

1-1-2009

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Recommended Citation

Shauhin A. Talesh, *The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law*, 43 *Law & Soc'y Rev.* 527 (2009).

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Legal Studies Research Paper Series No. 2010-38

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The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law

Shahuin A. Talesh

This article demonstrates how the content and meaning of California's consumer protection laws were shaped by automobile manufacturers, the very group these laws were designed to regulate. My analysis draws on and links two literatures that examine the relationship between law and organizations but often overlook one another: political science studies of how businesses influence public legal institutions, and neo-institutional sociology studies of how organizations shape law within their organizational field. By integrating these literatures, I develop an "institutional-political" theory that demonstrates how organizations' construction of law and compliance within an organizational field shapes the meaning of law among legislators and judges. This study examines case law and more than 35 years of California legislative history concerning its consumer warranty laws. Using institutional and political analysis, I show how auto manufacturers, who were initially subject to powerful consumer protection laws, weakened the impact of these laws by *creating* dispute resolution venues. The legislature and courts subsequently incorporated private dispute resolution venues into statutes and court decisions and made consumer rights and remedies largely contingent on consumers first using manufacturer-sponsored venues. Organizational venue creation resulted in public legal rights being redefined and controlled by private organizations.

This article demonstrates how the content and meaning of California's consumer protection laws were shaped by automobile manufacturers, the very group these laws were designed to regulate.

An earlier version of this article won the American Sociological Association Best Graduate Student Paper in 2008, Sociology of Law Section, and the American Political Science Association Congressional Quarterly Press Award for Best Graduate Student Paper in 2007, Law & Courts Section. I would like to especially thank Lauren Edelman for providing thoughtful feedback on many drafts. Thanks also to Catherine Albiston, Jeb Barnes, Tom Burke, Sean Farhang, Malcolm Feeley, Stefanie Frame, Kaaryn Gustafson, Jacob Hacker, Bob Kagan, Kristin Luker, Stewart Macaulay, Michael McCann, Ted Mermin, Paul Pierson, Eric Schickler, Martin Shapiro, Jonathan Simon, *LSR* General Editor Carroll Seron, and the anonymous *LSR* reviewers for helpful suggestions on earlier drafts. An earlier version of this article was presented at the 2008 and 2009 meetings of the Law & Society Association and the 2008 Empirical Legal Studies Conference. Financial support for this project was provided for by the Center for the Study of Law and Society at the University of California, Berkeley. Please address correspondence to Shahuin Talesh, Jurisprudence & Social Policy, University of California, Berkeley (Berkeley School of Law), 2240 Piedmont Ave. #2150 Berkeley, CA 94720; e-mail: stalesh@berkeley.edu.

Law & Society Review, Volume 43, Number 3 (2009)

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Electronic copy available at: <http://ssrn.com/abstract=1908987>

My analysis draws on and links two literatures that examine the relationship between law and organizations but often overlook one another: political science studies of how organizations influence public legal institutions, and neo-institutional sociology studies of how organizations shape law within their organizational field. The political science literature on interest group politics suggests that business interests often co-opt the legislative and regulatory process through tactics such as lobbying, agenda setting, and venue shopping (Kamieniecka 2006; Leech et al. 2002; Baumgartner & Jones 1993; Ayres & Braithwaite 1991; Kingdon 1984; Quirk 1981; Stigler 1971; Bernstein 1955). Political scientists, therefore, have made great strides in explaining the mechanisms by which organizations actively influence law among public legal institutions tasked with enacting, implementing, and enforcing legal rules.

Organizational sociologists applying neo-institutional analysis focus more on the relationship of law and private organizations. A central contribution has been to explain the impact of law on “organizational fields,” the community of organizations that coexist and interact in some area of institutional life and share common systems of meaning, values, and norms (Dobbin et al. 1993; Sutton et al. 1994; Edelman 1990, 1992). More recently, neo-institutional scholars of law and organizations turn the tables, by showing how, at least in the civil rights context, courts defer to institutionalized organizational structures and practices. Judicial deference to organizational practices renders law “endogenous,” i.e., the content and meaning of law is determined by the social arena that it is designed to regulate (Edelman et al. 1999; Edelman 2002, 2005, 2007; Edelman & Suchman 2007).

My analysis builds on both these literatures on law and organizations by examining how private entities influence the meaning of legislation through both political and institutional mechanisms. Specifically, the research question I examine is: How and under what conditions can business organizations shape the meaning of legislation, once it is enacted? I focus in particular on the capacity of private business to influence how and where disputes over public legal rights are resolved.

Amidst the proliferation of public-private partnerships and “responsive regulation” sanctioned and approved by legislatures and administrative agencies, business organizations across a wide variety of industries are increasingly engaged in “public” decision-making in private settings (Ayres & Braithwaite 1992; Lobel 2004). Private entities are actively governing themselves while simultaneously delivering services and benefits traditionally administered by public entities (Macaulay 1986; Hacker 2002; Freeman 2000). Private organizations’ expanding role even includes using internal and alternative dispute resolution structures to adjudicate civil and

consumer rights and remedies created by legislatures (Galanter & Lande 1992; Edelman & Suchman 1999). In an era where Americans are increasingly likely to encounter law in private alternative disputing forums sanctioned by the state, it is particularly important to learn how business organizations can shape the meaning of laws enacted by the legislature and determine where public legal rights and remedies are resolved.

Existing political science and organizational sociology approaches have yet to adequately answer this question. Specifically, neo-institutional sociologists generally fail to account for how organizations directly interact with the legislature and do not theorize how organizational fields affect the meaning of law at the legislative level. Political scientists focus less attention on law within organizational fields and overlook institutional ideas about the importance of private institutional structures as a means of reshaping law among core legal institutions.

This article develops an “institutional-political” theory that integrates political science studies of how businesses influence public legal institutions with neo-institutional studies of how organizational responses to law are shaped by and through organizational fields. I show how organizations’ capacity to shape the content and meaning of law in the legislative context results both when organizations create and institutionalize dispute resolution venues within their organizational field *and* when organizations directly engage in political mobilization and lobbying tactics. As legal and organizational fields and logics “overlap” (Edelman et al. 2001:1627–34), organizational ideas about the meaning of law and compliance flow into the legislative and judicial arena and reshape law’s meaning.¹

By analyzing approximately 4,000 pages of legislative history, I explore how automobile manufacturers shaped the meaning of California’s consumer warranty laws over the past 35 years. Manufacturers were initially subject to an aggressive but ambiguous California consumer warranty protection law enacted in 1970, the Song-Beverly Consumer Warranty Act (Song-Beverly Act or Act).² The purpose of the Act was to hold manufacturers accountable for warranties they issue to consumers. The legal rights and remedies provided by the Song-Beverly Act and in particular, the Tanner Consumer Protection Act³ (Lemon Law), a specific section of the Act enacted in 1982 targeting automobile manufacturers, included

¹ Edelman defines *legal fields* as “the environment within which legal institutions and legal actors interact and in which conceptions of legality and compliance evolve” (Edelman 2007:58).

² Civil Code § 1790 et seq. (1970).

³ Civil Code § 1793.22 (1982).

a choice of full restitution or replacement, attorneys' fees, civil penalties, and a legal presumption as to what constitutes a "reasonable number of attempts."

I show how automobile manufacturers *created* dispute resolution venues to resolve such conflicts and that these structures became institutionalized within the organizational field. Manufacturer advocacy coalitions lobbied the legislature regarding the "legal value" (Edelman et al. 1999:447) of these structures and linked the issue of consumer protection to existing business values of efficiency, informal resolution of disputes, and customer satisfaction. Without formally evaluating the merits of these institutional venues, the legislature and courts subsequently incorporated institutionalized organizational practices into statutes and legal decisions. These actions made powerful consumer rights and remedies contingent on first using manufacturer dispute resolution procedures where equivalent rights and remedies are not available. Moreover, consumers who ignore manufacturer institutional venues and go directly to court forfeit some of their rights. Thus, automobile manufacturers actively created the terms of legal compliance with consumer warranty protection laws and fundamentally transformed public rights attainable in court into private rights to dispute resolution. The legislative history provides a pathway for tracing the process by which automobile manufacturers' response and construction of the meaning of consumer protection laws within their organizational field became enshrined in public legal institutions at the core of the legal field. What was supposed to be a powerful and consumer-friendly statute became diluted and allowed "repeat players" (Galanter 1974:97) to gain considerable advantage and "to hold court" (Edelman & Suchman 1999:943) in a privatized forum with less financial exposure.

