honest for one thing. And I don't mean to say that he would be dishonest. But just to keep all the facts straight.

And on our board, I definitely am glad a technician is there. Because if the manufacturer makes a statement, you can always look at the technician and say is that right. And he'll usually say yes, that's right. (Citizen Panel Arbitrator, LL4570, lines 714–745)

Thus, the rules and procedures California arbitrators are taught to follow when fact-finding are subtly tilted toward manufacturers' interpretations and evidence. Although neutral on their face, trainer concerns over maintaining impartiality and a fast, efficient process when discovering facts allow manufacturers structural advantages (cf. Galanter 1974). Conversely, Vermont arbitrators view active fact-finding as a duty, a mechanism for impeaching the credibility of parties, and a technique for preventing either party from gaining advantages simply because they possess more documents, expertise, or experience.

### **The Role of Consumer Emotion and Individual Voice in the Process**

Public and private actors in Vermont and California both claim their forum creates an informal, flexible adjudicatory environment that still provides due process protections such as the right to an impartial and neutral decision maker, the right to notice and opportunity to be heard, and the right to present and rebut evidence. However, they conceptualize the *meaning* of due process protections differently.

In California training programs, due process concerns *require* removing consumer emotion and individual voice from all facets of the adjudicatory process. While informal disputing forums are traditionally thought of as domains that value emotion and individual voice (Bush 1989; Bush and Folger 1994), trainers in California

admonish arbitrators “don’t feel buyer’s remorse” and “have empathy not sympathy.” Concerns that matter to consumers, especially the emotional impact of the problem, are constructed as irrelevant. Thus, emotion in these processes is omitted from the entire process, regardless of whether such emotions were germane to determining whether a consumer met her burden of establishing a “safety defect” or “substantial impairment of use, value, or safety of the vehicle to the buyer.”

Unlike California, Vermont arbitrators emphasize the importance of emotion and consumer voice when evaluating consumer grievances:

PANEL ARBITRATOR (DEALER): Sometimes some emotion is a good thing. . . . [W]hen consumers are emotional, you see them telling their case. We are here for a hearing for about an hour. We are here for a snapshot of their experience with the car. So when you see emotions, you can sometimes get a quick snapshot and a good feel of their experience and that is really important. (Dealer Panel Arbitrator, LL4590, lines 120–125)

Emotion, therefore, offers an important lens into the consumer’s experience with her vehicle.

Consumer emotion is also weighed heavily in Lemon Law Board deliberations. Vermont arbitrators indicate citizen panel arbitrator perceptions of mechanical problems as anxiety provoking and an emotional experience were important issues to consider, especially when evaluating whether a defect “substantially impaired the use, value or safety of the vehicle *to the buyer*”:

PANEL ARBITRATOR (TECHNICAL EXPERT): So if we just had technical people on the board that were all car people, it is not a good representation of what a consumer goes through. Let’s say you have a consumer advocate on the board who is a female that has raised children, and the consumer that comes [to the hearing] is primarily a female, and three times her kids were locked in the car at the grocery store because the [car] automatically locked the doors on her. . . . she may look at it and say, you know what, the livelihoods of those kids are jeopardized, she doesn’t want to leave her kids, because you are not supposed to leave our kids in the car, somebody might take them or they might get injured, you just don’t- and that is where having somebody that is not in the automobile business, those are the types of questions make me think, “Yeah, I’ve never thought of it that way,” because I am just thinking technical. I am thinking I know what the car business end of it is like, and it is good to hear what consumers think and how they can relate to the inconvenience factor. (Technical Expert Panel Arbitrator, LL4530, lines 635–710)

In sum, while both California and Vermont dispute resolution programs emphasize due process protections, they conceptualize the meaning of due process differently. California arbitrators are taught to view consumer emotion and voice as compromising due process while Vermont arbitrators view consumer emotion—both at actual hearings and during deliberations—as relevant and fundamental to evaluating the merits of the case and assuring a fair process.

