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# HOW THE “HAVES” COME OUT AHEAD IN THE TWENTY-FIRST CENTURY

Shauhin Talesh\*

## INTRODUCTION

In 1974, Marc Galanter published *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, a seminal law and society article that analyzed the distributive effects of legal processes.<sup>1</sup> Galanter argued that litigants who are “repeat players”<sup>2</sup> (as opposed to “one-shotters”<sup>3</sup>) shape the development of law by playing for favorable rules—settling cases likely to produce adverse precedent and litigating cases likely to produce rules that promote their interests.<sup>4</sup> By filtering cases in which courts develop law, repeat players secure legal interpretations that favor their interests and impede the ability for one-shotters to achieve significant social reforms through the legal system.<sup>5</sup> Succinctly stated, Galanter’s article stands for the proposition that the “haves” are able to come out ahead because they are able to influence the public legal order—courts, legislatures, and regulatory agencies.

Twenty-five years later, Lauren Edelman and Mark Suchman published *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*.<sup>6</sup> Their article explained how the

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1. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95 (1974).

2. Galanter defines a “repeat player” as a person, business, or organizational entity that anticipates having repeated litigation and has the resources to pursue long-term interests. *See id.* at 97.

3. A “one-shotter” is a person, business, or organizational entity that deals with the legal system infrequently. *See id.*

4. *See id.* at 99–101.

5. *See id.*

6. Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 *LAW & SOC’Y REV.* 941 (1999).

archetypal repeat player—the large bureaucratic organization—encounters the law.<sup>7</sup> They hypothesized that organizational repeat players no longer simply influence the public legal order, but have internalized important elements of the legal system. By creating rules that govern themselves when disputes arise and increasingly using alternative dispute resolution in inter- and intraorganizational conflicts,<sup>8</sup> Edelman and Suchman argue that large bureaucratic organizations have gone from merely being “structurally privileged actor[s] in the public legal order to being a private legal order in [their] own right.”<sup>9</sup>

Although these scholars discussed the impact of certain institutional arrangements on the societal balance of power, they remained relatively agnostic about the processes and mechanisms that bring about these arrangements.<sup>10</sup> What is specifically missing are accounts of *how* the “haves” create a private legal order. What are the processes and mechanisms through which the “haves” alter the public legal order? Most importantly, is there a connection between the “haves” influencing the public legal order and creating the private legal order? If so, how does the connection take shape and form within public and private legal systems?

This Article dives into this unexplored terrain and examines the internalization of law by private organizations as a coherent phenomenon. I bridge the speculations in Galanter’s path-breaking article regarding how repeat players influence the public legal order and Edelman and Suchman’s hypotheses regarding organizational creation of a private legal order. In particular, I suggest that the two theories should be connected and explored empirically if we want to better understand the link between public and private legal orders and the effect public and private institutional arrangements have on statutorily created legal rights. In an era in which public–private partnerships are rising and Americans are increasingly encountering law in private disputing forums,<sup>11</sup> it is important to understand how public legal rights end up being adjudicated in private forums with the blessing of the state. This Article argues that organizations come out

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7. See *id.* at 942.

8. See *id.* at 943–48, 964–76.

9. *Id.* at 943.

10. Numerous times in their article, Edelman and Suchman indicated that their theory was merely a “hypothesis” and “conjectural,” and invited sociolegal and political scholars to test and develop these hypotheses. *Id.* at 983–84.

11. See Shaubin A. Tadesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Laws*, 46 *LAW & SOC’Y REV.* 463, 463–65, 491 (2012) (discussing the rise of public–private partnerships across a series of industries).

ahead by *creating* disputing forums that are administered by independent third-party organizations and influencing the public legal order to utilize and maintain a private legal order. As opposed to separately evaluating how repeat players influence the public legal order or create a private one, my theoretical framework explains how organizations<sup>5</sup> seamlessly flow through these increasingly blurred boundaries between the public and private sphere and ultimately shape the content and meaning of laws designed to regulate them.

Through archival, historical analysis that examines over twenty-five years of California's legislative history regarding its consumer protection law, I demonstrate how automobile manufacturers subject to the Song-Beverly Consumer Warranty Act (Song-Beverly Act or Act),<sup>12</sup> a powerful California consumer warranty protection law aimed at holding manufacturers accountable for warranties they issue to consumers, weakened the impact of these laws by creating private dispute resolution forums.<sup>13</sup> Although dispute resolution procedures were not a part of the original Song-Beverly Act, the legislature and courts subsequently incorporated private dispute resolution venues into statutes and legal decisions and made consumer rights and remedies largely contingent on first using manufacturer-sponsored venues in which potential recovery was curtailed.<sup>14</sup> Organizational forum creation resulted in public legal rights being redefined and controlled by private organizations.

The legislative history provides a unique pathway for tracing how the dispute resolution proceedings curtailed consumers' rights and allowed manufacturers to gain institutional advantages. More importantly, it demonstrates the process through which automobile manufacturers respond to and construct law to create a private legal regime. With state support, organizational repeat players created a quasi-private legal order and then influenced the public legal order, namely legislatures and courts, to operate this private legal order.

Flushing out this subtle but missing link is significant for several reasons. First, and most importantly, I build upon and refine Galanter's famous article by highlighting the current sophistication of organizational repeat players. I accomplish this by focusing not only on how repeat players play for favorable rules, but also on how they play for favorable institutional structures that are ultimately codified into law and deferred to by courts, and alter the infrastructure of access for consumers. Organizational repeat players not only settle potentially

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12. CAL. CIV. CODE § 1790 (West 2009).

13. See *infra* notes 56–105 and accompanying text.

14. See *infra* notes 76–105 and accompanying text.

unfavorable outcomes and play for favorable rules in the public legal system, but they also create disputing structures and use the public system to move the entire disputing game to their own private adjudicatory regime, which is certified by state regulatory agencies. Moreover, to the extent that a one-shotter consumer returns to the public courthouse to seek relief after disputing in a private forum, she does so with fewer rights. By demonstrating how the “haves” mediate the distributive effect of the law’s impact by altering the disputing structures litigants are obligated to use, I provide a nuanced analysis of how the law on the books differs from the law in action.

Second, this Article enhances our understanding of organizational influence over public institutions, namely, legislatures and courts. In particular, I examine Galanter’s claims where one would most expect the law to protect one-shotters: in cases arising under a remedial statute that grants strong legal protections.<sup>15</sup> By focusing on a situation in which we would expect one-shotters to have the best chance at success, I illuminate how the legislative *and* litigation processes—and the structures within these processes—limit potential substantive success of a new law. Third, I highlight the potential pitfalls that occur when public legal institutions yield the jurisdictional forum for statutorily created rights to private courts run by organizational repeat players.

Part II of this Article reviews the literature examining organizational repeat players’ advantages in disputing in public and private dispute resolution institutions. Part II suggests that, to more fully understand repeat player advantages in disputing, we need to simultaneously examine repeat player advantages in public and private legal institutions, especially because private actors increasingly adjudicate public legal rights in private settings. Part III uses my case study of the California Lemon Law to highlight how manufacturers have been able to institutionalize a private dispute resolution system within their field and ultimately channel public legal rights into private forums with legislative and judicial deference and approval. Part IV discusses the implications of this study and points to other areas where organizational dispute forum creation is occurring and also affecting where litigants resolve disputes. Part V offers an agenda for future research that can help further highlight my theory and explore whether and how the “haves” come out ahead in these quasi-private disputing forums that permeate society.

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15. See Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 *LAW & SOC’Y REV.* 869 (1999) (noting social reform statutes that afford litigants the opportunity for attorneys’ fees, civil penalties, and strong remedies are most likely to protect one-shotters).

## II. ORGANIZATIONAL REPEAT PLAYER ADVANTAGES IN PUBLIC AND PRIVATE DISPUTE RESOLUTION INSTITUTIONS

While much has been written about Galanter's repeat player versus one-shooter typology, this Part particularly focuses on studies that examine the relationship between organizational repeat players and public and private dispute resolution institutions. My synthesis reveals that existing approaches have primarily examined repeat player influence over public and private dispute resolution forums separately. Rarely have scholars simultaneously examined repeat player influence in public and private dispute resolution institutions. This analysis suggests how organizational responses to law within organizations can ultimately influence the meaning of legislation.

### A. *How the "Haves" Influence the Public Legal Order: Court Decisions and Legislative Statutes*

In *Why the "Haves" Come Out Ahead*, Galanter explained how repeat players shape the development of law and engage in a litigation game quite differently than one-shooters.<sup>16</sup> Galanter noted that repeat players have long-term strategic interests beyond the immediate monetary stakes of an individual dispute.<sup>17</sup> Specifically, repeat players play the odds in their repetitive interactions and engagements by settling cases that are likely to produce adverse precedent and litigating cases that are likely to produce rules that promote their interests.<sup>18</sup> Some factors that influence parties' decisions to litigate or settle include assessments of the likelihood of success, the resources available, and the costs of continuing litigation. Galanter's framework is significant because it highlights how unequal resources and incentives of parties may allow repeat players to control and determine the content of law. Repeat players, consequently, are able to influence and shape the public legal order.<sup>19</sup>

Although Galanter set up a dichotomy between repeat players and one-shooters primarily in structural terms, his description and analysis clearly signal that, in modern American society, the typical repeat players are large bureaucratic organizations.<sup>20</sup> Large bureaucratic organizations often initiate the play, enjoy economies of scale, develop cordial and facilitative informal relations with the court and court offi-

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16. See Galanter, *supra* note 1, at 100–14.

17. See *id.*

18. *Id.* at 101.

19. See *id.* at 101–03.

20. See *id.* at 113 ("One party is a bureaucratically organized 'professional' (in the sense of doing it for a living) who enjoys strategic advantages.").

cial, and have access to client-specialized litigation.<sup>21</sup> By focusing on situations in which repeat players gain advantages in the legal system, Galanter set out an important agenda for those interested in the following areas: (1) the gap between the law on the books and law in action; (2) the limits of the legal system to achieve redistributive outcomes; (3) the advantages and disadvantages of alternative and conventional legal procedures; and (4) the law's capacity to produce social change. Scholars have been mapping and exploring these questions ever since.<sup>22</sup>

Galanter's framework has been studied quite extensively in relation to courts<sup>23</sup> and tribunals.<sup>24</sup> Other scholars have focused on state and federal court-connected alternative dispute resolution (ADR) programs, or what Galanter calls "court-appended systems."<sup>25</sup> Courts use a variety of appended systems, including voluntary ADR programs;

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21. *Id.* at 98–99.