My approach, therefore, expands prior analyses of the relationship between organizations and law in several ways. First, this study brings neo-institutional sociology's emphasis on the importance of private institutional structures into political science studies of the legislative process and regulation. As this case study shows, institutional venues for resolving disputes are, especially when deferred to by legislatures and courts, a clear form of political power worthy of closer focus by scholars interested in the relationship between business, law, and politics. Changes to consumer protection laws were not merely the product of interest group lobbying and capture of the legislative and regulatory process. By showing how private institutional venues created and institutionalized within the organizational field ultimately shaped the legislative facet of the legal environment, I demonstrate that the politics of consumer protection policy are, at least partially, institutionally determined and rooted within the logic of organizational fields.

Second, I simultaneously bring the legislature into studies of legal endogeneity by neo-institutionalists. Whereas prior studies focused on judicial deference to organizational dispute resolution forums (Edelman et al. 1999; Edelman 2002, 2005, 2007), I focus on legislative deference to organizational dispute resolution venues.⁴ In the legislative context, the endogenous construction of law operates through constitutive processes such as cultural frames and cognitive schemas but also involves direct political mobilization and lobbying (compare Edelman & Stryker 2005). By importing political analysis into neo-institutional studies of law and organizations, I offer a framework for how neo-institutionalists can examine the legislative (as opposed to judicial) facet of the legal field. Third, although law and society scholarship over the past 40 years has dedicated considerable attention to studying whether and how rights matter in society (Scheingold 1974; Galanter 1974; Tushnet 1984; Minow 1987; Crenshaw 1988; Rosenberg 1991; Ewick & Silbey 1998; Albiston 1999, 2005), less attention is currently devoted to consumer rights, an arena that affects all individuals in society.⁵ I expand the reach of law and society and neo-institutional analysis by refining and extending theories of the endogeneity of law into the consumer protection law arena. Finally, by linking political science and sociology literatures, I follow a small cluster of scholars who are developing an integrated field of scholarship concerning the relationship between organizations and law (Barnes & Burke 2006; Schneiberg & Bartley 2001; Thelan 1999).

Organizational Responses to Law

Before examining how automobile manufacturers constructed the meaning of consumer protection laws in California, I discuss existing political science and organizational sociology literatures on how organizations influence and shape law within legal and organizational fields.

⁴ Prior statutory analysis of Title VII by neo-institutionalists is traditionally limited to analyzing the plain meaning of the statute upon creation, paying less attention to how organizations influence the construction of statutes prior to and at inception.

⁵ Although law and society scholars in the 1960s and 1970s published a series of articles on issues relating to the consumer-manufacturer relationship and the impact on consumer rights in the context of federal and state consumer protection laws (Macaulay 1965, 1979, 1991; Andreason & Best 1977; Best & Brown 1977; Trubek et al. 1979; Trubek & Bourgoignie 1987), less attention has been recently channeled to examining consumer rights.

Business Influence Over Legislative and Regulatory Outcomes

For decades, political scientists have been probing the various mechanisms by which businesses influence legislative outcomes and the regulatory process. In particular, political scientists examine how interest groups form advocacy coalitions that lobby, negotiate for favorable laws, and build (or set) agendas in their favor (Kamieniecka 2006; Leech et al. 2002; Baumgartner & Jones 1993; Kingdon 1984). Two major tactics that businesses use to influence legislators and public opinion are issue redefinition and framing (Baumgartner & Jones 1993). Often, businesses postpone and even defeat policy proposals by amplifying critical beliefs and values (Kamieniecka 2006), redefining policy goals (Snow et al. 1986), and dominating the rhetoric of the debate (Riker 1996).

When direct influence is less likely to be successful, interest groups and policy entrepreneurs often shop for venues and try to move decisionmaking authority into alternative and potentially more favorable policy venues (Baumgartner & Jones 1993). The initial thrust of venue shopping studies focused on how venue shopping is strategic, planned, and deliberate (Baumgartner & Jones 1993; Sabatier & Jenkins-Smith 1999). However, more recently, Pralle (2003, 2006) offers a more complex model of venue shopping in practice and focuses on: (1) the limited rationality of political actors, and (2) the cultural or ideological constraints on venue choice. Advocacy groups choose venues not only to advance substantive policy goals but also to serve organizational needs or reinforce organizational identities and reputation (Pralle 2003). Organizational considerations may also prevent venue shopping even when it may seem rational to do so: “[t]he range of options canvassed by a strategic actor is likely to be circumscribed by a culturally specific sense of appropriate action” (Pralle 2003:256; citations omitted).

More recently, political scientists are analyzing how businesses shape and change institutions over time without formal revision of rules or attack on statutes (Hacker & Pierson 2002; Hacker 2002; Pierson 2004). Instead of attacking laws directly, powerful interests and political elites adapt existing institutions and policies to new ends (conversion), create new institutions or policies without eliminating existing ones (layering), and alter the effect of existing institutions on social life because of changing circumstances (drift) (Thelan 2004; Streeck & Thelan 2004; Hacker 2004; Schickler 2001). Thus, business influence occurs within existing policy bounds as well as through large-scale legislative reform (Barnes 2007, 2008; Hacker 2004).

In addition to influencing legislative outcomes, business influence on regulatory policy has also received significant attention by

economists and political scientists (Quirk 1981; Posner 1974; Stigler 1971; Bernstein 1955). Consistent with mainstream pluralist political science and client politics (Wilson 1989), “capture” arguments show how competing interest groups reshape regulatory agencies so that they become a friendly protector of private interests by (1) exerting direct influence on regulatory bodies, (2) inserting people within agencies who have sympathetic views toward business, and (3) isolating regulatory agencies and making their survival dependent on the existence of groups that need continued oversight (Gormley 1983; Sabatier 1975; Kolko 1965; Bernstein 1955; Huntington 1952; Herring 1936; Shapiro 1988).

Political scientists have made great strides in explaining the mechanisms by which businesses actively influence law among legislatures and regulatory agencies. Political scientists, however, focus less on how internal dispute resolution structures developed by organizations can shape law among public legal institutions. To tackle this issue and develop a theory that accounts for how organizations construct the meaning of law within an organizational field and then import their logic into the legislature, the next section draws on neo-institutional organizational sociologists who focus on how organizations shape their legal environment.

The Sociological New Institutional Movement and Legal and Organizational Fields

Neo-institutional sociologists challenge the notion that organizations simply resist, obey, or avoid law in a way that yields the most rational or favorable cost-benefit outcome (Vaughn 1998; Pfeffer & Salancik 1978; Williamson 1975; Scott & Davis 2007). Instead, neo-institutionalists see organizations as complex social actors whose behavior is shaped by their cultural environment (DiMaggio & Powell 1983; Meyer & Rowan 1977; Scott 1983). These scholars are interested in how common systems of meaning, values, and norms develop among the community of organizations that make up the organizational field (Suchman & Edelman 1996; Edelman 2007). Thus, neo-institutionalists argue that rationality is socially constructed by nonmarket factors such as widely accepted norms and patterns of behavior that become taken for granted and institutionalized within organizational fields.

In response to antidiscrimination laws that alter the “legal environment,” organizations often adopt many legal practices and structures because their cultural environment constructs adoption as the legitimate or natural thing to do (DiMaggio & Powell 1983; Edelman 1990, 1992). Organizations respond to new laws by creating new offices and developing written rules, procedures, and policies that attempt to achieve legal legitimacy while simulta-

neously limiting law's impact on managerial power and unfettered discretion over employment decisions (Edelman 1992). The increasing legalization within organizations has been empirically studied in response to changes in civil rights law (Dobbin et al. 1993; Dobbin & Sutton 1998; Sutton et al. 1994; Edelman 1990, 1992; Edelman et al. 1999), education (Short 2006), antipollution law (Hawkins 1983), health and safety law (Bardach & Kagan 1982), and environmental law (Kagan et al. 2003). As organizational responses to law spread among the organizational field over time, they become institutionalized (Edelman 1990).