### The Enforcement of Legal Procedures

Business and consumer values are filtered into the procedures used in dispute resolution structures operating in both states in very different ways. Specifically, concerns over efficiency and managerial discretion and control drive the tolerant and relaxed procedural rules operating in California. As a result, manufacturers gain subtle structural advantages even though these procedural rules are facially neutral. Conversely, in Vermont, concerns over transparency, equal access, and consumer protection drive a series of strict procedures implemented by the program administrator overseeing the program. Vermont's structure, therefore, may be more likely to curtail certain repeat player advantages.

While California training programs, run by the NDR and BDR, maintain that they are autonomous organizations uninfluenced by manufacturers and subject to state regulatory oversight, interviews suggest how manufacturers still influence their programs:

THIRD PARTY ADM. (trainer): Manufacturers are too involved in the process, you know, that's a hard one to defend sometimes, quite honestly. From my perspective, it is actually difficult to defend. Because I think there are times when I think we do things that we don't really need to do. . . . [T]o the extent that whatever [the Manufacturer Liaison for the BDR] said, you know, we need to do it this way, it usually wound up we're going to do it that way because that's what the manufacturers want. (Third-party Adm., BC8030, lines 564–569, 685–694)

Manufacturer influence is especially evident in the procedures California arbitrators are asked to implement. For example, the NDR advises arbitrators to allow only twenty minutes for parties to present their case-in-chief and five minutes for closing arguments. These guidelines resulted from a few manufacturers complaining that some consumers were taking too long to present their cases. In this instance, managerial concerns over having an efficient, quick process trump allowing parties to present their case in the manner that suits their strategic interests.

In order to provide parties as much discretion as possible when presenting their cases, California dispute resolution structures are very flexible about what types of evidence are admissible. Although permitting hearsay and not using formal rules of evidence are seemingly harmless and in theory make it easier for consumers to offer evidence (NDR Part I, lines 140–144; ZZ6040, BDR FN, lines 443–445), repeat players benefit from relaxed evidentiary rules because they have more access to resources, information, warranty records, and invoices (cf. Galanter 1974). Moreover, in this instance, repeat player advantages are even greater because, as I explained in the prior section, arbitrators are instructed to not actively investigate facts and rely solely on the parties' presentation of evidence. The education and socialization process, therefore, allows legal procedures to be reconstituted and infused with seemingly innocuous business logics of efficiency, informality, discretion, and control. As a result, organizational repeat players are more likely to gain subtle advantages.

In contrast to manufacturer-sponsored programs in California, Vermont arbitrators believe the Lemon Law Board is a legitimate forum because it is funded and run by the government. Concerns over equal treatment before the law and transparency are particularly important for establishing legitimacy and preventing excessive business discretion and influence in the process:

PANEL ARBITRATOR (CITIZEN): Any time the manufacturer is supporting a program, I would look at it twice because the manufacturer and the dealer do not like intervention on their business. They don't like to be told they have to fix a car. . . .

When the legislature that is a freeman's body makes a decision to add a program like this, you can rest assured that everybody's treated on an equal basis, and that there's no money coming from anybody to support the program where there would be a chance of influence. . . . I think that a government-run [program] like Vermont is free, it's equal, and people are all treated fairly. . . . (Citizen Panel Arbitrator, LL4560, lines 495–528)

Vermont's dispute resolution structure adheres to a strict procedural format in part to combat excessive arbitrator discretion and manufacturer informational advantage. Vermont's structure is different from California's structures in three important ways. Unlike California, hearsay evidence is not allowed. Second, parties are not given any time restriction when presenting their cases. Finally, the program administrator of the Lemon Law Board actively assures procedural rules are strictly enforced. As part of her duties, the administrator makes sure arbitrators prevent parties from making arguments that were not made in their written statements, prevents

admission of documents that are not filed at least five days in advance of the hearing, may request arbitrators ask a question when discrepancies require clarification, and may personally interject a clarification question during proceedings. Thus, rather than build discretion into legal rules, Vermont uses strict procedures and active oversight by the program administrator to add an additional layer of procedural and substantive protection to the adjudicatory process.<sup>16</sup>

### The Meaning of Legal Terms and Remedies

Managerialized and business conceptions of law in California arbitrator training programs also alter the *meaning* of remedies and statutory legal terms. Although arbitrators are required to apply the formal lemon law on the books, arbitrators, in action, apply an altered form of lemon law (cf. Harrington 1985).