22. For a comprehensive account of studies using Galanter's framework, see IN LITIGATION: DO THE "HAVES": STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

23. See *id.* (highlighting various empirical studies using Galanter's framework); see also Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995) (arguing that, quite apart from using the status of different litigants, lawyers can be viewed as repeat players who affect judicial outcomes); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001) (finding that randomized experimental evaluation of a legal assistance program for low-income tenants showed that the provision of legal counsel produced large differences in outcomes for low-income tenants in housing court, independent of the merits of the case); Donald R. Songer et al., *Do the "Haves" Come Out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925–1988*, 33 LAW & SOC'Y REV. 811 (1999) (finding repeat player litigants with substantial organizational strength are much more likely to win in the federal courts of appeals than one-shot litigants that have fewer resources); Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235 (1992) (finding that litigation resources are much more strongly related to appellant success in the courts of appeals than in either the U.S. Supreme Court or state supreme courts); John Szmer et al., *Does the Lawyer Matter? Influencing Outcomes on the Supreme Court of Canada*, 41 LAW & SOC'Y REV. 279 (2007) (examining the impact of lawyer capability on the decision making of the Supreme Court of Canada and finding that litigation experience and litigation team size influenced Canadian court decision making); Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970*, 21 LAW & SOC'Y REV. 403 (1987) (sampling 5,904 cases from sixteen state supreme courts between 1870–1970 to conclude that stronger parties, especially larger governmental units, achieved an advantage over weaker parties, though the advantage generally was rather small).

24. See Rebecca L. Sandefur, *Effects of Representation on Trial and Hearing Outcomes in Two Common Law Countries* (July 7, 2005) (unpublished manuscript), available at <http://www.reds.msh-paris.fr/communication/docs/sandefur.pdf> (evaluating 14,000 civil cases in the United States and United Kingdom across a variety of disputing forums and finding that one important effect of lawyer representation was increased formality, which may work to disadvantage people who try to represent themselves).

25. See Galanter, *supra* note 1, at 135–60 (discussing a wide variety of dispute resolution systems connected to the court system).

mandatory ADR interventions; or a combination of nonbinding arbitration, mediation, and early neutral evaluation.<sup>26</sup>

A slightly alternative model involves employers, banks, health care organizations, and other businesses using mandatory arbitration clauses and adhesive clauses in contracts to channel disputes into forums that are often controlled or funded by the party with superior economic power.<sup>27</sup> This is largely done with court approval and deference.<sup>28</sup> Because arbitration awards can only be overturned on limited grounds, many commentators argue that such clauses permit parties to contract out of their obligation to comply with public policy as embodied in statutes creating individual rights.<sup>29</sup> Nevertheless, the Supreme

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26. See, e.g., JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 2-3 (1996); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002) (highlighting the various dispute resolution design approaches); *Court ADR Pocket Guide*, RESOLUTION SYSTEM INSTITUTE'S COURT ADR RESOURCE CENTER, <http://courtdr.org/pocketguide> (last visited Feb. 3, 2013).

27. Cf. RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT (1997); Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847 (1996) (tracing the expanded use of ADR within the business world); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997) (reviewing the enforceability of pre-dispute arbitration agreements and arguing that a well-designed private arbitration alternative for employment claims is in the public interest); Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905 (1996) (observing that U.S. courts will enforce almost all arbitration agreements, regardless of the claim's genesis as a statutory or nonstatutory dispute); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes*, 2 U. PA. J. LAB. & EMP. L. 73 (1999) (reviewing the enforceability of adhesive arbitration clauses and arguing in favor of mandatory arbitration, provided that there are certain reforms); *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1851 (2000) (exploring developments of ADR generally, with attention to judicial use of ADR). For a comprehensive review of the various dispute resolution design forums operating, see Bingham, *supra* note 26.

28. See Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 922-30 (2011) (showing that courts defer to employer grievance procedures as evidence of nondiscriminatory treatment); see also Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999) [hereinafter Edelman et al., *The Endogeneity of Legal Regulation*]; Shauhin A. Taleh, *The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law*, 43 LAW & SOC'Y REV. 527, 549-50 (2009) (showing that legislatures defer to organizational disputing procedures when evaluating the merits of consumer protection law).

29. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999) (observing that arbitration makes vast areas of law privatizable); see also Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993) (arguing for an expanded scope of judicial evaluation of arbitration awards to ensure the enforcement of public law); Richard C. Reuben, *Public Justice: Toward a State Action Theory of ADR*, 85 CALIF. L. REV. 577 (1997) (arguing that courts enforcing arbitration agreements are engaged in state action and that ADR is an extension of the public justice system with the attendant need for due process protections).



Court's recent decision in *AT&T Mobility LLC v. Concepcion* clearly reaffirms deference to organizationally controlled disputing structures via contract.<sup>30</sup>

Although Galanter's article and its progeny mapped the dilemmas of judicially created common law rules, others have expanded the analysis to social reform *legislation* designed to address a specific social problem or protect disadvantaged interests.<sup>31</sup> In theory, remedial statutes bolster the position of one-shotters by transferring rule advantage to the one-shotter through fee-shifting, punitive damages, and attainable legal standards that set reachable benchmarks for establishing liability.<sup>32</sup> Legislative changes reflect an attempt to overcome the incremental legal advantages gained by repeat players through strategic settlement. However, the power and scope of legislatively created substantive rights depends not just on the statutory language, but also on the legal decisions generated by courts involving individual disputes.

Examining the pattern of adjudicated outcomes in published federal court opinions in the first five years following the passage of the Family Medical Leave Act (FMLA),<sup>33</sup> Catherine Albiston empirically demonstrated how publishable rule-making opportunities in the litigation process occur in dispositive motions, such as motions to dismiss and summary judgment motions, which employers typically won.<sup>34</sup>

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30. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (finding that, under the Federal Arbitration Act, California must enforce arbitration agreements even if the agreement requires that consumer complaints be arbitrated individually instead of on a class-wide basis).

31. Cf. Albiston, *supra* note 15; Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001) (arguing that, for consumers, the realities of arbitration differ from its idealized benefits); Sarah R. Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (arguing for reform of mandatory arbitration to protect one-shot players such as employees, consumers, insureds, victims of torts, and patients); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 33 (1999) ("[E]mployees, labor lawyers, and civil rights activists have been most distrustful of an 'employer-controlled' dispute resolution system that is thought to lack many procedural due process protections and which may be controlled by decisionmakers who do not understand the legal entitlements at issue."); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996) (advocating for legislative proposals to reverse the trend toward privatizing employment rights).

32. See Albiston, *supra* note 15, at 870 ("Arguably, these remedial statutes strengthen the position of one-shot players . . . relative to repeat players by transferring the rule advantage to the one-shot player. Thus, through one transaction, legislation may overcome the incremental legal advantages accumulated through strategic settlement behavior.").

33. *Id.* at 871. Thus, Albiston examined the early years of a social reform statute when one might expect one-shotters to do fairly well against repeat players. She also "examine[d] Galanter's claims where one would most expect the law to protect the one-shot player: cases arising under a remedial statute granting individual rights." *Id.*

34. See *id.* at 897-99.

Conversely, employees that typically received favorable relief did so via settlement or trial, in which rule-making opportunities did not arise.<sup>35</sup> Early published decisions favored employers and impacted the development of law by affecting the parties' estimates of their likely success and their subsequent decisions to settle or proceed.<sup>36</sup> Although one-shotter employees may successfully utilize the law to gain benefits in their particular disputes, such success often removes their experiences from the judicial determination of rights. Thus, employee litigants may view the legal landscape as less hospitable despite the remedial language of the statute.<sup>37</sup>

In sum, in addition to lobbying, campaign contributions, and agency capture, Galanter's study and the studies that followed highlight how repeat players are able to influence judicial decisions and social reform legislation.

### *B. The Increasing Internalization of Law by Organizational Repeat Players*

Drawing on Galanter's seminal article, in 1999, Lauren Edelman and Marc Suchman enumerated several aspects of private organizations' law-oriented behavior that had become significant features of the legal terrain in the past twenty-five years.<sup>38</sup> They agreed with Galanter that in modern American society, large bureaucratic organizations take advantage of repeated litigation and use their resources to pursue long-term interests.<sup>39</sup> Moreover, as Galanter noted, they acknowledged that organizations also participated in "alternative disputing arenas, such as court-appointed forums [and] direct negotiations 'in the shadow of the law.'"<sup>40</sup> Edelman and Suchman hypothesized that since 1974, however, organizations have "increasingly 'internalized' important elements of the legal system," including legal rules, structure, personnel, and activities.<sup>41</sup> They speculated that internalization has undergone four interrelated shifts in recent years:

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35. *Id.* at 898–99.

36. *Id.* at 899.

37. In fact, Albiston succinctly finished her article in a manner that encapsulates her cautionary reminder on the limits of the law's ability to generate social change: "The paradox of losing by winning suggests that for one-shot players claiming individual rights, success comes at the price of silence in the historical record of the common law. Thus, once again, the 'haves' come out ahead." *Id.* at 906.

38. See Edelman & Suchman, *supra* note 6, at 942–43.

39. See *id.* at 942 ("[O]rganizations take advantage of this repetition by employing all the classic long-term strategies . . .").

40. *Id.* (citing Robert H. Mnookin & Lewis Korhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979)).

41. *Id.* at 942–43.

(1) legal rule making has been internalized through the 'legalization' of individual firms and of larger organizational fields, (2) legal dispute processing has been internalized through the increasing use of alternative dispute resolution in both intra- and interorganizational conflict, (3) legal expertise has been internalized through the growing prominence and changing role of in-house counsel, and (4) legal enforcement has been internalized through the reemergence of private organizational security staffs.<sup>42</sup>

These processes interact with one another and allow the large bureaucratic organization to create a private legal order by incorporating and subsuming many of the public legal system's central functions.<sup>43</sup> Legal models and processes incorporated into organizations mimic public legal institutions, but are infused with organizational values and logics.<sup>44</sup> Although "have-not" groups may receive some short-run advantages from the introduction of societal norms into the workplace, the organizational "colonization" of law "subtly skews the balance between democratic and bureaucratic tendencies in society as a whole, potentially adding to the power and control of dominant elites."<sup>45</sup>

Although Edelman and Suchman encouraged scholars to study the internalization of law as a coherent phenomenon, they acknowledged that their hypotheses were "necessarily tentative and conjectural."<sup>46</sup> Fortunately, there has been some work on dispute resolution programs within organizations.<sup>47</sup> Often, these internal forums emphasize active disputant participation, which incorporates mediation and other forms of negotiation, that focus less on public rights than on therapeutic healing and private psychological issues.<sup>48</sup> Empirical studies of informal disputing structures specifically using Galanter's framework

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42. *Id.* at 943. For a thorough explanation of the typology, see *id.* at 943-55.

43. See *id.* at 943 ("As private legislatures, courthouses, law offices, and police departments, organizations construct within and around themselves a semiautonomous legal regime that simultaneously mimics and absorbs even the most 'official' institutions of governmental law.").

44. See Edelman & Suchman, *supra* note 6, at 943.

45. *Id.* at 944.

46. *Id.* at 943.

47. See CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996); see also Corinne Bendersky, *Culture: The Missing Link in Dispute Systems Design*, 14 *NEGOT. J.* 307, 309-10 (1998) (arguing that dispute systems should be tailored to company culture and looking at differences between what an organization says it does to handle conflicts (explicit conflict system) and what its members actually do in practice (implicit conflict system)); Bingham, *supra* note 26, at 881-82; Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *LAW & SOC'Y REV.* 497 (1993) (examining the processes by which internal complaint officers handle sexual harassment disputes).