Organizations' ability to mediate law's impact on organizations can affect the manner in which claims are resolved.⁶ Edelman et al.'s (1993) study of internal grievance complaint handlers for 10 large organizations revealed that complaint handlers were often unconcerned with actual formal legal rights and outcomes, not fully apprised of the law, and chose not to invoke legal principles when attempting to address employee complaints.⁷ Neo-institutionalists increasingly emphasize that organizational fields may have multiple, contradictory logics that at times overlap with other fields (Heimer 1999; Edelman et al. 2001; Schneiberg 2005). For example, law becomes "managerialized" when the managerial and business values of an organizational field influence the way we understand law, legality, and compliance (Edelman et al. 2001). That is, lawlike structures developed among organizations try to adhere to the primary logic within private organizational fields—namely, rationality and efficiency (Edelman 2007). However, these structures simultaneously try to appeal to the primary logic of the core of the legal field—namely, impartiality, justice, and protecting rights (Edelman et al. 2001).

Law is rendered endogenous when managerialized conceptions of what law means are deferred to by core legal institutions such as courts. That is, law is endogenous when "organizations are both responding to and constructing the law that regulates them" (Edelman et al. 1999:407; Edelman 2002, 2005, 2007). Edelman and her coauthors demonstrate that employment discrimination law is endogenous to the extent that judicial interpretations of antidiscrimination law come to incorporate the presence of institutionalized structures as evidence of fair, nondiscriminatory

⁶ Antidiscrimination laws that are ambiguous with respect to the meaning of compliance, constrain the procedures more than substantive outcomes of such procedures, and contain weak enforcement mechanisms create more discretion and flexibility for employers to respond (Edelman 1990, 1992; Edelman et al. 1993).

⁷ Other studies of alternative dispute resolution models used in the context of private disputes also reveal that informality tends to disadvantage parties with fewer resources and options (Abel 1982; Delgado et al. 1985; Delgado 1988; Erlanger et al. 1987; Silbey & Sarat 1989; Harrington 1985).

treatment. As courts increasingly defer to internal grievance structures that place a premium on fair procedure without examining their substantive effect, they weaken the capacity of equal opportunity laws to directly effectuate change (Edelman et al. 1999; Edelman et al. 2001). Moreover, ambiguous and vaguely defined legal terms such as discrimination become infused with managerial values and principles that equate compliance mechanisms with *per se* evidence of nondiscriminatory treatment. As courts embrace managerial rhetoric and values into law, organizational constructions of law gain not just organizational legitimacy, but legal legitimacy as well (Edelman et al. 2001). The blurring of overlapping legal and organizational field logics, therefore, have powerful consequences for how courts interpret law.

In sum, neo-institutionalists and political scientists tend to emphasize different mechanisms when explaining the relationship between business organizations and law. Neo-institutionalists focus on how organizations and organizational fields respond to law, often through symbolic indicators of compliance that diffuse among organizations and become institutionalized. Only recently have Edelman and colleagues begun examining how organizational fields influence core legal institutions such as courts. Neo-institutionalists, however, fail to account for how organizations directly interact with the legislature and do not theorize how organizational fields affect the meaning of law at the legislative level. An analysis of legislative deference to organizational construction of law needs to account for how organizations directly interact with public actors such as legislators during the lawmaking process. By contrast, political scientists focus on the tactics businesses use to directly influence public legal institutions. Political scientists, however, focus less attention on neo-institutional ideas about the importance of private institutional structures as a means of reshaping the meaning of law among core public legal institutions.

These limitations hinder the application of some political science theories to situations where disputes are increasingly resolved in private dispute resolution venues. For example, although it is well settled that interest groups shop for favorable venues, less is known about what interest groups do when shifting into existing venues is unlikely to lead to favorable outcomes. Although regulatory capture takes various forms, typically capture studies focus on business capture of *existing* governmental regulatory agencies and regulatory enforcement. Capture studies also do not address organizational reshaping of formal legislative content and language once laws are enacted.

In this study, I develop an “institutional-political” theory to show how organizations’ construction of law within an organizational field shapes the meaning of law among legislators and courts.

I draw from neo-institutional ideas about the importance of institutional structures as mechanisms for endogenously shaping the meaning of law and from political science literatures on how interest groups form advocacy coalitions that lobby and reframe issues at the legislative level in accordance with business prerogatives. The following case study explores how automobile manufacturers created and institutionalized private dispute resolution venues in response to California consumer warranty laws, and then convinced the legislature to incorporate these structures into statutes. Legislative codification of manufacturers' private structures made consumer rights largely contingent on consumers using these structures before seeking relief in court.

Examining the overlap among organizational and legal fields allows me to demonstrate how ideas and norms about institutional venues initially developed within an organizational field flow into the core logic of the legal field. Although this study is consistent with traditional political science studies of interest group politics, venue shopping, institutional change, and capture, it enhances these literatures by showing that political action and what businesses choose to lobby for is often determined and driven by institutionalized norms within the organizational field. By focusing on the subtle process by which organizations' construction of law and compliance within an organizational field is successfully codified into law, this study presents a nuanced analysis about not only how businesses shape the content and meaning of law, but also how public rights created by statute become privatized and co-opted by businesses. Organizations do not just capture existing institutions or shift from one venue to another—they *create* their own institutional venues.

Methodology

In order to examine how automobile manufacturers shaped the meaning of law at the legislative level and determined where public legal rights were adjudicated, I analyzed approximately 4,000 pages of legislative history concerning California's two consumer warranty protection laws: the Song-Beverly Act and the Lemon Law. I obtained these documents from the California legislative archives. Because the California legislature did not keep transcripts of oral testimony at hearings during the time period I reviewed, my inquiry consisted of written records. I took direct advantage of situations in which organizations and legislators voluntarily produced information while a variety of statutory provisions and amendments to the Song-Beverly Act and Lemon Law were being created, drafted, and evaluated. This approach also

allowed me to trace how manufacturers and legislators interacted over time. To develop my initial sampling frame, I located (1) any documents relating to the initial creation of the Song-Beverly Act in 1970, and (2) any documents relating to the enactment of the California Lemon Law in 1982 or subsequent amendments thereafter until 2006. This search produced approximately 4,000 pages of legislative history.

Next, I screened the documents for relevance. I defined as relevant any documents concerning (1) consumer, manufacturer, or legislative involvement in the creation of the Song-Beverly Act; or (2) the creation of the Lemon Law in 1982 and/or amended provisions relating to either the establishment of a legal presumption or the creation of dispute resolution procedures. The Lemon Law was specifically enacted to deal with warranty issues for new motor vehicles. My purpose was to identify and closely examine the complete history of the creation and codification of private dispute resolution procedures into the Lemon Law.⁸ I was particularly interested in examining this statute because it establishes a “legal presumption” of what constitutes a “reasonable number of attempts” for automobile manufacturers to fix warrantable defects. Consumers are eager to invoke this statutory provision because it establishes specific conditions under which consumers are entitled to full restitution or replacement of their vehicles. I identified approximately 1,500 pages of relevant documents.