For example, the meaning of legal remedies is reshaped in California training programs. According to the California lemon law, a consumer is entitled to full restitution or replacement of her vehicle if she establishes she met the statutory “legal presumption” for providing a manufacturer a “reasonable number of attempts” to fix the automobile. California trainers, however, allow arbitrators the discretion to determine the appropriate remedy for a consumer should she prevail:

INTERVIEWER: So in that situation even if the consumer may have hit the legal presumption, if there’s a sure fix, the arbitrator has—

THIRD-PARTY ADM.: Can still do it. Mm-hmm. He could still award another repair. . . . And I think there’s a little bit more fairness in that, you know, because really, what if you really were just out with a fix? And that happens all the time. (Third-party Adm., BC8040, lines 1154–1167)

Thus, even though consumers in California dispute resolution structures are entitled as a matter of law to the choice of full restitution or replacement when they establish the “legal presumption,” California training programs build discretion into the meaning of legal remedies even when formal law does not provide such discretion. Business values, namely, managerial discretion and

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<sup>16</sup> Although California state regulators regularly monitor third-party administrator training programs, they repeatedly lamented their lack of enforcement powers. On one hand, state regulators encourage manufacturers to voluntarily certify their dispute resolution programs. But on the other hand, California regulators have very little regulatory teeth to force manufacturers to alter the design and operation of private programs.

customer retention (by keeping the consumer in her current vehicle with a repair) trump social context, emotion, and frustration that often drive a consumer who has given a manufacturer six chances to fix a defect and wants a full refund regardless of whether the defect can be repaired.

Moreover, interviews I conducted with manufacturers, state regulators, and 8 years of consumer satisfaction surveys by the California Department of Consumer Affairs all show that consumers, manufacturers, and state regulators agree that another repair attempt, reimbursement for expense, or other nominal award (i.e., extra-legal remedies) do not constitute a consumer “win” even though a consumer technically receives a decision indicating she prevailed (Calif. Dept Con. Aff. Survey 2002–09). Thus, even when manufacturers lose a case and are ordered to award a repair, all parties believe manufacturers actually prevailed. Based on the California Department of Consumer Affairs survey data and my interviews with field actors, the parties themselves seem to believe extra-legal awards are “symbolic” awards (Edelman 1992).

To provide a richer portrait of how this interpretation of remedies relates to outcomes, Figure 3 shows that, when extra-legal (symbolic) awards are added to California consumer denials, the disparity between consumer wins and losses in California is even larger. Moreover, when compared to Vermont’s win rate over time, consumers are more likely or at least as likely to lose in California as they are to win in Vermont.

As noted earlier, to establish a causal link between the dispute resolution structures and case outcomes would require a sample of more than two states and data that allow controls for differences in the types of cases and a variety of broader environmental, cultural,

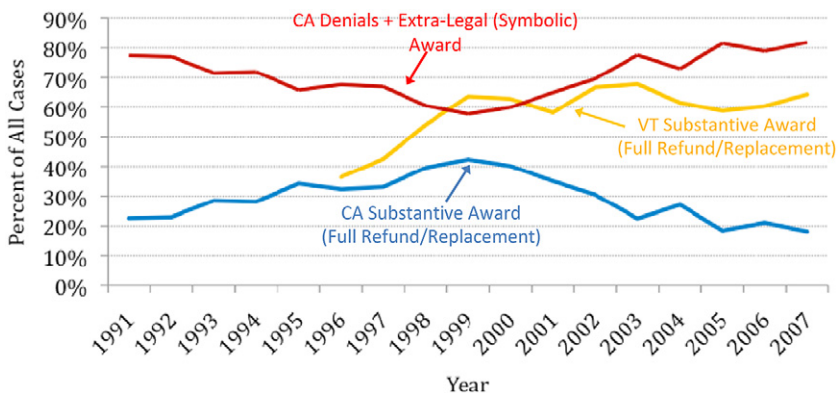


Figure 3. The Paradox of Winning Through Losing for Manufacturers.