48. See ALAN F. WESTIN & ALFRED G. FELIU, *RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION* (1988).

focus on variation in complainants' success rates,<sup>49</sup> the influence of occupational prestige and experience,<sup>50</sup> legal resources and representation,<sup>51</sup> and complaint handlers' decision making.<sup>52</sup>

In sum, Galanter's article and its progeny focus on law in the court, while Edelman and Suchman's article and its progeny focus on law in the organization. Moreover, studies by legal and empirical scholars tend to examine organizational actors' influence in these separate and dichotomous worlds, that is, inside organizations or inside public legal institutions, such as courts and legislatures. There has not been enough critical interrogation of the ways in which "lawmaking" within organizations shapes the meaning of law among courts and legislatures in ways that allow organizations to ultimately operate private adjudicatory regimes. In the following Parts, I bridge these literatures by exploring the processes and mechanisms through which organizational repeat players influence the public legal order by creating a private legal order.

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49. See Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843, 845 (2010) ("Primarily using a sample of 301 AAA consumer arbitrations that resulted in an award between April and December 2007, it considers such issues as the costs incurred by consumers in arbitration, the speed of the arbitral process, and the outcomes of the cases . . ."); see also John A. Hannigan, *The Newspaper Ombudsman and Consumer Complaints: An Empirical Assessment*, 11 LAW & SOC'Y REV. 679 (1977) (suggesting that a newspaper ombudsman works best as a communication "facilitator," but is less effective as a dispute "mediator" and least beneficial to the socially advantaged who appear to use it to pursue more difficult problems); C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 LAW & SOC'Y REV. 239, 241 (2008) ("[L]egal experience, establishment size, and indicators of legal compliance insulate employers from unfavorable charge outcomes.").

50. See Karyl A. Kinsey & Loretta J. Stalans, *Which "Haves" Come Out Ahead and Why? Cultural Capital and Legal Mobilization in Frontline Law Enforcement*, 33 LAW & SOC'Y REV. 993 (1999) ("[T]axpayers with high occupational prestige and the owners of family businesses are more likely to come out ahead in tax audits . . ."); see also Hirsh, *supra* note 49, at 260–72 ("[I]n situations where employers are willing to settle . . . , establishments with prior experience with the charge resolution process are . . . more likely to pay monetary damages and receive mandates to change their employment policies.").

51. See Hirsh, *supra* note 49, at 241; see also Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 189–99 (1997) (noting that lawyer representation and party resources are important in determining whether repeat players are likely to prevail more often in employment disputes resolved by the American Arbitration Association); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44 (noting that variance in repeat player bias in employment arbitration is explained in part by lawyer representation).

52. See Lauren Edelman et al., *supra* note 47, at 516 (finding that internal complaint managers tasked with addressing sexual harassment claims through an organization's internal grievance process tend to recast disputes in terms of managerial prerogatives as opposed to legal rights). *But see* Sharon Gilad, *Why the "Haves" Do Not Necessarily Come Out Ahead in Informal Dispute Resolution*, 32 LAW & POL'Y 283 (2010) (noting that the repeat player effect is less pronounced in informal dispute resolution process).

I focus on a subtle, less explored area in which organizations operate a legal regime that is outside direct court oversight, outside the organization, and outside of a direct contractual relationship. In response to powerful consumer protection laws, I show how automobile manufacturers first created internal dispute resolution structures to adjudicate public legal rights outside the judicial process and then ceded control of these structures to third-party dispute resolution organizations for legitimacy purposes. The legislature ultimately codified these privatized adjudicatory systems into law and afforded considerable deference to these quasi-private and quasi-public regimes. Thus, I demonstrate a connection between the “haves” creating the private legal order and influencing the public legal order. The “haves” no longer simply play for favorable rules in the public arena, but rather play for removing the entire game from the public arena into the private arena, actively creating the terms of legal compliance and reshaping the meaning of consumer rights and remedies.<sup>53</sup> By analyzing the powerful interactions between organizations, legislatures, and courts, and the explicit roles that they play in reshaping public and private legal regimes, I offer a nuanced lens into the processes and mechanisms through which law codified in public legal institutions is flowing from law that is created among and within organizations. Understanding how organizational influence converges in both spaces simultaneously is particularly important given the turn toward public-private partnerships and the contracting out of rights to private and quasi-private adjudicatory regimes.<sup>54</sup>

### III. CALIFORNIA’S CONSUMER WARRANTY LAW—HOW THE “HAVES” PLAY FOR FAVORABLE DISPUTE RESOLUTION STRUCTURES

The following Parts trace how public legal institutions ceded the jurisdictional forum for consumer disputes to organizational repeat players. As manufacturers yielded to demands for laws and regula-

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53. See Talesh, *supra* note 28, at 528–30.

54. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997). For a thorough discussion of the rising role of private organizations in public governance across education, health care delivery, prison administration, and regulatory standard setting, implementation, and enforcement, see *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (Jody Freeman & Martha Minow eds., 2009).

tions over their warranties, their norms, values (concerns over efficiency, cost-containment, informality, discretion, and customer satisfaction), and desire for privatizing these claims shaped the legislative process and, ultimately, the substance and application of consumer warranty laws at pivotal moments in the legislative development of the Song-Beverly Act and the Lemon Law. Over time, the content and meaning of California's consumer warranty laws have been redefined and controlled by private organizations, the very groups such laws were designed to regulate.

Before highlighting the results of my case study, let me say a brief word about my method and data. The following analysis draws from legislative documents obtained from the California State archives concerning the legislative history of the first consumer warranty protection statute passed in the United States—the Song-Beverly Act—and the California Lemon Law, a law that dealt solely with automobile warranties.<sup>55</sup> The legislative history allowed me to take advantage of situations in which interested stakeholders and legislators voluntarily produced information while a variety of statutory provisions and amendments to the Song-Beverly Act were being created, drafted, and evaluated. I was particularly attentive to the codification of dispute resolution grievance procedures into the California Lemon Law. The legislative history contained a variety of documents that I categorized into three general areas: letters, legislative documents, and miscellaneous. I was able to obtain a range of written statements and responses from a set of differently situated individuals within organizations and the legislature. In-depth content analysis of the legislative history allowed me to gain a historically informed understanding of manufacturers' ability to create private legal institutions and influence

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55. I reviewed the session laws and amendments concerning the Song-Beverly Act and Lemon Law from 1970 to 2002. Song-Beverly Consumer Warranty Act, ch. 1333, 1970 Cal. Stat. 2478 (codified as amended at CAL. CIV. CODE § 1790 (West 2009)); Act of Nov. 16, 1971, ch. 1523, 1971 Cal. Stat. 3001; Act of Dec. 22, 1972, ch. 1293, 1972 Cal. Stat. 2584; Act of July 10, 1976, ch. 416, 1976 Cal. Stat. 1068; Act of Sept. 21, 1978, ch. 991, 1978 Cal. Stat. 3058; Act of July 11, 1980, ch. 394, 1980 Cal. Stat. 776; Act of July 8, 1981, ch. 150, 1981 Cal. Stat. 953; Act of July 4, 1982, ch. 381, 1982 Cal. Stat. 1709; Act of July 7, 1982, ch. 388, 1982 Cal. Stat. 1720; Act of Aug. 21, 1986, ch. 547, 1986 Cal. Stat. 1949; Act of Sept. 28, ch. 1280, 1987 Cal. Stat. 4553; Act of Aug. 29, 1988, ch. 697, 1988 Cal. Stat. 2314; Act of July 21, 1989, ch. 193, 1989 Cal. Stat. 1179; Act of Oct. 9, 1991, ch. 689, 1991 Cal. Stat. 3096; Act of Sept. 30, 1992, ch. 1232, 1992 Cal. Stat. 5785; Act of Aug. 28, 2002, ch. 306, 2002 Cal. Stat. 1226. I also reviewed legislative history using documents that I gathered from the California state archives, which are cited to the fullest extent possible in this Article. Additionally, all of these documents are available on file with the author. For a more thorough explanation of my methodological approach for this analytic history, see Taleah, *supra* note 28, at 536–39. This Article focuses on aspects of the legislative history that I used to build my theoretical argument concerning how organizations influence public and private legal institutions.

public legal institutions. Thus, by closely tracing what transpired while the Song-Beverly Act and Lemon Law were being generated and subsequently amended, I was able to evaluate how altering the rule-making opportunities and institutional structures afforded to consumers in the litigation process affected the development of law and the determination of rights.

A. *The Song-Beverly Consumer Warranty Act: Creating Statutory Rights and Remedies for One-Shotter Consumers*

In 1970, California passed the first consumer warranty protection law in the United States, the Song-Beverly Act.<sup>56</sup> Consensus for a consumer warranty law grew out of an investigation and public hearings conducted by the California Senate Business and Professions Committee in November of 1969.<sup>57</sup> The committee concluded that, aside from automobile repairs, the single largest category of consumer complaints from the State Attorney General's office, Better Business Bureau, California Department of Consumer Affairs, and radio and television hotlines was warranty problems.<sup>58</sup> Consumers complained that warranties were confusing and misleading, and that manufacturers and retailers rarely accepted responsibility for making repairs under their warranties.<sup>59</sup>

The committee inquiry convinced California State Senator Alfred Song that consumers needed legal protection.<sup>60</sup> As the leading proponent and coauthor of the Song-Beverly Act, Song indicated that the purpose of creating a consumer warranty protection law was to limit manufacturers' ability to perpetuate social and economic advantage through the manufacturer-consumer relationship.<sup>61</sup> The Act intended to eliminate delays and lack of accountability by companies who issue

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56. See Press Release, Alfred H. Song, Cal. Legislature, Song Warranty Bill Passes Legislature [hereinafter Song Press Release] (on file with author); see also Talesh, *supra* note 28, at 541.

57. See SENATE REPORT ON SB 272 (on file with author).

58. See *id.* In particular, (1) warranties failed to state any method of obtaining repairs for the defective product; (2) neither manufacturers nor retailers accepted responsibility for the warranty; (3) written warranties were confusing and misleading; (4) warranty repair work often took months to complete; and (5) local retailers and repairers often refused to do any warranty work because manufacturers did not fully reimburse them for work performed. See Song Press Release, *supra* note 56.

59. See Gordon Davis, Editorial, May 20, 1970 (on file with author).

60. Press Release, Cal. State Capitol (Feb. 2, 1970) (on file with author); see also Letter from Alfred Song, Senator, Cal. Legislature, to Mrs. Ralph A. Ingram (July 2, 1971) ("[T]he Song-Beverly Act [gives] consumers legal weapons to enforce provisions of warranties on products purchased after March 1, 1971.") (on file with author).