Once my initial screening of documents was complete, I employed “process tracing” (PT; George & Bennett 2005) methods and carefully analyzed the legislative history. As a “within-case method,” PT allows inferences about causal mechanisms within the confines of a single or few cases (Bennett & Elman 2006). PT is also useful for exploring the underappreciated temporal dynamics of institutional change. When using PT, the researcher examines archival documents to determine whether a causal process suggested by a theory is in fact evident in the sequence of events in that case (George & Bennett 2005). This method allowed me to test whether the California legislature’s deference to and codification of manufacturers’ institutional venues could be explained by blending insights of sociological neo-institutional theory and interest group politics and lobbying. I traced the legislative history with an eye for

⁸ The analysis in the following sections is derived from my review of the legislative history for the following statutes and amending bills: Cal. Stat. 1970, ch 1333, SB 272; Stat. 1971, ch. 1523, SB 742; Stat. 1972, ch. 1293, SB 685; Stat. 1976, ch. 416, SB 568; Stat. 1978, ch. 991, AB 3374; Stat. 1980, ch. 394, AB 2263; Stat. 1981, ch. 150, SB 282; Stat. 1982, ch. 381, AB 3561; Stat. 1982, ch. 388, AB 1787; Stat. 1986, ch. 547, AB 3835; Stat. 1986, ch. 547, AB 3835; Stat. 1987, ch. 1280, AB 2057; Stat. 1988, ch. 697, AB 4513; Stat. 1989, ch. 193, AB 1104; Stat. 1991, ch. 689, AB 211; Stat. 1992, ch. 1232, SB 1762; Stat. 2002, ch. 306, SB 1765. Additional information regarding the legislative history and specific documents in the legislative record is on file with the author.

information that provided context, processes, or mechanisms that contributed distinctive leverage in causal inference (Brady & Collier 2004). By exploring the chain of events and the resulting decisionmaking outcomes of the legislature, I was able to uncover the sequence of events as bills and amendments were proposed and make “causal process observations” (Brady & Collier 2004:252–5). PT is considered most persuasive when the researcher is able to trace an account from beginning to end, when there are few breaks in the causal story, when multiple consistent within-path inferences related to a centrally important theory are shown to be true, when the quality of the evidence is high, and where some of the evidence is of “smoking gun” quality, i.e., the evidence strongly corroborates the explanation (Bennett & Elman 2006). As I demonstrate, all these factors were present in my case study.

I relied on qualitative content analysis of each document and traced the content and requirements of proposed laws against what was ultimately enacted into law. I paid particular attention to the written dialogue and struggle that took place among manufacturer and consumer advocacy groups and the legislature. I explored advocacy coalition formation and behavior and venue creation by manufacturers over time. I also uncovered the manner in which consumer warranty protection law became endogenous. Thus, consistent with political scientists who study the subtle ways institutions develop and change over time (Hacker 2002, 2004; Barnes 2007, 2008; Pierson 2000a, 2000b, 2004), I used the legislative history as a “testing ground for theory and not just the raw material for compelling narrative” (Hacker 2002:65).

The legislative history contained a variety of documents that I content-coded and categorized into three areas: letters, legislative documents, and miscellaneous. There were a variety of letters in the legislative history from many different groups, including but not limited to manufacturers, legislators, governors, plaintiffs and defense lawyers, consumers, consumer advocacy groups, manufacturer associations, and manufacturer advocacy groups. These detailed letters provided a timeline and tremendous insight into what each person or group’s position was concerning the relevant bill or proposal before the legislature.⁹ The legislative documents included committee reports, amendments, voting records for some bills, legislative analyst reports, bill summaries, proposals, red-line

⁹ Many manufacturers also provided their own reports concerning their private institutional venues to assist the legislature. The legislative history included General Motors’ position statements; California Manufacturers’ issue statement, report, and editorial; California Automobile Dealers Association letters; New Motor Vehicle Board letters; Motor Vehicle Manufacturers Association analysis; Ford Motor Company’s release statement in opposition to the Lemon Law; problem papers; appeals board brochures; charts; and proposed amendments.

revisions of statutes, handwritten notes of legislators, and Judicial, Senate, and Legislative Committee analysis. The miscellaneous documents consisted of press releases, newspaper articles, interviews with legislators, reports from the federal government, and other documents related to consumer warranty protection.

In addition, I used Westlaw to search for any published state court decisions that interpreted the Lemon Law dispute resolution procedure, Civil Code 1793.22(c).¹⁰ This search served two purposes. First, it allowed me to evaluate what California courts said regarding Lemon Law dispute resolution proceedings. Second, it allowed me to determine whether California courts referenced the third-party dispute resolution provisions in their opinions and, if so, to determine whether courts afforded any deference to such procedures. Four cases fit these criteria: *Jernigan v. Ford Motor Co.* (1994), *Suman v. BMW of North America* (1994), *Kwan v. Mercedes-Benz of North America* (1994), and *Suman v. Sup. Ct (BMW of North America)* (1995). These cases revealed that courts also deferred to the logic of manufacturers as to the value of institutional venues.

An Institutional-Political Analysis of How Manufacturers Construct the Meaning of California's Consumer Warranty Laws

This section demonstrates how automobile manufacturers shaped the content and meaning of California consumer protection laws. Manufacturers created and institutionalized dispute resolution structures within their organizational field and then used interest group tactics to lobby the legislature to codify such structures into law.

Stage 1: The Song-Beverly Consumer Warranty Act—Creating a “Legal Weapon” for Consumers

California's consumer warranty statute was an outgrowth of investigations and public hearings by the California Senate Business and Professions Committee in November 1969. The committee concluded that aside from automobile repairs, the single largest category of consumer complaints was warranty problems. In addition to warranties being confusing and misleading, consumers complained that manufacturers and retailers rarely accepted re-

¹⁰ Under the California database, my search term on Westlaw was “Song/2 Beverly & dispute/2 resolution & 1793.22.” This search produced 14 cases. Ten of the 14 cases were excluded because these cases did not interpret the dispute resolution provision in any manner and therefore did not fit the sampling frame criteria.

sponsibility for making repairs under their warranties. The largest number of warranty complaints concerned automobile dealers and manufacturers.

The committee inquiry convinced California State Assembly Senator Alfred Song that consumers “need legal protection” (Song press release, 2 Feb. 1970). As the leading proponent and coauthor of the Song-Beverly Act (Civil Code §§ 1790 et seq.), Senator Song specifically indicated that the purpose of creating a consumer warranty protection law was to establish “legal weapons” for consumers (Song letter, 2 July 1971). If manufacturers wanted the advertising and marketing benefits of issuing warranties at the time of sale, manufacturers needed to eliminate the practice of making warranties “little more than sales gimmicks” (Song letter, 10 Aug. 1970; *San Francisco Chronicle*, 25 June 1970, p. 12 [quoting Song]).

The proposed Act set forth rights, responsibilities, and the legal relationship of buyers and sellers of consumer goods in California. Manufacturers or retailers issuing express warranties for consumer goods sold in California that were unable to service or repair consumer goods to conform to the applicable express warranties were required to either replace the goods, reimburse buyers, or face potential lawsuits. The Act initially proposed that if the buyer established that a retailer or manufacturer’s failure to comply was willful, any subsequent court judgment could include a civil penalty up to three times the actual damages plus attorneys’ fees. By addressing future performance and the responsibility of the warrantor in case of unforeseen failure, the rights and remedies under the Song-Beverly Act went far beyond the California Commercial Code. In particular, the Commercial Code severely limits damages to the cost of repair or diminution in value, provides no potential for civil penalties or attorneys’ fees, and focuses on manufacturer obligations regarding the product at the time of sale.

Not surprisingly, the original Song-Beverly Act had strong public support among California residents. Private businesses, however, opposed the bill, claiming the law was “poorly drafted,” “full of ambiguities making the measure difficult to interpret,” “an unnecessary restriction on big business,” and “absurd and ridiculous” (Legislative enrolled bill report to Governor Reagan, 11 Sept. 1970; Legislative Commerce and Public Utilities Committee analysis, 3 Aug. 1970; Lee Stoddard, Speed Queen letter, 12 Feb. 1971; Raypack Inc. letter to Governor Reagan, 12 Aug. 1970; Song letters, 3 and 10 Aug. 1970). Manufacturers indicated that the availability of civil penalties would clog the court system and put them out of business. However, once it became clear the Act was likely to pass despite contentious opposition, those opposing the bill participated in the process. Senator Song’s description of his

interactions with manufacturers highlights the process whereby business values were injected into the revision process:

Once they realized that I was determined to pass SB 272, they sat down quietly with me and we went over the bill section by section, word by word. They admitted the need to end warranty abuses, and I accepted a series of amendments that, without weakening the bill, brought it more in line with current business practices. (Song senatorial report 1990, pp. 1–4; see also Song letter to Governor Reagan, 24 Aug. 1970)

The legislative history did not indicate precisely what changes or revisions manufacturers requested in order to fall more in line with current business practices. The final bill codified into law, however, reduced recovery for civil penalties from three times actual damages to two. It also indicated that manufacturers and retailers would only be liable under the Act if they had been given a “reasonable number of attempts” to fix defects (Civil Code § 1793.2). This provision, however, was not specifically defined in the Act. Although the California Manufacturers and Retailers Associations maintained that the bill was still ambiguous and poorly drafted, they withdrew opposition to the bill. Most other businesses remained opposed despite participating in the process. In August 1970, the Song-Beverly Act easily passed and went into effect for products bought on or after March 1, 1971.