or ideological factors that might explain the differences in case outcomes. While the data I collected reveals that it is unlikely that the variation in the number of cases filed is being driven by environmental factors such as lawyers, business and legal culture, or changes in the law,<sup>17</sup> I was denied data to determine whether the types of cases in each state are different.<sup>18</sup> Nonetheless, differences between the states in consumer win rates suggest that dispute resolution structures might be important mechanisms through which one party or the other gains advantage. At a minimum, the content and meaning of critical statutory terms that determine whether consumers have a viable cause of action such as “reasonable number of attempts,” “substantial impairment,” and “legal presumption” are being determined by semi-autonomous third-party organizations hired by automobile manufacturers, the very group that such laws are designed to regulate (Edelman et al. 2011; Edelman and Talesh 2011; Talesh 2009; Edelman et al. 1999).

Conversely, because Vermont arbitrators undergo minimal formal training, are provided the lemon law statute unfiltered and without business interpretation, and sit on a panel that balances business and consumer logics in the adjudicatory structure, business logics do not shape the meaning of law as strongly as in California. Although automotive dealers I interviewed in Vermont share the same business values as California automotive dealers and automobile manufacturers across the country, i.e., efficiency, discretion, control, productivity, and customer retention, business actors’ perspectives when deciding lemon law cases are counterbal-

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<sup>17</sup> Both states also provided data on the number of consumer cases filed, dismissed on administrative grounds, withdrawn, settled before hearing, and ultimately adjudicated at the hearing. With these data, I considered selection bias effects that could skew my findings if one state had a disproportionate number of cases falling out prior to hearing. The profiles in the two states were nearly identical: pre-hearing settlements were reached in 28% of Vermont cases and 30% of California cases. Moreover, the annual rate of cases filed in both states was uniform across the entire time frame. Two-thirds of the cases filed for each year across the time period in my sample are within one standard deviation of the average number of cases filed in any given year. All of the remaining cases fall within two standard deviations.

<sup>18</sup> In an effort to determine whether the case populations in each state were different, I requested from both California and Vermont’s dispute resolution programs access to written complaints filed by consumers for the past ten years to evaluate what specific type of claims were being made (and thus, develop a measure for types of cases). I also requested data on which cases ultimately settled prior to a formal ruling. Both dispute resolution programs denied my request due to the undue burden of compiling this data and confidentiality concerns (mostly pertaining to settlements). Thus, I am unable to definitively rule out that the cases in each state are different. However, based on my own observation of actual lemon law hearings in both states, I have no reason to believe the types of cases in either state are qualitatively different. Moreover, both public and private actors indicated in interviews that only the “hard” cases reach an actual arbitration hearing. Evaluating possible qualitative differences among different case populations is always an issue in comparative studies and exceedingly difficult to obtain and evaluate as a practical matter.

**Table 2.** Differences in California and Vermont Dispute Resolution Structures

	California Managerial Justice Adjudicatory Model	Vermont Collaborative Justice Adjudicatory Model
Education & Training Program	Extensive	Minimal
Socialization Process of Arbitrators	Extensive (conformity, follow organizational script)	Minimal (maintain and value identity as a dealer, technical expert and citizen arbitrator panel member)
Presence of Emotion/Voice in Adjudicatory Process	Ignored and de-valued	Important, provides snapshot of consumer's experience with vehicle
Fact-finding role of Arbitrators	Adversarial Process/Passive Investigator	Inquisitorial Process/Active Investigator
Procedural Rules	Tolerant (e.g., hearsay permitted)	Strict (e.g., hearsay not permitted)
Neutrality & Legitimacy	Based on Professional Training, Education, & Socialization	Based on Transparency and Interest Representation/Balance

anced with consumer perspectives on the five-person Lemon Law Board. Thus, both business and consumer interpretations of lemon law terms are a part of the decision making process.