61. See Letter from Alfred H. Song, *supra* note 60; Editorial, *Consumer Bill Should Become Law*, L.A. TIMES, Sept. 11, 1970, at R8 (noting that Song indicated that the purpose of the law was to have manufacturers stand behind their products).

warranties for their products. Song specifically targeted manufacturers who were taking advantage of consumers with warranties that provided no substantive relief when consumers experienced problems.<sup>62</sup>

The proposed Act set forth rights, responsibilities, and the legal relationship of buyers and sellers of consumer goods in California.<sup>63</sup> Manufacturers that issued express warranties for consumer goods sold in California and were unable to service or repair those goods to conform to the applicable express warranties were required to either replace the goods, reimburse buyers, or face potential lawsuits.<sup>64</sup> The Act initially proposed that if the buyer established that a manufacturer's failure to comply was willful, any subsequent court judgment could include a civil penalty up to three times the actual damages and the plaintiff's attorneys' fees.<sup>65</sup> If manufacturers issuing warranties chose to continue to ignore their responsibilities, Senator Song wanted the Act to afford consumers legal rights protected by the court system: "There is no effective remedy aside from the courts . . . . Certain private and government agencies collect complaints of shady business dealings, but they will not act to reimburse the customer. . . . Filing suit in court is the best alternative for the consumer."<sup>66</sup> 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, which severely limited damages to the cost of repair or diminution in value, provided no potential for civil penalties or attorneys' fees, and focused on manufacturer obligations regarding the product only at the time of sale.

Although the original Song-Beverly Act had strong public support,<sup>67</sup> private businesses opposed the Act, claiming that the law was

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62. See Song Press Release, *supra* note 56 (highlighting the specific focus of the bill). In the same report, Song also noted, "Good companies will not have to worry . . . , for they already back up their products with integrity. These bills are aimed at the chislers and sharpshooters who have plagued California's marketplace for years." Press Release, Cal. State Capitol, Song Committee Passes Tough Consumer Bills (May 22, 1970) (internal quotation marks omitted) (on file with author); see also *Warranty Bill Passed by Senate*, S.F. CHRONICLE, June 25, 1970, at 11 (quoting Senator Song).

63. See Talesh, *supra* note 28; see also Alexander Auerbach, *Solid Warranties Promised in State Bill*, L.A. TIMES, August 25, 1970, at 8 (summarizing the proposed bill); Press Release, *supra* note 60.

64. See SENATE REPORT, *supra* note 57.

65. *Id.*

66. Press Release, Cal. State Capitol (Oct. 24, 1969) (internal quotation marks omitted) (on file with author).

67. The California legislature conducted a poll indicating that both Democrats and Republicans favored a stringent consumer protection bill and that a state agency should have the power to sue and force manufacturers to comply with their warranties. *Id.*



“full of ambiguities making the measure difficult to interpret,” and an unnecessary restriction on big business.<sup>68</sup> Moreover, manufacturers expressed considerable concern about the potential civil penalty award of three times the actual damages, plus attorneys’ fees.<sup>69</sup> Once it became clear that the Act was likely to pass, however, those opposing it decided to participate in the process. Senator Song described the process of refining the details of the bill:

At that first meeting they spent their time shouting that I was trying to put them all out of business.

We had other meetings, however, as I moved the bill through the Senate and to the Assembly. 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.<sup>70</sup>

The final version of the Act reduced civil penalties from three times actual damages to two, and indicated that a manufacturer or retailer who was unable to service or repair consumer goods to conform to the applicable express warranty would only be required to either replace the goods or reimburse the buyer, but only after being given a “reasonable number of attempts” to fix the defect.<sup>71</sup> This language, however, was not specifically defined in the Act.

In August of 1970, the Song-Beverly Act easily passed and went into effect for products purchased on or after March 1, 1971.<sup>72</sup> This was the first consumer warranty law, state or federal, passed in the

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68. CAL. COMM. ON UTILS. & COMMERCE STAFF ANALYSIS, ASSEMB. 141 (1970) (on file with author); *see also* Memorandum from Senators Song and Karabian to Governor Reagan on SB 272 (Sept. 11, 1970) (on file with author); Letter from Alfred H. Song, Senator, Cal. Legislature (May 25, 1970) (“The California Manufacturers Association says that these bills are unnecessary restrictions on big business.”) (on file with author); Press Release, Cal. State Capitol, Song Warranty Bill Passes Assembly Committee (Aug. 10, 1970) (indicating that manufacturers claimed the bill would place too heavy a burden on small, out-of-state manufacturers) (on file with author); Letter from Lee Stoddard, Serv. Manager, Speed Queen, to Messers Thompson & McCarthy (Feb. 12, 1971) (on file with author).

69. In an attempt to convince Governor Ronald Reagan to veto the bill, one manufacturer sent a letter to the governor and referred to the civil penalty provision as “absurd and ridiculous,” and asked, “Why is the manufacturer the only whipping boy?” Letter from A. Whittell, Jr., President, Raypack, Inc., to Ronald Reagan, Governor, Cal. (Aug. 12, 1970) (on file with author).

70. Song Press Release, *supra* note 56; *see also* Letter from Alfred H. Song, Senator, Cal. Legislature, to Ronald Reagan, Governor, Cal. (Aug. 24, 1970) (on file with author).

71. CAL. CIV. CODE § 1793.2(d)(2) (West 2009).

72. *See* Song-Beverly Consumer Warranty Act, ch. 1333, 1970 Cal. Stat. 2478 (codified as amended at CAL. CIV. CODE § 1790 (West 2009)); *see also* Talesh, *supra* note 28, at 541.

country.<sup>73</sup> At the Act's inception, rights-based rhetoric dominated the legislative discourse as consumer organizations pressed for strong legislation that would arm one-shotter consumers with powerful legal weapons, attainable through the court system.<sup>74</sup> However, all parties involved realized that ambiguities in the law could create unforeseen challenges.<sup>75</sup> For instance, in addition to failing to define what constituted a reasonable number of attempts, the Act did not define what constituted a willful violation or a civil penalty.

### *B. The "Haves" Create a Private Legal Order*

Despite establishing strong rights and remedies, the Song-Beverly Act was not entirely effective during the 1970s.<sup>76</sup> Testimony at the California State Assembly Committee's hearings in December of 1979 revealed a high level of consumer dissatisfaction with new cars and warranty performance.<sup>77</sup> Manufacturers rarely acknowledged that they were given a "reasonable number of attempts" to fix a defect under warranty, relying in part on the Act's failure to define this language.<sup>78</sup> Thus, full restitution or replacement of new automobiles rarely occurred.<sup>79</sup>

In the early 1980s, the California legislature attempted to eliminate ambiguity in the warranty law by creating a "lemon law" that established a "legal presumption" as to what constituted a "reasonable number of attempts" to fix a problem that consumers could specifically invoke against automobile manufacturers.<sup>80</sup> The bill proposed

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73. However, the problem regarding warranties was not limited to California. In 1975, in response to complaints by consumers concerning manufacturers' failure to uphold their warranties, the Federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Magnuson-Moss Act) was passed, which set forth minimum requirements for those who chose to issue full warranties. See Pub. L. No. 93-637, 88 Stat. 2183 (codified as amended at 15 U.S.C. §§ 2301–2312 (2006)).

74. See *supra* notes 56–76 and accompanying text.

75. Even Senator Song noted that "like most new pieces of legislation, [the Act had] its share of loopholes and ambiguities." Letter from Alfred H. Song, Senator, Cal. Legislature, to Ronald Reagan, Governor, Cal. (Nov. 5, 1971) (on file with author).

76. For a more thorough summary of the legislative history during this time period, see Talesh, *supra* note 28, at 541–42; see also DEP'T OF CONSUMER AFFAIRS, STATE OF CAL., ON AB 1787: NEW CAR WARRANTIES (1982) (highlighting consumer frustration with warranty repairs based on manufacturer refusal to perform repairs and provide a full refund) (on file with author); Press Release, Cal. State Capitol, "Lemon Law" to be Heard (Apr. 18, 1980) (on file with author); CAL. COMM. ON CONSUMER PROT. & TOXIC MATERIALS ON AB 1787: AUTOMOBILE WARRANTIES (1981) (highlighting consumer frustration and the fact that full refunds are rare) (on file with author).

77. See sources cited *supra* note 76.

78. See sources cited *supra* note 76.

79. See sources cited *supra* note 76.

80. Talesh, *supra* note 28, at 541–42.

that a consumer could invoke a "legal presumption" that the automobile manufacturer had been given a reasonable number 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 twenty days or more.<sup>81</sup> The presumption could only be rebutted at trial by the manufacturer if it was able to show that four attempts or twenty days was not reasonable in that particular case.<sup>82</sup>

During the legislative process, automobile manufacturers alerted the legislature that, during the 1970s, the manufacturers had created dispute resolution structures to resolve automobile warranty disputes outside of court.<sup>83</sup> 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.<sup>84</sup> Some manufacturers contracted with third-party dispute resolution organizations to administer these programs.<sup>85</sup> Diffusion of dispute resolution structures among manufacturers and dealers occurred in the 1970s and 1980s.

Manufacturers framed the benefits of their dispute resolution process in terms of values that were important to them: efficiency, informality, and customer satisfaction.<sup>86</sup> Moreover, manufacturers collectively claimed that the creation of these internal dispute resolution processes served to increase their credibility with consumers and the public, while reducing costs and keeping disputes out of court.<sup>87</sup>

Chrysler emphasized to the Senate Judiciary Committee that its grievance procedure offered an efficient, fast, and informal way to satisfy concerned customers.<sup>88</sup> Similar to Chrysler, Ford also claimed

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81. *See id.*

82. *See id.*

83. *See id.* at 542; *see also* Memorandum from Cal. Legislature on AB 1787 (May 5, 1981) (on file with author).

84. *See* CAL. SENATE COMM. ON JUDICIARY, ON AB 1787: MOTOR VEHICLE WARRANTIES—REPLACEMENT OR REFUND 8–9 (1981–1982) (on file with author); Memorandum, *supra* note 83.

85. *See* CAL. SENATE COMM. ON JUDICIARY, *supra* note 84; Memorandum, *supra* note 83.

86. *See* Letter from Stewart M. Weiner, Senior Att'y, Ford Motor Co., to R. L. Dugally, W. Reg'l Manager of Governmental Affairs, Ford Motor Co. (July 24, 1981) (highlighting the request to increase the out-of-service requirement from twenty days to thirty) (on file with author); Letter from C. R. Weed, Ford Motor Co., to R. L. Dugally, W. Reg'l Manager of Governmental Affairs, Ford Motor Co. (May 11, 1981) (opposing proposed lemon law due to increased costs and increased litigation) (on file with author); Press Release, Ford Motor Co. (Mar. 30, 1981) [hereinafter Ford Press Release] (on file with author).

87. *See* Ford Press Release, *supra* note 86.

88. Chrysler informed Assemblywoman Tanner that it established fifty-four Customer Satisfaction Arbitration Boards (CSAB) across the country during the 1970s and that "the purpose

that its goals were to provide a "speedy, inexpensive, and fair system to resolve product disputes as an effective alternative to lengthy and costly dependence on the courts."<sup>89</sup> Despite not providing consumers with a right to oral presentation, Ford noted that the goal of their dispute resolution program was

increased customer satisfaction—the satisfaction of knowing a product performance or service complaint will be heard by an impartial board whose members are independent of Ford Motor Company

. . . .