Senator Song’s achievement was a remarkable one because the Song-Beverly Act was the first consumer warranty law—state or federal—passed in the country. At its inception, the Song-Beverly Act’s purpose was to arm consumers with powerful legal weapons attainable through the court system. However, all involved realized that ambiguities in the law could create unforeseen challenges. Even Senator Song noted that “like most new pieces of legislation, [the Act had] its share of loopholes and ambiguities” (Song letter, 5 Nov. 1971). In particular, the Act did not define what constituted a reasonable number of attempts, willful violation, or a civil penalty. One also sees, even before the law’s passage, early attempts by manufacturers to mediate the law’s impact.

Stage 2: Manufacturers’ Mediation of California Consumer Rights Through Institutional Venue Creation

Despite lofty goals, the Song-Beverly Act was not entirely effective during the 1970s. Testimony at the California State Assembly Committee’s hearings in December 1979, revealed a high level of consumer frustration with new cars and warranty performance. Manufacturers rarely acknowledged that they were given a reasonable number of attempts to fix a defect under warranty, especially since the Song-Beverly Act did not define the term. As a

result, full restitution or replacement of new automobiles rarely occurred (Department of Consumer Affairs enrolled bill report, 2 July 1982; Bill Lockyear memo, Assembly Committee on Labor, Employment, and Consumer Affairs, 18 April 1980).

In 1980, California Assemblywoman Sally Tanner decided to clarify and expand the Song-Beverly Act by proposing a specific law, referred to as the California “Lemon Law,” which defined what constituted a “reasonable number of attempts” for new motor vehicles. Because automobiles were the primary source of complaints from consumers and the second most expensive purchase for consumers, Assemblywoman Tanner felt that it was necessary to add some teeth to legal protections afforded consumers. The bill proposed that a consumer could invoke a “legal presumption” that the automobile manufacturer had been legally given a reasonable of attempts to repair a nonconformity if (1) the same nonconformity had been subject to repairs by the manufacturer or its agents four or more times, or (2) the new motor vehicle had been out of service by reason of repair for a cumulative total of 20 days or more.

Manufacturers strongly objected to the Lemon Law and lobbied against the proposal. They alerted Assemblywoman Tanner and the rest of the legislature through letters and detailed memoranda that, in response to the Song-Beverly Act’s passage in 1970, automobile manufacturers had created internal dispute resolution processes to resolve consumer disputes. In particular, the three major American automobile manufacturers, Ford, General Motors, and Chrysler, submitted reports detailing the goals and structure of their programs to the legislature. With some variation, these dispute resolution processes consisted of panels of three to five persons, often including manufacturer and dealer representatives, a mechanic, and a consumer advocate.

Diffusion of institutional venues among manufacturers and dealers occurred in the 1970s and 1980s. More than 2,000 automotive dealers across the United States jointly funded and controlled a third-party dispute resolution process to resolve warranty complaints. Manufacturers often used the Better Business Bureau or other third-party organizational surrogates to administer these programs.

Manufacturer advocacy to the California legislature was also uniform. Led by Ford, General Motors, and Chrysler, manufacturers without exception framed the purpose and benefits of their dispute resolution processes in terms of legitimacy, efficiency, informality, and customer satisfaction as opposed to consumer protection. Manufacturers collectively claimed that their institutional venues were primarily created to benefit consumers and provided less costly, more effective ways of resolving disputes. Despite not

providing consumers with a right to oral presentation, Ford noted the legitimacy such programs provided “as self-regulating mechanisms. . . . Their very existence means that our dealers and our own personnel are perceived as taking the extra steps required to resolve issues to the satisfaction of customers” (Ford Consumer Appeals Board memo, p. 2; in legislative records from the early 1980s). Full restitution in these programs, however, remained rare.

In sum, as in the employment context (Edelman et al. 1993), internal dispute resolution processes provided a means through which manufacturers’ values and norms influenced the structure and content of the organizational field far more than did consumers’ interests.¹¹ Moreover, as shown in the interest group and venue shopping literatures (Baumgartner & Jones 1993; Pralle 2003, 2006), advocacy coalitions influenced public policy and re-defined consumer rights by linking them to other socially recognized values such as informality and efficiency.

Stage 3: The Legislature Codifies Manufacturer Institutional Venues into the Lemon Law

After the original Lemon Law was narrowly defeated in 1980 and 1981, the Lemon Law, Civil Code § 1793.22, was enacted in 1982, but with significant changes from the original proposal.¹² In order to pass the bill, the California Legislature deferred to and codified the logic of manufacturers’ valuation of institutional venues without any apparent formal review of these programs. Under the Lemon Law, a consumer was entitled to a “legal presumption”

¹¹ In addition, a pure rational choice account of manufacturers’ response is unlikely to fully explain manufacturers’ actions. The field of manufacturers and dealers developed institutional venues in the 1970s even though manufacturers were *not* excessively at risk of repurchasing cars. Between 1970 and 1980, the legislative history indicates that manufacturers rarely repurchased consumers’ automobiles because they claimed they had not been given a reasonable number of attempts, and this provision was not defined in the Song-Beverly Act. However, manufacturers created these structures anyway because they were concerned about other business values such as exuding legitimacy, being responsive to consumers, and creating informal forums to resolve problems (compare Edelman et al. 1992).

¹² In 1981, Assemblywoman Tanner withdrew her proposed bill after the Senatorial Subcommittee approved a proposal by Automobile Importers of America to tie the Lemon Law to manufacturers’ dispute resolution programs. She withdrew the bill because she did not want to require customers to take their grievance to company-sponsored panels, especially since some consumer groups were dissatisfied with these programs. Although with reservations, Assemblywoman Tanner ultimately went along with the rest of the California legislature and passed the Lemon Law in 1982. This is consistent with political science studies that interest groups lobbying the legislature often engage in a contested struggle to influence the legislature (Baumgartner & Jones 1993). Although this case study demonstrates that what constitutes compliance with consumer protection law was institutionally derived, lobbying and overt political conflict played a critical role as well. Therefore, integrating political science and sociology theories into an institutional-political framework in this instance allows for a more complete explanation.

that the manufacturer received a “reasonable number of attempts” if (1) the same nonconformity had been subject to repair four or more times *within* the first 12,000 miles or 12 months from purchase, or (2) had been out of service by reason of repair for a cumulative total of more than 30 (not 20) calendar days *within* the first 12,000 miles or 12 months from purchase. A manufacturer was permitted to rebut the presumption at trial by showing that its actions in a particular case was reasonable.

The most significant changes, however, concerned the codification of manufacturers’ dispute resolution processes into the Lemon Law. Specifically, the legal presumption as to what constituted a “reasonable number of attempts”—the main purpose of the Lemon Law—could not be asserted in court unless the consumer first resorted to the existing “qualified third-party dispute resolution process” to the extent that a manufacturer maintained one (Civil Code § 1793.22(c)). Thus, legal protections afforded under the Lemon Law were *contingent* upon using manufacturers’ third-party dispute resolution processes if they existed. Dispute resolution processes “qualified” if they met the minimum requirements set forth in the federal warranty law, the Magnuson-Moss Warranty and Federal Trade Commission Improvement Act (Magnuson-Moss Act), and in particular, Federal Trade Commission Rule 703, for dispute resolution proceedings.¹³ Decisions under dispute resolution processes were binding on manufacturers but not consumers. Moreover, in a display of deference to manufacturer venues, the Lemon Law indicated that if the consumer chose to reject the arbitrator’s ruling and sue, the arbitrator’s findings could be admitted at trial *without* any need for evidentiary foundation. The Lemon Law also provided that no civil penalties or attorneys’ fees could be recovered in dispute resolution processes unless the manufacturer-run program permitted such recovery. Further, unlike the all (restitution, replacement) or nothing (no award) remedies at trial, arbitrators were permitted to award consumers the opportunity to allow manufacturers another repair attempt.