In sum, the institutional design of dispute resolution, and how field logics are translated by field actors in different dispute resolution systems, leads to two different meanings of law operating in California and Vermont (see Table 2).

Consistent with neo-institutional studies of how managerial conceptions seep into law through training processes (cf. Bisom-Rapp 1996, 1999; Edelman et al. 1992), managerial and business values flow into law operating in California's private dispute resolution structures primarily through an arbitration training and socialization process conducted by third-party administrators. The institutional context socializes arbitrators to ignore consumer emotion and narrows the fact-finding role of arbitrators to a passive arbiter reliant on parties to present facts. As a result, arbitrators are taught to adjudicate cases not in the shadow of the formal lemon law on the books, but in the shadow of a managerialized lemon law replete with its *own* rules, procedures, and construction of law that changes the meaning of consumer protection. Moreover, as business values flow through the disputing structure, organizational repeat players gain subtle opportunities for advantages through the operation of California dispute resolution structures.

Vermont's vastly different dispute resolution system has far less tendency than the process in California to introduce business values into the meaning and operation of lemon laws. To the extent business logics are introduced into the process by the pres-

ence of dealer and technical expert board members, they are balanced with competing consumer logics by the presence of citizen panel members and a state administrator. Rather than emphasizing professional training and socialization, Vermont's structure illustrates how participatory representation, an inquisitorial fact-finding approach, and balancing consumer and business perspectives in the decision making process can help curb repeat player advantages.

## **The Implications of Organizational Governance Structures For Consumer Rights**

### **Theoretical and Social Policy Implications**

This article elaborates the literature on the relationship between organizations and law by integrating neo-institutional studies of how managerial values flow into law with socio-legal studies of repeat players' advantages in disputing. In the lemon law context, the structure of dispute resolution shapes the extent to which managerial and business values influence the meaning of law, and consequently, the extent to which repeat players are advantaged. My study, therefore, contributes to law and society scholarship on studies of the law in action (Macaulay 1963), dispute resolution in organizations (Edelman and Suchman 1999; Galanter and Lande 1992), repeat players advantages in disputing forums (Galanter 1974), and access to justice (Felstiner et al. 1980–81). In particular, this study fits within the long socio-legal tradition of exploring the gap between the law on the books and law in action but also builds on this tradition by examining the meaning-making activities of organizations as they adjudicate public legal rights in third-party forums they create. In this instance, the law in action as presented at training sites becomes and replaces the law on the books in manufacturer-sponsored dispute resolution programs. In doing so, my study answers socio-legal scholars, who have for the past two decades, called for more empirical studies of how organizational governance structures operate *in action* (Edelman and Suchman 1999; Galanter and Lande 1992; Macaulay 1986). Also, contrary to most studies that demonstrate how repeat players gain advantages in disputing structures, my comparative research design allows me to explore how dispute resolution structures can also inhibit repeat player advantages.

My study also extends the neo-institutional literature on law and organizations by examining how law is constructed within different dispute resolution structures. I reveal the micro-processes and mechanisms through which law shapes meaning in these different dispute resolution structures, even as meaning

in these structures reshape law. In contrast to prior studies (Edelman et al. 1993; Edelman et al. 2001; Marshall 2005), my comparative qualitative design allowed me to analyze variation in how managerial values flow into law. Finally, unlike prior studies that show how managerial values influence written policies and internal legal structures (Edelman et al. 1993; Marshall 2005), here, managerial logics flow into third-party organizations that train arbitrators on the meaning of lemon laws. This is a critical and as yet unrecognized way by which the “haves” gain structural advantages through seemingly neutral dispute resolution processes (cf. Galanter 1974).