As self-regulating mechanisms . . . [t]heir very existence means that our dealers and our own personnel are perceived as taking the

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was to aid a dissatisfied purchaser [and] to correct a problem that keeps the vehicle from being in conformance with the terms of the express warranty." Letter from A. E. Davis, A.E. Davis & Co., to Cal. Comm. on Consumer Prot. & Toxic Materials (April 27, 1981) (on file with author). Chrysler succinctly described the structure and goals of its program in a letter dated August 7, 1981 to the Senate Judiciary Committee:

Chrysler can't afford any dissatisfied purchasers, so it has established a procedure of using third parties to resolve, in a matter of weeks instead of years, disputes between the purchaser and the dealer over an unrepaired component of the vehicle during the warranty period. This is accomplished through Customer Satisfaction Arbitration Boards (CSAB). These consist of five members—a certified auto mechanic, a consumer advocate, a public member, a dealer representative and a Chrysler employee. After review of each complaint received from a dissatisfied purchaser, the final decision can be voted on only by the mechanic, consumer advocate and the public member. The decisions, so far, have ranged all the way from denying that the purchaser had a valid case to ordering the dealer and Chrysler to replace the vehicle with a new one. Replacement has taken place in four instances . . . , so this system works and in a matter of weeks, not years as would be the case under AB 1787. The final decision is binding on Chrysler and the dealer, but not on the customer who still has the option of going to court.

In summary, we believe this Chrysler CSAB program is a far better way, and certainly less costly in time and money to the car owner, to get a satisfactory resolution to the problem of the so-called "Lemon" car than the long, drawn out method embodied in AB 1787.

Letter from A. E. Davis, A.E. Davis & Co., to Cal. Senate Judiciary Comm. (Aug. 7, 1981) (on file with author). Approximately, two weeks after this letter, Chrysler informed the California Senate that they were incorporating their grievance procedure into their 1982 product warranty due to:

1. excellent dealer support with 95% participation;
2. positive national and local media coverage;
3. satisfied owners, a majority of whom indicate an intention to again purchase Chrysler products;
4. a growing consumer awareness that Chrysler Corporation and its dealers are concerned about customer programs;
5. reduced litigation and small claims action.

Letter from Charles O. Swift, President, Swift World of Cars, and John B. Vandenberg, President, The Vandenberg Companies, to Cal. Senate Judiciary Comm. (Aug. 19, 1981) (on file with author).

89. Ford Press Release, *supra* note 86.

extra steps required to resolve issues to the satisfaction of customers  
 . . . .<sup>90</sup>

General Motors<sup>91</sup> and automotive dealers<sup>92</sup> similarly focused on the legitimacy and efficiency of these processes. Lobbying by manufacturers, therefore, suggests that business values of efficiency, cost-containment, discretion, customer satisfaction, and improved corporate image drove manufacturer expansion of these dispute resolution processes. Full restitution under these processes, however, remained rare.

*C. The California Lemon Law Finally Enacted—The “Haves”  
 Legitimate a Private Legal Order by Influencing the  
 Public Legal Order*

The creation of internal dispute resolution processes provided a means through which manufacturers' values and norms influenced the structure and content of the lemon laws far more than did consumers' interests. In particular, manufacturer advocacy coalitions influenced public policy and redefined consumer rights by linking them to other

90. Memorandum from the Ford Consumer App. Bd. (on file with author); *see also* Letter from Richard Dugally, W. Reg'l Manager of Governmental Affairs, Ford Motor Co., to Sally Tanner, Assemblywoman, Cal. State Assembly (June 30, 1981) (on file with author). The Ford Consumer Appeals Board (FCAB) is composed of three consumer representatives, a Ford dealer representative, and Lincoln dealer representative. Memorandum from the Ford Consumer App. Bd. (on file with author). Consumers fill out a one-page document explaining the nature of their complaint. *Id.* The board reviews cases monthly and reaches decisions by a simple majority vote. The consumer has no opportunity for an oral presentation. *Id.* Decisions from the board are binding on the company and its dealers, but not the consumer, who is free to pursue other avenues of recourse. *Id.* The FCAB process averaged thirty-seven days from start to finish. *Id.*; *see generally* CAL. SENATE COMM. ON JUDICIARY, *supra* note 84.

91. In February 1979, General Motors created a third-party arbitration and mediation program through the Better Business Bureau. The program was started in San Francisco. General Motors also indicated to the legislature that the programs were efficient ways to resolve disputes and keep customers happy. Of the 383 complaints heard in the San Francisco program, 75% were resolved by mediation. Of the 25% that went to arbitration, the dispute resolution officer ruled in General Motors' favor two-thirds of the time. Moreover, General Motors only refunded six automobiles. The average time to obtain a decision was fifty days from filing the grievance. General Motors noted that given what *they* determined to be a successful process, they were establishing similar procedures in Los Angeles, Sacramento, and Fresno. Similar to the other models, there was no charge to the consumer. *See* CAL. SENATE COMM. ON JUDICIARY, *supra* note 84.

92. In response to the passage of the Song-Beverly Act in 1970, approximately 2,000 automobile dealers created and participated in a program called "Autocap" to deal with warranty complaints. *See* Letter from Robert J. Beckus and Loren V. Smith, Cal. Advocates, Inc., to Members of the Cal. State Assembly (June 1, 1981) (on file with author). Although it was considered a "third-party" resolution process, dealerships largely ran and funded Autocap. Writing on behalf of two thousand franchised new car dealerships opposing passage of the Lemon Law, California Advocates, Inc. indicated that "the automobile industry has established a variety of workable programs for settling consumer complaints" and cautioned that the price of new vehicles would increase, as would additional litigation, if the Lemon Law was passed. *Id.*

socially recognized values such as informality and efficiency. This resulted in legislators ceding the jurisdictional forum for consumer disputes to manufacturer-sponsored dispute resolution procedures. After the Lemon Law was narrowly defeated in 1980 and 1981,<sup>93</sup> it was ultimately enacted in 1982, but with significant changes from the original proposal.<sup>94</sup> In order to pass the bill, the California Legislature adopted and codified the logic of manufacturers' valuation of dispute resolution proceedings without any apparent formal review of these programs.<sup>95</sup> Consumers were then entitled to a "legal presumption" that the manufacturer received a reasonable number of attempts if (1) the same nonconformity has been subject to repair four or more times *within the first 12,000 miles or twelve months from purchase*, or (2) has been out of service by reason of repair for cumulative total of more than thirty (*not twenty*) calendar days *within the first 12,000 miles or twelve months from purchase*.<sup>96</sup> Manufacturers would be permitted to attempt to rebut the presumption at trial by showing that, under the specific facts of the case, the manufacturers' actions were reasonable.<sup>97</sup> A later amendment to the Lemon Law also eliminated the "willfulness" requirement to recover attorneys' fees.<sup>98</sup>

The biggest changes, however, concerned the codification of manufacturers' dispute resolution procedures 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

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93. See Press Release, Assemblywoman Sally Tanner, Cal. State Assembly, Fact Sheet: AB 1787 (Tanner)—"Lemon Bill" (noting that the Lemon Law was defeated by a single vote) (on file with author).

94. See Act of July 7, 1982, ch. 388, 1982 Cal. Stat. 1720; see also Editorial, *Legislature Gets Second Try at Creating Lemon Aid*, INDEPENDENT/PRESS-TELEGRAM, Apr. 7, 1981, at B6 (on file with author).

95. See Memorandum from Cal. State Legislature on AB 1787, The Auto "Lemon" Bill (highlighting the lemon law provisions that changed) (on file with author); Memorandum from Cal. State Legislature, Major Differences Between Prior Version and New Version of AB 1787 (on file with author).

96. See Act of July 7, 1982, ch. 388, sec. 1, § 1793.2(e)(1), 1982 Cal. Stat. 1720, 1721–22. Since the passage of the original Lemon Law in 1982, the current lemon law has extended the period for which a vehicle could potentially be presumed a lemon to 18,000 miles or eighteen months from the date of original purchase. See Act of Sept. 22, 1999, ch. 448, sec. 1, § 1793.22(b), 1999 Cal. Stat. 2968, 2968–69.

97. See Act of July 7, 1982, ch. 388, sec. 1, § 1793.2(e)(1), 1982 Cal. Stat. 1720, 1721–22 ("This presumption shall be a rebuttable presumption affecting the burden of proof in any action to enforce the buyer's rights . . .").

98. See Act of Sept. 28, 1987, ch. 1280, sec. 4, § 1794(d)–(e), 1987 Cal. Stat. 4553, 4562–4563 (removing the requirement of willfulness for the award of attorneys' fees when a buyer prevails in an action under the Lemon Law).

the manufacturer maintained one.<sup>99</sup> Thus, the legal protections afforded under the Lemon Law were contingent upon using the manufacturers' third-party dispute resolution process, if one existed. The dispute resolution process "qualified" if it met the minimum requirements for dispute resolution proceedings set forth in the federal warranty law, the Magnuson-Moss Warranty Act, and in particular, Federal Trade Commission (FTC) Rule 703.<sup>100</sup> Decisions under the dispute resolution process were binding on the manufacturer but not the consumer.<sup>101</sup> Nonetheless, the Lemon Law indicated that if the consumer chose to reject the grievance program's ruling and sue, the findings of the dispute resolution arbitrator could be admitted at trial without any need for evidentiary foundation.<sup>102</sup> Also, no civil penalties or attorneys' fees could be recovered during these dispute resolution processes unless the manufacturer allowed for such recovery in the design of their program.<sup>103</sup> Further, unlike the all (restitution or replacement) or nothing (no award) potential at trial, arbitrators were permitted to simply award consumers the opportunity to allow manufacturers another repair attempt.<sup>104</sup>

The codified legitimacy of these structures not only reflected manufacturers' logic as to the positive value of these procedures, but also made the legal presumption contingent on using manufacturers' dispute resolution procedures without any formal legislative inquiry into whether these processes were procedurally and substantively fair to consumers. Although manufacturers still publicly opposed passage of the Lemon Law in this form, business lobbyists recognized the potential for keeping these disputes out of courts.<sup>105</sup>

Thus, the broad, vague mandate of the 1971 Song-Beverly Act gave wide latitude to manufacturers. Manufacturers responded both to en-

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99. See Act of July 7, 1982, ch. 388, sec. 1, § 1793.2(e)(2)-(3), 1982 Cal. Stat. 1720, 1722.

100. See CAL. CIV. CODE § 1793.22(d) (West 2009). Specifically, FTC Informal Dispute Resolution Procedures placed the following requirements on manufacturers: (1) notify the buyer about the existence, location, and method for using the dispute resolution program, both at the time of sale (in the warranty itself) and, if necessary, at the time a dispute arises; (2) fund the program; (3) insulate the program from manufacturer influence; (4) make the program free to the consumer; and (5) reach a decision within forty days of notification of the dispute. See 16 C.F.R. § 703.5 (2002). However, the Lemon Law did not establish a means of ensuring that these programs were operated fairly and impartially.