Although manufacturers still publicly opposed passage of the Lemon Law, some recognized the potential for keeping these disputes out of courts. Loren Smith, a lobbyist for the Motor Car

¹³ In 1975, Congress passed the Magnuson-Moss Act, which set forth minimum requirements for manufacturers that chose to issue full warranties. Specifically, the Federal Trade Commission regulation Rule 703 (1975) required manufacturers to (1) notify the buyer about the existence, location, and method for using the dispute resolution program; (2) fund the program; (3) insulate the program from manufacturer influence; (4) make the program free to the consumer; and (5) require the program to reach a decision within 40 days. The Magnuson-Moss Act did not establish a means of ensuring that these programs operated fairly and impartially. It also did not provide for civil penalties.

Dealers Association, commented after the Lemon Law passed: “[w]e think it’s a good start. I look at it as a way to eliminate court cases” (The Californian, 26 May 1982, p. 19) (compare Edelman et al. 1993). Thus the broad, vague mandate of these laws and weak enforcement mechanisms gave wide latitude to manufacturers.

Like employers in the civil rights context, manufacturers responded to both environmental demands (change in public attitudes and awareness, the law, legal mandates) and managerial self-interests (desire for fewer lawsuits, greater efficiency, informality, quick resolution, and no civil penalties or attorney’s fees) by developing private institutional venues to satisfy legitimacy and efficiency concerns. Through issue redefinition, framing, and advocacy coalitions, organizations redefined and “converted” (compare Hacker 2002, 2004; Barnes 2007, 2008) public rights attainable in court into private rights to dispute resolution. The legislature, without ever formally and critically analyzing whether manufacturer institutional venues were procedurally and substantively fair to consumers, “layered” manufacturer venues into the Lemon Law via formal revisions (Streeck & Thelan 2004; Barnes 2007, 2008). Thus, the norms regarding compliance that evolved within the organizational field during the 1970s shaped manufacturers’ conceptions of law in their lobbying behavior in the 1980s.

Stage 4: Conflicting Tensions of Symbolic Structures and Substantive Compliance

Although the final codified Lemon Law encouraged consumers to use automobile manufacturer-sponsored institutional venues, the Lemon Law did not establish a means of ensuring that manufacturer-run programs operate fairly. Consumers were funneled into these processes by manufacturers claiming they were complying with the minimum requirements under FTC Rule 703. However, there was no regulatory or monitoring oversight. Not a single manufacturer formally qualified its program under the Lemon Law after its passage in 1982.

The legislative history indicates that many consumer groups complained to Assemblywoman Tanner and the California Department of Consumer Affairs in the mid-1980s. Complaints included allegations that (1) arbitrators often had no legal training and no training in the Lemon Law, and often were not even provided copies of the applicable warranty law, (2) many manufacturer processes did not allow consumers oral presentation at hearings while dealers and manufacturer representatives often participated in the decisionmaking process (Ford and Chrysler) or staffed these panels with their own employees, (3) manufacturer proceedings were

taking much longer than 40 days as required by FTC guidelines, and (4) arbitrators relied on expert testimony from mechanics supplied by manufacturers to evaluate automotive defects. Moreover, decisions in favor of consumers often resulted merely in another repair attempt for manufacturers. However, there was often no follow-up by arbitrators to determine if repair attempts resolved the problems.

Consumers virtually gave up on manufacturers' dispute resolution processes due to the lack of fairness, loss of time, and safety hazards associated with continuing to drive unsafe vehicles. In a letter to Assemblywoman Tanner, the Director of Consumer's Aid of Shasta, Inc., stated:

[s]ince I contacted you a year and half ago—I've given up completely on arbitration either BBB or the Mfgs. [*sic*] I've been referring all the people who contact me—after they establish their complaints with the manufacturer to go directly to a lawyer. Boy this hurts, I believe only as a last resort in lawyers! I guess I'm saying the only way the American made cars, which approximately 85% of our calls have been American made, will listen and improve their crappy quality control is through their pocket-books! (Jean Clemens letter, 29 July 1987)

In 1987, Assemblywoman Tanner developed what she termed a "due process" bill. She proposed (1) establishing a program in the California Bureau of Automotive Repair to certify manufacturer arbitration programs, and (2) investigating consumer complaints regarding the qualified program's failure to follow its own written procedures. Although certification was voluntary, Assemblywoman Tanner proposed that if a manufacturer did not have a "qualified third-party dispute resolution process" certified by the state and the consumer filed suit and prevailed (i.e., was awarded restitution or replacement), the consumer would be automatically entitled to a civil penalty plus attorneys' fees. No showing of willfulness was required for the civil penalty.

Manufacturers, not surprisingly, were not pleased. Once again, manufacturers deflected the Song-Beverly Act and Lemon Law's goal of protecting legal rights toward focusing their institutional venues more on fairness and informality (compare Edelman et al. 1993). Automobile manufacturers argued that the certification process would overly formalize the process. The following letter sent by General Motors to the California legislature captures the flavor of letters and memoranda sent by the vast majority of manufacturers concerning their collective desire to not formalize private dispute resolution processes:

AB 2057 would create a new certification process for automobile manufacturers' voluntary arbitration programs. *In so doing, it*

would formalize the procedure to the point where an arbitrator would be required to be trained in the specifics of the lemon law. . . . General Motors has about 1,000 arbitrators in California. No more than 250 are attorneys. It seems unreasonable to provide for treble damages based upon the decision of a layman arbitrator, untrained in the law.

The idea of General Motors' arbitration program, which is voluntary and predates the California's [1982] lemon law, is that it be informal and non-legal, that the process be easily understood by the consumer, and that a lengthy court setting be avoided. (G.M. letter, 8 July 1987; emphasis added)

Although this bill ultimately passed, it was not without significant revisions. Labeled the "Tanner Compromise," manufacturers agreed to (1) certify their programs, (2) "take into account" statutory standards, (3) provide dispute resolution panels with copies of the Lemon Law, and (4) require panel familiarity with the law (David Collins, General Motors, 16 Jan. 1990; see also Senate legislative analysis, 4 Sept. 1987). However, arbitrators retained flexibility and final authority regarding the standards, statutory or otherwise, that they chose to ultimately apply in particular cases. The finalized statutory language also indicated that manufacturers could avoid non-willful civil penalties as long as they substantially complied with certification requirements. Finally, manufacturers who chose not to maintain a dispute resolution process or certify their process under Civil Code § 1793.22(c) were not subject to a mandatory civil penalty if the consumer received full restitution or replacement at trial. Rather, in those situations, the jury had discretion to award a civil penalty up to twice the actual damages.

Thus, due to the lack of enforcement and monitoring mechanisms in the Lemon Law concerning dispute resolution processes, manufacturers initially ignored the minimum procedural requirements and FTC Rule 703 guidelines. In response to consumer outrage from 1982 to 1987, the legislature in 1987 focused its efforts on regulating the certification process, but again left substantive results to manufacturers and their third-party administrators. Since 1987, approximately three-fourths of all automobile and motor home manufacturers participate in California's Arbitration Certification Program. Manufacturers that do not certify their program often maintain some form of uncertified dispute resolution process.

Stage 5: Deference to Dispute Resolution Procedures—Legislative Logic Converges With Manufacturer Logic

Over time, amendments the legislature made to the Lemon Law had less to do with protecting consumer rights and more to do

with legitimating institutional venues into law and consequently, bolstering the degree to which consumers, manufacturers, legislators, and courts deferred to institutional venues designed and funded by manufacturers. Core legal ideals about impartiality and protecting formal legal rights blurred with manufacturer logic regarding institutional venues framed as more efficient and informal.

In 1989, the Lemon Law was amended to clarify the dispute resolution certification process. The amendment established that when a Lemon Law case went to court, only decisions from a qualified third-party dispute resolution process certified by the state were admissible into evidence without further foundation. This bill was unanimously adopted in response to a few rogue manufacturers' attempts to admit findings from uncertified dispute resolution processes. The Senate Judiciary Committee expressly noted the deference private venues should be afforded in court: "[t]his policy is intended to encourage manufacturers to submit their dispute resolution programs for state certification by giving *extra credence* to the findings and decisions of that body" (Legislative Council report, 19 July 1989, p. 1; emphasis added).

In 1991, the legislature sponsored a bill that proposed precluding consumers from filing lawsuits unless they first participated in the qualified third-party dispute resolution process and received a decision. Thus, in this proposal, a consumer's right—not just to raise a legal presumption but also to file a lawsuit under the Song-Beverly Act—was predicated on participating in the manufacturers' dispute resolution process.