This study also has critical policy implications for consumers’ access to justice and more broadly, for the civil justice system. Arbitration and alternative adjudicatory processes are generally a subset of the civil justice system that has been declared a neutral and independent adjudicatory body by legislatures and even by the United States Supreme Court.<sup>19</sup> The legitimacy of arbitration is based on a widely held belief that independent arbitrator training organizations can teach arbitrators to be impartial and neutral. Moreover, internal grievance and alternative dispute resolution processes generally operate with a “consensus” rather than “adversary” philosophy (Bush 1989; Bush and Folger 1994). As a result, these structures allow greater opportunity for individual voice in the process, increase access to justice for parties who want to avoid the delay and expense of the court system, and eliminate repeat players’ ability to develop a body of favorable precedent.

But this comparative study highlights the difficulties of contracting out an interest-neutral activity such as adjudicating public legal rights to private organizations anchored in a non-neutral business logic. My empirical data suggest that these consumer dispute resolution structures differ substantially with respect to: (1) how they filter competing business and consumer logics; and (2) how well they protect and preserve the consensus values of informal dispute resolution. In this instance, the structure of dispute resolution may determine whether consumers gain meaningful access to justice outside the court system (cf. Sandefur 2008).

To the extent consumer protection laws are undermined by business norms in various private disputing forums, these policies may be ineffective in ameliorating social and economic disadvan-

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<sup>19</sup> The United States Supreme Court indicates: “The streamlined procedures of arbitration do not entail any consequential restrictions on substantive rights” *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987); see also *AT & T v. Concepcion LLC*, 131 S. Ct. 1740 (2011).

tages for consumers. This is especially important because consumers, employees, shareholders, and health care patients are increasingly channeled, with the blessing of legislatures and courts, into alternative dispute resolution structures operating outside formal legal institutions. Because the civil and consumer rights revolutions of the 1960s have been re-routed into a variety of different organizational dispute resolution structures, future studies should examine *variation* in how these structures operate, how these structures give different meanings to law, and what effect different structures have on procedural fairness and substantive justice for parties.<sup>20</sup>

### Rethinking Organizational Governance in the 21<sup>st</sup> Century

Although this article focuses on public and private dispute resolution structures in the context of consumer warranty laws, scholars would be well served to examine other structures like these that affect consumers, especially in the area of financial and capital markets governance. The global financial crisis highlights the need for more analysis of how businesses construct the meaning of compliance sometimes in ways that may undermine legal regulation. Just as managerial and business logics transformed consumer rights in this study, corporate culture and institutionalized practices impacted the regulation of financial and lending institutions in the recent banking crisis. In particular, deference to corporate and financial institution lending practices, disclosure policies, internal compliance structures, auditing, and reporting systems amidst a push for flexible, collaborative regulation and delegated governance failed to sufficiently protect consumers and investors from excessive fiscal risk-taking policies (Edelman and Talesh 2011; Krawiec 2003; O'Brien 2007). Although these corporate structures may be adopted to signal compliance and ethical conduct by corporations, the recent financial crisis demonstrates that such institutionalized structures may provide little guarantee that financial fraud and abuse will not occur. Because laws regulating organizations are often ambiguous with respect to their meaning, future studies should focus empirical analysis on how organizational *forms* of compliance can end up constructing the actual *meaning* of compliance in ways that are

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<sup>20</sup> In this sense, this article reveals a subtle form of industry capture that policymakers may want to focus on. Unlike the traditional account of regulatory capture, organizations are not co-opting existing regulatory institutions. Instead, organizations are creating their own dispute resolution institutions and using training processes to institutionalize a version of the lemon law that is infused with business values.

inconsistent with regulatory goals. Understanding the processes by which private organizations operate governance structures and shape the content and meaning of laws designed to regulate them will allow for more sophisticated policy design and informed legislative and judicial decisions.

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