101. For a summary of the California Lemon Law, see Talesh, *supra* note 28, at 544. See also Civ. §§ 1793.22 and 1793.2.

102. See Civ. § 1793.22(c).

103. See Talesh, *supra* note 28, at 544; see also Civ. §§ 1793.2, 1793.22, 1794.

104. See sources cited *supra* note 103.

105. One lobbyist bluntly noted the benefits of the new lemon law to manufacturers: "[W]e think it's a good start. I look at it as a way to eliminate court cases." Talesh, *supra* note 28, at 545.

vironmental demands (changes in public attitudes and awareness, the law, and legal mandates) and internal managerial interests (desire for fewer lawsuits, greater efficiency, cheaper and quicker resolution, and no civil penalties or attorneys' fees) by developing private dispute resolution processes to satisfy legitimacy and efficiency concerns. The legislature used industry norms to fill in the meaning of what constituted a "reasonable number of attempts" and what a consumer must do to obtain the legal presumption.

However, the legislature did not motivate manufacturers to create these processes. Instead, the legislature followed, and ultimately codified, institutionalized organizational practices. In doing so, the legislature, without ever formally analyzing the merits of this grievance procedure, incorporated institutional organizational practices into the Lemon Law and yielded the jurisdictional forum for consumer disputes to private processes. Consumers' rights to attorneys' fees, civil penalties, and restitution or a replacement car became contingent upon using manufacturer-sponsored dispute resolution structures in which consumers had no right to attorneys' fees or civil penalties, and may potentially receive an "award" of an additional repair attempt. Thus, in this instance, manufacturers were successfully able to play not for favorable rules, but rather for favorable institutional structures that transfer claims into the private courthouse.

*D. Utilizing and Maintaining the Privatized System: Conflicting Tensions Between Informality and Due Process*

Once organizational dispute resolution structures became formally codified into the Lemon Law, legislative amendments had less to do with protecting consumer rights and more to do with giving legal legitimacy to institutional venues through cursory regulatory monitoring and oversight. Legislative amendments also bolstered the degree that consumers, manufacturers, legislators, and regulators deferred to institutional venues funded by manufacturers. Due to the lack of enforcement and monitoring mechanisms in the Lemon Law concerning dispute resolution processes, manufacturers initially ignored the minimum procedural requirements of the Lemon Law and FTC Rule 703 guidelines of the Magnuson-Moss Act.<sup>106</sup> No manufacturer formally

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106. CAL. DEP'T OF JUSTICE, ON AB 2057: BILL ANALYSIS (1987) ("Some third-party resolution mechanisms established by manufacturers did not comply with minimum statutory criteria. Manufacturers, however, did not violate the law because they were not required to establish any third-party dispute resolution processes; the third-party procedure is entirely permissive.") (on file with author); Letter from David Manhart, Legislature Advocate, Cal. Pub. Interest Research Grp., to Tom Maddock, Bureau of Auto. Repair (Aug. 2, 1988) (highlighting the initial compli-



“qualified” its program under the Lemon Law after its passage in 1982.

In response to consumer frustration, the California Department of Consumer Affairs conducted an inquiry of Lemon Law dispute resolution programs.<sup>107</sup> Their inquiry revealed significant problems, including (1) grievance procedures were taking much longer than forty days as required by FTC guidelines; (2) many manufacturers' processes did not allow consumers an oral presentation at hearings, while dealers and manufacturer representatives often participated in the decision-making process, as with Ford & Chrysler, or staffed these panels with their own employees; and (3) grievance officers and arbitrators often had no legal training, no training in the Lemon Law, and often were not even provided copies of the applicable warranty law.<sup>108</sup> Moreover, a decision in favor of a consumer was often merely another repair attempt for the manufacturer.<sup>109</sup> However, the dispute resolution panel rarely followed up to ensure the repair attempt resolved the problem.

In 1987, after a series of negotiations with manufacturers to reform the Lemon Law grievance process,<sup>110</sup> the legislature focused its efforts

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ance problems with the original lemon law) (on file with author); CAL. DEP'T OF CONSUMER AFFAIRS, ON AB 2057: ENROLLED BILL REPORT 7 (1987) (summarizing some problems with the Lemon Law) (on file with author); CAL. SENATE COMM. ON JUDICIARY, ON AB 2057: NEW MOTOR VEHICLE WARRANTIES (1987-1988) (on file with author). Consumers were funneled into these processes by manufacturers who claimed they were complying with the minimum requirements under the FTC Rule 703, but there was little regulatory or monitoring oversight. See Letter from Sally Tanner, Assemblywoman, Cal. State Assembly, to George Deukmejian, Governor, Cal. (Sept. 14, 1987) (summarizing the history and proposed amendments to the Lemon Law) (on file with author).

107. Letter from Jean Clemens, Dir., Consumers Aid of Shasta, Inc., to Sally Tanner, Assemblywoman, Cal. State Assembly (July 29, 1987) (on file with author); James T. Mulder, *Sweetening the 'Lemon Law'*, L.A. TIMES, Jan. 12, 1987 (“Those revisions were implemented after the attorney general's office came out with a study showing few arbitration cases statewide resulted in buybacks and many arbitrators were ignoring the lemon law.”).

108. Letter from Carmen Gonzalez, Consumer Program Dir., and Lynn Nesselbush, Legislative Advocate, Cal. Pub. Interest Research Grp., to Sally Tanner, Assemblywoman, Cal. State Assembly (Apr. 27, 1987) (on file with author); see also CAL. DEP'T OF CONSUMER AFFAIRS, *supra* note 106; CAL. SEN. COMM. ON JUDICIARY, *supra* note 106; CAL. PUB. INTEREST RESEARCH GRP., FACT SHEET ON AB 1057 (1987) (on file with author); Mulder, *supra* note 107; ON AB 2057: COMMENTS (June 17, 1987) (on file with author); Letter from Mark F. Anderson, Partner, Kemnitzer, Dickinson, Anderson & Barron, to Sally Tanner, Assemblywoman, Cal. State Assembly (May 1, 1989) (highlighting the problems with the Lemon Law) (on file with author).

109. See *supra* note 103 and accompanying text.

110. In 1987, Tanner proposed what she termed a “due process” bill that sought to ensure that fair and impartial decisions are made on complainants participating in manufacturer-run dispute resolution proceedings. Letter from Sally Tanner, Assemblywoman, Cal. State Assembly, to Senate Judiciary Comm. (June 22, 1987) (on file with author). Tanner proposed the following: (1) establish a program in the California Bureau of Automotive Repair to certify manufacturer

on regulating the certification process, but again left substantive results to manufacturers and their third-party administrators.<sup>111</sup> In particular, manufacturers agreed to take into account statutory standards, provide dispute resolution panels with copies of the Lemon Law, and require the arbitrators to be familiar with the law.<sup>112</sup> Manufacturers also authorized dispute resolution panels to obtain independent, expert inspection of the automobile if they deemed it necessary.<sup>113</sup> In return, manufacturers agreed to certify their programs as long as arbitrators "retain[ed] final authority to decide what standard, statutory or otherwise, to apply in any given case."<sup>114</sup> Thus, arbitrators retained flexibility and discretion over the rigorousness with which they applied codified law. Manufacturers that maintained a qualified third-party dispute resolution process that "substantially complies" with the regulatory guidelines would not be liable for a nonwillful civil penalty. This compromise was in response to manufacturers' desire to keep these processes relatively informal:

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.

The idea of General Motors' arbitration program, which is voluntary and predates the [sic] California's [1982] lemon law . . . , is that

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arbitration programs; (2) annually recertify or decertify programs as inspection warranted; (3) investigate consumer complaints regarding qualified programs' failure to follow its own written procedures; (4) notify the Department of Motor Vehicles of failures by manufacturers to comply with the dispute resolution decision; and (5) submit a biennial report to the Legislature evaluating the effectiveness of the program. See LEG. ANALYST, ANALYSIS OF ASSEMBLY BILL NO. 2057 (1987) (on file with author). Although certification would be voluntary, 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 (awarded restitution or replacement), the consumer was *automatically* entitled to a civil penalty plus attorneys' fees. No showing of willfulness was required for a civil penalty. See AB 2057—JUDICIARY COMMITTEE STATEMENT (1987) (on file with author).

111. Republican Assemblypersons indicated that the certification program would turn these informal proceedings into "formal court hearings," overemphasize "detail and procedure," and lead to "countless appeals over piddly little questions." CAL. COMM. ON GOV'T EFFICIENCY & CONSUMER PROT., ON AB 2057: REPUBLICAN ANALYSIS (1987) (on file with author).

112. Letter from David A. Collins, Office of the Gen. Counsel, Gen. Motors Corp., to Michael Dyer, Chief, Arbitration Review Prog. (Jan. 16, 1990) (on file with author).

113. Memorandum from The Cal. Dep't of Justice on AB 2057 Analysis (July 9, 1987).

114. Letter from David A. Collins, *supra* note 112. Moreover, manufacturers who chose not to maintain a dispute resolution process or not to certify their process would not be subject to a mandatory civil penalty if the consumer received full restitution or replacement at trial. Rather, in those situations, the court—in particular, the jury—would have discretion to award a civil penalty up to twice the actual damages. Finally, all the manufacturer was required to do to avoid civil penalties for nonwillfulness was make sure its program "substantially complied" with certification requirements. ON AB 2057: CONCURRENCE IN SENATE AMENDMENTS (1987) (highlighting changes made) (on file with author).

it be informal and non-legal, that the process be easily understood by the consumer, and that a lengthy court setting be avoided.<sup>115</sup>

Manufacturers, therefore, were once again able to deflect the Song-Beverly Act and Lemon Law's espoused goal of protecting legal rights toward focusing their dispute resolution processes more on efficiency and informality.<sup>116</sup> By certifying a dispute resolution process with the state, a manufacturer gains the ability to introduce a favorable ruling into evidence should the consumer decide to sue, and gains the ability to resolve the dispute without threat of attorneys' fees, civil penalties, and likely restitution, because the arbitrator, unlike a court, can award an additional repair attempt instead of full restitution or replacement. Legal rights, such as the right to civil penalties, have become contingent upon whether a manufacturer maintains a qualified third-party dispute resolution proceeding.

*E. The Private Legal Order's Influence on the Judicial Determination of Consumer Rights*

Because many Lemon Law disputes have been privatized, there are not many published California court cases addressing issues relating to these dispute resolution processes.<sup>117</sup> However, court cases interpreting California's consumer warranty laws, and the Lemon Law in particular, reflect deference to these quasi-private dispute resolution structures in a manner consistent with the legislature's codification of manufacturers' preference for informal, private resolution of statutory rights.<sup>118</sup> California courts indicated that the legislature intended to "confer a benefit" on manufacturers who maintained dispute resolution processes by immunizing them from nonwillful civil penalties.<sup>119</sup> Specifically, the courts interpret the presence of institutionalized structures as evidence of fair treatment and a public policy concern for quick resolution outside the courts: "[W]e encourage manufacturers to maintain qualified third-party dispute resolution processes, thereby

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115. See Talesh, *supra* note 28, at 546-47 (quoting General Motors's letter to the California Legislature (July 8, 1987)).