California's leading plaintiffs' Lemon Law firm, Kemnitzer, Dickinson, Anderson & Barron (Kemnitzer), compiled information from Better Business Bureau Autoline (a dispute resolution program many manufacturers use to run their programs) and other dispute resolution companies. Kemnitzer reported that consumer awards under BBB Autoline are often far smaller than the full restitution consumers can obtain in court. Of the 600 cases in which consumers sought restitution from the manufacturer that the BBB Autoline arbitrated in 1990, approximately 25 percent of consumers received a restitutionary award that they could have received in court while 57 percent were awarded the opportunity to allow manufacturers another chance to fix the defect—a remedy not available under the Song-Beverly Act or Lemon Law (Alan Cohen, Senior Attorney, Council of BBB letter, 24 May 1991). Of the 250 cases in Northern California that were decided between 1988 and 1991 by Toyota's and Hyundai's dispute resolution programs, only 10 percent (25 cases) received full restitution (Mark Anderson letter, 26 Aug. 1991, referencing deposition, 18 April 1991, *Ricardy v. Toyota Motor Sales*, Civil No. 46138 (Superior Court, Sutter County)). Kemnitzer argued that, although private dispute

resolution programs had improved, state certified third-party venues sponsored by manufacturers should not be a prerequisite to litigation.

The legislative history indicates that although the State Assembly passed this proposal by a vote of 72-0, Assemblywoman Tanner succeeded in having the proposal withdrawn by the State Senate on the eve of the final vote after strong opposition from consumer advocates. Nonetheless, the fact this proposal almost passed shows how far the “rationalized myth” (Suchman & Edelman 1996) of manufacturer institutional venues had been inscribed into legislative thinking regarding consumer rights.

Stage 6: Judicial Deference—Organizational Logic Overlaps With Judicial logic

Because many Lemon Law disputes have been privatized, there are only four published California court cases substantively interpreting manufacturer-sponsored dispute resolution processes. However, the four cases exemplify the argument that consumer warranty law is endogenous, i.e., much like legislative enactments, judicial interpretations of consumer warranty violations incorporate the presence of institutionalized venues as evidence of fair treatment, and a public policy concern for quick, informal resolution of consumer disputes. Judges, these cases suggest, reflexively interpret consumer warranty protection law not as protecting legal weapons, but as a system for keeping cases out of court in the hope that consumers and manufacturers can work problems out in private dispute resolution venues.

In 1994, the California court of appeals in the Second Appellate District issued two decisions within months clarifying that manufacturers with qualified third-party dispute resolution processes were immunized from non-willful civil penalties under Civil Code § 1794(e) but potentially liable for civil penalties for willful misconduct under Civil Code § 1794(c) (*Suman v. BMW of North America* 1994). California courts indicated that the Legislature intended to “confer a benefit” to manufacturers who maintained dispute resolution processes by immunizing them from non-willful civil penalties (*Jernigan v. Ford Motor Co.* 1994). California courts also signaled that consumers should accept the success and failure of such privatized processes: “[w]e encourage manufacturers to maintain qualified third-party dispute resolution processes, thereby ensuring that fewer consumers will have to take their problems to court” (*Suman v. BMW of North America* 1994:13). The following passage best reflects how, with respect to dispute resolution proceedings, the California courts adopted the logic and preferences

of the legislature, which masks the fact that the legislature adopted the logic and preferences of manufacturers:

The overall thrust of subdivision (e) is the Legislature's preference for using alternative forms of dispute resolution when a new motor vehicle buyer has repeated difficulties getting his or her nonconforming vehicle repaired properly. The intent of the Legislature vis-à-vis subdivision (e) is encouragement of both the new motor vehicle manufacturer and the new motor vehicle buyer *to work out their problems without resort to court intervention*. To that end, subdivision (e) offers manufacturers an incentive ('carrot') for (1) maintaining a dispute resolution process and/or (2) responding promptly to a consumer's demand for replacement or restitution ... [§ 1794(e) is] a means of *encouraging consumers to communicate their troubles to the manufacturer prior to filing a lawsuit* ... Subdivision (e) seeks to ensure that *courts of law are used as a last resort by consumers of new motor vehicles*. (Suman v. Sup. Ct. [BMW of North America] 1995:1318; emphasis added)

The judicial and legislative message to consumers was clear: if a dispute resolution process existed, then a consumer should use the private "courthouse" (Edelman & Suchman 1999).

Even for willful civil penalties, dispute resolution procedures constituted a partial defense. When evaluating willful misconduct under § 1794(c), California courts held that juries should consider the nature of the manufacturer's conduct, including whether they acted reasonably, acted in "good faith," or maintained written policies and procedures to resolve consumer disputes (*Kwan v. Mercedes-Benz of North America* 1994:186; *Suman v. Sup. Ct. [BMW of North America]* 1995:1323). Thus, the judicial component of this journey through California's Lemon Law reflects deference to private venues in a manner consistent with the legislature's codification of manufacturers' preference for informal, private resolution of public rights.

Stage 7: The Current State of Lemon Law Dispute Resolution

Since 1992, there has been very little substantive change to the dispute resolution provisions of the California Lemon Law. Today, all 50 states have consumer warranty laws. Many states channel consumers into dispute resolution provisions as a prerequisite to claiming a legal presumption in court. Over the course of 35 years since California's groundbreaking consumer warranty law, manufacturers have been able to develop and legitimate an alternative dispute resolution system, with the blessing of the state, which largely transforms and privatizes legal rights to a point where manufacturers are, in effect, the legislature and court (Edelman &

Suchman 1999). This is a critical yet largely unrecognized mechanism through which “the ‘haves’ come out ahead” (Galanter 1974:95).

Overlapping Organizational and Legal Fields and the Privatization of Consumer Rights

This article elaborates the literature on organizational responses to law by combining political science theories of the legislative process with neo-institutional studies of how organizations shape the meaning of law. By integrating these approaches, my “institutional-political” framework explains not just how organizations shaped the content and meaning of law, but also how public rights created by the legislature were channeled into private forums. Organizational construction of law in the legislative context results from both institutional legal meaning-making in the organizational field *and* direct political mobilization and lobbying. Private institutional venues created within manufacturers’ organizational field shaped the meaning of law among public legal institutions such as legislatures and courts. As organizational and legal fields and logics overlapped and blurred, institutionalized organizational ideas and norms about the meaning of consumer rights and what constitutes compliance with consumer protection laws seeped into the logic of the legal field.

California’s consumer protection laws were intended to limit manufacturers’ ability to perpetuate social and economic advantage through the manufacturer-consumer relationship. Although the Song-Beverly Act (1970) and the Lemon Law (1982) altered the legal environment by changing public perceptions and attitudes about consumer entitlement and rights, the ambiguity of these laws gave manufacturers wide latitude to construct their legal environment. Manufacturers created internal dispute resolution procedures as evidence of fair treatment and formed advocacy coalitions that lobbied the legislature about the “legal value” (Edelman et al. 1999:447) of the procedures. Manufacturers, similar to employers, responded in a manner that addressed both environmental demands (public perception, reputation, legitimacy) and organizational business interests (efficiency, fewer lawsuits, informal resolution). As manufacturer dispute resolution venues spread among manufacturers over time, the venues became institutionalized by organizations and legitimated by legislative codification.

The legislative process became an important domain for importing ideas from the organizational field into the legal field. Amendments to the Lemon Law were less about preserving con-

sumer rights and more about developing ways to legitimate these organizational structures without extensive review and oversight. Courts followed the legislature's lead by indicating that the purpose of the Lemon Law was to assist parties in resolving disputes informally. Thus, courts were relevant only as a last resort even though the Song-Beverly Act's and the Lemon Law's original purpose was to arm consumers with legal weapons attainable in court. The legislature's and courts' perceptions of manufacturer institutional venues as efficient and the proper forum for these conflicts was culturally conditioned around manufacturers' norms and beliefs that private dispute resolution was the appropriate mechanism for conflict resolution. Manufacturers constructed the meaning of laws designed to regulate them and transformed laws intended to provide consumers powerful rights into a codification of industry practices. When the legislature and courts incorporated institutionalized ideas from the organizational field into statutes and case decisions, California consumer warranty laws became endogenous.