116. See *id.*; see generally CAL. SENATE COMM. ON JUDICIARY, *supra* note 106, at 5-6 (1988) ("GM opposes the provisions of this bill because it would formalize the manufacturers' heretofore voluntary arbitration procedures to such an extent that the arbitrator would need to be trained in the specifics of the lemon law. They contend the bill would make them liable unreasonably for treble damages and the buyer's attorney's fees if a layman arbitrator untrained in the law, misapplied the lemon law. GM has approximately 1000 arbitrators in California, only 250 of whom are attorneys.").

117. My review of California cases on Westlaw revealed only four cases that dealt substantively with the California Lemon Law grievance procedures.

118. See, e.g., *Suman v. BMW of N. Am., Inc.*, 28 Cal. Rptr. 2d 133 (Cal. Ct. App. 1994).

119. *Jernigan v. Ford Motor Co.*, 29 Cal. Rptr. 2d 348, 351 (Cal. Ct. App. 1994).

ensuring that fewer consumers will have to take their problems to court."<sup>120</sup> Public legal institutions essentially cede jurisdiction of these claims to private organizations and alter where consumers can seek relief for lemon law disputes.

Since the early 1990s, there has been very little substantive change to the dispute resolution provisions of the California Lemon Law. State regulations yield control over the design and implementation of these venues to manufacturers and the third-party administrators with whom they contract. Once certification is granted by the California Department of Consumer Affairs, third-party dispute resolution organizations hire and train arbitrators on consumer warranty laws and administer lemon law programs on behalf of various manufacturers.<sup>121</sup> California was not unique. Following the rise of alternative dispute resolution structures beginning in the 1970s<sup>122</sup> all fifty states developed lemon laws in the 1980s that permitted third-party dispute resolution organizations to administer lemon law cases on behalf of automobile manufacturers.<sup>123</sup> The vast majority of automobile and motorhome manufacturers participate in a private dispute resolution process.<sup>124</sup> Most states include a similar dispute resolution provision as a predicate to claiming a legal presumption in court that a manufac-

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120. *Suman*, 28 Cal. Rptr. 2d at 140. The following highlights how courts defer to the legislature regarding the value of dispute resolution processes, which tracks the same arguments that manufacturers made to the legislature during the legislative process:

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. . . . [Subdivision (e) is] a means of encouraging consumers to communicate their troubles to the manufacturer prior to filing a lawsuit . . . .

. . . [S]ubdivision (e) seeks to ensure that courts of law are used as a last resort by consumers of new motor vehicles.

*Suman v. Superior Court*, 46 Cal. Rptr. 2d 507, 512 (Cal. Ct. App. 1995) (emphasis added).

121. See *Talesh*, *supra* note 11 (highlighting the lemon law arbitration training processes in which private arbitrators participate, which are run by third-party administrators hired by manufacturers).

122. Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002) (highlighting in detail the rise of alternative dispute resolution in the United States over the past forty years).

123. These laws often make claiming a legal presumption in court contingent on first using these dispute resolution structures. Thirty-three states make invoking the legal presumption in court contingent on first using the manufacturer-sponsored dispute resolution structure, if one exists.

124. *Talesh*, *supra* note 11, at 471-74 (exploring in detail two of the three lemon law dispute resolution training processes than manufacturers fund).

turer had a reasonable number of attempts.<sup>125</sup> By influencing and fundamentally altering the infrastructure of access that consumers have to claim rights in court, manufacturers, with state approval, were able to systematically filter a powerful consumer warranty law out of the public sphere and utilize and maintain a private legal order.

#### IV. IMPLICATIONS OF ORGANIZATIONAL REPEAT PLAYERS' INTERNALIZATION OF PUBLIC LEGAL RIGHTS

This case study highlights *how* organizations use their capacity as a structurally privileged player in the public arena to establish a private legal order in its own right. In doing so, it crystallized the challenges of using law to assist economically weaker parties. In the context of social reform legislation, such as California's consumer warranty law, the "haves" do not just influence the public legal order as Galanter previously noted, nor do they simply create a private legal order as Edelman and Suchman hypothesized. Rather, as this Article demonstrates, organizational repeat players create a private legal order and then influence the public legal order to utilize and maintain the private legal order with state support. In this regard, the content and meaning of consumer warranty laws are being determined by private organizations, the very group these laws are designed to regulate.<sup>126</sup>

California's consumer protection laws were intended to be an important encroachment on manufacturers' prerogatives. These laws sought to limit the manufacturers' ability to perpetuate social advantage or disadvantage through the manufacturer-consumer relationship, and in doing so, constrain managerial and business prerogatives regarding how to develop, maintain, and comply with warranties issued to consumers. Manufacturers created dispute resolution grievance procedures as evidence of fair treatment and then lobbied the legislature about the legal value of the procedures. Manufacturers responded in a manner that addressed both environmental demands (public perception and legitimacy) and managerial interests (efficiency, fewer lawsuits and awards paid out, and quicker resolution). Through political mobilization and lobbying by automobile manufac-

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125. See *id.* at 466 ("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 . . ."); Talesh, *supra* note 28, at 550 ("Many states channel consumers into dispute resolution provisions as a prerequisite to claiming a legal presumption in court.").

126. For a further elaboration of how organizations influence the meaning of legislation, see Talesh, *supra* note 28. See also Lauren Edelman & Shauhin Talesh, *To Comply or Not to Comply—That Isn't the Question: How Organizations Construct the Meaning of Compliance*, in *EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION* 103 (C. Parker & V. Nielsen, eds., 2011).

turers, the legislature and courts legitimated these efforts by making them relevant, if not dispositive, to the determination of liability, and altered the potential remedies consumers were afforded under the Song-Beverly Act. Amendments to the Song-Beverly Act and the Lemon Law became less about preserving consumer rights and more about developing ways to legitimate these dispute resolution structures without thorough review and analysis by the state. Thus, manufacturers' ability to internalize the law rests on the public legal system's willingness to yield jurisdiction to manufacturer-sponsored, third-party private dispute resolution forums that mirror and mimic public legal institutional apparatuses.

The result was that consumer rights were redefined as contingent upon using manufacturer-sponsored dispute resolution procedures in a number of critical ways. First, the legal presumption that a manufacturer had been given a reasonable number of attempts and therefore the consumer was entitled to restitution or replacement was initially proposed as four repair attempts or twenty days out of service, but became codified into law as four repairs or thirty days out of service within the first twelve months or 12,000 miles of use.<sup>127</sup> Second, if a manufacturer maintains a dispute resolution process, the consumer must use such process in order to claim the presumption.<sup>128</sup> Third, simply by establishing dispute resolution procedures, manufacturers create the potential of 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.<sup>129</sup> Fourth, if the manufacturer prevails in the dispute resolution process, the manufacturer now contains a legal advantage in the public courthouse, namely, the arbitrator's findings, which are automatically admissible in court without any evidentiary foundation should plaintiff decide to sue.<sup>130</sup> Fifth, just by requiring manufacturers to maintain dispute resolution proceedings, state courts and legislatures limit a consumer's opportunity to establish nonwillful civil penalties, a much easier standard than willful civil penalties.<sup>131</sup> By establishing these private dispute resolution structures and raising the threshold of access for consumers to obtaining relief in court, the "haves" gain a significant advantage in the

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127. See Act of July 7, 1982, ch. 388, sec. 1, § 1793.2(e)(1), 1982 Cal. Stat. 1720.

128. See CAL. CIV. CODE § 1793.22 (West 2009).

129. See *id.* §§ 1793.2(d), 1793.22.

130. See *id.* § 1793.22(c).

131. See *id.* § 1794.

external (public) and internal (private) legal systems. This is a critical, and as yet unrecognized, process through which the "haves" come out ahead.

This case study reveals the processes and mechanisms through which organizational repeat players play for favorable structures that are codified into law such that almost the entire "game"—wins and losses—is first played in a private forum in which organizations are able to design the rules, train the "judges," and limit the scope of remedies. Most importantly, the state certifies these disputing processes. Manufacturers and the third-party dispute resolution organizations that they contract with are afforded latitude to act as the rule-making body because they are allowed to develop and set forth the parameters and limits of its disputing program, subject to minimal certification and monitoring by the state. Moreover, although the third-party dispute resolution organizations are technically independent of manufacturers, train the arbitrators, and administer the disputing program, these organizations are funded by manufacturers.<sup>132</sup> Thus, organizations are simultaneously influencing public and private legal spheres.

This Article does not suggest that manufacturers' adoption of dispute resolution proceedings run by third-party organizations are not significant, or that manufacturers' desire to privatize the disputing process is driven by disregard for the law and consumer problems in general. The legislative history shows that manufacturers believe these processes are better for the consumer because they are quicker, more informal, efficient, and allow consumers to avoid court. Moreover, at a minimum, they are symbols that demonstrate commitment to consumer warranty protection. These dispute resolution grievance procedures 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.

These processes, however, do not always guarantee protection for consumers under the Lemon Law, and make organizational grievance processes de facto gatekeepers that consumers must travel through if they want to preserve all their rights and remedies in court. Consumer legal protections and rights are adjudicated in a forum that can be described, at best, as something less than what was originally intended by the California legislature in 1971 in terms of procedural and substantive protection. Understanding how this transformation takes

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132. Talesh, *supra* note 11, at 464, 466 (noting that manufacturers fund private lemon law dispute resolution processes).

place is critical because these quasi-private dispute resolution systems that are approved by the legislature potentially reshape the workings of the sociolegal order itself.

More broadly, my study highlights a growing but subtle trend in which public legal rights are being channeled into alternative forums often operated by third-party organizations *with* legislative and judicial support. This is consistent with a global shift toward collaborative and new governance arrangements that involve private actors in traditional government functions. The disputing systems examined in this Article are somewhat unique because they are not court-appended or inside organizations—the two forms Galanter and Edelman and Suchman previously discussed. Instead, these privatized disputing systems achieve legitimacy primarily through legislative codification and occasional judicial decisions. For example, through legislative enactment, states are contracting with private “judging” organizations that consist of a board of medical experts independent of health insurance companies to evaluate denials of coverage to insureds.<sup>133</sup> While some states experimented with these models in the 1990s, the Patient Protection and Affordable Care Act of 2010 requires all states to contract with independent medical review organizations to resolve disputes when their insurer or health plan deems a service unnecessary or denies coverage.<sup>134</sup> Congress also mandates that grievances pertaining to certain environmental law violations be addressed in organizational disputing forums that have been approved by the President and selected through the procedures of the American Arbitration Association.<sup>135</sup> The U.S. Department of Commerce delegates authority to resolve disputes over intellectual property in Internet domain names to the Internet Corporation for Assigned Names and Numbers (ICANN).<sup>136</sup> Financial service firms, through mandatory arbitration

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133. For a state-by-state review of external review boards, see KAREN POLLITZ ET AL., KAISER FAMILY FOUND., *ASSESSING STATE EXTERNAL REVIEW PROGRAMS AND THE EFFECTS OF PENDING FEDERAL PATIENTS' RIGHTS LEGISLATION* (rev. ed. 2002), available at <http://www.kff.org/insurance/externalreviewpart2rev.pdf>. See also Frank A. Sloan & Mark A. Hall, *Market Failures and the Evolution of State Regulation of Managed Care*, *LAW & CONTEMP. PROBS.*, Autumn 2002, at 169, 169–206.

134. For a comprehensive summary of the new standards for medical review organizations as set forth by the Patient Protection and Affordable Care Act of 2011, see Marc A. Rodwin, *New Standards for Medical Review Organizations: Holding Them and Health Plans Accountable for Their Decisions*, 30 *HEALTH AFFAIRS* 519, 519–24 (2011).

135. See 42 U.S.C. § 9612(b) (2006).

136. See Edward Brunet, *Defending Commerce's Contract Delegation of Power to ICANN*, 6 *J. SMALL & EMERGING BUS. L.* 1 (2002) (arguing that this delegation is constitutional and represents a conscious political judgment to privatize the policymaking and administration associated with the non-national domain-name system); see also Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, *LAW & CONTEMP. PROBS.*, Winter/



clauses that have been validated by courts, are channeling investors into an industry-supported dispute resolution program with the support of the Financial Regulatory Authority and the U.S. Supreme Court.<sup>137</sup>

The deference to quasi-private disputing structures by legislators and courts can even be seen in the criminal justice domain. Since the passage of the Prison Litigation Reform Act of 1995, states are initially channeling prisoner grievances into prison grievance hearing boards.<sup>138</sup> Moreover, *in lieu of* enforcing the exclusionary rule for potential violations of the Fourth Amendment, the U.S. Supreme Court defers to police administrative discipline hearings. As recently as 2006, the Supreme Court held that the Fourth Amendment exclusionary rule does not require suppression of evidence seized by law enforcement officers under a search warrant executed without complying with the “knock and announce” rule, reasoning that police administrative discipline hearings and training programs provide enough deterrence to potential police misconduct.<sup>139</sup>

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Spring 2004, at 221, 246–48 (highlighting the multi-stakeholder process that led to ICANN adopting dispute resolution system administered by third-party administrators).

137. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (affording considerable deference to arbitration in a securities case). The Financial Regulatory Authority is the largest regulator for all securities firms doing business in the United States. It was formed by consolidation of the enforcement arm of the New York Stock Exchange, NYSE Regulation, Inc., and the National Association of Securities Dealers (NASD). This merger was ultimately approved by the United States Securities and Exchange Commission in 2007. See NAT. ASSOC. OF SEC. DEALERS, INC., EXCHANGE ACT RELEASE NO. 34-56145 (2007), <http://www.sec.gov/rules/sro/nasd/2007/34-56145.pdf>; FIN. INDUS. REG. AUTH., INC., EXCHANGE ACT RELEASE NO. 34-59962, <http://www.sec.gov/rules/sro/finra/2009/34-59962.pdf>.

138. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended at 18 U.S.C. § 3626 (2006)).

139. *Hudson v. Michigan*, 547 U.S. 586 (2006). In *Hudson*, Justice Scalia’s majority decision highlights the deference to internal organizational systems:

Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to “assume” that unlawful police behavior would “be dealt with appropriately” by the authorities, but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been “wide-ranging reforms in the education, training, and supervision of police officers.” Numerous sources are now available to teach officers and their supervisors what is required of them under this Court’s cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline. Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect. There is also evidence that the increasing use of various forms of citizen review can enhance police accountability.

*Id.* at 598–99 (citations omitted).

In sum, in the twenty-first century, we see civil, criminal, and consumer rights established by legislatures and sometimes courts, channeled into quasi-private and quasi-public dispute resolution systems created or administered by organizations with varying degrees of support and deference from courts, legislatures, and regulatory agencies. Thus, in the spirit of Galanter's "speculations" almost forty years ago, the following Part sets forth a research agenda that addresses the impact of institutional arrangements on the delivery of justice in these quasi-private and quasi-public forums that repeat players and one-shotters now find themselves.

#### IV. CONCLUSION: A RESEARCH AGENDA FOR EXAMINING WHETHER AND HOW THE "HAVES" COME OUT AHEAD IN THE TWENTY-FIRST CENTURY

This Article explains the impact of institutional arrangements on the delivery of justice and explores the subtle ways through which repeat players position themselves to gain advantage. The theoretical framework I set forth for understanding how the "haves" potentially come out ahead in a world in which state and federal governments are increasingly channeling the adjudication of public legal rights into private and quasi-private forums should be viewed as a first step. The possible directions for future empirical work are many, and I will highlight a few here.

At the most basic level, significantly more research is needed to explore *how* different dispute resolution systems with varying degrees of business and state involvement operate on the ground and interpret and implement law. To the extent that disputing in many arenas has been rerouted from courts to organizationally created disputing forums, often via mandatory arbitration clauses with judicial and legislative approval, we need to explore the patterns of disputing in these domains. Too often researchers focus on outcomes, the absence or presence of a lawyer, "theoretical polemics about the advantages and disadvantages of various private courts,"<sup>140</sup> and other variables that can be collected at a macro level without critically interrogating how these processes operate on the ground. Understanding the relationship between law, organizational repeat players, and dispute resolution institutions needs to be more informed by data about what is

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140. Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 *STUD. IN L., POL., & Soc'y* 393, 410 (1992).

actually happening and why.<sup>141</sup> Obviously, the data are only available if empirical legal scholars have access to quasi-private and quasi-public dispute resolution structures, which remain largely confidential and private. Regulation designed to secure public access to information in these forums would augment the policymaking in this area.<sup>142</sup> Further, the enactment of legislation that requires large organizations to keep and make public records of claims and outcomes would increase transparency.

Examining *how* organizationally created dispute resolution systems, internal or external, operate is critical because they are not all the same. My ongoing empirical work in this area highlights this point.<sup>143</sup>

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141. Here, I join a series of scholars who have commented on the need for more fine-grained research on what occurs on the ground. In particular, Galanter and Lande have urged more research:

This, then, raises the need to actually do the assessment of what difference it makes. We submit that the consequences of proposed modifications of courts are not knowable a priori. We can, of course, patch together suggestive answers from other things we know about courts, but we could give better answers if we had more systematic information about these private courts. Most of the literature to date has been taken up with "how to do it" and with theoretical polemics about the advantages and disadvantages of various private courts. This debate needs to be more informed by data about what is actually happening and why. That data will be available only if researchers have access to private courts. One significant initiative that would enhance the quality of policy-making in this area would be regulation designed to secure public access to information about private judicial proceedings.

*Id.* at 410-11; see also Menkel-Meadow, *supra* note 31, at 58 ("We have little empirical verification of the claims made both for and against arbitration and ADR, including positive assertions made about reduced cost, speed, and access to dispute mechanisms, as we really do not have much data about whether one-shotters always do worse in institutionally established ADR . . ."); Bingham, *supra* note 26, at 908 ("For policy makers to decide this question, they will need considerably more information on how these systems operate than we have right now. Researchers have generally not compared different dispute system designs. Confidentiality, privacy, and private forums make access to the necessary data difficult and often impossible to get.").

142. In this respect, I follow a group of scholars who have called for more transparency and access to these quasi-private forums. See Bingham, *supra* note 26 (noting commentators have called for greater transparency and accountability through regulatory reform); Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions*, 4 *EMP. RTS. & EMP. POL'Y J.* 285 (2000) (suggesting legislation that requires arbitrators to issue written, publishable opinions that are publicly available to provide for dignity concerns of the parties, increase confidence in private dispute resolution, enhance predictability, and provide institutional benefits of legitimacy, quality, and equal access to information as well as the ability to deter wrongdoing by employers); Adriaan Lanni, Note, *Protecting Public Rights in Private Arbitration*, 107 *YALE L.J.* 1157 (1998) (suggesting that public disclosure of arbitration awards is necessary).

143. I compare two dispute resolution systems operating outside the court system, one administered by private organizations, and the other by the state. Despite having similar formal consumer lemon laws, the law in action in both states is different based on the way business and consumer perspectives are accounted for in the dispute resolution systems. See Talesh, *supra* note 11.

Debates over the impact of institutional arrangements too often devolve into a comparative debate between courts and alternative disputing structures. However, organizational involvement and control over dispute resolution systems varies.<sup>144</sup> To the extent possible, there needs to be more comparison of "private courts" operating outside the shadow of the court system. This will allow scholars and policy-makers to move beyond counterfactual hypotheticals: "If this case were adjudicated in a court instead of a private forum . . . ."

Empirical scholars interested in qualitative work should identify comparison cases across legal jurisdictions so that we can uncover the variation in how these processes are designed and operated on the ground. To what extent does the training organizational judges undergo impact (if at all) how law is interpreted and implemented in these forums? What is the quality of justice provided by intra-organizational and other ADR systems established by large organizations? What factors explain the variation in the quality of organizational dispute resolution structures? What accounts for the variation in disputing systems' integrity, responsiveness, and effectiveness? What difference do these structures make in terms of procedural fairness and substantive outcomes for individuals? What difference does a single private judge versus a panel of private judges make in the manner in which the case is processed? To the extent the state is going to approve and certify quasi-private disputing structures, what is the proper level of state oversight?

Answering these questions would help move the debate concerning the privatization of disputing away from normative claims over whether these forums are necessarily "good" or "bad" toward an analysis of under what conditions do these processes facilitate or inhibit repeat player advantages. Although my case study highlights a nuanced way in which repeat players play for favorable structures, scholars should examine how the privatization of law differentially affects the "haves" and "have-nots" in other areas.<sup>145</sup>

In sum, this Article attempts to re-animate discussion about something Galanter explored almost forty years ago in his seminal article:

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144. A number of scholars have discussed the various levels of organizational involvement and control. See CARRIE J. MENKEL-MEADOW, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODE*, ch. 25 (2011); see also Bingham *supra* note 136, at 221 (highlighting a series of different dispute resolution design systems with varying degrees of organizational control); Bingham, *supra* note 26; Edelman & Suchman, *supra* note 6, at 947-52 (noting the variation in structures); Eisenberg & Hill, *supra* note 51 (noting that employee win rates were lower in cases based on employer-promulgated procedures than in cases based on individually negotiated contracts).

145. See sources cited *supra* note 141.

how particular institutional arrangements impact the societal balance of power. Galanter focused on problematizing how repeat players influence law *in* the courts. Twenty-five years later, Edelman and Suchman speculated that organizational repeat players make law *in* the organization. I have attempted to offer a more complex image of how organizational repeat players encounter and influence law that simultaneously accounts for organizational influence in both public and private spheres. My theoretical framework certainly requires further empirical examination by scholars. If we want to understand why the “haves” come out ahead, we need to pay attention to how institutional structures are codified into law by the legislature and deferred to by courts in a way that fundamentally alters the infrastructure of access for litigants. Answering this challenge will allow scholars to start conceptualizing organizations as not simply repeat players in the legal system, but as a surrogate for the legal system that is able to redefine and control public legal rights through private disputing structures.