My institutional-political framework makes multiple contributions to sociology and political science studies of law and organizations. In particular, I extend theories of legal endogeneity into the legislative (as opposed to judicial) facet of the legal environment. I also show that the politics of consumer protection policy and what manufacturers lobby for are, at least partially, institutionally determined and rooted within the logic of organizational fields. In this instance, manufacturer institutional venues are, especially when deferred to by legislatures and courts, a form of political power.

My approach, therefore, enhances existing political science literatures concerning business influence over the legislative process. First, my focus on institutional venues augments the theoretical implications of the literature on interest group venue shopping by demonstrating what businesses do when shifting from one venue to another is unlikely to be helpful. Businesses *create* their own venues to resolve disputes. Second, although the neo-institutional account has some kinship with the regulatory capture literature, here, manufacturers did not capture existing regulatory institutions, as in the traditional account (Shapiro 1988; Herring 1936; Huntington 1952; Bernstein 1955; Kolko 1965; Sabatier 1975; Gormley 1983). Instead, manufacturers reshaped formal legislative language and created new institutional venues *in lieu of* using public venues where success was less likely. Finally, I augment the growing political science literature on institutional change and development by demonstrating that the overlapping and blurring of organizational fields and logics act as subtle "mechanisms of change" (Barnes 2008:11). Tracing how consumer protection laws were revised over time reveals that the anchor for institutional change

among public legal institutions often lies embedded *inside* business organizations.

The Effects of Organizational Privatization of Public Legal Rights

Manufacturers, like employers, do not simply resist, ignore, or obey ambiguous laws, but instead they construct compliance in a manner that serves their rational and legitimacy interests. Legislative and judicial deference to organizational responses to law had a powerful effect on the meaning of consumer rights. In particular, public legal rights created by the legislature were redefined and controlled by private organizations.

Consumer rights have been redefined in powerful ways. First, if a manufacturer maintains a dispute resolution process, the consumer must use the process in order to claim the “legal presumption” in court that a manufacturer has been given a “reasonable number of attempts.” Second, simply by establishing a dispute resolution procedure, manufacturers create the potential for resolving disputes *without* providing full restitution or replacement (the only awards consumers are entitled to in court), paying plaintiffs’ attorneys’ fees (which consumers are automatically entitled to in court should they prevail), and paying civil penalties up to twice the actual damages. Instead, one final repair attempt can be “awarded” in favor of consumers. Third, if the manufacturer prevails in the private process, the manufacturer now contains a legal weapon, namely, the arbitrator’s findings, which are admissible in court without evidentiary foundation should the consumer decide to sue. The fate of California’s consumer protection laws as mechanisms for social change poignantly demonstrates the paradoxical role that law plays in American society. The legislature initially provided consumers with weapons but then limited the practical effect of these weapons when it made them contingent on the use of manufacturer dispute resolution processes.

Manufacturers were also able to control consumer rights once they were privatized. As managerial and business values penetrated the way legislators and courts understood consumer protection law, manufacturers gained the ability to control the processes, the rights, and the remedies through private dispute resolution venues. In particular, manufacturers co-opted the dispute resolution process because they fund the processes, design the rules and remedies, and are the “repeat players” who benefit from altered rules (Galanter 1974:97). Other than attempts by legislators to legitimate these structures by establishing parameters for certification and cursory state regulatory monitoring mechanisms, manufacturers have in effect deregulated themselves from court

jurisdiction and implemented their altered version of consumer rights in private venues.¹⁴

It is important to note that manufacturers' eagerness to privatize the process is not likely driven by wanton disregard for the law or lack of concern over consumer warranty problems. The legislative history suggests that manufacturers believe that these processes are better for the consumer because they are more informal and efficient. Manufacturers also believe that these processes free the court system of these cases. However, manufacturers' ability to control consumer warranty rights through private dispute resolution procedures transforms and potentially undermines formal legal rights in several ways.

First, the punitive, compensatory, and deterrence goals of consumer protection laws may remain unfulfilled by these procedures. Manufacturers frame a new rights rhetoric geared more around therapeutic healing (letting the consumer air frustrations) and problem-solving (giving the manufacturer one final repair attempt) than substantive relief obtainable in the court system (restitution, replacement, attorneys' fees, and civil penalties). At one point, General Motors admitted that only 250 of its 1,000 arbitrators were lawyers and purposely instructed its arbitrators not to rely on law when addressing disputes (G.M. letter, 8 July 1987). Second, an unfair dispute resolution process together with an unfavorable ruling may convince some consumers that further legal action is unwarranted or futile. The most significant way that manufacturer control transforms legal rights is that legislatures and courts view these institutional venues themselves as evidence of good faith on the part of the manufacturer when evaluating whether a manufacturer's failure to repurchase was willful.

Social Policy Implications

When evaluated from a social policy standpoint, manufacturers' adoption of institutional venues to resolve disputes has not been entirely negative for consumers. At a minimum, institutional venues are symbols that demonstrate commitment to consumer warranty protection. Institutional venues may also provide a significant opportunity for consumers to vent frustrations, resolve disputes, and even punish manufacturers in the form of restitution when consumers are fed up with improper service and a breach of warranty is recognized by the arbitrator. However, the implementation of symbolic policies and procedures does not guarantee substantive change for consumers. Even in the most favorable in-

¹⁴ Of course, as one anonymous reviewer noted, not all claims by consumers, whether in court or private venues, are necessarily meritorious.

stitutional venues, these procedures do not provide equivalent compensation or public recognition that consumers could receive through Lemon Law claims in court. Manufacturers' adoption of dispute resolution procedures may perhaps represent an improvement in handling consumer warranty disputes, but it may also hinder detection of manufacturers not living up to their obligations under warranties.

Even in situations where one would most expect law to protect the one-shot player—cases arising under a remedial statute granting individual rights—there are subtle, nuanced ways by which statutes can be weakened. Once legislatures and courts codify and defer to institutional venues, one sees a shift toward more organizational power both to resist rights mandates and to control the enforcement, the dispute resolution process, rules, and most important, the *meaning* of consumer rights. Although Minnesota Attorney General Hubert H. Humphrey in 1989 submitted a letter on behalf of attorney generals in all 50 states proclaiming, “[s]tate new car lemon laws [are] the single most important advance in consumer protection in the last decade” (CA Lemon Law report 2002), the law in action suggests that these laws are susceptible to organizational transformation and reconstruction in subtle but powerful ways.

Although this article focuses on deference to organizational dispute resolution venues in the context of consumer warranty laws, scholars would be well served to examine legislative and regulatory deference and codification of structures that organizations create in other areas affecting consumers: namely, financial and capital markets governance—especially in light of the current economic crisis in the United States. Amidst the push toward collaborative and delegated governance arrangements between business and government in the past two decades, laws such as the Gramm-Leach-Bliley Act¹⁵ and the Sarbanes-Oxley Act¹⁶ rely on and defer to corporations' financial disclosure policies and internal compliance structures such as ethics codes, monitoring, and auditing and reporting systems in order to protect consumers and investors from financial fraud (Krawiec 2003; O'Brien 2007). Similar to the Lemon Law context, the legislative and regulatory apparatus looks to corporations to determine what “best practices” are and what constitutes compliance with these laws. Although these corporate structures may symbolize compliance and ethical conduct by corporations, the recent financial crisis shows that such institutionalized structures may provide little guarantee that financial fraud and abuse will not occur.

¹⁵ Pub. L. No. 106–102, 113 Stat. 1338 (1999).

¹⁶ Pub. L. No. 107–204, 116 Stat. 745 (2002).

How the basic architecture of legal systems—public *and* private—are institutionally structured in ways to privatize law and limit possibilities of using the public system for redistributing change is worthy of future focus by political and sociolegal scholars. Given the current momentum for public-private governing models and the prevalence of pre-dispute mandatory arbitration clauses in consumer and employment contracts, the subtle struggles for legal institutional power and authority in the twenty-first century are not likely only about what the rules are, i.e., playing for favorable rules in the disputing game, but rather, who is the legitimate *supplier* of the rules and where the legitimate *venue* is for the disputing game.

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